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THE NIXON PARDON: LIMITS ON THE BENIGN PREROGATIVE

*by Hugh C. Macgill**

INTRODUCTION

The President . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.¹

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, 1974.²

President Ford's grant of pardon to Richard Nixon last September 8 attracted greater attention to the pardon provision of Article II, § 2, than it has received before. The storm of criticism that greeted the pardon³ was directed primarily at the President's judgment in exercising his pardon power in the manner and at the time that he did. There are at least five arguments, however, for the proposition that the President lacked constitutional and legal authority to grant such a pardon at all. Three of those arguments have been urged publicly.⁴ The former Watergate Special Prosecutor has declared that he is not persuaded by them;⁵ it seems unlikely, therefore, that the question will be resolved in litigation. "But history also has its claims";⁶ the arguments which can be made against the validity of the Nixon pardon merit careful evaluation before the pardon itself is received into history as a measure of the President's power under Article II, § 2.

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1. U.S. CONST. art. II, § 2.

2. Proclamation 4311, F.R. DOC. 74-21059, 39 Fed. Reg. 32601-2 (1974).

3. The Gallup Poll reported that public approval of President Ford dropped from 66% to 50% following the pardon. The New York Times, October 13, 1974, p. 1, col. 6.

4. See *infra*, text accompanying notes 7-10.

5. Report of the Watergate Special Prosecutor to the Attorney General, October 12, 1974, printed in The New York Times, October 13, 1974, p. 76, col. 2.

6. *Rosenberg v. United States*, 346 U.S. 273, 310 (1953) (Frankfurter, J., dissenting).

The five arguments, in summary form, are:

1. The impeachment exception to the pardon power was designed to secure legislative inquiry into official malfeasance from executive interference. Inquiry by impeachment was frustrated by Richard Nixon's resignation; inquiry by criminal prosecution was frustrated by the pardon President Ford granted Mr. Nixon. The pardon is invalid, as a violation of the spirit and purpose of the impeachment exception.⁷

2. The power to pardon cannot be exercised prior to conviction; Supreme Court observations to the contrary are mere dicta. Richard Nixon was not convicted; he could not be pardoned.⁸

3. Limitations upon the pardoning prerogative of the English sovereign at the time our Constitution was drafted, which were known to the framers of the Constitution and not expressly disclaimed, are applicable to the pardoning power conferred upon the President. Those limitations included a requirement that a pardon, to be valid, had to specify the offenses which it covered. The pardon granted Richard Nixon did not so specify and is, therefore, void.

4. However broad the constitutional scope of the pardoning power may be, it can be limited by regulations issued under the President's authority which, while in effect, have the force of law and are binding upon the President himself. Existing pardon regulations establish procedures which the President did not follow, and eligibility criteria which Richard Nixon did not meet.⁹

5. The President's grant of pardon to Richard Nixon interfered with the jurisdiction of the Watergate Special Prosecutor, in violation of a regulation which the Supreme Court has held to be binding upon the President.¹⁰

DISCUSSION OF THE ARGUMENTS

I. *The pardon is void for violating the impeachment exception to the pardoning power.*

The first argument, made by I. F. Stone,¹¹ is the only one of the five which would invalidate the Nixon pardon by reference to the

7. I.F. Stone, *On Pardons and Testimony*, The New York Times, October 9, 1974, p. 43, col. 2. See also Stone, *Mr. Ford's Deceptions*, 21 THE NEW YORK REVIEW OF BOOKS 3 (November 14, 1974), for the view that the Nixon pardon was the result of collusion.

8. This position is attributed to Professor Philip Kurland. The New York Times, September 13, 1974, p. 1, col. 6.

9. The procedural aspect of the pardon regulations [28 C.F.R. §§ 1.1-1.9 (1974)] is noted by I.F. Stone, *supra* note 7.

10. Richard Sprague, Assistant District Attorney, Philadelphia, in The New York Times, October 5, 1974, § 4, p. 17, col. 1.

11. See *supra* note 7.

express language of Article II, § 2. The argument turns on the impeachment exception to the pardoning power.

It is generally conceded that the exception was designed to foreclose any possibility that an official might receive a pardon for offenses recited in articles of impeachment exhibited against him in the Senate by the House of Representatives, and plead that pardon in bar of a Senate trial on the articles.¹²

The celebrated instance of a pardon being thus used to frustrate impeachment proceedings is the case of the Earl of Danby, in 1678.¹³ In 1700 Parliament assured that the Danby problem would not recur, by providing in the Act of Settlement that a royal pardon could not be pleaded in bar of impeachment.¹⁴

The first draft of the Constitution, reported to the Federal Convention by the Committee of Detail, followed the language of the Act of Settlement in providing that "[The President] shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment."¹⁵ Thus, the Framers may reasonably be supposed to have had the Danby problem in mind when the exception was first drafted.

But there is another situation where the executive power to pardon might collide with the legislative power to impeach, and the final

12. Raoul Berger has suggested, with unwonted diffidence, that the impeachment exception may be surplusage, an oversight of the Framers. If "offenses" are the same as "crimes", as Blackstone appears to have supposed [See 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1st American ed., 1772)] [hereinafter cited as BLACKSTONE], and if impeachments under the Constitution are not criminal proceedings, a pardon for an "offense" could not be pleaded to an impeachment even if the exception had been omitted. See R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 84-85 (1973) [hereinafter cited as BERGER]. The suggestion would have still greater force if one could be certain that the Framers foresaw the difficulties later generations would discover in the impeachment clauses, and Mr. Berger's solutions to them.

13. Danby was Charles II's chief minister. The House of Commons, concerned about the King's dealing with France but without power to impeach the sovereign, delivered articles of impeachment for treason against Danby to the House of Lords. The King appeared before the Lords to announce that he had pardoned Danby and dismissed him from office. Inquiry into the King's own conduct, the motive behind the impeachment of Danby, was thus frustrated by the pardoning prerogative as it then existed. See BERGER, *supra* note 12, at 43-46.

14. 12 & 13 Will. III, c.2, § 3 (1700).

15. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 171-172 (1937) [hereinafter cited as FARRAND]. The pertinent provision of the Act of Settlement declared that "no pardon under the great seal [*i.e.*, royal pardons, as distinguished from general, or parliamentary pardons] should be pleaded in bar to an impeachment by the House of Commons." *Supra* note 14. See text accompanying notes 72-73 *infra*. The first draft of the impeachment exception may have been suggested by John Rutledge. W. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 15 (1941).

version of the impeachment exception may have been designed to cover that situation as well. The Act of Settlement, and the language of the first draft of the pardoning power, left open the possibility that a pardon could still be pleaded in bar of execution of the judgment. Under British practice there was no limit to the sanctions which could be imposed following conviction on impeachment; in Story's words, judgment could "not only reach the life, but the whole fortune of the offender."¹⁶ After the Act of Settlement, though a pardon could not prevent conviction, the technical possibility remained that it might still have served to prevent a hanging.¹⁷

Under the Constitution, of course, judgment upon conviction in cases of impeachment extends only to removal from and disqualification for office.¹⁸ By the terms of the first draft of the impeachment exception, a pardon granted following conviction on impeachment might have been pleaded in bar of execution, to prevent removal and disqualification. There were two ways that problem could be avoided. The exception, extending originally to pleas "in bar of an impeachment," could have been amended so as to extend also to pleas "in bar of execution of judgment upon conviction in cases of impeachment." An exception in those terms would not limit the President's power to grant pardons; instead it would limit the circumstances in which the grantee could plead the pardon in bar. Alternatively, the exception could be re-drafted to limit the President's power to grant a pardon in the first place. The Convention chose the second method. By broadening the language of the exception, and withholding power from the President to grant pardons at all "in cases of impeachment," the last loophole between the respective jurisdictions of the executive and legislative branches appeared to have been closed.¹⁹

It may not seem likely to us that anyone would attempt to recover an office or to remove a disqualification on the basis of a pardon granted in an impeachment case, nor that a pardon would be granted under that circumstance. The attempt could be made only in a time of political chaos so drastic that nice points of constitutional law probably would not grip the public's attention. The possibility may have seemed

16. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1496 (1833).

17. See 4 BLACKSTONE 392-93 and *Ex parte Wells*, 59 U.S. (18 How.) 307, 312 (1855). The prerogative was exercised at least once, on behalf of survivors of the 1715 uprising. 4 BLACKSTONE 392-93; 4 H. STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND 417-18 (14th ed., 1903).

18. U.S. CONST. art I, § 3 (7).

19. The language was adopted during floor debate. 2 FARRAND 419.

greater to the Framers, however, than it does to us. Perhaps, with the alternating over-reaching of Crown and Parliament still fresh in their attention, they were determined to trim the powers of legislature and executive alike. Thus, the Senate has no discretion in fixing punishment, and the President has no power to obstruct execution.

On that interpretation, the impeachment exception applies only to pardons which interfere with impeachment proceedings or judgments. It denies the President any power to grant a pardon which purports on its face to relieve the grantee from amenability to impeachment, and it would defeat a grantee's attempt to plead an otherwise valid pardon in bar of impeachment proceedings at any stage. Since the Nixon pardon does not fall into either of those situations, Mr. Stone cannot argue that it is void under the impeachment exception unless he can find a basis for extending the scope of the exception to criminal prosecutions as well.

There are two ways of developing such a proposition. The first might be presented in the following form:

The exception of "cases of impeachment" refers to impeachable offenses, not impeachment proceedings. The same offense might be the subject of a criminal indictment as well as of articles of impeachment. A pardon cannot prevent criminal prosecution of the offender for such an offense any more than it can prevent his impeachment therefor.

Of course, in the absence of a definition of impeachable offenses, any variance between the description of an offense in impeachment articles and the description contained in an indictment would present interesting practical difficulties.²⁰ That, however, meets a quibble with a quibble. The argument fails for a more radical reason: its failure to observe the Constitution's clear separation of political and criminal jurisdiction, maintained consistently through the impeachment and pardoning clauses.²¹ The impeachment power of Congress is a grant of

20. Compare Resolution, REPORT ON THE IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, 93d Cong., 2d Sess. H.R. REP. NO. 93-1305, 120 CONG. REC. H8967-8 (daily ed., August 22, 1974) with list of areas of criminal investigation by the Watergate Special Prosecutor, The New York Times, September 11, 1974, p. 28, col. 7.

21. U.S. CONST., art. I, § 2 (5); art. I, § 3 (7); art. II, § 2; art. II, § 4; art. III, § 2 (3). Tocqueville may have been the first to characterize the impeachment provisions as "political jurisdiction", not realizing how vexed the question would later become. See A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 106-11 (Anchor ed., 1969). Nice jurisdictional distinctions have not always been observed in state practice. In 1917 the Texas legislature impeached, convicted, removed and disqualified Governor James E. "Pa"

political jurisdiction whose exercise leads to political sanctions; thus confined, it is absolute. The President's pardoning power, expressly withheld from the politically cognizable aspects of "offenses against the United States," is equally absolute with respect to their criminally cognizable aspects. The powers appear to have been designed so that there could be no collision between them. The argument that the impeachment exception prohibits pardoning of the criminal aspects of offenses that are also impeachable assumes a collision, and requires the executive power to give way. There is no textual support for smudging the line, and still less for maintaining that it smudges in only one direction.

The pattern of which the impeachment exception is a part would defeat the argument even if the language of the exception, taken by itself, could bear the strain of the suggested interpretation. Mr. Stone chooses the second possible device for extending the exception into criminal prosecutions, one that requires only interpretation of the spirit of the impeachment exception, not a forcing of its language. He accepts that the genesis of the exception was the Danby problem, the use of a pardon to block legislative investigation of executive misconduct by means of impeachment. That form of investigation into the Nixon administration's conduct was blocked by Mr. Nixon's resignation. The only remaining means for pursuing the investigation lay in criminal prosecution, which was blocked by the pardon. The Nixon pardon therefore violated the "spirit and the purpose of this ancient constitutional exception to the pardoning power."²²

Of course spirits are notoriously more difficult to tie down than words. But when the "spirit" at work here is confined to a local habitation and given a name, it becomes evident that Mr. Stone's argument is infirm in exactly the same respects as the previous, literal one.

An argument about the "spirit and purpose" of the exception is not intelligible without a prior agreement, or assumption, about the "spirit" of the impeachment power itself, which the exception is designed to protect from executive interference by means of pardon. There is no overlap between the letter of the impeachment power's political jurisdiction and the letter of the pardoning power's criminal applicability. The collision Mr. Stone requires can only be found in an

Ferguson; in 1925 the legislature pardoned him by statute, at the behest of Governor Miriam "Ma" Ferguson despite a formal opinion of the Attorney General that the statute was unconstitutional. See Van Hecke, *Pardons in Impeachment Cases*, 24 MICH. L. REV. 657 (1926).

22. *Supra* note 7.

expansive reading of the impeachment power, based on its "spirit." That is the "spirit" Mr. Stone is really talking about.

But it is hardly clear that criminal prosecution of Mr. Nixon would have been within the investigative "spirit" of the impeachment power; it is much more clear that the Nixon pardon was within the letter of the pardoning power. The time to argue from the "spirit" of a power comes when the letter of that power has been exhausted. The problem is not that the Nixon pardon interfered with congressional investigation; rather, Congress failed to pursue its investigation at all. Why should a court be asked to protect the power of Congress from executive interference, when Congress could protect its own power merely by exercising it fully?

If Congress were determined to pursue its investigation it could do so by requiring a full report from the Watergate Special Prosecutor. It could even revive impeachment proceedings against Richard Nixon to strip him of his pension and entitlements. Either device would be as efficient for investigative purposes as criminal prosecution would have been; both are within the letter of congressional power, and neither is subject to executive interference. Powers enjoyed by the respective branches of government are preserved through their exercise, not by restricting the powers conferred on other branches. "The tools belong to the man who can use them."²³ If there is not enough public outcry to support renewed exercise of the impeachment power, then no great political necessity exists for imposing novel restrictions on the pardoning power.

Mr. Stone's argument may have its appeal, particularly to anyone who would have liked to see a complete record compiled of the activities of the Nixon administration. So seen, however, the argument is reduced to an expression of frustration. It is a political disagreement with President Ford's judgment, not a legal argument aimed at his power under Article II, §2.

II. *Historical arguments*

The second and third arguments against the validity of the Nixon pardon look to history for implied limitations on the pardoning power.²⁴ The Supreme Court has dragged Clio into the mud so often that recourse to history as an aid in constitutional interpretation calls

23. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 571, 654 (1952) (Jackson, J., concurring).

24. The historical basis of the asserted post-conviction limitation on the pardoning power is assumed, subject to the *caveat* expressed in the text following note 33 *infra*.

for more than pragmatic justification.²⁵ That may be accomplished by summarizing, at the outset, just what will be taken as "history" for the purpose of assessing these two arguments, and why.

The scope of the pardoning power the Framers intended to convey can be measured by their understanding of the term of art they employed. While it may often be true that the intent of the Framers "must be divined from materials as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh,"²⁶ their understanding of "pardon" can be fairly ascertained from the common law sources with which they were familiar. The Framers worked with an eye to the constitutional struggles in England during the previous century, and they were concerned to establish beyond debate the guarantees so expensively wrung from the Crown by Parliament during that period.²⁷ They took their legal history largely from Coke and Blackstone,²⁸ and those sources, as well as the pertinent portions of

25. See generally C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969) [hereinafter cited as MILLER]. Major earlier contributions to the debate are: Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction [The Intent Theory of Constitutional Construction]*, 27 CALIF. L. REV. 399 (1938); Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555 (1938). For a professional historian's acid suggestion that legal writers, like the Supreme Court, may produce mere law-office history see an article by Professor William Goldsmith impugning Raoul Berger's scholarship in the *Boston Sunday Globe*, November 25, 1973, § A, p.1, col. 1. Mr. Berger's sprightly reply appears in the *Boston Globe*, December 9, 1973, § A, p. 3, col. 1.

26. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 634 (Jackson, J., concurring).

27. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30-31 (1967); Goebel, *supra* note 25, at 564-66; BERGER, *supra* note 12, at 4-5; *Schick v. Reed*, ____ U.S. ____, 43 U.S.L.W. 4083, 4085 (Dec. 23, 1974).

28. Goebel believed that Coke was the authority most widely cited by colonial lawyers. Goebel, *supra* note 25, at 564 n.25. As for Blackstone, the "Commentaries are accepted as the most satisfactory expression of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it." *Schick v. United States*, 195 U.S. 65, 69 (1904); see also *Gertz v. Welch*, ____ U.S. ____, 94 S. Ct. 2997, 3027 n.14 (1974). Of course, what is accepted as fact by the Supreme Court will not necessarily be accepted in any other place. However, eight of the delegates to the Federal Convention were subscribers to the first American edition of Blackstone, and are so listed at the front of the fourth volume, issued in 1772 (Gunning Bedford, David Brearley, William Livingston, Thomas Mifflin, Gouverneur Morris, Robert Morris, Roger Sherman and James Wilson). References to Blackstone in debate confirm contemporary familiarity with his work. See, e.g., 2 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 405, 410, 479 (2d ed., 1836), for Wilson's citations. Wilson's speeches, like those of many of his contemporaries, are even more plentifully sprinkled with references to Montesquieu than to Blackstone. Goebel remarked that the revolu-

debates on the Constitution itself, are "history" for present purposes.²⁹ Of course the "original understanding" may be merely the beginning of inquiry into the scope of a power. Changing conditions and exigent circumstances often bring about changes in practice, which may serve as glosses on the scope of the power involved;³⁰ the significance of constitutional provisions is to be gathered not only from their origin but from "the line of their growth" as well.³¹ Evidence of practice and relevant judicial decisions may therefore also be admitted as "history," for such persuasive power as they may have.³²

A. *The pardon is void because it was granted prior to conviction.*

The argument that the pardoning power cannot be exercised prior to conviction has been attributed to Professor Philip Kurland, who also regards Supreme Court observations to the contrary as dicta.³³ Unfortunately his premises have not received the same publicity accorded his conclusion. Evaluation of his conclusion in terms of its historical

tionary generation began to couch assertions of common law rights in the rhetoric of natural law in the mid 1770s. Goebel, *supra* note 25, 565-66. But Madison observed, "the British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry." THE FEDERALIST, No. 47.

29. It may be more advocacy of the view than inquiry into its truth to add the following benediction from Chief Justice Marshall:

As this power had been exercised from time immemorial by the executive of that nation whose language is our language and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon . . .

United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833).

Note that Marshall did not condition his adoption of English practice on any showing that the Framers were familiar with it.

30. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), for the classic collision between the "organic" theory, propounded for the majority by Hughes, and the "intent" theory, presented in its most unyielding form by Sutherland for the dissenters. The collision is subjected to illuminating examination in MILLER, *supra* note 25, at 39-51.

31. *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.).

32. The point at which practice, however uniformly followed, may become law is hardly fixed. The nearest the Court has come to such a question in pardon litigation is *The Laura*, 114 U.S. 411 (1885), where a statute authorizing the Secretary of the Treasury to remit forfeitures in certain classes of cases was challenged as an infringement of the President's remission power under Article II. Justice Harlan relied in part on long-established and accepted usage to sustain the statute. His task, however, was not difficult. There *was*, after all, a statute; the antiquity of a predecessor statute, enacted in 1797, was deemed to confer nearly constitutional dignity upon it, and exercise of the Secretary's power under the statute did not restrict the President's exercise of his authority under the Constitution. See also *Schick v. Reed*, _____ U.S. _____, 43 U.S.L.W. 4083, 4086-87 (Dec. 23, 1974), where Chief Justice Burger reaffirms the general proposition that usage in pardons can become nearly prescriptive.

33. *Supra* note 8.

support is subject to the *caveat* that Mr. Kurland may justify it on different grounds, though none immediately appears.

The argument can be sustained only if the post-conviction limitation can be read into the language of Article II, §2. The clear weight of authority is against such a restriction having existed at common law, and there is no reason to suppose the members of the Federal Convention thought otherwise. Coke declared flatly that the King might grant a pardon "either before attainder, sentence, or conviction, or after."³⁴ Blackstone, describing the uses of pardons, said that "a pardon may be either pleaded upon arraignment, or in arrest of judgment, or . . . in bar of execution."³⁵ A pardon pleaded upon arraignment surely was granted before conviction; in fact, had pardons issued at common law only following conviction, the Danby case itself would never have arisen.

Further evidence of the Framers' sense of the matter can be gleaned from debates in the Federal Convention itself. Luther Martin moved to insert "after conviction" in the language which became Article II, §2, but withdrew the motion after James Wilson suggested that pre-conviction pardons "might be necessary to obtain the testimony of accomplices."³⁶ The fact that the motion was made and withdrawn is not helpful to the argument for an implied limitation, though of course it is less damaging than outright rejection by the Convention would have been. The fate of Martin's motion, however, is less significant than the fact it was offered at all. Martin had no reason for suggesting the limitation if he supposed the term "pardon," standing alone, to contain it by implication; if Wilson had thought the motion surplusage, he need not have addressed its merits.³⁷

Though neither common law sources nor the records of the Federal Convention furnish any support for a post-conviction limitation on the pardoning power, it remains to be seen whether the power has

34. E. COKE, *THIRD INSTITUTE*, c.105, 233 (6th ed., 1680).

35. 4 BLACKSTONE 395. See also *id.* at 369, 389; 2 W. HAWKINS, *PLEAS OF THE CROWN*, c.37 (6th ed., 1788); 2 BACON'S *ABRIDGEMENT* 805-06 (4th ed., 1778).

36. 2 FARRAND 426. Iredell made the same point in the North Carolina convention. 4 ELLIOT'S *DEBATES* 127.

37. The other three limitations proposed in the Convention would have imposed restrictions on the President's pardoning power which neither statute nor common law had imposed on the royal prerogative. The impeachment exception has already been mentioned in that regard. *Supra*, text accompanying notes 15-19. Roger Sherman's proposal, that the President be empowered to grant reprieves until the next session of the Senate and pardons with that body's consent, was defeated. 2 FARRAND 419. The third proposal, warmly debated but not adopted, was an exception in cases of treason. 2 FARRAND 626-27, 636; 3 FARRAND 127, 158. The inference that Martin's proposal conformed to the pattern of conscious innovation is permissible.

been exercised in a way that is consistent with the existence of such a limitation, and whether the Supreme Court has addressed the problem.

It can at least be declared with certainty that the Supreme Court has never been faced squarely with the question. Observations in several opinions that no such limitation exists are dicta. Two opinions in particular have received wide publicity recently;³⁸ it may be useful to discuss those cases briefly, in the hope that they will not again be paraded about as relics worthy of public veneration.

The best-known case in the genre is *Ex parte Garland*, decided in 1867.³⁹ Justice Field, writing for the Court, laid down that "[t]he power thus conferred is unlimited 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."⁴⁰ The only difficulty with this celebrated language is that it has nothing to do with Garland's case.⁴¹ Augustus Garland had been admitted to practice before the Court in 1860. Subsequently he was a Representative, later Senator, from Arkansas in the Confederate Congress. He received a full pardon for his participation in the Confederate cause from President Johnson in July 1865, and wished to resume his practice before the Supreme Court. The only obstacle in his way was his ineligibility to take the

38. Representative Dennis inserted the opinions in *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), and *Burdick v. United States*, 236 U.S. 79 (1915), in the record of the hearings held on the Nixon pardon by the Special Subcommittee on Criminal Justice of the House Judiciary Committee on October 17, 1974. The New York Times, October 18, 1974, p. 20, col. 5. An earlier case which has also received some attention is *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855), where Justice Wayne quoted extensively from English authorities on the scope of the pardoning power, including the broad declarations of Coke quoted *supra* at note 34. The question before the Court, however, was whether the power to pardon included the power to pardon conditionally. The Court's reliance on common law sources is therefore of interest as an example of methodology, but it has no direct significance for the question of a post-conviction limitation. The dissent of Justice McLean in the Wells case, 59 U.S. (18 How.) at 316-28, is a classic example of the alternative approach, emphasizing the unique and positive character of indigenous American political institutions, and taking a contemptuous view of arguments relying on analogies to British practice. In the latter, McLean shows himself a worthy spokesman in the tradition most vigorously articulated, if not actually founded, by Judge Root. See 1 ROOT'S [CONN.] REPORTS, iii-ix ("The Origin of Government and Laws in Connecticut"), ix-xv ("On the Common Law of Connecticut") (1798), and, generally, P. MILLER, *THE LEGAL MIND IN AMERICA* (1962). For a contemporary echo see the dissenting opinion of Justice Marshall in *Schick v. Reed*, ___ U.S. ___, 43 U.S.L.W. 4083, 4090 (Dec. 23, 1974).

39. 71 U.S. (4 Wall.) 333 (1867).

40. *Id.* at 380. The indebtedness to Coke is clear. See *supra* note 34.

41. "Mr. Justice Field . . . used classic language which neither history nor reason support." Lattin, *The Pardoning Power in Massachusetts*, 11 B.U.L. REV. 505, 519 (1931).

Test Oath prescribed by Congress in a statute which prohibited persons who had not taken the oath from appearing before the Court by virtue of previous admission.⁴² Mr. Garland claimed that Congress had no power to impose disabilities upon him in derogation of the absolute pardon he held from the President. That was the sole issue before the Court. The quotation from Field's opinion set forth above was by way of a preamble to his holding:

This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.⁴³

There is no way of knowing whether the Court would have characterized the President's power in such extravagant terms had the issue not been one of securing the power from congressional interference. But that *was* the issue before the Court, and the sweeping language about the scope of the power was unrelated to its resolution.⁴⁴

The second case which has been cited in support of the proposition that there are few if any limitations on the President's power is *Burdick v. United States*.⁴⁵ George Burdick was City Editor of the *New York Herald*. He was questioned before a grand jury concerning customs frauds which had been the subject of exposé articles in the *Herald*. He refused to respond on the grounds of possible self-incrimination and, on being recalled, was presented with a pardon signed by Woodrow Wilson for all offenses relevant to the grand jury's inquiry. Burdick refused to accept the pardon. He asserted that acceptance was a necessary element of the pardon's validity, and continued in his refusal to answer questions before the grand jury. In reviewing his judgment for contempt, the Court was presented by both sides with arguments concerning the validity of pre-conviction pardons. But, as the Court declared, "[t]he issue in the case is the effect of the unaccepted pardon."⁴⁶

42. 12 Stat. 502 (1862) and 13 Stat. 424 (1865).

43. 71 U.S. at 380. *Accord*, *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

44. Garland's pardon was granted not only prior to conviction but, so far as it appears from the record, prior to the institution of any proceedings against him. The pardon's validity was not at issue before the Court. The same was true of the pardon in *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833).

45. 236 U.S. 79 (1915).

46. *Id.* at 87. The Court held that the pardon was not effective without acceptance. Cf. *Biddle v. Perovich*, 274 U.S. 480 (1927), and *Schick v. Reed*, ____ U.S. ____, 43 U.S.L.W. 4083 (Dec. 23, 1974).

Of course it would be foolish to contend that the Supreme Court would have an entirely clear slate to write on, were it confronted squarely with the issue of the validity of a pre-conviction pardon; the Court's dicta over the years are broad hints of hostility to limitation on the presidential power. However, claims made in reliance on *Garland* and *Burdick* that the issue is foreclosed are entitled to no respect whatever; the quality of debate would be improved if they were not made at all.⁴⁷

While the Supreme Court has not decided against post-conviction limitation on the pardoning power, neither do its decisions offer any support for the limitation. Early treatises are similarly unhelpful. Neither Tucker⁴⁸ nor Kent⁴⁹ nor Story⁵⁰ suggested that the President's power under Article II, §2 differed significantly from the royal prerogative at common law. It was the opinion of William Wirt, when Attorney General, that the Constitution permitted pre-conviction pardons, though the general practice of granting pardons only following conviction or confession represented the sounder policy.⁵¹ The weight of the inference permissibly to be drawn from his opinion, that pardons generally were not granted prior to conviction, is at least offset by his legal conclusion.

State practice, which might at first appear to substantiate a claim that the pardoning power is exercised only following conviction, actually cuts against that proposition. The constitutions of thirty-two states expressly confine the governor's power to post-conviction relief.⁵² The

47. If the battle is to be waged with dicta, the following example should also be admitted:

Although the Constitution vests in the President "power to grant reprieves and pardons for offences against the United States, except in cases of impeachment," this power . . . is ordinarily exercised only in cases of individuals after conviction . . .

Brown v. Walker, 161 U.S. 591, 601 (1896).

48. 2 TUCKER'S BLACKSTONE 268; 5 *Id.* 394-402 (1803).

49. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 283-84 (13th ed., 1884).

50. 3 STORY §§ 1488-98 (1833).

51. In his opinion of March 30, 1820, Wirt advised President Monroe that [A]ll previous pardons must be granted on *ex parte* representations, by which the President may be deceived; whereas, on a full trial on the plea of not guilty, the court and jury will never fail to recommend to mercy, if there be any ground for such recommendation; and the President will thus be placed on a sure footing. The latter course, too, so far as I am informed, is more consonant with the general practice both of the State and federal governments, and is least exposed to discontent and censure, of which there is always danger from the adoption of a new, although a legal course.

1 OP. ATT'Y GEN. 343-44 (1852).

52. ARIZ. CONST. art. 5, § 5; ARK. CONST. art. 6, § 18; CALIF. CONST. art. 5, § 8 ("after sentence"); COLO. CONST. art. IV, § 7; HAWAII CONST. art. IV, § 5 (Legislature

relevant constitutional provisions in two other states, though unclear, seem to follow the pattern.⁵³ Of the remaining sixteen states, two make no constitutional provision for pardon at all;⁵⁴ seven, though not limiting the power to post-conviction exercise, do require approval of a pardon or parole board;⁵⁵ one subjects the governor's otherwise plenary power to requirements of notice and report.⁵⁶ Only six follow the federal model, conferring unfettered power upon the executive.⁵⁷

The drafters of the pardon provisions of the state constitutions had the language of Article II, §2 before them as a model if they wished to follow it. However, in forty-four out of fifty states, the model was rejected in favor of a more particular grant of power to the executive, hedged with restrictions of which the post-conviction limitation is representative. Of course it might be argued that the states really *were* following the federal model, declaring in terms what the federal pardoning power was known to contain by implication. The contention would require close, and probably ingenious reading of all of the state constitutional debates; it may more readily be supposed that the state provisions reflect an altogether different view of the appropriate scope of executive pardoning power. If there is a gloss on the federal power to be found in state practice, it must be in interpretations placed on

vay modify the constitutional grant.); IDAHO CONST. art. IV, § 7; ILL. CONST. art. V, § 12; IND. CONST. art. V, § 17 (Legislature may modify the constitutional grant.); IOWA CONST. art. IV, § 16; LA. CONST. art. V, § 10; ME. CONST. art. V, part 1, § 11; MASS. CONST. Pt. 2, c.2, art. VIII, § 1; MICH. CONST. art. V, § 14; MINN. CONST. art. V, § 4; MISS. CONST. art. V, § 124; MO. CONST. art. IV, § 7; NEB. CONST. art. IV, § 13; N.H. CONST. Pt. 2, art. 52; N.M. CONST. art. V, § 6; N.Y. CONST. art. IV, § 4; N.C. CONST. art. III, § 5(6); N.D. CONST. § 76; OHIO CONST. art. III, § 11; OKLA. CONST. art. VI, § 10; ORE. CONST. art. V, § 14; TENN. CONST. art. 3, § 6; TEXAS CONST. art. 4, § 11; UTAH CONST. art. VII, § 12; VA. CONST. art. V, § 12; W.VA. CONST. art. 7, § 11; WISC. CONST. art. V, § 6; WYO. CONST. art. IV, § 5. There seems to be no recent authoritative summary of state practice. See generally 3 ATT'Y GENERAL'S SURVEY OF RELEASE PROCEDURES (1939) [hereinafter cited as ATT'Y GEN. SURVEY] and C. JENSEN, THE PARDONING POWER IN THE AMERICAN STATES (1922).

53. The Florida constitution requires concurrence of three members of the governor's cabinet for a pardon to be granted. FLA. CONST. art. 4, § 8(a). Under a previous constitution, a post-conviction limitation was imposed by judicial decision. *State ex rel. Owens v. Barnes*, 24 Fla. 153, 4 So. 560 (1888). The terms of the Nevada constitutional provision have not so far been interpreted judicially. NEV. CONST. art. 5, § 13.

54. Connecticut and South Carolina.

55. DEL. CONST. art. 7, § 1; GA. CONST. § 2-3011, par. XI; KAN. CONST. art. I, § 7 (Power in governor "under regulations and restrictions prescribed by law."); MONT. CONST. VI, § 12 (Power in governor, subject to law); PA. CONST. art. IV, § 9; R.I. CONST. amend. II (Pardon shall issue only with the "advice and consent of the Senate"); WASH. CONST. art. 3, § 9 (Pardons to issue "as prescribed by law.").

56. MD. CONST. art. II, § 20.

57. ALA. CONST. art. 5, § 124; ALASKA CONST. art. III, § 21; KY. CONST. § 77; N.J. CONST. art. V, § II(1); S.D. CONST. art. IV, § 3(7); VT. CONST. ch. 2, § 20.

the pardoning power in the constitutions of the six states which did follow the federal model, not of the forty-four which appear to have rejected it.

Courts in those states have uniformly refused to discern any post-conviction limitation in the constitutional pardon provision, although the refusals seem to be dicta, uttered in lighthearted reliance on dicta of the Supreme Court already discussed.⁵⁸

In *Commonwealth v. Bush*,⁵⁹ however, the Kentucky Supreme Court was obliged to decide the question on its merits, in terms of constitutional language identical to that of Article II, §2, and without the benefit of Justice Field's remarks in *Ex parte Garland*.⁶⁰ John M. Harlan, then Attorney General of the Commonwealth, sought reversal of a judgment dismissing an indictment on a plea of pardon granted pending prosecution and before conviction, on the grounds that the Governor had no power before conviction. The court supposed that a pardon, like a remission of fine or forfeiture, might require some prior judicial procedure in order to identify and define the offense to which it extended, but "this may be done as well and effectually before as after formal conviction."⁶¹ The court went on to observe that its hold-

58. In *Territory v. Richardson*, 9 Okla. (Burford) 579, 60 P. 244 (1900), it was claimed that the recipient of a pardon, by pleading not guilty and moving for a change of venue, had lost his opportunity to raise the pardon as a defense to the indictment. The validity of the pardon itself was contested on the grounds that it had been granted in violation of regulations prescribed by statute. The first point was rejected on common law authority, the second on the grounds that executive pardoning power, granted by Congress to the territory's governor, was not subject to restriction by the territorial legislature. In *Dominick v. Bowdoin*, 44 Ga. 357 (1871), the Georgia court held it was error to refuse a pardon as evidence in favor of an applicant for habeas corpus who had been arrested on a bench warrant for the same offense recited in the pardon. While the court spoke at length about the validity of a pardon granted prior to conviction, relying on English practice and Supreme Court dicta for the point, it appears that the pardon had been excluded on the grounds that it had been procured by fraud. On the latter point, the court held that the pardon should have been received and the question of fraud resolved as a matter of law. See also *State v. Woolery*, 29 Mo. 300 (1860).

It was argued in dissent in *Dominick*, with some ingenuity and at very great length, that no "offense" exists—and, therefore, no occasion for exercising the pardoning power—until one has been proved by criminal conviction or by valid confession. The majority felt it sufficient to observe that acceptance of a pardon implies confession. But after *Biddle v. Perovich*, 274 U.S. 480 (1925), it is not certain that a pardon must be accepted to be effective. The fiction of confession by acceptance, as a device for establishing the existence of a pardonable "offense," is thus destroyed. It does not follow, however, that the argument based on the word "offense" is rehabilitated. It fails for the simpler and ruder reason that a merely semantic argument will not suffice to snare a king.

59. 63 Ky. (2 Duvall) 264 (1866).

60. 71 U.S. (4 Wall.) 333 (1867).

61. 63 Ky. (2 Duvall) 264 (1866).

ing was consistent with "long and undisturbed usage, apparently matured into prescriptive authority," under identical language in a prior constitution, deemed adopted by the convention which proposed the constitution then in effect.⁶²

It remains to be seen whether there is "long and undisturbed usage" under the federal pardoning power which will provide authority, whether or not "prescriptive," for the post-conviction limitation.

Petitions for pardon have been handled by the Office of Pardon Attorney in the Department of Justice since 1891.⁶³ That officer's jurisdiction and the procedures followed in its exercise are established by federal regulations.⁶⁴ The regulations clearly contemplate that a petitioner for pardon shall have been convicted, but they do not in terms require it.⁶⁵ It is at least arguable that these regulations pertain only to persons who make formal application for pardon, and do not confine the President's power to grant pardons as he may see fit.⁶⁶ In practice, the vast majority of pardons are granted only after conviction, and in accordance with the appropriate regulations. Of the 2,314 pardons granted by Presidents Kennedy, Johnson and Nixon, it appears that only three preceded conviction.⁶⁷ The ambiguity of the regula-

62. *Id.* at 264-65. The court found that for years pardons had been granted "before conviction, but generally, if not always, after legal accusation of the offense." *Id.* at 265-66.

63. From 1865 to 1891, the Pardon Clerk in the Department of Justice performed the same functions. Cozart, *Clemency Under the Federal System*, 23 *FED. PROBATION* No. 3, 3 n.1 (1959). See also W. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 95-135 (1941).

64. 28 C.F.R. §§ 0.35-36; 1.1-1.9 (1973).

65. 28 C.F.R. § 1.2 *Contents of petition*.

Each petition for Executive clemency should include: The name and age of the petitioner; the court, district, and State in which he was convicted; the date of sentence; the crime of which he was convicted; the sentence imposed; the date he commenced service of sentence; and the place of confinement. . . .

28 C.F.R. § 1.3 *Eligibility for filing petition for pardon*.

No petition for pardon should be filed until the expiration of a waiting period of at least three years subsequent to the date of the release of the petitioner from confinement, or, in case no prison sentence was imposed, until the expiration of at least three years subsequent to the date of the conviction of the petitioner. In some cases, such as those involving violation of narcotic laws, income tax laws, perjury, violation of public trust involving personal dishonesty, or other crimes of a serious nature a waiting period of five years is usually required. . . .

66. The Pardon Attorney is responsible for "receipt, investigation, and disposition of applications to the President for pardon. . . ." 28 C.F.R. § 0.35 (1973). The general clemency regulations apply to "[p]ersons seeking Executive clemency." 28 C.F.R. § 1.1 (1973) (emphasis added).

67. 32 CONGRESSIONAL QUARTERLY WEEKLY REPORT 2458 (No. 37, September 14, 1974).

tions and the existence of those three exceptions to an otherwise general practice vitiate the strength of an argument against pre-conviction pardons based on usage. In addition, a former counsel to the Watergate Special Prosecutor found that "the pardon power has been used frequently to relieve Federal offenders of criminal liability . . . even where no criminal proceedings against the individual are contemplated."⁶⁸ The Nixon pardon may be a relative anomaly in the recent history of federal pardons, but more than that would have to be shown in order to say that it is void.

Even if a post-conviction limitation appeared to have support in history or usage, as it does not, the problem of amnesty would remain a serious obstacle to its acceptance. The argument that pre-conviction pardons are void must draw some distinction between pardon and amnesty, or hold that amnesties are void as well. The latter is obviously untenable and, while there is a lexicographical difference between pardon and amnesty, no juridical distinction between them has ever been recognized.⁶⁹

The Supreme Court has summarized adequately the general understanding of amnesty in the following terms:

[Amnesty] is usually addressed to crimes against the sovereignty of the State, to political offenses, forgiveness being

68. Memorandum by Philip Lacovara, quoted in the Watergate Special Prosecutor's report to the Attorney General. The New York Times, October 13, 1974, p. 76, col. 3. A request for a copy of the memorandum, an abstract of its contents, or citations to the sources which were relied upon in preparing it was declined by the Watergate Special Prosecutor's office on the grounds that the memorandum was intra-office and confidential in character. It was noted, somewhat curiously, that "this memorandum does not discuss the historical practice of granting pardons." Letter from Peter M. Kreindler, Counsel to the Special Prosecutor, October 25, 1974.

69. A good general summary of problems related to amnesty is contained in 3 ATT'Y GEN. SURVEY 237-65 (1939). Grants of general pardon by Andrew Johnson provoked the Reconstruction Congress to claim exclusive power of amnesty. The claim is attacked, and the history of general pardons set forth exhaustively, in *The Power of the President to Grant a General Pardon or Amnesty for Offences Against the United States*, 8 AM. L. REG. (N.S.) 513, 577 (1869). If the congressional assertion had been generally accepted, a colorable argument could then have been made that an amnesty is a general pardon granted by Congress prior to conviction, while an ordinary pardon granted by the President must be preceded by conviction.

For discussion of amnesty questions raised by the Vietnam War see Lusky, *Congressional Amnesty for War Resisters: Policy Considerations and Constitutional Problems*, 25 VAND. L. REV. 525 (1972); Freeman, *An Historical Justification and Legal Basis for Amnesty Today*, 1971 LAW & SOC. ORDER 515 (1971). All of the commentators are in substantial agreement about the historical background and present character of amnesty. See also 20 OP. ATT'Y GEN. 330 (1895) (1892 opinion on the President's amnesty power rendered by Solicitor General W.H. Taft) and *id.* at 668 (1893 opinion of Attorney General Olney).

deemed more expedient for the public welfare than prosecution and punishment.⁷⁰

In an earlier decision recognizing concurrent congressional power to grant amnesty, the Court remarked that the "distinction between amnesty and pardon is of no practical importance. . . . [Amnesty] is usually exerted in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted."⁷¹ Amnesty thus defined corresponds to the general, or parliamentary pardon at common law. Like amnesty, the general pardon also extended to classes of persons or classes of offenses in relatively general terms, and ordinarily was granted following major disruptions.⁷² In form a general pardon was a prayer from Parliament to the sovereign that the prerogative of clemency be exercised in a particular manner. It became effective only upon the sovereign's assent which, practically, could hardly be refused.⁷³ Perhaps it was the joint participation of the legislature and the executive in the grant of a general pardon which inclined the Supreme Court to find that, while amnesty is a form of pardon, both the President and Congress have power to grant it. The decision, while obviously prudent, otherwise lacks even the semblance of logic.⁷⁴ It is

70. *Burdick v. United States*, 236 U.S. 79, 95 (1915). The language quoted was entirely unrelated to any issue in the case. See text *supra* at notes 45-47.

71. *Brown v. Walker*, 161 U.S. 591, 601-02 (1896).

72. Examples of general pardons from 1376 in England and from the Revolution to the Civil War in this country are given in 8 AM. L. REG. (N.S.) 513, 577 (1869). The characterization of a general pardon as an "Act of Oblivion" by the court of King's Bench in 1690 catches both the nature and the etymology of amnesty. The Earl of Salisbury's Case, Cart. 132 (K.B. 1690). There was one practical difference between a parliamentary pardon and a royal pardon at common law. The royal pardon was a special act of grace, and had to be pleaded specially; a parliamentary pardon was a statute, a public act, and the courts were obliged to notice it in most cases. COKE, THIRD INSTITUTE 233; 4 BLACKSTONE 394-95. The distinction does not survive in this country. *Biddle v. Perovich*, 274 U.S. 480, 486-87 (1927).

73. Appearances were nonetheless observed; both houses rose and uncovered as the "act of grace" was read, the clerk intoning Norman French expressions of gratitude and loyal wishes for the sovereign's health and longevity. 3 ATT'Y GEN. SURVEY 245-46.

74. *Brown v. Walker* involved a statutory grant of immunity from prosecution for persons giving testimony or obeying subpoenas in matters being investigated by the Interstate Commerce Commission. The statute, 27 Stat. 443 (1893), was challenged as incompatible with the fifth amendment. The Court treated it as "virtually an act of general amnesty" (161 U.S. 591, 601); though amnesty was found to be a form of pardon, hence an incident of the President's power under Article II, the Court held it within the Congress' authority to enact. Except for a citation to *The Laura*, 114 U.S. 411 (1885) (see *supra* note 32), the Court betrayed no discomfiture over the inconsistency of its reasoning. The President's power to grant a general pardon, or amnesty, is clear in principle; the concurrent power of Congress to do the same must be taken as established by the *Brown* decision. It should be noted, however, that the statute

sufficient for present purposes, however, to note that, historically and constitutionally, amnesty is a form of pardon; it may issue prior to conviction and it lies within the pardoning power of the President under Article II, §2. Amnesty cannot be distinguished in any constitutionally significant fashion from the general concept of pardon; neither can it be reconciled with the proposition that presidential pardons can only be granted following conviction.

It is agreed that an offense must have been committed before it can be pardoned,⁷⁵ but beyond that apparently common-sensical limitation there is no restriction at all on the timing of pardons. If the Nixon pardon is invalid, the reasons must be sought elsewhere.

B. *The Nixon pardon is invalid for failure to specify the offenses to which it extends.*

The second historical argument is directed against the vagueness of the Nixon pardon. Mr. Stone's contention, already discussed, that the pardon violated the impeachment exception obviously proceeded from the fear that whatever offenses Mr. Nixon might have committed, the pardon would prevent them from being known. There may also have been some concern that the pardon, by being so very vague, might extend to more offenses than the President knew of when he granted it. Both of those concerns would have been largely allayed by specificity in the terms of the pardon, and that very specificity would be the chief practical result of imposing a post-conviction limitation on the pardoning power. It is also reasonable to suppose that the Nixon pardon was greeted with such widespread dismay for similar reasons, not because of any general desire to see Mr. Nixon prosecuted, convicted or punished further. The "void for vagueness" argument, then, is another attempt to express the visceral uneasiness elicited by the pardon in the terms of constitutional argument. Like the post-conviction argument previously discussed, it has only such strength as history and usage can supply.

involved there had been signed by the President, a fact which the Court could have used to improve its reasoning without sacrificing its prudent conclusion. The Court might have an interesting problem if Congress, dissatisfied with executive provision for Vietnam war resisters, passed a statute granting general amnesty over the President's veto, and a trial court then refused to honor a defense of amnesty in a criminal prosecution.

75. 3 ATT'Y GEN. SURVEY 143. For a discussion of the suspending and dispensing prerogatives see 6 W. HOLDSWORTH, HISTORY OF THE LAWS OF ENGLAND 217-25 (1927). The suspending power was abolished and the dispensing power curtailed by the English Bill of Rights. *Id.* at 240-41. See also J. KENYON, THE STUART CONSTITUTION 401-13 (1966).

The appropriate range of inquiry into history and usage was discussed in the previous section.⁷⁶ The first consideration is the extent to which the members of the Federal Convention may reasonably be supposed to have understood the validity of a pardon to turn on its specificity. The first step in that consideration must be Blackstone.

Blackstone's treatment of the question of specificity⁷⁷ is suggestive, but inconclusive. There were statutory restrictions on the language of pardons, and there were also technical rules of interpretation which courts could apply for the purpose of disallowing pardons. But the net effect of these limitations on the scope of the pardoning prerogative is not clear.

It appears from Blackstone that the prerogative to pardon murder was confined to cases of self-defense and misadventure by two statutes

76. See text accompanying notes 26-32 *supra*.

77. Blackstone's text, from which these comments are drawn, is as follows:

As to the *manner* of pardoning: it is a general rule, that, wherever it may reasonably be presumed the king is deceived, the pardon is void. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed. General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony; (for it is presumed the king knew not of those proceedings) but the conviction or attainder must be particularly mentioned. . . . It is also enacted by statute 13 Rich. 2, st. 2, c.1. that no pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein; and particularly in murder it shall be expressed, whether it was committed by lying in wait, assault, or malice prepense. Upon which Sir Edward Coke observes, that it was not the intention of the parliament that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations. And it is remarkable enough, that there is no precedent of a pardon in the register for any other homicide, than that which happens *se defendendo* or *per infortunium*: to which two species the king's pardon was expressly confined by the statutes 2 Edw. 3, c.2, and 14 Edw. 3, c.15, which declare that no pardon of homicide shall be granted, but only where the king may do it *by the oath of his crown*; that is to say, where a man slayeth another in his own defence, or by misfortune. But the statute of Richard the Second, beforementioned, enlarges by implication the royal power, provided the king is not deceived in the intended object of his mercy. And therefore pardons of murder were always granted with a *non obstante* of the statute of King Richard, till the time of the revolution; when, the doctrine of *non obstante's* ceasing, it was doubted whether murder could be pardoned generally: but it was determined by the court of king's bench, that the king may pardon on an indictment or murder, as well as a subject may discharge an appeal. Under these and a few other restrictions, it is a general rule, that a pardon shall be taken most beneficially for the subject, and most strongly against the king.

4 BLACKSTONE 393-94 (citations omitted).

of Edward III.⁷⁸ That substantive limitation on the offenses which could be pardoned gave way later in the fourteenth century to a procedural restriction on the manner of pardoning. By statute of Richard II,⁷⁹ pardon could be granted for murder, treason and rape, but the offense had to be specifically named in the charter; in cases of murder, the circumstances of the offense, whether it was committed by assault, or by lying in wait, or by premeditation, had to be particularly set out. Evidently it was supposed that the disclosure requirement would check abuses of prerogative more effectually than attempts at substantive limitation. The crown avoided that disclosure requirement, however, by granting pardons *non obstante* the statute, until the power to act "notwithstanding" acts of Parliament was abolished in 1688.⁸⁰

Apart from that legislative requirement of specificity in the language of pardons, Blackstone also speaks of further restrictions on general language which were judicially created and applied. If it appeared to a court that the king had been deceived or misinformed in any particular of the case, the entire charter was void. So, for example, a pardon of "all felonies" did not pardon a particular conviction or attainder⁸¹ of felony. The conviction or the attainder had to be recited in the charter; if it did not appear from the charter that the king was informed of the conviction or the attainder, his intention to pardon it would not be presumed. His power was not contested, but his intention to exercise the power had to be clearly stated. Finally, Blackstone adds that "general words have also a very imperfect effect in pardons."

Blackstone does not make it clear whether the statute of Richard II and the technical rules governing the effect of pardons were parts of a pattern of restraint upon general language so pervasive as to have formed part of the common understanding of the pardoning

78. 2 Edw. 3, c.2 (1328) and 14 Edw. 3, c.15 [Coke makes it c.14. THIRD INSTITUTE 236] (1340).

79. No charter of pardon from henceforth shall be allowed before any justice for murder, or for the death of a man slain by await, assault, malice prepensed, treason, or rape of a woman, unless the same murder, death of the man slain by await, assault, or malice prepensed, treason, or rape of a woman, be specified in the same charter . . .

13 Rich. 3, st. 2, c.1 (1389). See also T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 446 (5th ed. 1956), where the date given is 1390.

80. The Bill of Rights provided, in pertinent part, that "no dispensation by *non obstante* shall be allowed but . . . the same shall be held void and of no effect except a dispensation be allowed of in such statute . . ." 1 W. & M., sess. 2, c.2(2) (1688).

81. A bill of attainder was "an act of parliament for putting a man to death or for otherwise punishing him without trial in the usual form." J.F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 160-61 (1883). Cf. U.S. CONST. art. I, § 9(3), and *United States v. Lovett*, 328 U.S. 303 (1946).

prerogative.⁸² The principle that a pardon is void where "it may reasonably be presumed" that the king was deceived is ambiguous. It may have been intended to protect the king from impositions, and it may just as easily have been a polite way of curtailing abuses of the prerogative by the king himself. There is no way of determining how it was understood without knowing the circumstances in which courts found it "reasonable" to presume that deception had occurred. The same ambiguity exists in the corollary to the general principle, that courts would disallow pardons of felonies where there had been a conviction or an attainder unless the conviction or attainder were recited in the charter, on the assumption that the king had been insufficiently informed. It can be inferred from Blackstone that every excuse and fiction may have been utilized for the purpose of disallowing pardons which did not specify the offenses to which they extended, but Blackstone himself certainly did not commit himself on the point, or compel the inference to be drawn. The authorities he cited were Coke and Hawkins,⁸³ and a colonial lawyer or constitutional draftsman would presumably have gone to those sources for more specific information than Blackstone, the Am. Jur. of the day, could supply.

Blackstone appears to have followed Coke so closely that the earlier work adds little to resolve the question of specificity. Coke does mention two practical situations, offering rules which at first seem contradictory. A pardon reciting an indictment or attainder where in fact there had been neither was disallowed, but a pardon of a felony "and all outlawries⁸⁴ thereupon, if any be" was a good pardon of the outlawry even though the king did not know for certain that there had been one.⁸⁵ The first situation seems to turn on a particularly harsh technicality. If the king's intention to pardon the attainder or conviction was clear, why should his intention to pardon the felony itself have

82. It can be inferred from Blackstone, as might have been supposed even without him, that the effectiveness of restraints on the pardoning prerogative varied according to whether the crown or parliament enjoyed political ascendancy. The statute of Richard II, for example, did not become fully effective until the Glorious Revolution of 1688 confirmed parliament's final triumph.

83. The only case cited by Blackstone in this section is *Rex v. Parsons*, 2 Salk. 499, 91 Eng. Rep. 428 (K.B. 1692), relied upon for the proposition that murder could be pardoned generally after the Bill of Rights.

84. Outlawry was the ultimate sanction of medieval criminal law. Ordinarily pronounced against a person indicted of felony who fled rather than stand trial, "it involved not merely escheat and forfeiture, but a sentence of death." 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 581 (2d ed., 1968); 1 POLLOCK & MAITLAND 476-78. For a description of the procedure see YEAR BOOKS, 10 EDW. IV & 49 HEN. VI (1470) (N. Neilson ed., Sel. Soc., Vol. 47, 1930).

85. THIRD INSTITUTE 238.

been doubted? If the relatively immaterial misrepresentation or omission was taken to imply the existence of more material ones, then the rule seems to have been deliberately restrictive of the prerogative, as well as being very harsh on the felon.⁸⁶ In the second situation, the charter by its very terms applied to an outlawry "if any be;" courts were thus denied any leeway for disallowing the pardon on the grounds, flimsy as they might at best have been, that there was an outlawry the king had not known of, or that there was not the outlawry the king thought there had been; in effect the king had said he did not care. The two situations offered by Coke confirm the implication of Blackstone's example, that the king could pardon any offense at any stage of proceedings, but his intention that pardon should be allowed a particular person for a particular offense at any particular stage of proceedings usually had to appear on the face of the charter. The sovereign prerogative of mercy may indeed have been ample, and pardons may well have been read most beneficially to the recipient; even so, it follows from Coke and Blackstone that both king and felon had to exercise some ingenuity if they wished to be certain that a pardon would hold up in court.⁸⁷

The other authority relied upon by Blackstone was Hawkins' *Pleas of the Crown*. Hawkins confirms in greater detail the highly technical restrictions on the allowability of pardons described generally by Coke and Blackstone.⁸⁸ But he also made a greater effort than either Coke

86. The felon's lot was not an happy one. If he asked for a pardon of his offense only, and was indicted for it before the pardon was granted, it could be disallowed in court for failure to recite the indictment. But if, in prudent anticipation of indictment, he asked for and received a pardon of both the offense and the expected indictment, and the indictment was then actually handed up, it might still be disallowed, leaving him with no recourse except to return to the king, if he could, and request an amended charter.

87. Unlike Blackstone, Coke made his own policy preferences quite clear. He found that the legislative intention behind the statute of Richard II had been to prevent pardons of murder, except in cases of self-defense and misadventure as provided in the statutes of Edward III, by imposing disclosure requirements no king would find it politic to observe. Coke went on to say that the statute was conducive to the peace of the realm and conformable to the law of God. He added, by way of rebuke to the Stuarts, that "it hath been conceived (which we will not question) that the King may dispense with these laws by a *non obstante*, be it general or special, (albeit we find not any such clauses of *non obstante* . . . but of late times)." THIRD INSTITUTE 236. Coke's view, obviously conditioned by his parliamentary sympathies, may have also reflected the ancient notion that murder, as *malum in se*, ought not be pardonable at all.

In the same section, Coke mentions a fourteenth-century assertion by parliament that it should have exclusive power to pardon. Apparently the claim succumbed to political realities.

88. Hawkins also shared Coke's view of the purpose and excellence of the statute of Richard II:

before him or Blackstone after⁸⁹ to determine what requirements of specificity were recognized at common law, and to summarize the policies involved. Hawkins' comments on the question may have been the inspiration for Blackstone's provocative remark that "general words have . . . a very imperfect effect in pardons." They deserve to be considered in some detail.

The point which concerned Hawkins was precisely the one which relates most directly to the Nixon pardon: whether the specificity required in pardons for murder, treason and rape by the statute of Richard II was also required, by usage and expectation, in pardons for other offenses as well. He found it generally believed that the statute was the only obstacle to pardoning murders, treasons and rapes by general words, and that there was no obstacle at all to the use of general words to pardon any other felonies:

But I find this point no where solemnly debated. Neither doth it seem easy to reconcile it with the general rules concerning pardons, applicable in other cases: for if a felony cannot be well pardoned where it may reasonably be intended that the king, when he granted the pardon, was not fully apprised of the state of the case, much less doth it seem reasonable that it should be pardoned when it may well be intended that he was not apprised of it at all. And if a felony whereof a person be attainted cannot be well pardoned, even though it appear that the king was informed of all the circumstances of the fact, unless it also appear that he was informed of the attainder; much less doth it seem reasonable that a felony should be well pardoned where it doth not appear that he knew anything of it: For by this means, where the king in truth intends only to pardon one felony, which may be very proper for his mercy, he may by consequence

[I]t hath been often . . . formerly adjudged, that a murder might be well pardoned under the general description of a felonious killing, if the charter had the clause of *non obstante* of this statute, which construction seems in a great measure to evacuate so excellent a law, by barely changing the form of the charter. But it seems difficult to give a good reason why this statute should so easily by [sic] evaded, which was made for the prevention of such great mischiefs, and in no ways . . . tends to abolish the king's prerogative, but only to put such a restraint upon the abuse of it, which . . . every one must own to be reasonable (footnotes omitted).

2 W. HAWKINS, *PLEAS OF THE CROWN* 546 (6th ed. 1788) [hereinafter cited as HAWKINS].

89. *THIRD INSTITUTE* was published in 1644, *PLEAS OF THE CROWN* in 1716, and the *COMMENTARIES* in 1765.

pardon the greatest number of the most heinous crimes, the least of which, had he been apprised of it, he would not have pardoned.⁹⁰

Hawkins proceeds to marshal precedents in support of his argument, saying that every pardon in the Register does specifically describe the offense pardoned, and he concludes that "where the books speak of pardons of all felonies in general as good, perhaps it may be reasonable for the most part to intend that they either speak of a pardon by parliament, or that they suppose that the particular crime is mentioned in the pardon, though they do not express it."⁹¹

The concept common to both the statute of Richard II and the technical rules for giving effect to pardons is disclosure. The king's knowledge of the particular crime or penalty imposed for it must appear on the face of the charter, or it will not be assumed that he intended to pardon it. The specificity of the king's intention must be reflected in the specificity of the language of the charter. Politely, that requirement prevents unscrupulous applicants and courtiers from imposing upon the king's mercy; practically, it relieves courts from uncertainty about the applicability of a pardon to any crime charged before them; politically, it makes the king publicly accountable for his exercise of the prerogative. The requirement, merely an inference to be drawn from Blackstone, is more clear from Coke; Hawkins, by articulating it, develops it into a concept of due process. Most important, Hawkins asserts that charters of pardon actually did reflect that notion of due process; it was not merely a restriction sought by parliament and courts, but a characteristic of the prerogative as exercised by the crown.

The picture of the pardoning prerogative which emerges from the commentators' treatment of it may have been neater and more orderly than the recalcitrant reality beneath.⁹² It is the effect of that picture on

90. 2 HAWKINS 543.

91. *Id.* at 543-44. "The books" continued in their careless way; *see, e.g.*, 3 BACON'S ABRIDGMENT 806 (4th ed. 1778).

92. The records of pardons, and of litigation concerning their validity, are sparse and inconclusive. The earliest known criminal pardon was by a writ of King Stephen remitting a forfeiture to one William fitz Robert in 1140-1. R. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL, 185 n.1 (Sel. Soc. vol. 77, 1959). Bodleian Register 'R' contains nine charters of pardon from Edward I of which seven are specific and two are general; at least one of the latter two, No. 381, may have been in the nature of an amnesty for a Lancastrian. E. DE HAAS AND G. HALL, EARLY REGISTERS OF WRITS 196-98 (Sel. Soc. vol. 87, 1970). *See also* G. SAYLES, SELECT CASES IN THE COURT OF KING'S BENCH UNDER EDWARD III 81 (Sel. Soc. vol. 76, 1958), for a pardon of a specific trespass granted by Edward III in 1333. There were two

the Framers' "original understanding" of pardon which matters, however, not the accuracy of the picture, nor of the understanding.

In that regard, it is useful to remember the nature of the amendments proposed to the draft of Article II at the Federal Convention. All three of them represented departures from the pardoning preroga-

cases in the following century, however, where pardons couched in the most general terms imaginable were allowed. One of them, the case of Richard Quatermaynes in 1459, is reported in detail. Quatermaynes, who seems to have been a grandfather of the Thomas Littleton upon whose work Coke based his *FIRST INSTITUTE* (see Preface, *FIRST INSTITUTE*, 10th ed., 1703), had been sheriff of Oxford. A return he had made in 1456 was alleged, two years later, to have been false. The court of King's Bench amerced him and certified the fine to the Exchequer Chamber for process. Two weeks before the falsity of the 1456 return was alleged, Quatermaynes received the king's pardon for "all manner of treasons, murders, rapes of women, rebellions, insurrections, felonies, conspiracies, champerties, maintenances and embraceries, and other trespasses, offences, neglects, extortions, misprisions, ignorances, contempts, concealments, forfeitures, and deceptions, howsoever done or perpetrated," and much else besides. Quatermaynes raised his pardon in the Exchequer Chamber, asking that the fine be quashed. Six times the justices found that "the court here is not advised whether the [pardon] should be allowed or not;" finally, they concluded that the false return and amendment therefore were covered by the words "trespasses", "misprisions", and "deceptions" contained in the pardon. M. HEMMANT, *SELECT CASES IN THE EXCHEQUER CHAMBER, 162-73* (Sel. Soc., vol. 51, 1933) (see *infra*, note 104).

Two interesting points emerged from the justices' discussion of Quatermaynes' case. It was agreed that there were some felonies and some misprisions which could only be pardoned by express words, but Quatermaynes' offense was not felt to be among them and they were not enumerated. It was also agreed that a special pardon, obtained by application to the king, would be construed very narrowly against the grantee, while a "general pardon", granted by the king on his own initiative, would be allowed without great insistence on specificity in its terms. It does not appear whether the phrase "general pardon" had the connotation of political amnesty it subsequently acquired. The political ramifications of the case cannot be determined from the record, but, given the troubled conditions at the time and Henry VI's tenuous grip on his crown, it is likely that some political considerations were involved in the opinions. On Henry's problems generally and his brief restoration in 1470, see D. LOADES, *POLITICS AND THE NATION 1450-1660*, 23-74 (1973).

The other case of the same period, which appears to have been much easier to decide, involved a pardon in the same blunderbuss terms granted to Quatermaynes. One John Boteler, taken as an outlaw, produced a charter pardoning him for "all offences, negligences, ignorances, contempts, forfeitures, and deceits . . . and also the outlawry if any was promulgated against the same . . . all kinds of escapes of felons, chattels of felons, and fugitives, chattels of outlaws and suicides, deodands, wastes, impeachments and all articles of the eyre, injuries and trespasses of vert and venison, sales of wood within the forests and without, and of all other things whatsoever . . ." *YEAR BOOK*, 10 EDW. IV & 49 HEN. VI (1470) (N. Neilson ed., Sel. Soc. vol. 47, 142-44, (1930)). The pardon appears to have been allowed without difficulty. The two cases, taken together, establish nothing except the unsettled character of the law at the time.

The later cases, decided during the period of constitutional conflict between the crown and parliament, might be expected to be more informative. Unfortunately they neither confirm nor dispel the general impression left by the commentators who cited them. They deal for the most part with the technical rules previously discussed, and such additional problems as whether suicide was excepted from an amnesty which ex-

tive at common law,⁹³ and none of them were adopted. The only change made in the first draft was in the impeachment exception. As proposed, it merely confirmed the limitation on the royal prerogative which had been secured in England by the Act of Settlement. As modified, however, it went beyond the Act of Settlement, to close the only loophole which remained under English practice.⁹⁴ The Framers

cepted murder. *Rex v. Warner*, 1 Keb. 66, 83 Eng. Rep. 814 (K.B. 1660); *Rex v. Ward*, 1 Keb. 548, 83 Eng. Rep. 1105 (K.B. 1663). The two cases which appear to deal directly with the question of specificity are inconsistent. In *Rex v. Dudley*, 2 Keb. 363, 84 Eng. Rep. 227 (K.B. 1668), the defendant pleaded his pardon of "all murders, felonies, penalties and burglaries &c" in bar of an indictment for robbery: the pardon was disallowed on the grounds that it was "not sufficient without a particular recital of a robbery." The following year, however, the same court allowed a pardon of "all killings, deaths, by lying in wait or by malice, all homicides, burglaries, felonies and misbehavior . . . *non obstante* 3 Edw. III cap. & 14 [sic] Rich. II" in a robbery case, on the grounds that the statutes did not require the robbery which was charged to be specified. One justice remarked that "of later times the particulars are recited, that pardons may pass the easier, not that they are better." *Rex v. Madox*, 2 Keb. 574, 84 Eng. Rep. 361 (K.B. 1669). See also *Coney and Obryan*, Skin. 157, 90 Eng. Rep. 73 (K.B. 1683), where Holt, then King's Serjeant, was asked to advise the court on the validity of a general pardon pleaded in bar of execution on a sentence of death for murder and felony. Holt argued that the pardon was good for the execution even if not for the offense, that it included a *non obstante*, and finally that the statute of Richard II "was not to hinder the King's mercy, but his misinformation." The court allowed the pardon unanimously, but did not say which of Holt's arguments had been persuasive.

The cases, while interesting, are inconsistent and necessarily inconclusive. The disposition of a limited number of cases in the King's Bench, even assuming the issues and the grounds of decision are accurately set out in the summary reports, do not necessarily tell us anything about the character of pardons in general. It is reasonable to suppose that most pardons would describe the crimes intended to be pardoned, simply because ordinarily there would be no reason not to. Where a charter was general in its terms, either because the king had been hoodwinked or because he wished to avoid disclosure for reasons of his own, legitimate or not, the validity of the charter would not necessarily be litigated. The evolution of early medieval practice is a murky subject. See N. HURNAND, *THE KING'S PARDON FOR HOMICIDE* (1969). Even the later practice, in the period prior to our Revolution, is probably impossible to make out from the cases; Hawkins' assertion that charters of pardon did contain particular descriptions of crimes, chiefly important for the fact that he made it, may actually have been true. As Professor Milsom remarks,

[T]he records of litigation, whether plea rolls which were the courts' minutes, or Year Books which were reports made for the professional or educational purposes of lawyers, are brusque in their unhelpfulness to outsiders. Charters and the like use words which we may not even recognize as terms of art, let alone guess at the volumes of meaning which it is the function of terms of art to import. Even legislative acts, even legal treatises, were addressed to an audience which knew something about the law and which lived in the society which the law regulated. . . . It is what was assumed that we need to know, not what was said.

Milsom, *Introduction* to 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* at xxv-xxvi (2d ed. 1968).

93. See note 37 *supra*, and text accompanying note 36 *supra*.

94. See text accompanying notes 15-19, *supra*.

evidently did not find it necessary to re-enact limitations on the prerogative which parliament had already imposed in England. Those were implied in the word "pardon" itself. It is clear from the pattern of proposed changes and their rejection, as well as the one change made in the impeachment exception, that the Framers were closely acquainted with the scope of the pardoning prerogative at common law. They were prepared to depart from it in the one area where parliament had left a job half done. In other respects, they conferred upon the President such powers as the King of England had enjoyed, but no more. Specificity in the language of pardons, sufficient to apprise all concerned of the offenses intended to be pardoned, and evidencing the grantor's knowledge of such offenses, was a due process limitation upon a power subject to no substantive restriction. The very character of the limitation was consistent with the tenor of the Convention's work, to secure and confirm the protections from executive irresponsibility their parliamentary predecessors had won in the preceding century. No modification was suggested at the Convention; the limitation can be presumed to have been imported into the presidential pardoning power of Article II.

There are no decided cases which confirm the argument; it has not even been addressed in dicta. If any president or governor has granted a pardon in terms which did not make clear the offenses pardoned, the pardon's validity has not come to litigation. The point seems to be so generally assumed that it has not needed express reinforcement.⁹⁵ If this limitation on the pardoning power is accepted, there can be no question that it is violated by the Nixon pardon. While allegations that the terms "full, free, and absolute pardon"⁹⁶ are completely without precedent are neither true nor directly relevant,⁹⁷ the recital of "all offenses against the United States which he . . . has committed, or may have committed or taken part in"⁹⁸ is language previously used only in general amnesties. Indeed, at least one such amnesty, granted Jean Laffite's pirates by James Madison, was more specific by far.⁹⁹

95. A general observation that the crime must be specified, in 3 ATT'Y GEN. SURVEY 135-36 (1939), appears to be the only remark on the subject.

96. See text of the Nixon pardon accompanying note 2 *supra*.

97. 32 CONGRESSIONAL QUARTERLY WEEKLY REPORT 2458 (No. 37, September 14, 1974). John Adams used the same terms, however, in a proclamation of amnesty in 1800. See 20 OP. ATT'Y GEN. 343 (1895).

98. See text of the Nixon pardon accompanying note 2 *supra*.

99. The Barataria pirates were amnestied for "all offenses committed in violation of any act or acts of the Congress . . . touching the revenue, trade, and navigation [of the United States], or touching the intercourse and commerce of the United States with foreign nations." 20 OP. ATT'Y GEN. 344 (1895).

An interesting practical explanation of the vagueness of the Nixon pardon was offered by the late Harry Kalven, in what may have been his last interview. Assuming that the President intended to relieve Mr. Nixon of any threat of prosecution for Watergate offenses, "it would be a terrible job to try to figure out in advance how you specify what the Watergate crimes are and be sure you caught them—he had to relieve Mr. Nixon of everything. . . . It's a drafting problem."¹⁰⁰ Professor Kalven's further reflections, evidently proceeding from his general sense of the subject rather than from specialized knowledge (though his general sense may well be preferred to the specialized knowledge of most people), led to an echo of Coke, Hawkins and Blackstone. "You can't say, 'I'm going to pardon you for anything you do next week.' I would think that's sufficiently different so that it's not a pardon. Then you say, now move that back one—I'll pardon you for anything you did which I don't know about.' How can that be a pardon?"¹⁰¹ Kalven observed that the practical problem President Ford may have faced, which explains the vagueness of the pardon, was one of timing; he chose not to wait until all offenses for which Mr. Nixon might have been prosecuted were known. If it is improper—and constitutionally impermissible—to pardon an offense which has not yet been committed, it is no more proper to pardon an offense which is not yet known to have been committed. Timing is of only incidental significance to the validity of the pardon.¹⁰² Knowledge of the commission of the offense must exist before the specific intent to pardon it can be formed; it is on that intent that the validity of a pardon depends. President Ford was advised by the Special Prosecutor of inquiry into ten areas of possible criminal involvement by Mr. Nixon while he was president.¹⁰³ It may be that the Nixon pardon is valid for prosecution

100. 3 STUDENT LAWYER No. 3, 9, 11 (November, 1974).

101. *Id.* at 55. Cf. *supra* note 75 and accompanying text. Kalven closely echoes Hawkins. See text accompanying note 90 *supra*.

102. Its significance is chiefly political.

103. The areas of criminal investigation possibly involving Mr. Nixon directly, of which the President was informed prior to his grant of pardon, were:

1. Tax deductions relating to the gift of pre-Presidential papers.
2. The Colson obstruction of justice plea in the Ellsberg matter.
3. The transfer of the national security wiretap records from the F.B.I. to the White House.
4. The initiating of wiretapping of John Sears.
5. Misuse of I.R.S. information.
6. Misuse of I.R.S. through attempted initiation of audits as to "enemies."
7. The dairy industry pledge and its relationship to the price support change.
8. Filing of a challenge to The Washington Post ownership of two Florida television stations.

arising from these ten areas. But if the due process of law attaches to the dispensation of mercy as well as to the administration of justice, the Nixon pardon is not valid beyond those areas.¹⁰⁴

III. *Arguments based on federal regulations.*

The fourth and fifth arguments against the validity of the Nixon pardon¹⁰⁵ are relatively less complex than the preceding three. They both turn on the soundness and applicability of the proposition that the executive branch is bound by its own regulations in the exercise of otherwise constitutional powers. That proposition emerges from several decisions of the Supreme Court invalidating dismissals of federal employees.¹⁰⁶ Those decisions were cited with approval in *United States v. Nixon*,¹⁰⁷ where the regulations establishing the office and duties of the Watergate Special Prosecutor¹⁰⁸ were found to confer independence upon that officer sufficient to permit him to maintain an action against the President.¹⁰⁹ Attempts to extend the rule to questions of pardon create serious problems of standing and justiciability.

A. *Existing regulations prescribe the procedures to be followed in granting pardons, and criteria of eligibility therefor; the President did not follow the procedures, and Mr. Nixon did not meet the criteria of eligibility.*

The argument requires a showing that the pardon regulations¹¹⁰ are binding upon the President. The terms of the regulations apply

9. False and evasive testimony at the Kleindienst confirmation hearings as to White House participation in Department of Justice decisions about I.T.T.

10. The handling of campaign contributions by Mr. Rebozo for the personal benefit of Mr. Nixon.

The New York Times, September 11, 1974, p. 28, col. 7.

104. Even the apparently exhaustive pardon granted Sir Richard Quatermaynes, discussed *supra* note 92, contained the following prudent condition:

[W]e have granted him our firm peace, provided, however, that he shall stand at right in our court if anyone should wish to speak against him concerning the premises or any one of the premises, as in the aforesaid letters is more fully contained.

M. HEMMANI, SELECT CASES IN THE EXCHEQUER CHAMBER 168. (Sel. Soc. vol. 51, 1933).

105. See *supra* text accompanying notes 9 and 10.

106. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260 (1953). See also *United States v. Short*, 240 F.2d 292 (9th Cir. 1956), and *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

107. _____ U.S. _____, 94 S.Ct. 3090, 3101-02 (1974).

108. 38 Fed. Reg. 30738, as amended by 38 Fed. Reg. 32805 (November 19, 1973).

109. *United States v. Nixon* _____ U.S. _____, 94 S. Ct. 3090, 3101-02 (1974).

110. 28 C.F.R. §§ 0.35-0.36 (1973) (Pardon Attorney); 28 C.F.R. §§ 1.1-1.9 (1973) (Executive Clemency). See *supra* notes 65 and 66.

only to the form and content of petitions for clemency, not to the manner in which the President may grant pardons on his own initiative. He cannot be bound by the regulations unless the procedures set forth in the regulations have been followed so uniformly that a form of estoppel has been created, prohibiting departure from established practice. Since it appears that the regulations have *not* always been followed, that showing is impossible.¹¹¹

The same regulations require a waiting period of three to five years following conviction before a person becomes eligible for clemency.¹¹² It is contended that because Mr. Nixon has not even been convicted of any offense, he could not be pardoned under the regulations. This contention assumes that even the President, acting on his own initiative, must observe the waiting period established by the regulations, a proposition which is not clear from the terms of the regulation, and which no court would lightly assume.

The overwhelming difficulties with this argument are standing and justiciability. Even assuming that the President is bound to follow the procedures set forth by the regulations, and that Mr. Nixon is ineligible for pardon under them, who would have standing to complain that the regulations have been violated? The early cases establishing that the executive branch is bound by regulations it has promulgated were all brought by employees who asserted that they had been denied a procedural protection in their dismissal; the decisions all went against the government, Justice Frankfurter remarking in one that "he that takes the procedural sword shall perish with that sword."¹¹³ The government had selected one particular weapon, and it was not allowed to use another. But a grant of pardon is no sword; it inflicts no wound. Mr. Nixon is unlikely to assert that he has been aggrieved by the President's failure to observe the relevant regulations, nor is he likely to raise his own ineligibility for clemency under them. The Pardon Attorney may have an interest in maintaining the integrity of his jurisdiction as prescribed by regulation,¹¹⁴ but he has no recourse beyond remonstrance or resignation. Even if he could prove that his jurisdic-

111. See *supra* text accompanying notes 67-68.

112. 28 C.F.R. § 1.3 (1973). See *supra* note 65.

113. *Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring in part and dissenting in part).

114. In *Service v. Dulles*, 356 U.S. 363 (1957), the Secretary of State dismissed the employee on the advice of the Loyalty Review Board of the Civil Commission, after the State Department's own Loyalty Review Board had twice refused to find the employee a security risk. The employee brought the case, not the State Department Loyalty Review Board, whose jurisdiction under the Department's regulations had been infringed upon.

tion extended to pardons initiated by the President, his argument would fail for want of justiciability. He is an employe of the executive branch, and he can be dismissed by the President. An opinion of a court in a claim asserted by him against the President would be merely advisory.¹¹⁵ The only remaining possible complainants would be members of the public generally who want to see regulatory procedures observed, or perhaps other persons who would have liked to obtain treatment similar to that accorded Mr. Nixon. Even a person in the latter class would be regarded by the courts as one who merely "suffers in some indefinite way, in common with people generally,"¹¹⁶ and standing would be denied.

In summary, the argument that the Nixon pardon is invalid because it violates the pardon regulations must fail. No violation can be shown and even if one could be shown, no one would be able to force a court to hear of it.

B. *The grant of pardon to Richard Nixon interfered with the jurisdiction of the Watergate Special Prosecutor, in violation of a regulation binding upon the President.*

This final argument derives its support from the extraordinary character of the regulations establishing the jurisdiction and powers of the Watergate Special Prosecutor. In pertinent part, those regulations give the Special Prosecutor "full authority for investigating . . . allegations involving the President," and full authority for "deciding whether or not to prosecute any individual, firm, corporation or group of individuals."¹¹⁷ By that pair of unambiguous provisions, the power to decide whether or not to prosecute Mr. Nixon was vested in the Special Prosecutor. The question remains, however, whether the regulations also protect the powers conferred upon the Special Prosecutor from interference by the President. It was clear that he could not be dismissed, as Archibald Cox had been, "except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action."¹¹⁸ It was not clear whether the same consensus

115. See *United States v. Nixon*, ____ U.S. ____, 94 S. Ct. 3090, 3100 (1974); *Muskrat v. United States*, 219 U.S. 346, 362 (1911).

116. *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). See generally *Scott, Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

117. 38 Fed. Reg. 30738-39 (1973).

118. 38 Fed. Reg. 30739 (1973).

provision attached to presidential limitation of or interference with the Special Prosecutor's jurisdiction; the regulation was modified by the following terms:

In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, . . . the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress and ascertaining that their consensus is in accord with his proposed action.¹¹⁹

The grant of pardon, an undoubted exercise of the President's "Constitutional powers," stripped the Special Prosecutor of any power to decide whether to prosecute Mr. Nixon. It is difficult to imagine a more effective limitation of or interference with the Special Prosecutor's independent jurisdiction. At the time of his resignation, a month after the pardon and eleven months after the regulations were promulgated, Mr. Jaworski gave his opinion that the pardon was entirely within the President's powers and that, as a party to the sessions at which the regulations were drafted, he was certain that there had been no intention to limit the President's exercise of his pardoning power under Article II, §2.¹²⁰ In light of that statement, it is interesting to note the written replies of Acting Attorney General Bork to questions put him in writing by Senator Kennedy, at the time the regulation was modified to make the protection from Presidential interference provision more clear. On November 16, 1973, the Senator inquired:

Do you consider the wording of the new language clearly to provide that the President may interfere with the Special Prosecutor's independence—that is, may limit his jurisdiction—with a "consensus" of the congressional leadership?¹²¹

On November 20, one day after the clarifying amendment was drafted, Mr. Bork replied:

In establishing a charter for Mr. Jaworski, the "consensus" provision was inserted for the purpose of providing additional

119. 38 Fed. Reg. 32805 (1973).

120. The New York Times, October 13, 1974, p. 76, col. 2.

121. *Hearings before the Senate Judiciary Comm. on the Special Prosecutor*, 93d Cong., 1st Sess., pt. 2, 512 (1973).

safeguards for the Special Prosecutor. Although public discussion has focused on removal, it was intended that the "consensus" provision apply to any attempt to limit the Special Prosecutor's independence, including his jurisdiction. . . .¹²²

By Mr. Bork's interpretation the regulation means exactly what it says, that the President could not make any attempt to limit the Special Prosecutor's jurisdiction without first obtaining the consensus of eight members of Congress. According to Mr. Jaworski's recollection, the regulation means something less than what it says; it imposes the consensus requirement on presidential interference, but not on exercise of the pardoning power. As an expression by a distinguished and conscientious attorney of his own understanding of his position, Mr. Jaworski's views command respect. As an interpretation of the meaning of the regulations arguably violated by the Nixon pardon, they are not dispositive. Another Special Prosecutor, equally conscientious, might take a different view, perhaps more consistent with the apparent meaning of the consensus requirement.

A Special Prosecutor who did take a different view of his role could not rest merely on a showing that the regulation required the President to ascertain the consensus of the congressional leadership before granting a pardon to Mr. Nixon. The binding effect of the regulations on the President is not established beyond question. It is true that Chief Justice Burger used sweeping language in declaring that the consensus provision, as a precondition for discharging the Special Prosecutor, was binding upon the President.

So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it. Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation by the Attorney General to a subordinate officer: with the authorization of the President, the Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the "consensus" of eight designated leaders of Congress.¹²³

122. *Id.* at 513. Attorney General Saxbe appears to have held the same view of the consensus provision. See *Hearings before the Senate Judiciary Comm. on the nomination of William B. Saxbe to be Attorney General*, 93d Cong., 1st Sess., 6 (1973).

123. *United States v. Nixon*, _____ U.S. _____, 94 S. Ct. 3090, 3101-02 (1974).

It could be argued, however, that the language quoted should be limited to the discharge aspect of the regulations. The cases relied upon by the Court all dealt with discharge of employes of the executive branch; the tools at hand were fitted to the particular task before the Court.¹²⁴ The issue was one of great public moment and concern: a finding that the Special Prosecutor was secure from ordinary dismissal was necessary in order to preserve the justiciability of the case.¹²⁵ The President's removal power, while a corollary of his appointment power, is not expressly conferred by the Constitution.¹²⁶ Assuming a challenge to the validity of the pardon arose from the Special Prosecutor's obtaining an indictment of Mr. Nixon and appealing the reasonably anticipated plea of pardon,¹²⁷ it may be that the Court would not—even should not—strike the balance in favor of the regulations. The interest asserted by the Special Prosecutor, protection of his jurisdiction, might appear less compelling than the interest asserted in *United States v. Nixon*, protection of his job. The President's interest, preserving the unfettered integrity of the expressly-conferred pardoning power, might be stronger.

Subject to that *caveat*, of indeterminable weight, the argument that the Nixon pardon is invalid as an interference with the Special Prosecutor's jurisdiction appears sound. The pardon did limit and interfere with that jurisdiction, no consensus of the congressional leadership was ascertained before granting it, and the regulation requiring that ascertainment was still in force at the time of the grant.

CONCLUSION

Of the five arguments raised against the validity of the Nixon pardon, two are substantial. The vagueness of the terms of the pardon render it highly suspect in terms of the historical understanding of the character of pardons. The limiting effect of the pardon upon the jurisdiction and powers of the Special Prosecutor is clear; that the pardon was granted in violation of a valid and binding regulation is hardly less so. Some remarks are in order on the question of standing to challenge the pardon and the circumstances under which it might be desirable for such a challenge to be made.

124. See *supra* note 106.

125. See *United States v. Nixon*, _____ U.S. _____, 94 S. Ct. at 3100.

126. See *Myers v. United States*, 272 U.S. 52 (1926) and, generally, C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 52-70 (1969).

127. Review of the pardon could also be secured through a declaratory judgment under 28 U.S.C. § 2201; see *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

The one person who clearly has standing to challenge the pardon's validity is the Special Prosecutor himself. No other federal prosecutor enjoys the protection from presidential removal required to survive an intra-branch dispute. It can at least be argued that members of the House of Representatives have standing, on the grounds that abuse of the pardoning power might be grounds for impeachment, a determination the House is constitutionally empowered to make.¹²⁸ There is considerable support for the proposition in case law, though it may be wondered why a legislator would need advice from the judiciary on the appropriateness of impeachment, and why a court should issue what is, in effect, an advisory opinion on the subject.¹²⁹ Since the Congress has no prosecutorial powers, the standing question could arise only in an action for a declaratory judgment. That form of action, admirably suited to many purposes, might seem rather a cheap way to raise an issue of this magnitude, when alternative means and an alternative party, the Special Prosecutor, exist.

The appropriate circumstances for challenge, by whomever brought, may be said already to exist. To the extent that more definite knowledge of Mr. Nixon's conduct in office, through indictment or prosecution, would be a necessary purgative for the Republic, the pardon should be set aside. The impact of the pardon on public confidence in the impartial administration of the law, equally difficult to measure, might be urged as an additional reason for challenge. Constitutional specialists might consider protracted litigation and public uncertainty a small price to be paid for a Supreme Court determination of a nice point of law. Ultimately, however, there seem but two circumstances which would make a challenge imperative. If the pardon seriously impeded significant aspects of investigations conducted by the Special Prosecutor's office, particularly in areas unrelated to

128. U.S. CONST. art. I, § 2(5). In 1923, the Governor of Oklahoma was impeached for abuse of the pardoning power. See 3 ATT'Y GEN. SURVEY 150-53 (1939). Federal courts have assumed that the President is similarly accountable in granting standing to members of Congress. *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973); the original grant of standing was made by the district court in *Holtzman v. Richardson*, 361 F. Supp. 544 (E.D.N.Y. 1973). See also *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973), and, generally, Note, *Standing to Sue for Members of Congress*, 83 YALE L.J. 1665, 1677-88 (1974).

129. *Nader v. Bork* appears to be the only case where the impeachment power was the sole basis on which standing was granted. The war power and responsibility for appropriations figured in *Holtzman v. Schlesinger* and in *Mitchell v. Laird*, 485 F.2d 611 (D.C. Cir. 1973). *Kennedy v. Sampson*, 364 F. Supp. 1075 (D.D.C. 1973) (senator's challenge of a pocket veto), turned on the more traditional grounds of the legislator's interest in the effectiveness of his vote. Cf. *Coleman v. Miller*, 307 U.S. 433 (1939).

Watergate, which were not scrutinized in the cover-up conspiracy trial, the Special Prosecutor has a responsibility to attempt to set the pardon aside. If it appears that Mr. Nixon may have committed criminal acts more extensive in number or more repugnant in kind than at present he is generally supposed to have done, the impropriety of the pardon would seem so great that it would have to be set aside in order to preserve the legitimacy of the pardoning power itself.

If neither contingency arises, a measure of doubt remains desirable, lest this one extraordinary exercise, with which the pardoning power will always be associated, be taken by history as the measure of Article II, § 2.

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