The original documents are located in Box 34, folder "Nixon Pardon - Legal and Historical Precedents (3)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Memorandum

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

TO : Philip Buchen
Counsel to the President

DATE: October 10, 1974

FROM : Robert Alan Jones RAJones
Special Assistant to the Administration

SUBJECT:

In accordance with our conversation yesterday, I have investigated all possible avenues of historical authority with regard to pardons. In the memo which follows and is attached to this, I have set out a brief historical prospective of the use of the pardon power as it applies to the Chief Executive.

To avoid duplication of research, I am hereafter listing the authorities that I consulted and am offering to you a very brief background analysis from the materials that I digested.

I utilized the following sources:

(1) After Conviction, Goldfarb & Singer, Simon & Schuster (1973);

(2) Amnesty: A Brief Historical Overview, John C. Etridge, Congressional Research Service/Library of Congress (1973) (UB340USD);

(3) The Constitution of the United States of America: Analysis and Interpretation, Senate Document No. 92-82, Congressional Research Service/Library of Congress (1973);

(4) The President, Office and Powers, Edwin S. Corwin, George Grady Press, 3rd Edition (1948);

(5) Pardoning Power of the President, W. H. Humbert, American Council on Public Affairs (1941); and

(6) The Federalist, Alexander Hamilton (1788), Jacob E. Cooke (Editor), Wesleyan University Press.

(7) Executive Clemency in Pennsylvania, William Smithers and George D. Thorn (1909)

There was a dearth of material dealing with the specific questions that we are interested in. It seems clear that the pardon or clemency power arose historically from two perspectives. The first was the monarchial power which amounted at that time to almost absolute control of the citizenry by the king, including the power to punish or forgive. The second was the powers of forgiveness and absolution whose origins were in the Church. In any event, by the time of the American Constitutional Convention the pardon power had been established for an excess of 1,000 years in western civilization. Therefore, there was no debate to our Constitutional Convention as to whether there should be a pardon power. The only issues were as to what limitations on the power should be placed on the Chief Executive. For example, the question arose as to whether the power should be limited to post-conviction situations. Another point of debate was whether or not the President should have the right to grant pardons in cases involving treason against the United States. Of course, both of the foregoing were decided in favor of granting the Executive the broadest possible power and he was limited only by language which forbade him from exercising the pardon power in the case of impeachment of public officials.

Some suggested language and appropriate quotations on the above sources are attached as a separate memo.

Memorandum

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

TO : Philip Buchen
Counsel to the President

DATE: October 10, 1974

FROM : Robert Alan Jones RAJones
Special Assistant to the
Administration

SUBJECT: Suggested Material for Use in the President's Statement Respecting the Pardon of Richard M. Nixon

Historically the power of the Executive to forgive (pardon) was brought to this country from England as a long established part of western jurisprudence.

The power of the head of state is traceable to our modern institutions from the earliest of the world's civilizations. The ancient theocracies held court in their temples. The Hebrews constructed their tabernacles so that tables of the law were covered by the "mercy seat." (Smithers p. 57: Smith; Old Testament History p. 232, ed. 1879). The Greeks maintained an alter of mercy at alters long after the development of political institutions.

It appears to have been the nature of civilization to provide some means of correction for the "inevitable errors which arise from imperfect human institution being executed by imperfect men." (Smithers p. 56.)

Even through the Dark Ages the concept of clemency survived although abused by the feudal Lords. However, as Feudalism gave way to Intelligence and the Church gained power the "devine right of Kings" again combined the religious and political functions of the Executive.

Early English Legal Scholars from Bracton and Bacon to coke reemphasized the nature of executive clemency. Perhaps Bracton expressed the view best in his essay "Of Judicature." "In cases of life and dealth, judges ought, so far as the law permiteth, in justice to remember mercy and to cast a severe eye upon the example but a merciful eye upon the person." (Smithers, p. 12.)

"All pardoning power can have been granted by the state to some individual only for better obtaining of the true ends of the law, or the better fulfillment of its true spirit not of its mere form."

[(Smithers, p. 60) Lieber: Manual of Political Ethics, p. 591, ed. 1839] This was basically the state of the law when the first American colonists arrived.

From that point the colonies under the King continued in the English Tradition to the time of the revolution.

(I would suggest that the President use the above historical material for his own background information and begin with a discussion dealing directly with our own Constitution.)

It is clear that the framers of the Constitution specifically intended a wide discretionary power respecting pardon be reposed in the chief executive. As Alexander Hamilton stated in the Federalist Papers, (no. 74),

"Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrased. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengence."

Hamilton further argued that at times the ability to act with a great deal of dispatch was required, for example in times of great public turmoil, and therefore the power needed to be placed unfettered in a single executive: "...a well timed offer of pardon...may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved it may never be possible afterwards to recall." It is in this sense that I (Gerald Ford) felt the necessity to act immediately to bring the public debate over the status of Mr. Nixon to a halt.

It has been suggested by some that the fact of the pardon for Richard M. Nixon would prevent the whole truth about the "Watergate" from having a public airing. However this is simply not the case. It is my understanding of the law that the granting of executive clemency by me to the former president and his acceptance of that grant precludes him from being able to raise the privilege against self incrimination as a bar to compelling his testimony as a witness in any federal trial dealing with the facts of this matter (Murphy v. Waterfront Commission, 378 U.S. 52, 79 (1964). See also Malloy v. Hogan, 378 U.S. 1 (1964)). Therefore, it is more likely that the former president may be called on to testify and the truth of the "Watergate" matter may be brought to light then would be possible if Richard Nixon were able to decline to testify on Fifth Amendment grounds.

Further, there is now no question left as to delaying the "Watergate" trials in order to abate possible predjudicial pretrial publicity surrounding the indictment and arraignment of a former president of the United States.

We all must remember that as was stated by Justice Oliver Wendell Holmes as far back as 1927:

> "A pardon is our days is not a private act of grace from an individual happening to possess power. It is part of the constitutional scheme. When granted it is a determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgement fixed..."

(Biddle v. Perovich, 247 U.S. 480, 486 (1927)).

It was my determination that in this most exceptional of cases the public good would best be served by pardoning Richard Nixon prior to allowing a further hardening of the division in this country respecting whether or not Mr. Nixon should be indicted and prosecuted. As I have stated, I believe that my actions will increase the probability of a full disclosure to the American public of all the relevant acts surrounding the "Watergate" incident and aftermath. I have taken this responsibility upon my shoulders in the genuine belief that these actions were and are what is best for the country.

[I have attached some source material for your possible use, and will be available to render further assistance when necessary.]

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REMARKS

I sent a copy of the enclosed material to Ken Lazarus and Jack Marsh also -

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THE Federalist

Edited, with Introduction and Notes, by

JACOB E. COOKE

Wesleyan University Press
Middletown, Connecticut

The Federalist No. 74

[73]

ALEXANDER HAMILTON

March 25, 1788

To the People of the State of New York.

THE President of the United States is to be "Commander in Chief of the army and navy of the United States, and of the militia of the several States *when called into the actual service* of the United States." The propriety of this provision is so evident
1 in itself; and it is at the same time so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them, which have in other respects coupled the Chief Magistrate with a Council, have for the
2 most part concentred the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.

"The President may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." This I consider as a mere redundancy in the plan; as the right for which it provides would result of itself from the office.

3 He is also to be authorised "to grant reprieves and pardons for offences against the United States *except in cases of impeachment.*" Humanity and good policy conspire to dictate, that the

From *The New-York Packet*, March 25, 1788. This essay appeared on March 26 in *The Independent Journal*. It was numbered 74 in the McLean edition and 73 in the newspapers.

benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The reflection, that the fate of a fellow creature depended on his *sole fiat,* would naturally inspire scrupulousness and caution: The dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other 4
in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clem- 5
ency. On these accounts, one man appears to be a more eligible dispenser of the mercy of the government than a body of men.

The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason. This, it has been urged, ought to have depended upon the assent of one or both of the branches of the legislative body. I shall not deny that there are strong reasons to be assigned for requiring in this particular the concurrence of that body or of a part of it. As treason is a crime levelled at the immediate being of the society, when the laws have once ascertained the guilt of the offender, there seems a fitness in refering the expediency of an act of mercy towards him to the judgment of the Legislature. And this ought the rather to be the case, as the supposition of the connivance of the Chief Magistrate ought not to be entirely excluded. But there are also strong objections to such a plan. It is not to be doubted that a single

man of prudence and good sense, is better fitted, in delicate conjunctures, to balance the motives, which may plead for and against the remission of the punishment, than any numerous body whatever. It deserves particular attention, that treason will often be connected with seditions, which embrace a large proportion of the community; as lately happened in Massachusetts.* In every such case, we might expect to see the representation of the people tainted with the same spirit, which had given birth to the offense. And when parties were pretty equally
6 matched, the secret sympathy of the friends and favorers of the
7 condemned person, availing itself of the good nature and weakness of others, might frequently bestow impunity where the terror of an example was necessary. On the other hand, when the sedition had proceeded from causes which had inflamed the resentments of the major party, they might often be found obstinate and inexorable, when policy demanded a conduct of forbearance and clemency. But the principal arguments for reposing the power of pardoning in this case in the Chief Magistrate is this — In seasons of insurrection or rebellion, there are often critical moments, when a well timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the Legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal. If it should be observed that a discretionary power with a view to such contingencies might be occasionally conferred upon the President; it may be answered in the first place, that it is questionable whether, in a limited constitution, that power could be delegated by law; and in the second place, that it would generally

* Hamilton referred to Shays' Rebellion. See Essay 6. (Editor)

be impolitic before-hand to take any step which might hold out the prospect of impunity. A proceeding of this kind, out of the usual course, would be likely to be construed into an argument of timidity or of weakness, and would have a tendency to embolden guilt.

PUBLIUS.

The Federalist No. 75
[74]

ALEXANDER HAMILTON

March 26, 1788

To the People of the State of New York.

THE president is to have power "by and with the advice and consent of the senate. to make treaties, provided two-thirds of the senators present concur." Though this provision has been assailed on different grounds, with no small degree of vehemence, I scruple not to declare my firm persuasion, that it is one of the best digested and most unexceptionable parts of the plan. One ground of objection is, the trite topic of the intermixture of powers; some contending that the president ought alone to possess the power of making treaties; and others, that it ought 1, 2
to have been exclusively deposited in the senate. Another source of objection is derived from the small number of persons by whom a treaty may be made: Of those who espouse this objection, a part are of opinion that the house of representatives ought to have been associated in the business, while another part seem to think that nothing more was necessary than to

From *The Independent Journal*, March 26, 1788. This essay appeared on March 28 in *The New-York Packet*. It was numbered 75 in the McLean edition and 74 in the newspapers.

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THE PARDONING POWER OF THE PRESIDENT

By W. H. Humbert

FOREWORD

By W. W. Willoughby

American Council On Public Affairs

WASHINGTON, D. C.

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THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

ANNOTATIONS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JUNE 29, 1972

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The idea ultimately failed, partly because of the diversity of ideas concerning the council's make-up. One member wished it to consist of "members of the two houses," another wished it to comprise two representatives from each of three sections, "with a rotation and duration of office similar to those of the Senate." The proposal which had the strongest backing was that it should consist of the head of departments and the Chief Justice of the Supreme Court, who should preside when the President was absent. Of this proposal the only part to survive was the above cited provision. The consultative relation here contemplated is an entirely one-sided affair, is to be conducted with each principal officer separately and in writing, and is to relate only to the duties of their respective offices.[2] The *Cabinet*, as we know it today, that is to say, the Cabinet *meeting*, was brought about solely on the initiative of the first President,[3] and may be dispensed with on presidential initiative at any time, being totally unknown to the Constitution. Several Presidents have in fact reduced the Cabinet meeting to little more than a ceremony with social trimmings.[4]

PARDONS AND REPRIEVES

The Legal Nature of a Pardon

In the first case to be decided concerning the pardoning power, Chief Justice Marshall, speaking for the Court, said: "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court. . . . A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him." Marshall

[2] E. Corwin, *The President—Office and Powers 1787–1957* (New York: 4th ed. 1957), 82.

[3] L. White, *The Federalists—A Study in Administrative History* (New York: 1948), ch. 4.

[4] E. Corwin, *The President—Office and Powers 1787–1957* (New York: 4th ed. 1957), 19, 61, 79–85, 211, 295–299, 312, 320–323, 490–493.

continued to hold that to be noticed judicially this deed must be pleaded, like any private instrument.[1]

In the case of *Burdick* v. *United States*,[2] Marshall's doctrine was put to a test that seems to have overtaxed it, perhaps fatally. Burdick, having declined to testify before a federal grand jury on the ground that his testimony would tend to incriminate him, was proffered by President Wilson "a full and unconditional pardon for all offenses against the United States" which he might have committed or participated in in connection with the matter he had been questioned about. Burdick, nevertheless, refused to accept the pardon and persisted in his contumacy with the unanimous support of the Supreme Court. "The grace of a pardon," remarked Justice McKenna sententiously, "may be only a pretense . . . involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected. . . ."[3] Nor did the Court give any attention to the fact that the President had accompanied his proffer to Burdick with a proclamation, although a similar procedure had been held to bring President Johnson's amnesties to the Court's notice.[4] In 1927, however, in sustaining the right of the President to commute a sentence of death to one of life imprisonment, against the will of the prisoner, the Court abandoned this view. "A pardon in our days," it said, "is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[5] Whether these words sound the death knell of the acceptance doctrine is perhaps doubtful.[6] They seem clearly to indicate that by substituting a commutation order for a deed of pardon, a President can always have his way in such matters, provided the substituted penalty is authorized by law and does not in common understanding exceed the original penalty.[7]

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[1] *United States* v. *Wilson*, 7 Pet. (32 U.S.) 150, 160–161 (1833).

[2] 236 U.S. 79, 86 (1915).

[3] Id., 90–91.

[4] *Armstrong* v. *United States*, 13 Wall. (80 U.S.), 154, 156 (1872). In *Brown* v. *Walker*, 161 U.S. 591 (1896), the Court had said: "It is almost a necessary corollary of the above propositions that, if the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offence as if it had never been committed." Id., 599, citing British cases.

[5] *Biddle* v. *Perovich*, 247 U.S. 480, 486 (1927).

[6] *Cf.* W. Humbert, *The Pardoning Power of the President* (Washington: 1941), 73.

[7] *Biddle* v. *Perovich*, 274 U.S. 480, 486 (1927).

Scope of the Power

The power embraces all "offences against the United States," except cases of impeachment, and includes the power to remit fines, penalties, and forfeitures, except as to money covered into the Treasury or paid an informer,[1] the power to pardon absolutely or conditionally, and the power to commute sentences, which, as seen above, is effective without the convict's consent.[2] It has been held, moreover, in face of earlier English practice, that indefinite suspension of sentence by a court of the United States is an invasion of the presidential prerogative, amounting as it does to a condonation of the offense.[3] It was early assumed that the power included the power to pardon specified classes or communities wholesale, in short, the power to amnesty, which is usually exercised by proclamation. General amnesties were issued by Washington in 1795, by Adams in 1800, by Madison in 1815, by Lincoln in 1863, by Johnson in 1865, 1867, and 1868, and by the first Roosevelt—to Aguinaldo's followers—in 1902.[4] Not, however, till after the Civil War was the point adjudicated, when it was decided in favor of presidential prerogative.[5]

Offenses Against the United States; Contempt of Court.—In the first place, such offenses are not offenses against the United States. In the second place, they are completed offenses.[6] The President cannot pardon by anticipation, otherwise he would be invested with the power to dispense with the laws, his claim to which was the principal cause of James II's forced abdication.[7] Lastly, the term has been held to include criminal contempts of court. Such was the holding in *Ex parte Grossman*,[8] where Chief Justice Taft, speaking for the Court, resorted

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[1] 23 *Ops. Atty. Gen.* 360, 363 (1901); *Illinois Central Railroad* v. *Bosworth*, 133 U.S. 92 (1890).

[2] *Ex parte William Wells*, 18 How. (59 U.S.) 307 (1856). For the contrary view, *see* some early opinions of the Attorney General, 1 *Ops. Atty. Gen.* 341 (1820); 2 *Ops. Atty. Gen.* 275 (1829); 5 *Ops. Atty. Gen.* 687 (1795); *cf.* 4 *Ops. Atty. Gen.* 458 (1845); *United States* v. *Wilson*, 7 Pet. (32 U.S.) 150, 161 (1833).

[3] *Ex parte United States*, 242 U.S. 27 (1916). Amendment of sentence, however, within the same term of court, by shortening the term of imprisonment, although defendant had already been committed, is a judicial act and no infringement of the pardoning power. *United States* v. *Benz*, 282 U.S. 304 (1931).

[4] *See* 1 J. Richardson, *Messages and Papers of the Presidents*, (Washington: 1897), 173, 293; 2 id., 543; 7 id., 3414, 3508; 8 id., 3853; 14 id., 6690.

[5] *United States* v. *Klein*, 13 Wall. (80 U.S.) 128, 147 (1872). *See also United States* v. *Padelford*, 9 Wall. (76 U.S.) 531 (1870).

[6] *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 380 (1867).

[7] F. Maitland, *Constitutional History of England* (London: 1920), 302–306; 1 *Ops. Atty. Gen.* 342 (1820).

[8] 267 U.S. 87 (1925).

I. E. - PRIOR TO COMMISSION OF THE ACT.

once more to English conceptions as being authoritative in construing this clause of the Constitution. Said he: "The King of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common law lawyer of the eighteenth century the word pardon included within its scope the ending by the King's grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. [Citing cases.] These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt insofar as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. Blackstone IV, 285, 397, 398; Hawkins Pleas of the Crown, 6th Ed. (1787), Vol. 2, 553. The same distinction, nowadays referred to as the difference between civil and criminal contempts, is stil maintained in English law."[9] Nor was any new or special danger to be apprehended from this view of the pardoning power. "If," said the Chief Justice, "we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery?" Indeed, he queried further, in view of the peculiarities of procedure in contempt cases, "may it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial?"[10]

Effects of a Pardon: Ex parte Garland.—The great leading case is *Ex parte Garland*,[11] which was decided shortly after the Civil War. By an act passed in 1865 Congress had prescribed that before any person should be permitted to practice in a federal court he must take oath asserting that he had never voluntarily borne arms against the United States, had never given aid or comfort to enemies of the United States, and so on. Garland, who had been a Confederate sympathizer and so was unable to take the oath, had however received from President Johnson the same year "a full pardon 'for all offences by him committed, arising from participation, direct or implied, in

[9] Id., 110–111.
[10] Id., 121, 122.
[11] 4 Wall. (71 U.S.) 333, 381 (1867).

the Rebellion,' . . ." The question before the Court was whether, armed with this pardon, Garland was entitled to practice in the federal courts despite the act of Congress just mentioned. Said Justice Field for a divided Court: "The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching [thereto]; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." [12]

Justice Miller speaking for the minority protested that the act of Congress involved was not penal in character, but merely laid down an appropriate test of fitness to practice law. "The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor at law, may be saved by the executive pardon from the penitentiary or the gallows, but he is not thereby restored to the qualifications which are essential to admission to the bar." [13] Justice Field's language must today be regarded as much too sweeping in light of a decision rendered in 1914 in the case of *Carlesi* v. *New York*.[14] Carlesi had been convicted several years before of committing a federal offense. In the instant case the prisoner was being tried for a subsequent offense committed in New York. He was convicted as a second offender, although the President had pardoned him for the earlier federal offense. In other words, the fact of prior conviction by a federal court was considered in determining the punishment for a subsequent state offense. This conviction and sentence were upheld by the Supreme Court. While this case involved offenses against different sovereignties, the Court declared by way of dictum that its decision "must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted." [15]

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[12] Id., 380.
[13] Id., 396–397.
[14] 233 U.S. 51 (1914).
[15] Id., 59.

Limits to the Efficacy of a Pardon.—But Justice Field's latitudinarian view of the effect of a pardon undoubtedly still applies ordinarily where the pardon is issued *before conviction.* He is also correct in saying that a full pardon restores a *convict* to his "civil rights," and this is so even though simple completion of the convict's sentence would not have had that effect. One such right is the right to testify in court, and in *Boyd* v. *United States* the Court held that the disability to testify being a consequence, according to principles of the common law, of the judgment of conviction, the pardon obliterated that effect.[16] But a pardon cannot "make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law."[17]

Congress and Amnesty

Congress cannot limit the effects of a presidential amnesty. Thus the act of July 12, 1870, making proof of loyalty necessary to recover property abandoned and sold by the Government during the Civil War, notwithstanding any executive proclamation, pardon, amnesty, or other act of condonation or oblivion, was pronounced void. Said Chief Justice Chase for the majority: "[T]he legislature cannot change the effect of such a pardon any more than the executive can change a law.

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[16] 142 U.S. 450 (1892).

[17] *Knote* v. *United States*, 95 U.S. 149, 153–154 (1877).

Yet this is attempted by the provision under consideration. The Court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the Court to be instrumental to that end." [18] On the other hand, Congress itself, under the necessary and proper clause, may enact amnesty laws remitting penalties incurred under the national statutes.[19]

Clause 2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

THE TREATY-MAKING POWER

President and Senate

The plan which the Committee of Detail reported to the Federal Convention on August 6, 1787 provided that "the Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court." [1] Not until September 7, ten days before the Convention's final adjournment, was the President made a participant in these powers.[2] The constitutional clause evidently assumes that the President and Senate will be associated throughout the entire process of making a treaty, although Jay,

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[18] *United States* v. *Klein*, 13 Wall. (80 U.S.) 128, 143, 148 (1872).

[19] *The Laura*, 114 U.S. 411 (1885).

[1] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 183.

[2] Id., 538–539.

THE PRESIDENT

OFFICE AND POWERS

History and Analysis of Practice and Opinion

BY

EDWARD S. CORWIN

We elect a king for four years, and give him absolute power within certain limits, which after all he can interpret for himself.

—*Secretary of State Seward*

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