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THE PARDONING POWER

BY

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled "The Pardoning Power" submitted by Prince Syed Jamal Shah in partial fulfilment of the requirements for the degree of Master of Laws of The University of Alberta.

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ABSTRACT

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

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

The aim of this thesis is to undertake a rational exposition of the common law of pardons and to provide some suggestions as to circumstances in which the pardoning power might be exercised.

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INTRODUCTION

The policy of pardoning public offenders in any case has been questioned by Beccaria,[1] who contended that clemency should shine forth in the laws, and not in the execution of them. It would certainly be impolitic to remit the punishment attached to an offence very frequently or indiscriminately. Few measures tend more strongly to embolden offenders; and nothing could more effectually introduce a contemptuous disregard of those laws which were intended to protect society. It should however be remembered that human institutions are fallible, and must in many respects be imperfect. No human faculties can anticipate the various temptations, which may urge a man to the commission of an offence, or foresee all the shades in the circumstances of a case which may extenuate the guilt of the accused. An offence may be within the letter, but foreign to the general scope and limit of the law. "If we consider accurately the nature of human punishment, we shall find it attended with unavoidable imperfections. How short is our discernment! The surface of the things and actions is always exposed to our view, the inward thoughts, the habitual temper, which form the greater part of moral conduct, are actively concealed from us. It is for this reason that laws assign the same name, nature and penalty to all offences, which bear a conformity in outward resemblance, though intrinsically varying from one another, by a thousand circumstances, known only to the searcher of the heart."[2]

In the judicial system the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed

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1. 3 Burr 1616.

2. Considerations on the laws of forfeiture for High Treason, 1746, by the Honourable York.

judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, it totally unknown, and cannot be acted upon. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the case. Such a proceeding, in ordinary cases, would subvert the best established principles, and there is nothing peculiar in a pardon which ought to distinguish it in this respect from other facts: no legal principle known to the court will sustain such distinction. 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 a person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.

As, therefore, society cannot sufficiently provide for every possible transgression of its ordinances, and measure by anticipation the degree of guilt which may attach to the offender, it has entrusted the king with power of extending mercy to him. The coronation oath requires the king to temper justice with mercy and in the expression of Lord Stafford, that "the king condemns no man: the great operation of the sceptre is mercy" -- a generous principle, which seems to have been sometimes acted upon in the country, even in the worst and most dreary periods of the history. The king is in legal contemplation, injured by the commission of public offences; his peace is said to be violated thereby, and right to pardon cannot be vested more properly than in the sovereign, who is from his situation, more likely than any other person to exercise it with impartiality, and to whom good policy requires that the people should love, with submissive respect, as the head of the nation, and supreme guardian of the laws.

DEFINITION

The definition of the pardon has been maintained by different authors and judges in different ways, but according to the traditional view, clemency is the generic term encompassing a variety of sovereign acts of mercy, all designed to relieve an individual from some sanction of the criminal justice system.[1] The archetypal act of clemency, the full pardon, is a grant to an individual which absolves him of almost all the legal consequences of the crime of which he has been or may be convicted.[2]

According to Lord Coke, a pardon is said to be a work of mercy, whereby the king, either before attainder, sentence or conviction or after, forgives any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical.[3] And the king's coronation oath is, "that he will cause justice to be executed in mercy." It is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of pardon will depend.[4]

In United States v. Wilson, Chief Justice Marshall gave judicial recognition to the view in the following terms:

> "A pardon is an act of grace, proceeding from the power interested 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.

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1. These definitions are taken from the law monograph on presidential clemency, W. Humbert, The Pardoning Power of the President (1941).

2. Ibid.

3. 3 Inst. 233.

4. Co. Litt. 274, 276

> It is the private, though official, act of executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court." [5]

Hence a party claiming benefit of a pardon must plead it or otherwise in some manner bring it to the attention of the court.[6]

After Wilson the trend of the courts in the United States was to view the granting of a pardon as a personal act of mercy bestowed upon an individual by the president.[7] When questions arose concerning the nature of this power, courts turned to principles developed at common law, by following the sayings of Marshall "as this power has been 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 the principles respecting the operation and effect of pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who avails himself of it." [8]

The Supreme Court abandoned this historical approach in 1927 with Biddle v. Perovich,[9] and gave a different emphasis to the power, stating:

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5. U.S. v. Wilson, 7 Pet. 150, 160 (1833).

6. Ibid.

7. See e.g. Ex. parte Garland, 71 U.S. (4 Wall) 333, 380 (1866).

8. 32 U.S. (7 Pet.) 150 (1833).

9. 274 U.S. 480 (1927). In this case the petitioner argued that the presidential commutation of his sentence from death to life imprisonment was invalid because it was imposed without his consent. The court upheld the commutation.

" A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of constitutional scheme. Where granted it is the determination of ultimate authority - that the public welfare will be better served by inflicting less than the judgment fixed, just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done." 10

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10. U.S. 274, 480-486 (1927).

THE ORIGIN OF CLEMENCY OR PARDONING POWER

The principle of clemency as developed in the English governmental system had its probable origin in the early tribal life of the Teutonic peoples. Its application at this early date was extremely vague and uncertain because of many counteracting influences. The existence of the right of private vengeance, retaliation, and blood feud offset its use. Added to this was the weakness of the royal power which was often nullified by powerful nobles.

This condition was typical of the different areas of England during the early Saxon rule. Coupled with this was the absence of a system of national jurisprudence, and no clear demarcation between public and private wrongs. As a result the kings attempted to apply clemency to those offences which threatened their royal power and authority.

After the Norman conquest, the prerogative of mercy found a place in the new code of laws compiled at the direction of William the Conqueror. Such repeated recognition of the executive as the dispenser of mercy might lead to the belief that the prerogative of mercy rested exclusively in the king.

Yet during the period from 560 to 1535, there were several contenders for the share of the king's prerogative of mercy. The great Earls strove for and secured the right to exercise a power of clemency within their jurisdictions.[1] The church, by obtaining a wide extension of the "benefit of clergy," influenced the king in the exercise of his pardoning power.[2] But perhaps the strongest opposition to unrestrained exercise

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1. John Allen, Inquiry into the Rise and Growth of the Royal Prerogative in England.

2. William Blackstone, Commentaries on the Laws of England.

of the pardoning power by the king came from parliament. Having observed that the king often exercised the pardoning power at his caprice,[3] parliament rebuked him for his free use of power and passed acts for the regulation of its exercise.[4] One of the later acts,[5] for example, provided that no pardon for treason, murder or rape should be allowed unless the offence was specifically mentioned in the charter of pardon.

Despite the parliamentary dissatisfaction with royal clemency, the king retained his power of pardon. His position with respect indeed became more secure in 1535, when parliament enacted that from the first day of July, 1536,

> "No person or persons, of what estate or degree so ever they be ... shall have any power or authority to pardon or remit ... but that the king's highness, his heirs and successors, kings of this realm, shall have the whole and sole power and authority thereof united and knit to the imperial crown of this realm, as of good right and equity it appertaines." [6]

By this enactment Parliament placed upon the king the sole responsibility for the exercise of the pardoning power and, at the same time, terminated the contentions of the great Earls and of the church for a share in this power. Parliament, however, showed no disposition to stop legislating with respect to the king's power. During the two hundred and fifty years following 1535 Parliament passed three important restrictive

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3. William R. Anson, The Law and Custom of the Constitution, 2nd ed.

4. Owen Ruffhead. The Statute at Large from MAGNA CHARTA to the End of the Last Parliament, 1761.

5. 13, Richard II, Stat. II, c. 1.

6. 27 Henry VIII, stat. 1, c. 24.

acts which affected either directly or indirectly the pardoning power. The Habeas Corpus Act of 1679,[7] establishing the principle that no man shall be arbitrarily imprisoned, made it a praemunire "to send subject of this realm a prisoner into parts beyond the seas" and prevented the king from remitting the punishment imposed for a praemunire of this sort. The royal power was further restricted by the Bill of Rights.[8] Although the king had claimed the right both to suspend with its execution in particular cases, parliament declared in 1689 that the royal exercise of both these alleged powers was illegal.[9] Twelve years later, after the king had abused the pardoning power by using it to shield his favourites from punishment, parliament provided in the Act of Settlement[10] "that no pardon under the Great Seal of England shall be pleadable to an impeachment by the Commons in parliament." Though these acts of parliament somewhat restricted the discretion of the king, he retained his prerogative of mercy.

Coke defined more accurately the nature of clemency and its true relationship to the royal prerogative.[11]

> " (a) A pardon is a work of mercy, whereby the king either before attainder, sentence or conviction or after, forgets any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical.
> (b) All that is forfeited to the king by any attainder, he may restore by his charter: but if by the attainder the blood be corrupted, that must be restored by the authority of parliament."

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7. 31 Charles II.

8. I William and Mary, sess. 11, c.2.

9. Sir William R. Anson, The Law and Custom of the Constitution (4th ed., 1909).

10. 12 and 13 William III, c. 2.

11. Coke, Institutes, chap 105, "of pardons."

But in spite of the different influences the severity of the English Criminal Law was increased until in 1769 Sir William Blackstone was led to say:

> "Yet, though ... we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found ther 'n, inflicted (perhaps inattentively) by a multitude of successive independent statutes upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by the act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through comparison, will often forbear to prosecute; juries, through comparison, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence, and judges through comparison, will respite one half of the convicts and recommend them to royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt to relieve his wants or supply his vices and if, unexpectedly, the hand of justice overtakes him, he deems himself peculiarly unfortunate in falling at last a sacrifice to those laws which long impunity has taught him to condemn." 12

Yet Blackstone believed that it was one of the merits of the English form of the government that it provided a method for modifying such a harsh and severe condition, for he said:

> "This is indeed one of the great advantages of monarchy in general above any other form of government: that there is a magistrate who has it in his power to extend mercy wherever he thinks it is deserved; holding a court of equity in his own breast to soften the rigour of the general law in such criminal cases as merit an exemption from punishment ... To him, therefore the people look up as the fountain of nothing but bounty and grace; and these repeated acts

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12. Blackstone, Commentaries, Book IV, p. 18.

> of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince." 13

When the American colonies were founded, the English legal conceptions of seventeenth and eighteenth centuries were transplanted to the new world. Included in these was the principle of clemency for criminal offenders.[14] And in most of the colonial charters the king delegated the pardon power and made provisions for its exercise. The charters varied greatly in form and substance. They were alike, however, in that they transferred from a superior to an inferior the competence to exercise certain prerogatives of sovereignty upon certain conditions and in particular places. The chief officer in each colony was the representative of the king.[15] The representative succeeded, with certain necessary limitations imposed by reason of his subordinate position, to the royal prerogatives as they were then understood in England.[16] Among these prerogatives was that of pardoning offences and remitting penalties. Although some of the charters failed to include this prerogative, each colony at some time during its history enjoyed, through delegation, the benefits of the royal prerogative of pardon.[17]

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13. Supra, page 7 (12).

14. United States v. Wilson 7 pet. 150.

15. Joseph Story, Commentaries on the Constitution of the United States (1883), 1-169-172.

16. Thomas Downwall, Administration of the Colonies, pp. 54, 56.

17. Christen Jensen, The Pardoning Power in the American States.

Except in royal colonies, the executive, with assistance at times from other colonial authorities,[18] exercised the prerogative of pardon with only slight provision for intervention by the English sovereign.[19]

In the royal colonies the governor possessed the power to grant pardons in all cases except in those of treason and willful murder. In these excepted cases he exercised the power of reprieve until the royal pleasure was known. He could remit fines and forfeitures not exceeding ten pounds.[20] The royal governor was to exercise the pardoning power independently without the need for securing the concurrence of the council.[21] Out of these provisions of the commissions and instructions, out of the provisions of the charters, and out of experiences of the colonists arose ideas of pardoning power later embodied in the constitutions of the several states.

With the outbreak of the American Revolution, colonial governments quickly disappeared and were succeeded by new state-governments. As the executive had usually exercised the power of clemency in the colonies it would have been natural to intrust the same power to the new state executives.[22]

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19. Jensen, supra, page 8.

20. Green, p. 125. With respect to fines and forfeitures.

21. Ibid.

22. "The fact that the pardoning power necessarily originated with the sovereign power, and that the rulers were considered the sovereigns, is the reason why, when jurists came to the treatment of the subject, they invariably presented it as an attribute indelibly inhering in the Crown. The monarch alone was considered the indisputable dispenser of pardon; and this again is the historical reason why we have always granted the pardoning privilege to the chief executive; because he stands it, if any one visibly does, in the place of the monarch of other nations; forgetting that the monarch has the pardoning power, not because he is the chief executive, but because he was considered the sovereign - the self-sufficient power from

(cont'd on page 12)

But at the same time the executive department in the state governments had not gained the confidence of the people. It brought remembrances of royal governors and their opposition to colonial rights. The legislature, particularly the lower house, had been the champion of the people in the colonial days. It was to be expected, therefore, that most powers of government would be concentrated in the legislature.

The representatives of the states, assembled in Philadelphia in 1787, possessed the opportunity of searching colonial charters, state constitutions,[23] records of English practice, and especially their own experiences,[24] for solutions to the various problems which confronted them. From any or all of these sources there were available some ideas concerning the prerogative of pardon. Some suggested that the executive "shall have power to grant pardons and reprieves, except in impeachments," others argued that "the supreme executive authority of the United States to be vested in a governor," one of whose authorities and functions was "the power of pardoning all offences, except treason, which he shall not pardon, without the approbation of the Senate."[25]

(continued from page 11.)
which all others flow; while with us the governor or president has but a delegated power, and limited sphere of action, which by no means implies that we must necessarily or naturally delegate, along with the executive power, also the pardoning authority." Lieber, Civil Liberty and Self-Government, 11, 147.

23. Concerning the value of state-constitutions to the members of the Philadelphia Convention, Mr. James Bryce has said: "It has been truly said that nearly every provision of the Federal Constitution that has worked well is one borrowed from or suggested by some state constitution; nearly every provision that has worked badly is one which the convention, for want of precedent, was obliged to devise for itself."
James Bryce, The American Commonwealth (3rd ed.), 1, 35.

24. Max Farrand, The Records of Federal Convention of 1787.

25. Journal, Acts and Proceedings of the Convention, assembled at Philadelphia, 1787.

The resolutions adopted by the convention and submitted to the Committees on Detail failed to include a reference to the matter of clemency,[26] but added the following to the clause defining the powers of the executive: "The power of pardoning vested in the Executive: his pardon shall not however be pleadable to an impeachment."[27]

The committee on Detail adopted the suggestion and incorporated it in the tenth article of a draft constitution reported to the Convention in the form: "He shall have powers to grant reprieves and pardons, but his power shall not be pleadable in bar of an impeachment."[28] Subsequently the convention inserted after "pardons" the words "except in cases of impeachment" and removed the words "but his pardon shall not be pleadable in bar of an impeachment."[29]

The convention did not further consider the matter of clemency until a motion was presented relating to pardons in cases of treason and asked that it be referred to the committee on style. Two days after, the committee on style submitted its report, in which appeared the provision: "and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."[30]

During the period from the close of the Philadelphia Convention until the constitution went into effect, there was, as at the convention itself, comparatively little discussion of the pardoning power.

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26. Ibid.

27. Meigs, p. 2

28. 12 and 13 Will[illegible] 2.

29. Supra, convention

30. Farrand, Records [illegible]

Some arguments against placing the power of granting pardons in the executive, except in cases of impeachment, were presented. Some critics of the pardon clause of the constitution contended that the president should not have the power to grant pardons; others submitted that pardons in cases of treason should not be allowed, at least not before conviction or without the consent of Congress.[31] These and other critics conceived that this was a very dangerous power which the president might use to shield his own confederates in case of an abortive attempt to subvert the constitution; or to stop investigations and, as a consequence, to avoid detection, since he could grant pardon before indictment.[32] The greatest misgivings about confiding this power to the president arose out of a contemplation of the crime of treason.[33] The critics held that in treasonable conspiracies the president himself would likely be involved and, entrusted with the pardoning power, would have in his hands an instrument with which he could prevent proper punishment of his confederates. If clemency were considered for the offence of treason, Congress, not the president, should be given the power of decision.

Some of the members of the ratifying conventions who favoured the constitutional grant of the pardoning power contended, first, that such a power should be lodged somewhere in a government. They argued that the testimony of an accomplice, which was necessary to secure a conviction, could best be obtained by clemency from the executive and that a spy serving the executive in time of war could only be saved by clemency from the executive who alone knew of his services. The latter need for clemency

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31. Elliot's Debates. II, 408 and I, 491.

32. Luther Martin; Genuine Information.

33. The Federalist, Lodge, editor, p. 464.

would arise if the president, seeking information concerning the enemy, would secretly send a man of some importance as a spy to obtain such information. By feigning resentment against his own country, the spy would possibly be received by the enemy into favour and confidence, making it possible for him to get valuable information for the president. After completing his mission and secretly transmitting the information to the president, the spy would return to his own country where he would be regarded with disfavour by the people for his supposed treason, since people would be unaware of his service to the country. The spy's life might even be endangered. Should not the president be able to exercise the pardoning power without interference from the legislature under such circumstances.[34] In the second place, the proponents of executive clemency deemed a legislature unsuited to the exercise of the power; hence the power could not be better placed than in the executive. During the debate in the Virginia Convention it was argued that it would be extremely improper to vest the power in the House of Representatives and not much less so to vest it in the Senate, since numerous bodies were actuated more or less by passion.[35] These bodies, moreover, would not always be in session, which would probably occasion fatal delay in such a case as a rebellion, when an otherwise well-timed offer of a pardon to the insurgents might restore tranquility. There, too, in numbers there would be greater danger of connivance, more encouragement to an act of obduracy, and less fear of suspicion or censure for an injudicious exercise of the power of pardon. But by placing the power to grant pardons in a single executive these difficulties would be avoided. As Hamilton explained:

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34. Elliot's Debates, VI, 110-113.

35. Ibid., III, 498.

> "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible filtered or embarrassed ... 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 plead for a mitigation of rigour of the law, and least apt to yield to considerations which were calculated to shelter a fit objective of its vengeance. The reflection that the fate of a fellow-creature depended on his sole feat, would naturally inspire scrupulousness and caution: the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind.[36]

Hamilton further argued that a single executive could act with as much dispatch as would be required in cases of insurrection or of rebellion. To the contention that Congress rather than the president should have power to grant pardons in cases of high treason, Roger Sherman replied in the New Haven Gazette: "It does not appear that any great mischief can arise from the exercise of this power by the president (though perhaps it might as well have been lodged in Congress)."[37] Sherman pointed out also with respect to the general power of pardon that the president could not grant pardons in cases of impeachment, so that impeached officials could also be excluded from office.

Thus the members of the ratifying conventions continued the arguments concerning the advisability of entrusting the executive with the power of clemency, but the pardon clause remained as it had been approved at the Philadelphia Convention. The discussion in these ratifying conventions had served only to s[illegible]s the relative advantages and disadvantages of lodging the pardoning power in the executive.

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36. The Federalist, Lodge, editor, pp. 363-464.

37. The Federalist and other Constitutional Papers, Ed. II, Scott, Editor, II, 608.

Authorization of Grant of Pardons, Remission of Fines, Regulations of Power of Pardons.

The authorization to grant pardons was given to the Governor General for Canada under part XII of the letters patent, in the following text:

> "XII. And we do further authorize and empower our Governor General, as he shall see occasion, in our name and on our behalf, when any crime or offence against the laws of Canada has been committed for which the offender may be tried thereunder, to grant a pardon to any accomplice, in such crime or offence, who shall give such information as shall lead to the conviction of the principle offender, or of any of such offenders if more than one; and further to grant to any offender convicted of any such crime or offence in any court, or before any judge, justice or magistrate, administering the laws of Canada, a pardon either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our Governor General may seem fit, and to remit any fines, penalties or forfeiture which may become due and payable to us. And we do hereby direct and enjoin that our Governor General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of our privy council for Canada and in other cases the advice of one, at least of his Ministers." 38

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38. Canada Gazette, Volume 81, 1947 (Oct. 11), pp. 3015-16.

PARDONING PROCEDURE

In England, a pardon may be effectually granted either by the Act of Parliament, or under the Great Seal, and in general, there seems no other legal mode of obtaining one.[1] It is settled that in pleading a pardon it must be averred, that it was granted under the Great Seal, if it be not granted by statute;[2] and that a coronation pardon, as it is termed, can not be taken advantage of, unless it be under that Seal.[3] And though the King's Sign Manual or Privy Seal, declaring His Majesty's intention to pardon the prisoner, is a sufficient authority to judges to discharge him[4] yet such Sign Manual is revocable, and does not amount to a pardon in legal contemplation, unless countersigned by one of His principal Secretaries.[5]

The mode of pardoning at the Assizes or Old Bailey, if the judge thinks that the conviction was improper, is by respiting the execution of the sentence, and sending a memorial or the certificate to the King, directed to the Secretary of State's office, stating, that from favourable circumstances appearing on the trial, he is induced to recommend the prisoner to mercy.[6] If the King agrees in the propriety of the suggestion, as is usual, a sign manual issues, signifying his intention to grant either an absolute or a conditional pardon, and directing the justice of the

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1. 1 Chitty, Crim. Law, 757.
2. Ibid.
3. Keble, 707.
4. 1 Bla. R. 479.
5. 4 Bla. Com. 400.
6. Dick. Dess. 432-3.

gaol delivery to bail the prisoner, in order to appear and plead the next general pardon that shall come out, which they do accordingly, taking his recognizance to perform the condition of the pardon, if any are annexed to the indulgence.[7]

A statute pardon is more beneficial to the prisoner than a pardon by the King's charter, under the Gr Seal. The former, if made by a public act, need not be pleaded, but the court must, ex officio, notice it,[8] which does not hold in the case of a charter of pardon, and it therefore lies upon the prisoner to insist upon and prove it. Neither can he lose the benefit of the statute pardon by his own laches or negligence or by his omission to plead it at the trial.[9]

In Canada, an application for a pardon shall be made to the Minister concerned, who shall refer it to the Board. The Board shall cause proper inquiries to be made in order to ascertain the behaviour of the applicant since the date of his conviction. Upon completion of its inquiries, the Board shall report the result thereof to the Minister with its recommendation as to whether a pardon should be granted but, if the Board proposes to recommend that a pardon should not be granted, it shall before making such a recommednation, forthwith so notify the applicant and advise him that he is entitled to make any representations to the Board that he believes relevant; and the Board shall consider any oral or writte

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7. 1 Bla. Rep.479.

8. Foster, 43.

9. 4 Bla. Com. 402.

representations made to it by or on behalf of the applicant within a reasonable time after such notice is given and before making a report under the section. Upon receipt of a recommendation from the Board that a pardon should be granted, the Minister shall refer the recommednation to the Governor in Council who may grant the pardon which shall be in the form set out in the schedule.[10]

In the United States the administration of the pardoning power centres in the Department of Justice. All applicants for clemency, except those in the Army and in the Navy,[11] present their requests to the Attorney General who, acting for the President, institutes an investigation of the applications, as well as the active administration of the pardoning process. This [illegible]er is under the direction of a pardon attorney, who devotes his attention exclusively to clemency matters and who comes directly under the Attorney General's supervision. The pardon attorney acts in accordance with a body of rules and with a definite procedure, both of which have evolved largely out of administrative experience. In the process of handling requests for clemency, there are discernable five fairly distinct stages which may be called, for the purpose of description: application, investigation, consideration and action, and notification.[9]

The nature of the pardoning power, the rules with respect to its exercise, and the characteristics of individual cases necessitate specific applications for varying degrees of clemency. Applicants may request any one of the forms of clemency, which include: full pardon, conditional pardon, "pardon to terminate sentence and restore civil rights," commutation,

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10. Criminal Record Act (1st Supplement), Chapter 12, Sec. 4.

11. Members of the defence forces who desire the restoration of civil rights apply to the Attorney General.

conditional commutation, remission of fines and forfeitures, and reprieves. The form of clemency sought is not of controlling importance. If a convicted person requests a form of clemency for which he cannot qualify, he does not thereby prejudice his opportunity for clemency in some other form. The authorities who administer the pardoning power consider each case and take such action as the case requires.

The president has power to grant pardons at any time after the commission of the offence, even before indictment. If there should arise cases of accumulated indications of innocence, or cases of insanity, imminent death, or newly discovered evidence, petitions for clemency will be examined before indictment, before trial, or before any considerable part of the sentence has been served. Ordinarily, however, the President does not consider applications for clemency until the defendant has begun his sentence and has served a portion of it.

Cases of lifetime prisoners who strongly contend that they were wrongfully convicted will be examined, primarily for the purpose of collecting facts which might be lost by postponing the examination, after the beginning of the sentence and before the time at which, according to the pardon rules, such cases would normally be considered. Except in such cases, petitions by applicants whose sentences to confinement exceed one year will not be investigated until the time for parole has been reached and until parole has been denied by the Parole Board. The Act of Congress governing the paroling of prisoners of the United States requires as pre-requisite to parole that the prisoner shall have served one-third of his term or terms, or, if sentenced for duration of his life, that he shall have served at least fifteen years of his sentence.[12]

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12. 36 Stat. L. 819; 37. L., p. 650.

Only in unusual cases will the President depart from the rules governing applications for pardon, and every prisoner applying before he becomes eligible for parole must state why subsequent release on parole would not substantially meet the requirements of his case. The President, moreover, will not consider a petition for a pardon or for a commutation while prisoners are on parole, except in cases of life prisoners and in cases of prisoners who have been on parole in excess of four years.

In cases involving "pardon to restore civil rights" the president will not consider petitions for the clemency until a period of four years has elapsed after release from prison or from a parole or probation, unless the petitioners can show exceptional circumstances in their cases. The usual probationary period is often lengthened for prisoners guilty of heinous crimes. If the crime involved perjury, subornation of perjury, violation of public trust involving personal dishonesty, or other crimes of serious nature, the prisoner must usually await the expiration of the five year period after release before he applies for the restoration of civil rights.[13] When the desire is for a "pardon to terminate sentence and restore civil rights" the plea for executive clemency must be delayed until, by reason of good conduct or of other commendable action, a parole, a conditional commutation, or other form of conditional release has been granted.[14]

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13. Persons guilty of violations of the narcotics laws must await the expiration of an eight year period after the expiration of the sentence. Everett S. Brown, "The restoration of civil and political rights by presidential pardon," American Political Science Review, XXXIV, 297.

14. A prisoner released from the penitentiary before the expiration of the term of his sentence because of deductions therefrom for good conduct is treated as though he was on parole until the expiration of the maximum term of his sentences. 47 Stat L. 381.

When the Attorney General receives an application for clemency, he refers it to the pardon attorney with instructions that an investigation be made. At this point the case enters the second stage of the pardoning process, that is, the stage of investigation. Obviously, the first thing to be done is to examine the application to determine whether or not it has been drawn properly in accordance with the rules requiring that specific information shall be given, that no appeal shall be pending, and that the parole period shall be passed. If these or other rules have not been observed, no action will be taken until compliance has been made with the rules. If the application, on the other hand, appears on its face to be entitled to investigation, the pardon attorney mails the application and the accompanying papers (affidavits and letters of commendation) to the United States Attorney of the district in which the trial took place, for the purpose of having him participate in the investigation. The United States Attorney is under definite instructions concerning his duties with respect to the investigation of applications for executive clemency.[15]

Under the instructions the United States Attorney must, without delay, acknowledge receipt of the pardon papers, and he must submit with promptitude consistent with his other official duties the reports requested by the pardon attorney. When long delay is unavoidable, the attorney is expected to notify the department, giving the causes for the delay and the approximate date on which the department may expect the report. Preparing his report, the United States Attorney states the facts in the case on a docket entries form which the pardon attorney had enclosed with the application. The pardon attorney instructs that the data called for by the docket

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15. "Instructions of the Attorney General to the United States Attorneys, Marshals, Clerks and Commissioners," Oct. 1, 1929, pp. 203 - 205.

entries form be prepared, with absolute accuracy, to show the offence of of which the applicant was convicted and the statute under which he was sentenced. After the United States Attorney has indicated the character of the crime which the applicant committed, he is directed to observe the statements of the applicant and to reply particularly to claims of innocence, of justice, and of fairness.

Considering the facts in the case, and subsequent developments and extenuating circumstances, the United States Attorney, acting on his own independent judgment, is to recommend a definite course of action in the case. If he deems a commutation desirable, he is directed to suggest the extent to which a sentence of imprisonment should be commuted and the amount by which unpaid fines and costs should be reduced. Unless there has been unusual delay by the court in hearing the applicant's case and imposing sentence upon him, however, the United States Attorney is not to recommend a reduction in imprisonment for time spent in jail before sentence, nor for time spent in jail after sentence but before commitment. When the attorney suggests a commutation of imprisonment, he is to specify a definite period without regard to the time spent in jail before commitment.

The United States Attorney acts ordinarily at the request of the pardon attorney who represents the Attorney General. Yet the United States Attornwy may act without being formally requested -- if the exigencies of a case require immediate action. When a United States Attorney feels that he has an urgent case, the proper procedure is for him to submit his report and recommendation, together with all other reports which are regularly called for by the pardon attorney. In no case should be omit the filled-in docket entries form.

When the United States Attorney has assembled in a report the required information, papers and recommendation, he is to send the report,

the petition and all other papers to the pardon attorney. While the United States Attorney prepares his report, the pardon attorney collects pertinent facts from all agencies. Possessing the results of these investigations the pardon attorney undertakes the preparation of the case -- an action constituting the third stage in the pardoning process. During this stage, the staff in the office of the pardon attorney assembles and examines the data submitted to see whether or not the case merits consideration and action. If none of the officials consulted has advised clemency, the papers are not prepared for presentation to the President, except in capital cases or at the President's special request, or at the special order of the Attorney General. If, on the other hand, any one of the officials suggests clemency, the papers are prepared for presentation to the President, unless the applicant desires to withdraw his application.

All the reports or applications for clemency from government officials to the President are confidential. Neither the applicant nor other persons may inspect any of these reports without first securing the consent in writing of the official who made the report. Even if permission be given, the pardon authorities will not allow access to the files unless the ends of justice appear to require it. Reports other than those from various officials to the President are open to inspection by the applicant, his attorney or representative, and by members of Congress.

When one of the government officials advises clemency and the applicant does not withdraw his application, the case enters the Court stage of the pardoning process, which has been called consideration and action. At this stage the staff in the office of the pardon attorney prepares the case for consideration and action by the Attorney General and by the President. In the preparation of the case, the pardon attorney and his

staff study carefully all the available information, examine any legal points that may arise, review representatives of the petitioner, and perform other work necessary to enable the Attorney General and the President to decide wisely and safely. The data assembled and submitted to the Attorney General for consideration contain: first, a statement concerning the crime of the applicant, the sentence of the Court, the performed portion of the sentence, and the place of confinement; secondly, a review of the contentions of the petitioner; thirdly, a brief of the reports and of recommendations of the United States Attorney, of the trial judge, and of other government officials; and finally, the conclusions and the recommendation of the pardon attorney.[16] If the pardon attorney recommends clemency, he encloses a warrant of pardon, ready for signature, in order to expedite the procedure should the Attorney General and the President act favourably on his recommendation.

The case then comes to the Attorney General, who passes on clemency cases after they have been investigated and studied by the pardon attorney. If the recommendation of the pardon attorney on a case meets with the approval of the Attorney General, he endorses the recommendation and sends it to the President. If, however, the Attorney General feels that the recommendation of the pardon attorney should be modified, he instructs the pardon attorney to change it. When the Attorney General has his recommendation prepared, he returns the papers in the case to the office of the pardon attorney. A messenger then takes the papers to the

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16. In cases which have attracted wide attention, the report to the President may assume considerable proportions. See "Letters from the Attorney General to the President," Concerning pardon for Eugene V. Debs, 67th Cong; 2nd Sess., S. Doc. No. 113.

President. He examines them for the facts in the case and for the recommendation of the Attorney General and makes a final decision on the case. The president may disapprove the recommendation of the Attorney General. If he does, he returns the papers to the Attorney General with instructions for the changes which he considers essential. Disapproval, however, is the exception rather than the rule. When the President grants clemency as recommended, he signs the warrant of pardon and returns it and all the papers to the Attorney General, who in turn forwards the pardon and the papers to the office of the pardon attorney.

There is still another stage in the pardoning process, namely, notification. When the President refuses to grant clemency, the pardon attorney notifies the applicant, his attorney and other interested parties. No reason is given the applicant for denial of clemency and no suggestion that the application be renewed at a future date is given except at the suggestion of the President in rare cases. Where the President grants clemency, the pardon attorney transmits the official warrant of clemency to the applicant,[17] either through the United States Marshal or through the prisoner's custodian. In a case involving "pardon to restore civil rights" the pardon attorney sends the warrant directly to the applicant. If fines were involved in the case, the United States Attorney receives for his files a photostatic copy of the warrant of clemency.

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17. Recipients of clemency, except those receiving the conditional forms, are often released before the warrants of clemency are formally delivered. At times a prisoner is allowed the clemency contemplated by his warrant of clemency upon receipt of telegram by the warden from the President ordering immediate action. Memorandum, In re acceptance of commutation of sentence, Feb. 1, 1927, Office of the Pardon Attorney.

WHEN AND HOW FAR THE PARDON CAN BE EXERCISED

The King's right to pardon and remit the consequences of a violation of the law, is confined to cases in which the prosecution is carried on in His Majesty's name, for the commission of some offence affecting the public, and which demands public satisfaction, or for the recovery of a fine or forfeiture, to which His Majesty is entitled. Non potest rex gratiam facere cum injuria dam no aliorum.[1] Hence, His Majesty has no legal rights to pardon a person found guilty on an appeal of murder, etc., it being a proveeding instituted at the suit, and in the name of a private individual;[2] though it seems, that his Majesty may pardon the burning of the hand, which is inflicted by statute on a conviction of manslaughter, on an appeal, such punishment being collateral to the object of the appeal, and intended as a satisfaction to public justice.[3] Nor can the King's pardon be considered a legal discharge of an attachment for non-payment of costs, or non-performance of an award,[4] for though such attachment is carried on in the shape of a criminal process, for a contempt of the court, yet it is in effect, and substantially a civil remedy, or execution for a private injury.[5] So, where any legal right or benefit is vested in a subject, the King can not affect it; and, consequently, where a statute gives a right of action to a party grieved, by the commission of

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1. 3 Inst. 236.
2. Id 237, Hawk, bk. 2, c. 37.
3. 5 co Rep. 50, a. Hawk., c. 37.
4. 4 Bla. Com. 285.
5. Ibid.

an offence, though it be of a public description, his Majesty has no power, by law, to prevent the party aggrieved from bringing his action, even by pardoning the offender before it is commenced,[6] nor can his Majesty discharge a recognizance to keep the peace towards an individual before it is forfeited, private security being the object of the instrument.[7] And, though the crown can legally pardon an offence against a statute, which gives a right of action to a common informer, before the action is begun, and may consequently defeat it;[8] yet when the informer has commenced the action, his right to the penalty is, ipso facto, irreversibly vest him, if he succeeds, and the King can not deprive him of it.[9] In s. the general principle is clear, that the King can not pardon in cases where no interest is, either in point of fact, or by implication of law, vested in him.[10]

The right to pardon obtains, however gross and criminal the offence may be, as in the case of a murder, rape, etc., though certain peculiar forms must in such instances be observed, as will be noticed. It is generally laid down in the books, that the crown cannot pardon a common nuisance while it remains unredressed, and is continuing so as to prevent an abatement of it, or a prosecution against the offender, though his Majesty might afterwards remit the fine.[11] As the continuation of a nuisance is, of itself, a fresh offence in point of law,[12] this doctrine

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6. 3 Inst. 238.
7. Ibid.
8. See Ibid.
9. Ibid., 3 Inst. 338.
10. Stra. 1272.
11. 12 Co. 30. 2 Hawk, b. 2, c. 37, s. 33.
12. See Ld. Rym. 370, 718.

may be supported on the ground that the King cannot dispense with the laws by any previous license. Besides a prosecution for nuisance, though technically criminal, is in substance and in effect a civil remedy; and the King can not subject the public to inconvenience by bestowing a favour on an individual or a few persons. There seems, however, some reason for the assertion,[13] that the pardon will save the party from the payment of any fine to the time when such pardon was granted; in this case the objection that the King cannot be previous licence dispense with or suspend the operation of the laws, does not apply. The crown may pardon male praxis[14] (right of action for damages).

The King's prerogative right to pardon violations of the law is not confined to offences punishable at common law by indictment. His Majesty may be charter of pardon discharge not only a suit in the spiritual court ex officio; but also any suit in such court ad instantiam partis pro reformatione morum; as for defamation, or laying violent hands on a clerk.[15] But the King can not, by pardoning, discharge any suit in a spiritual (or other) court in which the plaintiff seeks to recover any property; or in which an interest is vested in him; as in the case of a suit for legacies.[16] The King's right to pardon is also taken from him by statute in certain cases, in favour of public liberty. Thus to commit a subject to prison beyond the realm is by Habeas Corpus Act made a preamunire which the King can not pardon.[17]

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13. 3 Inst. 337.

14. Owen, 87, 3 Inst. 154.

15. 2 Hawk, p.c. c. 23, s. 41.

16. Ibid., C.37, s. 41.

17. 31 Car. 2. c. 2. s. 12.

The King's pardon under the great seal is not pleadable in bar of an impeachment by the House of Commons.[18] In 1687 the Earl of Danby was impeached for high treason by the House of Commons and when the articles of impeachment were delivered to the Lords, the Commons requested that Danby be committed to safe custody.[19] At this juncture the King came into the House of Lords and stated that the latter had been written by his order, that he had given Danby a pardon, and that Danby had already been dismissed.[20] A storm blew up, for as Sir Francis Winnington, late Solicitor General, said, "An impeachment is of no purpose when the pardon shall stop our mouths."[21] Under the law, said Winnington, "one who takes a pardon confesses the crime he stands charged with."[22] Danby went into hiding; the Commons introduced a bill of attainder which the Lords proposed to reduce to a bill of banishment, much to Common's displeasure.[23] At length the bill of attainder, first passed by the commons, also passed in the Lords, and Danby surrendered himself.[24] A protracted quarrel between the two Houses about matters connected with the treatment of pardon followed [25] and was terminated by the King's prerogation, shortly followed by dissolution of the parliament.[26] But Danby remained in prison because

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18. See 12 and 13 Wm. 3. c. 2. s. 3.
19. II Howell 622, 725.
20. Ibid., 725, 763.
21. Ibid., 775.
22. II Howell, 729.
23. Id. 750.
24. Id. 752, 763.
25. Chafee 130-131.
26. II Howell 830.

the King "could not enlarge him."[27]

Yet, as remarked by Sir Wm. Blackstone,[28] "After the impeachment is solemnly heard and determined, it is not understood that King's royal grace is further restrained or abridged; for after the impeachment and attainder of six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefits of the King's pardon."

There are some instances in which offenders are entitled to a pardon as a matter of right; some in which they have a strong equitable claim to it.

Approvement is where a person indicted for a capital crime and arraigned for the same, confesses the fact before plea pleaded, and accuses his accomplices in the same crime, in order to obtain his own pardon. In this case he is called an approver or prover or probator.[29] At common law where a person indicted for manslaughter or murder is found by the jury to have killed the deceased in his own defence or my misfortune, he is obliged to crave the King's pardon, to which however, he is entitled as a matter of right.[30] It is now usual to avoid expense by directing a general verdict of acquittal. There is another case in which offenders are entitled as a matter of legal right to a pardon; and that is where the King promises to pardon them, by special proclamation in the Gazette or otherwise.[31]

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27. Id. 832.

28. 4 Com. 399, 0.

29. 4 Bla. Com. 329-30.

30. 1 Chitty, Crim. Law, 765-6, Hawk, 6. 2. c. 37, s. 2.

31. 1. Leach, 118.

Accomplices who are, to use a technical expression, admitted to the King's evidence, have no legal claim to a pardon: nor has the magistrate before whom the original examination is taken, any power to promise them one on condition of their becoming witnesses.[32] In such cases, however, and in others where the party's evidence has been made use of, and he appears to have acted ingenuously, he has an equitable claim to the royal mercy;[33] and it is usually extended to him with reference to the old doctrine of approvement. Where offenders have by any of these means a legal right to a pardon, the Court of King's Bench will bail them, in order to afford them an opportunity of applying for a pardon;[34] and even where the offenders have merely an equitable claim under the circumstances to the royal mercy, that court will put off their trials for the same purpose.[35]

In the United States the history of the executive pardoning power reveals a consistent pattern of adherence to the English Common Law practice. The records of the Constitutional Convention, as discussed earlier, reveal little discussion or debate on Sec. 2 of Article II. The first report of the Committee on Detail proposed that the pertinent clause read: "He (the president) shall have the power to grant reprieves and pardons, but his power shall not be pleadable in bar of an impeachment."[36]

In Shick v. Reed[37] the United States Supreme Court was called upon to determine whether the commutation of a death sentence to a sentence

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32. Id. 121.

33. Williams J. Pardon II.

34. Leach, 118.

35. Ibid.

36. 2 H. Farrand. The Records of Federal Convention of 1787, at 185 (1911).

37. 95 s. ct. 379 (1974).

of life imprisonment without the possibility of parole was a valid exercise of the president's pardoning power.[38] A divided court [39] upheld the validity of this commutation, concluding that the power granted the president under article II, sec. 2, includes the power to substitute for the sentence imposed by the tried court another type of sentence not specifically provided for by statute.[40] In so holding, the court extended the scope of the president's pardoning power beyond its previous judicially recognized boundaries and beyond the scope of its English Common-law counterpart.

Petitioner Maurice L. Shick was tried for murder in 1954 while serving in the United States Army.[41] In the face of conflicting psychiatric testimony, the court martial rejected the defence of insanity and sentenced him to death.[42] After an Army Board of Review and the Court of Military Appeals affirmed his conviction and sentence,[43] his case was forwarded for final review to President Eisenhower.[44] On March 25, 1960, the President commuted his sentence to life imprisonment, on the express condition that

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38. Id at 382.

39. Chief Justice Burger wrote the majority opinion. Justices Marshall, Douglas and Brennan dissented. Id at 386.

40. Id at 384.

41. Id. at 381.

42. Shick was sentenced pursuant to Uniform Code of Military Justice art. 118, Act of May 5, 1950, ch. 169.

43. United States v. Shick, 7 U.S.C. M.A. 419.

44. Supra, note 42 at page 419.

he never be eligible for parole.[45] Shick received a dishonourable discharge from the Army and was transferred to the federal penitentiary at Lewisberg, Pennsylvania, to serve his life sentence.[46]

In 1971 Shick brought suit in the Federal District Court for the District of Columbia to require the United States Board of Parole to consider him for parole.[47] He argued that annexation of the non-parole condition to his commutation was an invalid exercise of the presidential pardoning power. The court rejected his claim and granted the Government's motion for summary judgment.[48] Before the Court of Appeals heard the case, the Supreme Court decided in Furman v. Georgia[49] that death sentences imposed at the direction of a jury are unconstitutional.[50] Because the imposition of a death penalty had been within the discretion of the court-martial,[51] Shick argued that Furman would be applied retroactively to his case, thus requiring the imposition of the only legal alternative punishment, with attendant eligibility for parole consideration.[52] Shick also argued that the president had exceeded his authority in granting the

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45. The President's order states: "Pursuant to the authority vested in me as President of the United States by Article II, Section 2, Clause 1, of the Constitution, the sentence to be put to death is thereby commuted to dishonourable discharge...and confinement at hard labour for the term of his natural life. This commutation of sentence is expressly made on the condition that the said Maurice L. Shick shall never have any rights, privileges, or benefits arising under the parole and suspension or remission of sentence laws of the United States."

46. 95 S. ct. at 381.

47. Id. Under the Federal parole statute, 18 U.S.C., s. 4202 (1970), which was applicable to Shick because he was imprisoned in a Federal institution, a prisoner may be released on parole after serving one third of a definite term sentence of fifteen years of a life sentence.

48. 95 S. ct. at 381.

49. 408 U.S. 238 (1972).

(cont'd on page 36)

the conditional commutation.[53] The Court of Appeals rejected both arguments and affirmed the decision of the district court.[54]

The Supreme Court likewise affirmed. The majority was unpersuaded by Shick's arguments concerning retroactive application of Furman. It reasoned that since his death sentences had been commuted in 1960, he was not under the death pen v at the time Furman was decided and thus that decision provide him no relief.

The court devoted most of its opinion to an examination of the constitutional validity of Shick's conditional commutation. In interpreting the meaning of the pardon power under the constitution, the court relied heavily on the history of the pardoning power in England prior to the drafting of the constitution[55] and of the court's previous interpretations of its scope in the country. It was concluded that the pardoning power granted the president was meant to be unfettered by any legislative enactments[56] and held that the power inescapably included the right to commute a death sentence to life imprisonment without eligibility for parole,[57] even though the latter was not authorised by statute.[58]

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continued from page 35...

50. Id. at 240.

51. See note 42 supra.

52. Shick v. Reed, 482 F. 2d 1266, 1270 (D.C. cir.1973).

53. Id at 1268.

54. Id. at 1270.

55. The court observed that "The history of executive pardoning power reveals a consistent pattern of adherence to the English Common law practice." Id at 383.

56. Id. at 385.

57. Id. at 384.

58. See note 42 supra.

The Supreme Court abandoned this historical approach in 1927 with Biddle v. Perovich.[59] In an opinion by Mr. Justice Holmes, the court stated that a pardon was an act for the public welfare, "not a private act of grace from an individual happening to possess power."[60] It rested its conclusion concerning the nature of a pardon on logical rather than on commonlaw principles or on concepts existing at the time the constitution was drafted.[61]

One manifestation of this non-historical approach in Biddle was the court's use of the terms "commutation" and "pardon" without drawing any distinction between them. Traditionally the concepts have been viewed as completely different forms of clemency.[62] A pardon is a reduction of punishment that requires acceptance by the prisoner to be effective.[63] A commutation, on the other hand, is a "substitution of a punishment of a different character for that which has been awarded by the court."[64]

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59. 274 U.S. 480 (1927). In this case the petitioner argued that the presidential commutation of his sentence from death to life imprisonment was invalid because it was imposed without his consent. The court upheld the commutation.

60. Id. at 486.

61. The Court announced this departure from the historical approach by stating, "We will not go into history..." Id.

62. See c.g., Lee v. Murphy, 63 Va (22 Gratt) 789 (1872).

63. Id. at 798.

64. Britt, conditional pardons and the commutation of Death Sentences, 20 Mod. L. Rev. 131 (1957).

Unlike a pardon, it does not require acceptance by the prisoner and can be imposed upon him against his will.[65]

Biddle disregarded the technical meaning of these terms. It reasoned that as long as the substituted sentence was not commonly recognized as being less severe the prisoner "on no sound principle ought to have any void in what the law should do for the welfare of the whole."[66] With this statement the court discarded the long standing requirement of prisoner consent.[67]

The Court's statement in Schick that "the requirement of consent was a legal fiction at best,"[68] shows that the majority shared the views expressed in Biddle. However, the court did not rely on Biddle in reaching its conclusion. Rather, it stated that this conclusion was "inescapable" in light of the English Common law."[69] In fact, the decision misconstrued the common law.

The distinction between these two forms of clemency was important at common law. According to Maitland, although the King possessed the power to pardon, he could not commute sentences.[70] He was able to avoid this disability however, by granting conditional pardons.[71]

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65. Lee v. Murphy, 63 Va (22 Gratt) 789, 798 (1872).

66. 274 U.S. at 487.

67. Id. at 166.

68. 95 S. ct. at 383.

69. Id. at 384.

70. F. Maitland, The Constitutional History of England (1955).

71. Id.

The English law officers Alexander Cockburn and Sir Richard Bethell explained this limitation on the King's powers in an 1854 opinion as follows:

> "The crown has no power, except when such power is expressly given by Act of Parliament, to commutate a sentence passed by a court of justice. Practically, indeed, commutation of punishment has long taken place under the form of conditional pardons. For the crown, having by the prerogative the power of pardon, may annex to a pardon such conditions as it pleases. Thus for offences for which the punishment was death, where it was not deemed advisable to carry the sentence of death into execution, the course, from an early period, was to grant a pardon on condition of the convict being transported to some settlement or plantation. But this could only be done with the consent of the felon. The crown cannot compel a man, against his will, to submit to a different punishment from that which has been awarded against him in due course of law." 72

Based on this statement of the law, Cockburn and Bethel ruled that the commutation of a sentence by the Governor of Barbados was invalid.[73]

Early American courts also recognised the distinction between the two forms of clemency and the necessity for consent. For example, in Ex parte Wells[74] the Supreme Court relied on the consent requirement to uphold the validity of conditional pardons.

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72. Britt, at 136-37.

73. Id. at 137. "The legal reputations of Cockburn and Bethel are such that their opinion must command the greatest respect. And this is the more so when, as in the present instance, the opinion conforms to accepted principles of English constitutional law." Id.

74. 59 U.S. (18 HOW) 307 (1855).

The court reasoned that, since the prisoner was required to accept a pardon for it to be effective, he, rather than the president, was imposing the new punishment.[75] Schick's citation of that case to support its conclusion that "the pardoning power was intended to include the power to commute sentences"[76] illustrates its misinterpretation of the traditional views of the pardoning power.

Schick also went beyond Biddle in upholding that a president may impose on a prisoner a punishment not already authorised by law.[77] Biddle, although expanding the scope of the pardoning power to include commutations, did not go so far as to hold that the president had unlimited freedom in substituting punishments.[78] In fact, commentators have viewed that case as "indicating 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 authorised by the law and does not "in common understanding exceed the original penalty."[79]

Schick, however, concluded that only the constitution limited the President and that to require him to substitute a punishment already authorised by law would place congressional restrictions on his pardoning power.[80] While the draftsmen of the constitution clearly expressed the

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75. Id. at 315.

76. 95 S. ct. at 384.

77. Id.

78. Biddle v. Perovich, 274 U.S. 480 (1927).

79. Congressional Research Service, The Constitution of the United States of America - Analysis and Interpretation 475 (1973).

80. 95 S. Ct. at 385.

view that the pardoning power should not be "fettered or embarrassed,"[81] the context in which they made the statement suggests that they were referring to the President's freedom to exercise his power, rather than his freedom to impose new punishments.[82] Hamilton said that the "benign prerogative of pardoning should be as little as possible fettered or embarrassed," the context in which he made the statement suggests that he was referring to the President's freedom to exercise his power, rather than his freedom to impose new punishments.[83] Hamilton said that the "benign prerogative of pardoning should be as little as possible fettered or embarrassed" because he believed that there "should be an easy access to exception in favour of unfortunate guilt."[84] In other words, he felt that the kinds of cases over which the president could exercise his pardon should not be unduly restricted. He did not, however, express a view as to the types of punishments the president might impose.

There is little authority either at common law or in the American courts concerning the nature of the conditions that can be attached to a pardon. The most frequent statement of the courts is that the condition can not be illegal, immoral or impossible to perform.[85] It is clear that (the governor) is authorised to substitute, with the consent of the prisoner, any punishment recognised by statute or the common law as enforced

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81. Id. at 384.

82. The Federalist, no. 74.

83. Id.

84. C. Jensen, The Pardoning Power in American States, p. 127.

85. Lee v. Murphy, 63 Va (22 Gratt) 789, 802.

in this state."[86] One of the few decisions concerning the executive's freedom to select a punishment not authorised by law was the case of the commutation by the Governor of Barbados, referred to above.[87] In that case the law officers Cockburn and Bethell not only ruled that the order was invalid because it was a commutation, but they also ruled that even had it been a conditional pardon, it would have been invalid.[88] The ground for this latter assertion of invalidity was that the Governor had substituted a prison sentence of nine years, where the law under which the prisoner was convicted authorised a maximum term of four years.[89]

Schick wanted to avoid the restriction of the president's pardoning power by Congress. However, in doing so, the court allowed the executive branch to exercise powers that were vested in Congress. The court had previously stated that "the authority to define and fix the punishment for crime is legislative and the right to relieve from punishment, fixed by law and ascertained according to methods by it provided, belongs to the executive department."[90] Afterwards the court stated that "the punishment appropriate for the diverse federal offences is a matter for the discretion of Congress."[91] The court could have permitted both branches to exercise their given functions, had it recognised the right of Congress to define the outer boundaries of the president's

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86. See text accompanying notes 72-73 supra.

87. Brett, supra note 64, at 137.

88. Id.

89. Ex parte United States, 349 U.S. 81, 82 (1955).

90. Bell v. United States, 349 U.S. 81, 82 (1955).

91. 95 S. ct. at 385.

pardoning power.

"In light of this intrusion of the executive branch into the legislative domain, it is unfortunate that Schick did not clarify the actual basis for its holding. The court announced that its decision was grounded in the "history of the English pardoning power."[92] Nevertheless, an examination of the decision shows that the court's conclusion deviated fro- the common law principles significantly. Rather than attempting to invoke the common law, the court could have openly announced that it was abandoning an historical approach and was basing its decision on currently existing conditions. The court then could have proceeded to enumerate the considerations upon which it based its conclusion that the president has the right to prescribe and impose punishment on individuals without either the prisoners' consent or the Congress' authorisation. Such an approach would have illuminated both the scope of the president's pardoning power and nature of his relation to Congress.

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92. S.E. Gibson, NC L. Rev. 53, 785-93, Ap 75.

CONDITIONAL AND FULL PARDON

(a) Introduction

Although the authorities, from the earliest times, state clearly that the king may annex to a pardon whatever conditions he pleases, there do not seem to be any indications that granting of conditional pardons became a common practice before the seventeenth century. In a conditional pardon the conditions annexed are either precedent or subsequent. If the grantee does not perform the conditions subsequent the pardon becomes null and void. Consequently if the conditions are not performed the original sentence remains in full force.[1] It has been said that when a conditional pardon is granted the conditions, to be operative, should appear on the face of the pardon.[2] The conditions attached to a pardon must not be immoral, illegal or impossible.[3] When a conditional pardon is accepted by a convict it is a contract between him and the state court.[4] If the convict faithfully observes the conditions set out in the document of clemency, he comes into the full enjoyment of all the effects realizable from a full pardon. When an act of clemency which permits a prisoner to leave the penitentiary upon conditions is revoked, he has no reason to complain about being returned to the penitentiary in the same condition he was in at the time of release and about being required to serve the unexpired part of his sentence. The convicted person does not serve his

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1. In re Flavell, 8 Watts & Sergeant (Pa.) 197.
2. Ex Parte Reno, 66 no. 266.
3. Lee v. Murphy, 22 Gratt, 789.
4. People v. Potter, 1 Edm. Sel. Cas. 235.

sentence while he is at liberty.

Consideration of a few Supreme Court decisions of the United States dealing with conditional grants of clemency, and with the pardon power in general, provides a useful predicate to understanding the approaches taken in Hoffa and Schick. United States v. Wilson,[5] is the source of Chief Justice Marshall's oft-repeated directive on the interpretation of the pardon prerogative. "As this power had been exercised, from time immemorial, by the executive of the 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 pardon."[6] Marshall developed the notion of pardon as a private act of grace, analogous to a deed, noting consequently that the recipient's acceptance was necessary to the validity of a pardon.[7]

In 1855 the Supreme Court followed Marshall's interpretive approach to the pardon power in Ex Parte Wells,[8] validating the "pardon" granted an individual sentenced to death on the condition of life imprisonment.[9] Confining the relevant inquiry to the exercise of pardon prerogative

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5. 32 U.S. (7 Pet.) 150 (1833). Wilson had received a pardon upon conviction for mail robbery and threatening the life of a mail carrier. At pronouncement of sentence on a subsequent conviction which may have been based on the same events, he declined to plead the pardon. The question before the Supreme Court was whether the lower court could take notice of the prior pardon without it being pleaded.

6. Id. at 150.

7. 32 U.S. (7 Pet.) at 160.

8. 59 U.S. (18 How.) 307 (1855).

9. The substitution of a life sentence for the death penalty has been labelled both a conditional pardon and commutation.

in England and the colonies at the time of the constitution's adoption,[10] the courts concluded that the framers intended the inclusion of the power to attach conditions in the general power "to grant reprieves and pardons."[11] Accordingly it rejected Wells' claim that the substitution of sentences by the device and imposing life imprisonment as a condition of pardon was the exercise of a "new" power of punishment.[12]

In the cases of Wilson and Burdick there was evidence of a willingness to return to the early American and English notions of clemency in construing the president's pardon power. The power was read in broad terms; it included the power to attach conditions, and the basic limitation was found, not in the separation of the presidential power to grant clemency and the Congressional power to set punishments, but in the acceptance requirement. Perovich held the latter requirement extraneous in the death penalty context;[13] its eschewal of the notion of clemency as an act private in nature laid the foundation for a more general departure from the acceptance requirement and from the earlier analytic approach.

In the case of Hoffa v. Saxbe, on March 4, 1967, Jimmy Hoffa[14] began serving an aggregate sentence of 13 years upon convictions for

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10. 59 U.S. (18 How.) at 311.

11. Id. at 311-13.

12. Id. at 315.

13. 1 J. Steven, supra.

14. James R. Hoffa was president of the International Brotherhood of Teamsters between 1958 and 1971.

obstruction of justice[15] and, in a separate prosecution, for violation of the mail and wire fraud statutes and for conspiracy to defraud a Teamsters' pension fund. On three occasions between November 1969 and August 1971, the United States Board of Parole denied Hoffa's application for parole. The warrant included the condition "that the said James R. Hoffa not engage in direct or indirect management of any labour organization prior to March 6, 1980."[16]

Hoffa brought suit, challenging the validity of conditional pardon. The court in Hoffa v. Saxbe,[17] found this condition to be within the president's pardon power. While approving the extensive historical interpretation of the executive's prerogative in Wilson and placing heavy emphasis on the need for flexibility in the exercise of clemency, the court did articulate some limits on the power to attach conditions. First, the right of a prisoner to reject the substituted sentence was again recognised.[18] Second, because the president as elected representative of the people exercises power within a constitutional scheme, Hoffa found that any condition attached to a commutation-and, by inference, to a

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15. This 1964 conviction before the United States District Court for the Eastern District of Tennessee was affirmed in the United States v. Hoffa, 349 F. 2d 20 (6th cir. 1965). The history of the challenges to the conviction that followed is set out in United States v. Hoffa, 437 F 2d, 11, 12 (6th cir.) Cert. denied, 402 U.S. 988 (1971).

16. 378 F. Supp. at 1241-42.

17. 378 F. supp. 1221 (D.D.C. 1976) The suit was brought against the Attorney General, under whom the office of the pardon attorney processes clemency petitions.

18. 378 F. supp. at 1241-42.

pardon -- must (a) directly relate to the public interest and (b) not unreasonably infringe on the individual's constitutional freedoms.[19] The dissociation condition was valid because the conviction related to union activity and in the court's opinion, the condition restricted Hoffa's rights only so far as was necessary to protect the public's interest in the integrity of unions.[20]

Hoffa asserted, unsuccessfully, that any valid condition of clemency must be a punishment "authorised by law," that is, by the statute under which the subject of clemency was convicted. This contention flows from a separation of powers model articulated by the Supreme Court in Ex Parte United States.[21] The right to try offences and impose the punishment for crime is legislative and the right to relieve from the punishment belongs to the executive department.

Historically speaking, the Transportation Act, 1830,[22] allowed the condition in a pardon to be one of undergoing a term of imprisonment instead of one of transportation. It was followed by the Penal Servitude Act, 1853, which substituted penal servitude for transportation. All these provisions were swept away by the Criminal Justice Act, 1948,[24] which in one short section (69) provides for the commutation of a death

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19. Id. at 1236. The test was derived from cases that conditions of clemency could not be "illegal, immoral, or impossible of performance."

20. Id. at 1238, 1240.

21. 242 U.S. 27 (1916) The Court invalidated the complete suspension of an embezzlement sentence by a federal District Court.

22. 11 Geo. 5 and 1 Will. 4, c. 39.

23. 17 & 17 Vict. c. 99.

24. 11 & 12 Geo. 6, c. 58.

sentence to one of imprisonment by means of conditional pardon.

A.B. Keith in his book, The Dominions as Sovereign States, published in 1938, states that "it has been ruled in Canada that pardon cannot be refused, even if given in order to secure deportation."[24] He has not cited any authority in support of this statement, instead he has cited two cases, namely Re Royal Prerogative of Mercy,[25] and Re Veregin.[26]

The second of these cases was in fact the earlier in point of time. It appears that Veregin was an alien who had been sentenced to a term of imprisonment. The crown remitted part of his term and made an order for his immediate deportation under Sec. 43 of the Immigration Act; this section permitted the Minister, by order, to deport an alien who had been an inmate of a gaol, after his term expired. Veregin sought to avoid the enforcement of the deportation order on the ground that the term of imprisonment to which he had been sentenced by the court had not expired, and that the order was accordingly invalid. Mellish, J., of the Supreme Court of Nova Scotia, upheld his claim. He held, first, that a remission of sentence could not in these circumstances be forced on an alien prisoner, who had a right, if he chose, to take the limit of time allowed him before deportation. He further held that the release of Veregin amounted to a pardon of his offence and that the pardon involved freedom from deportation.

This decision was clearly embarrassing to the Canadian government, and shortly afterwards the Governor-General in Council addressed

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24. The footnote referred to is n. 2 on p. 44 of the book.

25. (1933) S.C.R. 269.

26. (1933) 2 D.L.R. 362.

four interrogatories to the Supreme Court of Canada, which heard argument thereon and then gave a unanimous opinion.[27] The first of the interrogatories was: "Is it competent to the Governor-General in the exercise of His Majesty's royal prerogative of mercy, to release from prison without his consent a convict undergoing sentence for criminal offence (a) conditionally (b) unconditionally ?"

In dealing with this question the court first considered whether an unconditional release from prison necessarily implied a pardon of the offence or could be limited to a release only from execution of judgment. After noting that the former view had been adopted in the United States,[28] they held that according to the common law the effect of a pardon as regards the offence is a question of intention.[29]

They then turned to the details of the first interrogatory, and said: --

> "The interrogatories speak of releases which are conditional and releases which are unconditional. In the case of conditional release, the condition may be of such a character as to involve a voluntary act of the convict himself. In otherwords, such that the performance of it can only be effected with the consent of the convict. We assume from the course of the argument before us that the real purpose of the Interrogatories is to elicit the opinion of the court, as to the effect, in respect of the matters set forth therein, of a release from prison of a convict before expiration of the term of imprisonment imposed by his sentence, pursuance of a valid exercise of the royal prerogative; and it would serve no useful purpose in circumstances to explore the various hypothesis suggested by the term "conditional release"; and we beg the leave of your

27. Re Royal Prerogative of Mercy (1933) S.C.R. 269 (Duff C.J. And Rinfret, Lamont, Smith, Cannon and Crockett, J.J.).

28. Hoffman v. Coster (1837), 2 Whart. 453.

29. S.C.R. 269, at p. 271.

Excellency to limit our answers accordingly.

> "Interrogatory numbered one we shall treat as addressed to the question whether or not the act of clemency in releasing a convict from prison prior to the completion of the term of his sentence may be valid and effective in law without the consent of the convict. The answer to the interrogatory so put is in the affirmative." 30

The court went on to discuss the nature of a pardon, and after citing a number of opinions on the matter they expressed their agreement with the following remarks of Holmes J. --

> "A pardon 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." 31

It would be inconsistent with this view, they said, to regard an unconditional pardon as in the same category, in point of law, as an act of benevolence proceeding from a private person. They continued --

> "We do not think the authorities require us to hold that an unconditional pardon of an offence can take effect only upon acceptance by the grantee, and that, for example, a convict under the capital sentence can, in point of law, insist on being hanged, so that the only escape from such result is by statute or by a colourable and unconstitutional exercise of the prerogative in granting successive reprieves."

It had been argued that a remission of sentence could not be effected otherwise than by means of conditional parole requiring the consent of the prisoner. The court rejected the contention and held that

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30. Ibid., at pp. 271-272.

31. Biddle v. Perovich (1927), 274 U.S. 480 at p. 486.

a remission of sentence amounted to an unconditional pardon. They added --

> "Moreover, the statements in the books to the effect that a conditional pardon is operative only with the consent of the grantee are illustrated by references to cases in which the condition is in the nature of a substituted punishment. At common law, the king cannot commute the sentence of the court by the substitution of another and different penalty, because he has no power at common law to compel the convict, against his will, to submit to a punishment which has not been imposed upon him by a court of law. Obviously, in the simple case of partial remission, which is, in terms, unconditional, the convict is not subjected to any penalty or punishment beyond that which the sentence of the court has awarded against him. We do not pursue the discussion further." 32

The court then turned to the remaining interrogatories, and disposed of the inconveniences caused by Mallish J's judgment [33] by holding that a convict whose sentence has been wholly or partly remitted is one whose term has expired within the meaning of Sec. 43 of the Immigration Act. They further held that a remission of a sentence by way of pardon does not, of necessity, wipe out the offences, so that such a convict could be deported as being as undesirable alien under the machinery provided by Sec. 42 of the Act.

The result reached by the court accords, it is submitted, with both authority and common sense. It would be absurd to hold that the crown is bound to execute in full every sentence passed on a convicted criminal. An unsuccessful defendant in a civil case cannot compel the plaintiff to levy execution against him; why should it be supposed that

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32. (1933) S.C.R. 269, at pp. 273-274.

33. Re Veregin (1933) 2 D.L.R. 362.

an unsuccessful defendant in a criminal case should be in a better position? The only basis for such a supposition lies in these early authorities which refer to a prisoner as having "waived his pardon." But although this phrase at first sight appears to suggest that a prisoner can refuse an unconditional pardon, it clearly meant no more than that he had failed to plead the pardon and that the court would not take the judicial notice of it. In R. v. Boyes,[34] a witness for the crown who claimed the privilege against self-incrimination was handed an unconditional pardon under the Great Seal. Although plainly reluctant he was thereupon compelled by the trial judge to testify, and the accused was convicted. His counsel thereupon moved for a new trial on the ground that the witness had been wrongly compelled to answer. The case was argued twice before the Queen's Bench, but a new trial was refused. It is surely significant that although counsel for the prisoner clearly advanced every argument which seemed to the Bench tenable against the compulsion of the witness to testify, it did not occur to them to suggest that he was entitled to refuse the pardon.

According to Holmes, pardon is not a private act of grace, rather it is an act of state and this, in his view, carries the indication that the grantee's assent is not required. In so doing, Holmes was led to overlook the crucial question, which is; does the executive branch of government possess a power to imprison a man for life? Holmes never discussed this question. Instead he set up a dilemna- either the president can never pardon, conditonally or unconditionally, without the grantee's consent, or he always can do so. It would appear that Holmes

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34. (1861) 1 B. X. 311; 121 E.R. 730.

was prepared to make one qualification to his doctrine that pardons are self enforcing; a conditional pardon is valid without consent, he says, at any rate when it substitutes a lesser penalty for that imposed by the court. But who is to decide which of the two penalities is the lesser? Is a moderate whipping a lesser penalty than a long term of imprisonment? Is a moderate fine a lesser penalty than a short term of imprisonment?

In truth, the "inarticulate major premise" of Holmes J's decision is that the president ought to have power to commute death sentences. And to arrive at a decision that the president has such a power he was prepared to overthrow, in fact if not in theory, the earlier decision of the court. We may perhaps forgive him for his action when we reflect that the president's powers in this regard depend on the United States constitution, which is notoriously difficult to amend. But one tends to express disapproval of his final remarks, quoted above, which seem to suggest that a convicted prisoner is a man without rights, at the mercy of the public welfare.

In fact, the law on this matter is quite clear -- the crown has not now, and never has had, the power to substitute a penalty of a different character from that imposed by the court, by means of conditional pardon, unless the prisoner consents to such substitution. Nor has it any power other than that of conditional pardon by which such a substitution can be made. In saying this we are not, as Holmes thought, committed to holding that all pardons are ineffective without the grantee's consent. The true position in commutation cases is that the prisoner's consent is required, not to the grant of pardon, but to the performance of the conditions without compliance with which the pardon is, in terms, invalid.

Yet the practice of the Home Office disregards this rule of law. In 1925 the then Permanent Under Secretary, Sir Edward Troupe, wrote of the practice in terms which suggested that he thought the prisoner's consent to a conditional pardon to be no longer always necessary.[35] And afterwards the holder of the office, Sir Frank Newsam, stated quite clearly in 1954 that the practice is to review every sentence of death whether or not any representations are made on behalf of the prisoner.[36] He states that the practice is of long standing, but unlike his predecessor he does not suggest that it is based on statutory authority.

It may be added that the change in machinery effected by section 69 of the Criminal Justice Act, 1948, does not appear to have altered the position. The section provides that "where His majesty pardons any person who has been sentenced to death on condition that he serves a term of imprisonment, that person shall be deemed to have been sentenced by the court before which he was convicted to imprisonment for the said term." In other words, all that the section does is to provide a different machinery for commutation by means of conditional pardon from that which formerly existed under the Transportation Act, 1824. It does not touch the question of validity of a conditional pardon without the prisoner's consent. It is surely beyond question that in saying a person who has been conditionally pardoned is deemed to have been sentenced

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35. In his book the Home Office, published in 1925, Sir Edward Troup recognizes the general rule that a conditional pardon can take effect only with the express or implied consent of the person pardoned. In a somewhat obscure passage, however, at pp. 55-56 he seems to suggest that the general rule does not apply if the machinery of commutation by way of conditional pardon set up by the Transportation Act, 1824, the Transportation Act, 1830, and the penal servitude Act, 1853, is used. If this is a correct interpretation of what he wrote, he clearly misunderstood the purpose and effect of those statutes.

36. Newsam, The Home Office, 114-115.

to a term of imprisonment the section is referring only to a person who has received a valid conditional pardon. The section is silent as to when a conditional pardon is valid; the law on that matter was settled long before 1948.

Other problems suggest themselves. What is the legal position of a convict who has been sentenced to death and who is being held in prison to undergo a life term to which his death sentence has been commuted without his consent? Can he obtain his release by way of habeas corpus and/or detain damages for false imprisonment? If the commutation followed representations made by him[37] or by someone authorised to act on his behalf, his consent could easily be implied; it would be an unnecessary refinement to hold that formal offer and acceptance of a conditional pardon must be made in every case. But what is no representation were ever made?

It might be argued that a prisoner who failed, after a reasonably short period, to take steps to obtain his release had by his inaction impliedly accepted the condition of the pardon. But there is the devious difficulty that a man can hardly be taken to have accepted a condition unless he was aware that he had the option of refusing it.[38] It is said that every man must be taken to know the law (a proposition which would in any case hardly encounter an enthusiastic reception). It is

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37. Perhaps his solicitor would have an implied authority so to act.

38. In 1942 the law officers, Sir Frederick Pollock and Sir William Follett, advising on a procedure for commutation of a death sentence passed by a court in Nova Scotia, said that the consent of the convict in writing to a conditional pardon should be obtained before the pardon was granted (Forsyth, Cases and Opinions on Constitutional Law, 461). This, it seems, supports the submission in the text that it would be unsafe for the crown to rely upon an implied acceptance.

worth noting that in Biddle v. Perovich [39] the U.S. District Court had granted a writ of habeas corpus in a proceeding begun in 1925 by a prisoner whose sentence of death had been commuted sixteen years earlier. Holmes J., in delivering judgment which led to the withdrawal of the writ, did not suggest that the prisoner's long acquiescence precluded him from obtaining it, although he remarked there were difficulties in the way of the lower courts' conclusion, without specifying what they were.[40]

Much might depend on the particular case in which relief is sought. One method, as we have seen, was for the Secretary of State to signify in writing that His Majesty was willing to extend mercy on conditions, and thereupon any Judge allow the prisoner the benefit of the conditional pardon and make the appropriate order for punishment in accordance with the conditions. Presumably, the judge ought, before making the order, to satisfy himself that the prisoner accepted the conditions. It is submitted, nevertheless, that where the procedure has been adopted, a court from which the prisoner sought habeas corpus might well hold that he is being detained pursuant to an order of a judge acting within his jurisdiction and that as to the rest they must presume omnia rite acta.[41]

But that procedure may not have been adopted. One of the reasons which led to its being devised was the need for passing a conditional pardon under the Great Seal. Since 1927 that problem has been

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39. (1927) 274 U.S. 480.

40. Ibid., at p. 485.

41. In the King v. Suddis (1801) 102 E.R. 119, at p. 123 (the remarks of Grose J.)

of no importance. By Section 13 of Criminal Law Act, 1927,[42] it has been made possible for the king to grant conditional pardon to a convicted felon by warrant under the royal Sign Mannual, countersigned by a Secretary of State. This, on performance of the condition, has the same effect as the pardon under the Great Seal. Since the criminal justice Act, 1948, abolished the procedure by way of judge's order, it would seem that this is the procedure now used.[43] And it was probably used even before the Act was passed.

In cases where it has been used, it would seem that a court could not but hold that the prisoner is being illegally detained. In that event, he would be remitted to his original position, i.e., that of a person under sentence of death who had been reprieved. Theoretically, the sentence might now be executed. But public opinion would scarcely tolerate this, at all events if the period of reprieve had been of any length. Moreover, an opinion of the law officers, Sir William Horne and Sir John Campbell, though not precisely in point, suggests that the prisoner could not be referred back to his original sentence only for the purpose of compelling an acceptance of the conditions accompanying the pardon.[44] This however, is not very helpful, as the learned counsel did not suggest what should be done if he still refused to accept. The same position would arise under the common law in a case, if there were

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42. 7 & 8 Geo. 4, c. 28.

43. See Newsam, The Home Office, 114-115.

44. Forsyth, Cases and Opinions on Constitutional Law, 459-460.

any, where the prisoner has been granted a conditional pardon under the Great Seal.

The only other argument that can be advanced on behalf of the Crown is that a long course of practice has rendered the prisoner's consent no longer necessary. Even if this is qualified by saying that consent is not needed only in cases where the prerogative action is by common understanding beneficial to the prisoner, it still amounts to a claim that the royal prerogative can be extended by a course of practice.[45] Thus baldly stated, the proposition refutes itself. For upwards of three centuries it has been held that the king has no prerogative, but that which the law of the land allows him."[46]

(b) A Full Pardon

A pardon is full when it freely and unconditionally absolves the party from the legal consequences of his crime and conviction. In only rare cases does one sentenced to death for crime receive a full pardon. Usually the best he can hope for is a commutation of his sentence to life imprisonment. But there is one type of case, fortunately quite rate in capital cases, where justice demands a full pardon -- namely, where subsequent events prove that the convicted person is innocent.

In the United States the president as chief executive awards a full pardon in pursuance of his judgment concerning the individual case and of the obligations which rest upon him by virtue of his constitutional grant of powers. In contrast with the earlier conception, the president largely disregards the wishes of the convicted person. If he

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45. Plainly, if prerogative action which formerly was limited by a need to obtain the consent of the subject is no longer thus limited, the prerogative has been extended.

46. The case of proclaimation (1610) 12 Co. Rep. 74, at p. 76.

decides that an individual who has committed a crime should not suffer any of the legal consequences of the crime or, after suffering some legal consequences of the crime, should suffer no more, he may grant a full pardon. Thus the distinguishing features of a full pardon are that it constitutes a grant to an individual and that it absolves the individual from most of the legal consequences of the crime which he has committed.[47]

A pardon to terminate sentence and restore civil rights and a pardon to restore civil rights in kind form a full pardon.[48] Both types as indicated by their names are full pardons, granted to individuals for specific purposes. A pardon to terminate sentence and restore civil rights presupposes the serving of a part, usually the greater portion, of the sentence. The president confers such a pardon to relieve the prisoner from serving the remainder of his sentence and to restore civil rights, such as the right to hold office, to serve on juries, to act as a witness and to cast votes in elections which had been lost as a consequence of his crime and of his conviction. A pardon to restore civil rights presupposes the serving of the entire sentence and generally of a stipulated probationary period which varies in length according to the magnitude of the offence.[49] When either of these forms has come into operation, it possesses all of the exculpatory effects of a full pardon. Ostensibly the different phraseology is used to make clearer the executive purpose and to ward off criticism which would very probably ensue if clemency in

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47. Below, pp. 75-79.

48. Information concerning these two forms of clemency and the practice in the administration of the pardoning power was furnished by the James A. Finch, Pardon Attorney from Oct.7, 1907 to Feb. 29, 1939.

49. See rule 19 of "Rules Governing Applications for Pardon," prepared by the Attorney General and approved by the president, May 1, 1934.

these instances was classed with full pardons. Far too often, it is popularly, though erroneously, believed that all forms of full pardon enable a convicted person to avoid most of the punishment, if not all of it.

PRE-INDICTMENT PARDON

Pre-indictment pardon is granted during investigation of a case but before indictment. This type of pardon aborts the judicial process. In the leading United States Supreme Court decision on the pardon power of the Executive, Ex parte Garland[1] it was decided that the president's pardon before indictment was permissible.[2] In the case of Burdick v. United States,[3] Burdick was granted a pardon for all offences against the United States he may have committed in connection with any matter about which he was to be questioned.[4] When he rejected the pardon and continued to claim his Fifth Amendment privileges, the court was asked to decide "whether the president has power to pardon on offence before admission or conviction if it."[5] Fully aware of the earlier Garland dictum, the court expressly declined to decide this issue.[6] Thus, the issue of whether the president may pardon before indictment or conviction remains open.

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1. 71 U.S. (4 Wall) 333 (1866).
2. Id at 380.
3. 236 U.S. 79 (1915).
4. Id at 86.
5. Id at 87.
6. Ibid.

There is some authority supporting the president's power to pardon before indictment or conviction if the United States constitution's pardon clause interpretation recognizes[7] the power of this practice during the colonial period. In Pleas of the Crown[8], Hawkins makes several references to such parsons before indictment and convictions: "the king may prevent any popular action on a penal statute by a person from the offense before any suit commenced by an informer."[10] Blackstone's Commentaries[11] also refers to the king's lawful exercise of the pardon power before conviction: "(A) pardon may either be pleaded upon arraignment, or in arrest of judgement or in bar of execution."[12]

During the Constitutional Convention of United States held in Philadelphia in 1787, it was said that the pardoning power should be employed before conviction or indictment only where the usual circumstances of a case command it.[13]

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7. As the pardon) power has been exercised from time immemorial by the executive of that nation whose language is our language and to whose judicial institutions ours bears a close resemblance; we adopt their principles respecting the operation and effect of pardon.

8. 2 Hawkins, Pleas of the Crown (4th ed. 1762).

9. Id ch. 37, ss 33, 54.

10. Ibid.

11. S.W. Blackstone, Commentaries (G. Tucker ed. 1803).

12. Id at 401.

13. Journal of Federal Convention 613 (Scott ed. 1893).

President Ford may well have thought the unique case of Richard Nixon warranted such an unusual exercise of the pardon power before the judicial proceedings had run their course. Indeed, "The avowed objective[14] of President Ford's pardon of Richard Nixon could not have been accomplished by other than a pre-conviction and pre-trial pardon. He sought to avert the national controversy and divisiveness he believed would accompany the trial of a former president on charges of criminal conduct while in office."[15]

> "I could see that the new administration could not be effective if I had to operate in the atmosphere of having the former president under prosecution in a criminal trial. Each step along the way, I was deeply concerned, would become a public spectacle, and the topic of wide public debate and controversy.[16]

Notwithstanding historical support for president Ford's action, the pardon of Mr. Nixon before indictment and thus the blocking of the judicial process aroused a widespread sense of injustice which might be translated into legal arguements challenging the par as unfair, possibly unlawful, and perhaps even unconstitutional.

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14. There actually appears to have been two separate and distinct objectives of the pardon: showing mercy to Mr. Nixon and his family by sparing him a prolonged trial, and directing the nation's attention away from the controversy which surrounded the events leading to his resignation. Although president Ford alluded to the latter rationale in his statement accompanying the grant of pardon on Sept.8, 1974 (10 Presidential Documents NC 37 1102-03 1974) he emphasised the former. However, in his subsequent testimony before the House Judiciary subcommittee on criminal justice, the president stressed the national interest.

15. M.P. Zimmet, the Law of Pardon, Annual Survey of American Law. 1974/75.

Acceptance of a pardon before conviction implies a confession of guilt.[17] Faced with the possibility of prolonged litigation and an uncertain outcome of the trial, even an innocent defendant might be overwhelmed by the temptation to accept a pardon and "walk free."

The hardships incident to the acceptance of a post-conviction pardon have been well documented. To the extent they are based on evidence of the pardon recipient's immoral character, rather than conviction, the same hardship could conceivably flow from the implied admission of guilt inherent in the acceptance of a pardon before conviction, although the possible unfairness to the recipient certainly seems no greater than that to a criminal defendant who bargains for a plea; the certainty with which guilt is established by the different procedures belies their similarity. A guilty plea is made in open court where the judge, an impartial third party, is obliged to enquire into the factual background in order to determine if the plea is justified.[18]

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16. Hearings, N.Y. Times, Oct. 18, 1974, at 19, col. 2.

17. Burdick, 236, U.S. at 90-91, 94.

18. The court shall not enter a judgement upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. Fed. R. Crim. P. II (1966).

Further protection is offered the innocent by the judicial insistance that the plea be voluntarily entered in the light of "all of the relevant circumstances surrounding it."[19] No independent assessment of the recipient's guilt attaches to the pardoning process. Guilt is imputed to him regardless of all the revelant circumstances or the underlying factual basis.[20]

If the choice between innocence and freedom is unfair, it is doubtful, in the context of an offered pardon, that the unfairness rises to constitutional dimensions. Surely, the unfairness is not shocking to our conscience,[21] the resulting disabilities must be balanced against distinct benefits - immunity from criminal process and escape from punishment. Under a more modern view of the pardoning power, it may even be said that a preconviction pardon is not at all unfair to the recipient. The Supreme Court of the United States has suggested, without so holding, that a pardon may no longer depend upon the recipient's acceptance, thereby allowing him to benefit from the pardon without implicitly confessing guilt.[22]

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19. Brady v. United States, 397, U.S. 742-749 (1970).

20. Mark P. Zimmet, Supra.

21. Rochin v. California, 342 U.S. 165 (1952).

22. The Burdick holding that a full pardon must be accepted in order to be valid relied heavily upon the reasoning in the United States v. Wilson, 32 U.S. 150 (1833).

Because unfairness to the recipient, if any, does not rise to the level of a constitutional objection, a challenge to a pre-conviction pardon on this ground alone would probably be unavailing.

Another basis for challenging a pre-conviction pardon is that it interferes with the Attourney General's congressionally authorised "power to conduct the criminal litigation of the United States Government."[23] If the President grants a pardon before indictment he interferes with the Attourney General's discretion to prosecute. This was dramatically illustrated in the case of the Nixon pardon where the special prosecutor dropped his investigation into criminal liability of R. Nixon after the pardon was issued,[24] as the President had interceded. Interference with the Special Prosecutor's function was particularly disturbing in view of the fact that his independence was to be even greater than that enjoyed by the Attourney General.[25] Even beyond ending the criminal proceedings against Mr. Nixon, the pardon might have prejudiced the case against the other so-called "Watergate defendants" by estending its implication of guilt to them as agents of the former President.[26]

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23. United States v. Nixon 418 U.S. 683,694 (1974), referring to 28 U.S.C. ss 516 (1966).

24. N.Y. Times, Sept. 8, 1974 at 1, col. 4.

25. 28 C.F.R. s 0.38 (1973); Nixon, 418 U.S. at 696.

26. N.Y. Times, Sept. 1974, at 23 col. 2. The arguement was also made that agents of the former president should not be prosecuted after he was pardoned.

The weakness with the statutorily based arguement is that both the language of the statute granting prosecutorial discretion to the Attourney General and its legislative history[28] indicate that the statute was not intended to limit the President's otherwise lawful exercise of the power. Thus, the above arguement could not successfully challenge the Nixon pardon. The arguement, however, does raise the interesting possibility that through appropriate legislation Congress could prohibit such pre-indictment pardons in the future. Of course, the President's constitutional power clearly supersedes any conflicting statutory grant of authority.[29] Thus, the Supreme Court has said that the Congress can neither limit the effect of the presidential pardon nor exclude from its exercise any class of offenders.[30] Nor can the president be told whether or in which cases to grant a pardon.[31] Such limitations would clearly be inconsistent with the president's discretionary power. This precedent notwithstanding, it might not be inconsistent for Congress to legislate the point at which the President may interrupt the criminal judicial process with

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27. Attention is directed to the statutes' introductory language:" Except as otherwise authorised by law" 28 U.S.C. ss 516 (1966).

28. 28 U.S.C. ss 516 (1966).

29. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

30. Garland, 71 U.S. at 380.

31. Yelvington, 211 F. 2d at 643-44.

a pardon. A statute limiting exercise of the power after conviction would neither prevent the president achieving the pardon's power objective[32] nor interfere with his discretion to decide whether to exercise the power in a particular case. It would only prescribe the manner in which he could exercise the power.[33] Appropriate legislation might therefore furnish a basis for challenging any future preconviction or pre-indictment pardons.

Also a pardon granted before conviction might be challenged on constitutional grounds as violating the judicial function set out in article III of the constitution, by pre-empting federal court jurisdiction to hear a particular case or by prescribing its outcome. The article III requirements of a "case" or "controversy"[34] is satified only where the litigants have a stake in the outcome of the proceedings.[35] Since a pardon prevents any penalties or disabilities from being imposed upon conviction,[36] the parties lack the requisite

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32. 59 U.S. at 310; see also ex-parte Crossman, 267 U.S. at 119.

33. The Supreme Court itself certainly has not shrunk from the opportunity to prescribe the manner in which the president may grant a pardon, see Burdick, supra, note 17.

34. The judicial power shall extend to all cases, in law and Equity, arising under ... the laws of United States ... to controversies to which the United States shall be a party. US Court art. III, ss.2.

35. See Baker v. Carr, 369, U.S. 186, 204 (1962).

36. Knote v. United States, 95 U.S. 149, 153 (1877).

stake and the federal courts might, therefore, be effectively divested of jurisdiction to hear the case. To the extent that the jurisdiction of the federal courts may be controlled,[37] the necessary power has been entrusted to Congress, the representative body,[38] not the president. A pardon such as that granted former president Nixon might be regarded then as constitutionally repugnant in encroaching upon the separation of powers contemplated by the framers when they entrusted the power to alter the jurisdiction of the lower federal courts to Congress.

If a pardon granted before conviction does not unconstitutionally limit the lower federal courts' exercise of jurisdiction to hear a particular case,[39] such a pardon might be challenged as encroaching upon the judicial power by prescribing a rule for decision in a particular case. In the United States v. Klein[40] the Supreme Court struck down, as an unconstitutional interference with the judiciary, a congressional statute which by its terms prevented a claimant from pleading a presidential pardon in support of any claim for property seized under an act of Congress during the Civil War.[41]

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37. See H.M. Hart & W. Wechsler, The Federal Courts and the Federal Court System, 330-60 (2d 2 ed. 1973).

38. U.S. Court art. III,ss 1. 2.

39. In fact, the exercise of the pardon power has never been held to bar federal jurisdiction. The opinion of the court in ex-parte Garland, supra, actually contains a contrary suggestion.

40. Con't. on page 71.

The statute provided that a pardon should be conclusive proof of aid to the rebellion, thereby requiring the dismissal of the claim. Because the act purported to limit the original jurisdiction of the Court of Claims and appellate jurisdiction of the Supreme Court upon the finding of the specific fact, the court held that the statute offended the separation of powers doctrine by prescribing a rule for decision under the guise of limiting the court's jurisdiction.[42] A preconviction pardon may also prescribe a rule for decision of a case in a particular way; by barring the imposition of a penalty, it effectively mandates a rule for decision by removing the functional difference between judgement of conviction and an acquittal. Of course, one might argue that the social opprobrium associated with a judgment of conviction would still distinguish it from acquittal. However, even this distinction is questionable. The president's pardon before conviction, carrying with it the implication of guilt discussed above, might be the equivalent of any stigma that otherwise would follow from the conviction.

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40. 80 U.S. (13 wall) 128 (1871).

41. The Abandoned and Captured Property Act of 1863, 12 stat. 820.

42. Klein, 80 U.S. at 146-147.

The alternative to viewing executive clemency exercised before conviction or indictment as an impairment of judicial process is to see it as a constitutional check on the judiciary, and perhaps the Congress as well. It affords relief from undue harshness of evident mistake in the operation or enforcement of the criminal law.[43] Under this view the president's pardon power admittedly interferes with the judicial process, but as a constitutional check on the balance of power, rather than an unconditional encroachment on power.

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43. Ex-parte Crossman, 87-120, supra.

THE UNSPECIFIED OFFENCE PARDON

Richard Nixon was pardoned for "all offences" against the United States which he may have committed during his term in office.[1] No reported federal case involves such indiscriminately broad pardon. Even the general amnesties have identified the nature of offences pardoned. For example, the Proclamation of General Pardon and Amnesty issued at the conclusion of the Civil War extended to "the offence of treason against the United States, or of adhering, to their enemies."[2] By contrast Richard Nixon's pardon extends to offences he may have committed in the alleged cover-up of the Democratic Party Headquarters' burglary at the Watergate, possible federal income tax violations, alleged misuse of federal agencies, and all other areas in which he was potentially criminally liable.[3] By including every offence without regard to differing circumstances, President Ford used his pardoning power not to forgive the commission of a certain offence or class of offences, but to forgive an individual, whatever he may have done.

Such prerogative finds little historical support, establishing the president's authority to issue conditional pardons.

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1. Proclamation 4311, in 10 Presidential Documents, no. 37, 1103 (1974).

2. Proclamation of Dec. 25, 1868, 15 Stat, 711; 712.

3. Memorandum from Henry S. Ruth, Jr. Deputy Prosecutor, to Leon Jaworski, Special Prosecutor, N.Y. Times, Sept. 11, 1974, at 28, col. 1.

The court in Ex Parte W. Wells implied that the nature of the presidential pardon power is a limited one:

> "The power was to be used, not because it was prerogative power, but as incidents of the power particularly when circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of the vindicatory justice." [4]

This suggestion of a broad yet limited pardon power is evident in later Supreme Court opinions authored by Justice Field [5] and Holmes. [6] Further, English authorities, although not unanimous, are in general agreement that a pardon granted by

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4. 59 U.S. at 310; see also Crossman, 267 U.S. at 119.

5. Justice Field, writing for the Knote majority, commented regarding the pardon power that "there is a limit to it as there is to all (the president's) powers" 95 U.S. at 154.

6. Biddle, 274 U.S. at 486.

the king for unspecified offences was without effect.[7] If it is doubtful that the English monarch could pardon "all offences" how much more inappropriate it would be for the president of the United States to have such power. A pardon which forgives an individual for "all offences" he may have committed is an act of grace ill-suited to the constitutional form of government.

The pre-indictment pardon of Richard Nixon for "all offences" aborted the judicial process and aroused a national sense of injustice. A challenge by the special prosecutor to the pre-indictment aspect of the pardon would have been difficult in view of the historical references supporting such exercise of power. That support certainly does not mitigate

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7. (a) Blackstone decisively declared:
A pardon of all felonies will not pardon a conviction or attainder of felony; (for it is presumed the king knew not of these proceedings) but the conviction or attainder must be particularly mentioned. 5 W. Blackstone Commentaries. G. Tucker ed. (1803).
(b) Hawkins reasoned:
For if a felony cannot be well pardoned where it may be reasonably 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 where it may well be intended that he was not apprised of it at all; 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 pardon the greatest number of the most heinous crimes, the least of which had he been apprised ot it, he would not have pardoned. And for these reasons, general pardons have been of late years very rarely granted by the crown, without particular description of the offence intended to be pardoned. Hawkins, Pleas of the Crown (4th ed. 1762).

against the propriety of Congressional action prohibiting pre-indictment or the post-conviction exercise of the pardon power. Even a constitutional amendment would not be unusual when compared to the extensive state constitutional prectice of limiting the power's exercise to post-conviction situations in an effort to prevent its abuse.[8]

The Nixon pardon is most vulnerable to challenge for having failed to specify the offences it covers. It is doubtful that the constitution invests the president with the authority to pardon an individual for "all offences" he may have committed; even the English monarch was probably limited in this manner.

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8. In re Anderson, 34 Cal. App. 2d 48, 50, 92 P 2d. 1020, 1021 (1939) the alternative remedy for abuse is the impeachment process. Crossman, 267 U.S. at 121. But the great reluctance with which this process is pursued makes it an ineffective remedy.

EFFECTS OF A PARDON

In England, the king's pardon, if general in its purport and sufficient in other aspects, obliterates every stain which the law attached to the offender. Generally speaking, it puts him in the same situation as that in which he stood before he committed the pardoned offence; and frees him from the penalties and forfeitures to which the law subjected his person and property.[1] Though a pardon cannot wash away those doubts with which the evidence of one who has committed a serious offence will be received, yet in point of law, a pardon impliedly removes the stigma and restores a man to credit, so as to enable him to be a witness;[2] and it so far makes him a new man as to entitle him, according to some of the old books, to bring an action against anyone who scandalizes him in respect of the crime pardoned.[3]

When the offender's civil rights have once rested [illegible] king they can not be restored to the offender, nor are they divested [illegible] her Majesty by a mere pardon, without a clause of restitution.[4] It seems, however, that a clause of release of all judgments and executions in a general pardon extends to debts due to the king by forfeiture and extinguishes or merges the debt in the hands of the debtor.[5]

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1. 4 Blackstone, Commentaries, 402.
2. 1 Ventre, 349.
3. See Bac. Ab. pardon, H. Hob. 67, 81, 2.
4. Ibid.
5. 1 Saund. 362.

A charter of pardon after attainder is not sufficient to restore or purify the corrupted blood of the attainted offender,[6] and therefore, tho he may after such pardon purchase and sell lands, yet his descendants who were in esse at the time of attainder, can not inherit them; nor can he himself inherit as a descendant of another.[7] The king's charter is however sufficient to restore the blood as to all future descendents; consequently a son born after such a pardon may inherit,[8] unless there be in existence an elder brother who was born before the attainder and who might have inherited had not the attainder taken place; in which case the younger brother can not inherit, and the land will escheat pro defacto heredis.[9]

To determine more precisely the legal effects of a pardon, resort must be had to both the statutory and case law in the jurisdiction where the pardon is granted. What civil rights are restored will depend upon the civil rights lost; whether the offence was committed within or without the state; whether the state where the offence has been committed has granted a pardon; whether the ex-offender seeks to regain lost rights to property, office or marital status, or merely seeks to establish these rights for the future; whether he was convicted in or is applying for pardon in a civil death state; and whether he seeks to claim his rights from a public entity or a private individual. The particular right sought

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6. 4 Bla. Com. 402.
7. Co. Lt. 8
8. Ibid.
9. Ibid.

to be restored or acted upon is always of prime importance in determining the effect of the pardon.[10]

A. Effect of Pardon on Enhancement of Punishment Statutes

Depending upon the statutory privisions and the court's interpretation, an offence for which an offender has been pardoned may or may not be "counted" for purposes of enhancement of punishment or declaring the defendant to be an habitual offender. The majority rule is that a pardoned offence may be used,[11] the argument being that although a prior crime was pardoned, the conviction remains. The minority position is based upon the proposition that a pardon "blots out guilt" and thus the pardoned offence can not be taken into consideration in enhancement and habitual criminal statutes.

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10. (a) The California cases have stated that a pardon implies guilt and does not erase the fact of the commission of the crime or the conviction, nor wash out the moral stain nor does it restore offices forfeited in consequence of conviction. People v. Dutton, a Cal, 2d 508.
(b) In People v. Biggs, 9 Cal, 2d 508, the court held that the legislature may constitutionally impose a heavier penalty for subsequent conviction despite a prior pardon; on the contrary, In re Ringnalda, 48 F. Supp. 975 the court held that the pardon reaches both the punishment for the prescribed offence and the guilt of the offender so that when the pardon is full it releases punishment so that in the eyes of the law, the offender is as innocent as if he had never committed the offence.

11. In California, a "pardon" excepts the individual from punishment which the law inflicts for the crime which he has committed and generally, also, removes any disqualification or disabilities which would ordinarily have followed from the conviction, but the individual remains a convicted criminal for purpose of determining whether a conviction may be deemed a prior conviction with statutes prescribing increased punishment for those previously convicted of a crime: People v. Biggs, supra. The Illinois sentencing statute provides that for the purpose of determining sentence to be imposed, the court shall, after conviction consider the evidence, if any, received upon the trial and shall also bear and receive evidence, if any, received upon the trial and shall also bear and receive evidence, (cont'd on page 80).

B. Effect of a Pardon on Right to Vote, Hold Public Office, Serve On A Jury and be a Witness

Generally a full pardon restores the ordinary rights of citizship as the right to vot and hold public office.[12] The effect of the pardon may be set out the state constitution or statutes or in the regulations of the oning authority.[13] Pardon restores eligibility to public office bu oes not restore a person to public office which he held at the time of conviction.[14] A commutation or conditional pardon does not have the effect of restoring rights or removing disqualifications

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(con't from page 79).

if any, as to the moral character, life, family, occupation, and criminal record of the offender and may consider such evidence in aggravation or mitigation of the offence. The New York enhancement statute specifically provides that a previous felony conviction can be counted provided that the defendant was pardoned on the ground of innocence. McKinney Consol, Laws Period Law f. 70.10 (b) But where the pardon was granted on the ground of innocence this should be taken into account. In re Kaufmann, 245 N.Y. 423, 137 N.E. 730 (1927).
In Texas, a prior conviction can be involed as a basis for added penalty notwithstanding the Governor had granted full pardon after the defendant had served part of sentence. But see, R. v. Nickerson, (1975) 7 Nfld. f. P.E.I. R. 145 (P.E.I.C.A.). Following prior conviction; Jones v. State, 141 Tex. cr. r. 70. Overruling a previous case to the contrary.

12. A former felon who has received a pardon from another state for a crime committed in that state is entitled to vote in California; 31 op. Atty. Gen. 4 (1958).

13. The Handbook on Parole - Executive clemency - Texas, 1970 says that the pardon restores "citizenship", and that "restoration of citizenship" and "restoration of civil rights" are considered to be synonymous terms. As has been pointed out in the first chapter, an offender "does not lose !citizenship'" by conviction, hence the use of the term "restoration of citizenship" in connection with a pardon is unfortunate.

14. Hulgan v. Thornton, 205 Ga. 753, 55 S.E. 2d 115 (1949).

for office.[15] Generally, a conviction for which a witness has been pardoned can not be used in impeachment. However, some states permit the showing of the conviction which can be followed by showing of the pardon in rebuttal.[16]

C. Effect of a Pardon on Specific Statutory Disabilities

No general statement can be made as the effect of a pardon on other disabilities imposed by statute. For example, a pardoned ex-convict is still required to register under the Sex Offender law in California and is subject to restrictions on possession of fire-arms, unless the pardon was granted on the basis of a determination of innocence.[17]

D. Effect of a Pardon Under Licencing Laws

Generally, where an occuptational licensing law disqualifies persons convicted of a crime, a pardon does not remove the disqualification nor does it automatically restore a license that has been revoked on the grounds of a criminal conviction. Disbarment of an attorney is not prevented by pardon, nor does a pardon restore the license or right to license.[18] Some decisions have indicated that although loss of a professional license is a "penalty" the proceedings to revoke a license are not penal.[19] The revocation may thus not be a "conviction" within the power of the executive to pardon. The California statute which provides generally that a pardon shall "operate to restore to the convicted person all the

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15. McGee v. State, 29 Tex. App. 596, 16 S.W. 422 (1891).

16. People v. Hardwick, 204 Cal. 582.

17. 28 op. Atty. Gen. 178. Wests Ann. Cal. Pen. Code. ss. 4854 gives the Governor power to restore the right to possess firearms except to any person who was ever convicted of felony involving the use of dangerous weapon.

18. Deneen v. Gilmore, 214 III. 569, 73 N.E. 737 (1905)

19. Marlo v. State Board of Medical Examiners, 112 Ca. App. 2d, 276, 246 P. 2d 69 (1952).

ights, privileges, and franchise of which he has been deprived in consequence of the said conviction or by reason of any matter involved therein", adds significantly that "nothing in this article shall affect any of the provisions of the Medical Practices Act, of the power or authority conferred by law on the Board of Medical Examiners. Therein, the power or authority conferred by law upon any board permits any person or persons to apply his or their art of profession on the person of another."[20]

E. Effect of a Pardon in Wiping Out Guilt

There are two points of view as to whether or not a pardon wipes out guilt. The classic view was stated in ex parte Garland by the Supreme Court of United States;

> "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 the existence of guilt, so that in the eyes 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 penalities and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights; it makes him as it were, a new man, and gives him the credit and capacity."[21]

The opposite and majority view is stated in Burdick v. United States. This view is that a pardon is an implied expression of guilt and that conviction is not obliterated.[22] When this view is adopted, the

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20. West's Ann. Pen. Code ss. 4853. Where a prisoner has been adjudged an habitual criminal and sentenced under ss 644, but has been granted an unconditional pardon by the governor, the application of the section (4853) was nevertheless proper, notwithstanding this section as to the effect of a pardon. 8 op. Atty. Gen. 87.

21. Ex. Parte Garland, 71 U.S. 333.

22. Burdick v. United States, 236 U.S. 79.

pardoned offender is ineligible for an occuptational and professional license if the license statute provides that the license in question can be issued only to a person without a criminal record or a person of a "good character."[23]

Let us examine the situation as to why a statute should contain such a provision, when it is said that "In the eyes of the law the offender is as innocent as if he had never committed an offence." It is asserted that the law regards as true what is inherently false. "Everybody knows that the word "pardon" naturally connotes guilt as a matter of English. Everybody also knows that the vast majority of pardoned convicts were in fact guilty; and when it is said that in the eye of law they are as inn[redacted] if they had never committed an offence, the natural rejoinder is [redacted] eyesight of the law is very bad."[24]

If the offender is really to be treated as an innocent man after his pardon, the offence which he has committed can not properly be made ground for removing him from the office of an attorney and trustee, or from any office. He not only can not be disqualified as a witness, but proof of his conviction should not be allowed to discredit him. If an alien, he should not be debarred from naturalization or deported.

The earliest statement of the English Law of Pardon is made apparently by Bracton[25] who wrote in about the middle of the thirteenth century. He says of the effect of the pardon:

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23. State v. Hazzard, 139 Wash. 487.

24. Williston, 28 Harv. L. Rev. 657 (1915).

25. Twiss's Translation v. 2, p. 371.

> "But in all the aforesaid cases, whatever may have been made duly and according to the law of the land, a person is not restored except to the king's peace alone, that he may go and return and contract a-new, for that which he has been dissolved by the outlawry cannot be joined a-new by the inlawry without a new intention on the part of those who have contracted. For the king cannot grant a pardon with injury or damage to others. He may give what is his own, that is his protection, which the outlawed person has lost through his flight and contrivancy, but that which is another's he cannot give by his own grace. Likewise a person justly and duly outlawed is not restored to anything except to the king's peace, that he may go and return and have protection, but he cannot be restored to his rights of action and other things, for he is like a new-born infant and a man as it were lately born. Likewise inlawry does not restore a person to his previous actions and obligations, nor to his homage nor fealties, nor to his oaths, nor to other things dissolved by his outlawry, against the will of those by whose will they were previously united and confirmed, and accordingly neither to his inheritances nor to his tenements to the prejudice of the Lords, and so they cannot be restored to those things to which they had only a right. But no one is bound to them be preceding obligations, but they are bound to all others, that they may not be in a better condition on account of their outlawry, since they ought to be in worse condition."

The phrase in this extract that a pardoned man "is like a new-born infant and a man as it were lately born" seems to be the basis of any subsequent assumption that a pardoned offender is to be regarded as an innocent man. The extract however, shows clearly enough that the writer's idea was not that the offence was regarded by the law as not having been committed, or even no longer existing, but that the offender, so far as concerned the future, acquired the legal capacity of an innocent man. At a time when conviction destroyed civil rights this was very important matter. The following extract from Pollock and Maitland's history [26] also indicates clearly enough that the eye of the law was not

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26. Vol. 2, p. 481.

formerly so blind as to be unable to see that a pardoned felon has committed the crime of which he had been convicted.

> "The king could not protect the man-slayer from the suit of the dead man's kin. Even when the pardon was granted on the score of misadventure, the suit was saved by the express words. Proclamation was made in the court inviting the kin to prosecute, but telling them that they must come at once or never. What could the kin do in this case? They could make themselves extremely disagreeable; they could extort money. In Henry III's day, Mr. Justice Thurkelby was consulted by a friend who had obtained a pardon, but was being appealed. The advice that the expert lawyer gave was this: 'You had better go to battle; but directly a blow struck cry "craven" and produce your charter; you will not be punished, for the king has given you your life and members.'"

In 1410[27] the validity of indictments presented by a grand jury of which one member was outlawed and another a pardoned felon was drawn in question; the conclusion of the case is as follows:

> "And then on the opinion of all the justices, since one of the indictors was outlawed and another was excused and acquitted by the benefit of a general pardon, so that they were not probi et legales homines to inquire as the law wishes, it was awarded that all the indictments by them shall be taken as annulled."

The same conclusion was reached two centuries later by Lord Coke[28] who said of a pardoned felon not only that "he is not a fit person to serve on a jury, but also "by the same reason the testimony of such an one for a witness is in all cases to be rejected."

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27. III Henry IV.

28. Brown v. Crashaw, 2 Bulst. 154 (1614).

No case arose subsequently which indicated any enlargement of the views of the English Court as to the effect of a pardon until Cuddington v. Wilkins decided in 1615.[29] This decision has probably been the main foundation of the impression that after a pardon the law could not thereafter see the convict's guilt. The case was as follows: "Cuddington brought an action of the case against Wilkins for calling him a thief. The defendant justified, because beforetime he had stolen somewhat. The plaintiff replied, that since the supposed felony, the general pardon in the seventh year of the king was made, and made the usual averment to bring himself within the pardon. Whereupon the defendant demurs." The court said the felony was by pardon extinct; and the case was adjudged for the plaintiff, for the whole court was of the opinion that though he was a thief once, yet the pardon came, it took away not only poenam but reatum, and the report proceeds:

> "Now when the king had discharged it, and pardoned him of it, he had cleared the person of the crime and infamy, wherein no private person is interested by the commonwealth, whereof he is the head, and in whom all general wrongs reside, and to whom the reformation of all great wrong belongs."

In case of Searl v. Williams[30] where Hobart, C.J., says:

> "And therefore I hold that if a man shall call him felon, or thief, he may have his action, as upon any other pardon, which we resolved in the case of Cuddington v. Wilkins."

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29. Hob. 67, 81.

30. Hob. 81, 82 (1615).

But that the court meant that the legal infamy of the conviction was removed, not that the offender was "as innocent as if he had never committed the offence" is evident from the following sentence in the report:

> "It was said that he could no more call him thief, in the present tense, than to say a man had the pox, or is villain after he be cured or manumised, but that he had been a thief or villain he might say."

The immediate effect of the decision was the reversal of Coke's dictum that a pardoned felon could not be permitted to testify.[31]

The protection of a pardoned convict from being called by a name appropriate to his crime, and the restoration of his competency to testify, were sometimes expressed by stating that the convict acquired a new "credit" or "credit" and "capacity." The fact that this mode of expression is used by Hawkins in his "Pleas of the Crown"[32] and by Blackstone in his Commentaries,[33] has led to the habitual quotation of these words subsequently. But the even decision in Cuddington v. Wilkins if the distinction which the court there took between saying he is a thief is born in mind, amounts to no more than this, that as the plaintiff had been cleared of the legal consequences of infamy, a statement in the present tense, implying that he was still infamous, was slanderous. Nor does the admission of the testimony of a pardoned felon imply that credit

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31. In Celier's case, T. Ray (1680) "It was debated, that admitted a witness be convicted of felony, and afterwards pardoned, whether he shall thereby be restored to be a good witness? And my lord Chief Justice Scrogs and myself were of opinion, that he could not, because the pardon doth take away the punishment due to the offence, but cannot restore the person to his reputation; and of that opinion was Justice Nichols in Cuddington v. Wilkins' case.

32. Bk. 2, C. 37.

33. Vol. 4, p. 402.

must be given to his testimony.[34]

The true line of distinction seems to be that the pardon removes all legal punishments for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualification. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

If, however, the eyes of the law were unable to distinguish between a pardoned convict and one who had never been found guilty of a crime, proof of conviction should be as inadmissible to affect the credibility of the witness as it is to effect his capacity to testify; yet it has always been the law, and still is, that in spite of the pardon the conviction may be used to discredit the witness.[35]

The right of suffrage forfeited by conviction is restored by a pardon;[36] and the same principle seems applicable here that governs the capacity of a witness. As it was not guilt but conviction which took away the right, the deprivation of it is a legal punishment, and as such a pardon should excuse it.

But under a statute which requires as a condition of naturalisation that the alien seeking to be naturalised must prove that he has

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34. Thus in Bacon, abr. Title Pardon, it is said: "A pardon restores a man to his credit so as to enable him to be a witness, but yet credit must be left to the jury."

35. Rookwood's case, Holt 683, 885 (1696).

36. In re Executive Communication 14 Fla, 318 (1872).

behaved as a man of good moral character during his residence in the United States, it has been rightly held that a pardoned convict is not within the Statute.[37] Here it is not conviction, but character, which is in question. The court after quoting from Ex Parte Garland, said:[38]

> "And yet I do not suppose the opinion is to be understood as going the length of holding that while the party is to be deemed innocent of the crime by reason of pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was convicted of it. The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offence."

It may be doubted if a court suggested to appoint such a person a trustee, would feel sure that he had even been restored to "a state of innocence."

In an Arkansas case,[39] it appeared that a probate judge had been convicted of a felony and had appealed; while the appeal was pending, he [redacted] pardon which he thereupon pleaded and was discharged. It was [redacted] warranto proceeding that the unreversed conviction prevented him from exercising the office of a judge.[40]

In several cases the question has arisen of disbarring lawyers who have been convicted of crime but pardoned. The courts have found some difficulty in escaping the language of ex parte Garland[41] and in Texas it

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37. In re Spencer, S. Sawy. 195, 199 (1878).

38. 4 Wall, 333, 380 (1866).

39. State v. Carson, 27 Ark, 469 (1872).

40. See to the same effect, Commonwealth v. Fugate, 2, Leigh, (Va.) 724 (1830).

41. Supra.

has actually been held that a pardon is complete deference to disbarment proceedings based on the pardoned offence.[42] Indeed, the case of ex parte Garland itself concerned the right of a pardoned offender to practice law before the Supreme Court, and though the decision of the court may be right, since the only ground for supposing that complicity in the war of the rebellion (the offence in question) would involve disbarment, as a consequence, if there was a statute which imposed as a penalty disability to practice before the court, some of the reasoning of the case would support the conclusion which the Texas court actually reached.

The New York court, though disbarring the offender, was itself guilty of the following reasoning:

> "The pardon does reach the offence for which he was convicted, and does blot it out, so that he may not now be looked upon as guilty of it. But it can not wipe out the act he did, which was adjudged an offence. It was done, and will remain a fact for all time." 43

An interesting case compared with these is an English decision[44] which held a pardoned convict entitled to engage in the business of selling liquor at retail, although an act of parliament provided that every person convicted of felony shall forever be disqualified from selling spirits by retail and no license to sell spirits by retail shall not be granted to to any person who shall have been so convicted as aforesaid. It will be observed that this statute in form imposes a disability to carry on a certain business as a penalty for conviction of crime, but fairly construed

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42. Scott v. State, 6 Tex. App. 343.

43. In the matter of an Attorney, 86 N.Y. 563, 659 (1881).

44. Hay v. Justices, 24Q.B. Div. 561 (1890).

and having in mind the obvious purpose of the statute, there can be no doubt that the intent of parliament was to emphasize the requirements of good character (which doubtless existed apart from statute) as a qualification for conducting the business of selling liquor at retail. The decision warrants the conclusion that if a statute should provide that no one should be admitted to the practice of law or of medicine, or should be elected a judge, who had been convicted of felony, a pardon would qualify him. The truth is while pardon dispenses with punishment, it cannot change the character, and where character is a qualification for an office, a pardoned offence as much as an unpardoned offence is evidence of a lack of the necessary qualification.

A doctrine which denies to the law the possibility of distinguishing between a pardoned convict and one who has never committed a crime are illustrated by an Ohio decision.[45] This was a quo warranto proceeding to prevent certain persons from exercising the office of the police commissioners from which they had been removed by the governor, and the question was raised as to the sufficiency of the causes for their removal set forth by the governor. One of the causes was that the commissioner had appointed to a position on the police force one Mike Mullen who, the governor asserted, "was a man of notorious bad character;" and Mike Mullen had not only been appointed but subsequently promoted. It appeared that Mullen had been convicted of a crime, but had subsequently been pardoned. It was urged in defence of the commissioners that Mike Mullen's guilt had

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45. State v. Hawkins, 44 Oh. St. 98.

been "blotted out" and the offence obliterated, and therefore that it was proper to appoint and promote him. This view was actually taken by a dissenting judge. "The majority of the court, however, did not allow their common sense to be impaired by judicial dicta, and said,"[46]

> "Whatever the theory of the law may be as to the effect of pardon, it cannot work such moral changes as to warrant the assertion that a pardoned convict is just as reliable as one who has constantly maintained the character of a good citizen." 47

If one who has paid a fine on conviction of crime and is subsequently pardoned, is indeed an innocent man, or is to be regarded by the law, he should have the fine which he has paid returned to him. An early Georgia decision actually reached this result.[48] But the contrary conclusion was reached in New Jersey following an elaborate consideration.[49]

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46. Samual Williston, 28 Harv. Law Rev. 647 (1915).

47. State v. Hawkins, supra.

48. Flournoy v. Attorney-General, 1 Ga. 606 (1846).

49. Cook v. Freeholders of Middlesex, 2 Dutch (N.J.) 326, 331, 333 (1857). "If persons were granted upon the idea of innocence of the party pardoned, there would be manifest justice in returning the fine not only, but also in making full indemnity for the injury sustained by reason of the conviction. And a recent decision is based on the ground that pardon proceeds upon the idea of innocence. The power, it is said, is given to the executive to relieve against the possible contingency of wrongful conviction. I am not aware that the idea of innocence has ever been assumed by any writer upon government, or law, or ethics, as the true foundation of the pardoning power in the state. No doubt a clear case of innocence presents the strongest ground for the immediate remission of all the penalties of conviction. But this is not in practice the ground upon which pardons are or ought to be based, nor is it the ground upon which the pardoning power in a government is created or sustained. Pardon implies guilt. If there will be no guilt, there is no ground for forgiveness. It is an appeal to executive clemency. It is asked as a matter of favour to the guilty. It is granted not of right but of grace. A party is acquitted on the grounds of innocence; he is pardoned through favour. And upon this very ground it is that the pardoning power is never vested in a judge."

A similar question arose in the Supreme Court of the United States.[50] One who had been convicted of a crime was granted a pardon conditional upon his returning certain lands of which he had been charged with defrauding the government. Before returning the lands he made an agreement with the District Attorney that he should be reimbursed for certain expenditures which he had made upon the land. If he was to be treated as an innocent man, he certainly had a moral right to have his outlay returned, and under the law of Louisiana (where the case arose) perhaps a legal right. The Supreme Court, however, indulged in no fictitious belief in his guilt having been blotted out, and refused to enforce in his favour the agreement with the District Attorney.

A probable reason why courts have been willing to continue a mode of expression which suggests that a pardoned convict is the equal in character and conduct of an innocent man is because it has seemed desirable to conceal an injustice which the criminal law inflicts upon an innocent man unjustly accused and convicted. Under the law of England, no new trial was possible in case of felony.[51] The only redress, therefore, for an unjust conviction was a pardon. Of this procedure an acute English critic (afterwards a judge) said:

> "However unsatisfactory such a verdict may be, whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed. All that can be done in such a case is to apply to the Queen through the Secretary of State for the Home Department for a pardon for the person supposed to have been wrongly convicted."

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50. Bradford v. United States, 228 U.S. 446 (1913).

51. Regina v. Murphy, L.R. 2 C. 535 (1869).

This is one of the greatest defects in our whole system of criminal procedure. To pardon a man on the ground of his innocence is in itself, to say the least, an exceedingly clumsy mode of procedure; but not to insist upon this, it cannot be denied that the system places every one concerned, and specially the Home Secretary and the judge who tried the case (who in practice is always consulted), in a position at once painful and radically wrong, because they are called upon to exercise, what really, are the highest judicial functions without any of the conditions essential to the due discharge of such functions. They can not take evidence, they can not hear arguments, they act in the dark, and can not explain the reasons of the decision at which they arrive. The evil is notorious.[52]

This defect in English procedure was corrected by the Act of 1907 creating a court of Criminal Appeal, with the widest powers, including the right to hear further evidence and decide questions of fact.

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52. 1 Stephen, History of the Criminal Law, p. 312.

REVOCATION OF PARDON

In England it is laid down, as a general rule, that wherever it appears by the charter that the King was misinformed, or not fully apprised of the seriousness of the crime committed by the offender, and of the extent to which legal proceedings have been carried against him, the pardon is revoked, upon the presumption that it was gained from the King by imposition.[1]

In Canada, a pardon may be revoked by the Governor in Council (a) if the person to whom it is granted is subsequently convicted of a further offence under an Act of the Parliament of Canada or regulation made thereunder; or (b) upon evidence establishing to the satisfaction of the Governor in Council that (i) the person to whom it was granted is no longer of good conduct, or (ii) that such person knowingly made a false or deceptive statement in relation to his application for the pardon, or knowingly concealed some material particularly in relation to such application.[2]

In 1973, Desjardins, former director of the Provincial Building Trade Council of the Quebec Federation of Labour, was granted a pardon. In 1975, the National Parole Board was trying to revoke the pardon because the Quebec Government wanted him to be kicked out of the province's labour movement, but Verna Larmour, former press officer for the Justice Minister said, "that such a procedure was impossible because in the opinion of the

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1. The Statute 27 Edw. 3. c. 2; 3 hist. 238, 4 Bla. Com. 400.

2. Revised Statutes of Canada, 1970 (1st supp. c. 12). Criminal Record Act. Pages 186-187.

Justice Department and Solicitor General's Department pardons can not be revoked." But the next day Pierre Dupuis, acting chief of the Board's Clemency and Criminal Records Division, said pardons can be revoked and sixteen have been since the Criminal Records Act came into effect June 11, 1970.[3]

In most of the states in the United States a full pardon, once delivered, cannot be revoked. A conditional pardon may be revoked for violation of the conditions imposed. An unconditional form of clemency procured by fraud is revocable. The President has been held competent to revoke a pardon at any time before delivery to the warden,[4] but doubts have been expressed whether he could, after the pardon had been accepted, withdraw his clemency even though it could be shown that fraud had been practised in procuring the pardon.[5] Permitting a full pardon of clemency, fraudulently obtained, to remain effective runs counter to the suggestion that the President will be allowed full discretion in the violation of the law against fraud. It has often been stated by courts that a pardon procured by fraud is revocable.[6] This has been held even if it is not shown that the prisoner was connected with the perpetration of the fraud.[7]

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3. The Globe and Mail. 16 May, 1975 (Parole Board Working on a Request to Revoke Pardon for Desjardins).

4. In re Depuy, Fed. Case No. 3814, 7 Fed. Case. 506 (1869).

5. Ibid.

6. Commonwealth v. Halloway, 44 Pa. 210; Commonwealth v. Kelly, 9 Phila. 586; Rosson v. State, 23 Tex. App. 287.

7. Commonwealth v. Halloway, 44 Pa. 210.

Other courts have ruled that a pardon obtained by fraud can only be declared void "in a proceeding authorised by law, before a court having jurisdiction for the purpose, with ample opportunity to the person holding the pardon to defend.[8] The mere allegation that a pardon was fraudulently obtained is not sufficient to warrant its revocation. Such facts should only be determined in a judicial hearing.[9] In a case where a pardon was revoked because apparently (prima facie) it was obtained by fraud, affidavits were presented which rebutted this presumption. Under these conditions it was held that the pardon was again in full effect since the presumption of fraud had been removed.[10] It seems to be held generally that a pardon which is not void in its origin nor by reason of fraud and which has been delivered and accepted cannot be revoked.[11]

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

> "It has been suggested to me that if the man had been guilty of fraud in inducing me to pardon him, I might have set aside the pardon as void and directed the arrest of the former convict. I do not think in such a case a pardon could be set aside. I do not think either I or a court would have had the authority to issue a warrant for the arrest of the man and restore him to prison. It seems

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8. Knapp v. Thomas, 39 Ohio St. 377.

9. Ex Parte Rice, 162, S.W. 891.

10. Ex Parte Rosson, 24 Tex. App. 226.

11. Ex Parte Crump, 135 p. 428; State v. Nichols, 26 Ark. 74.

to me it would be like a case of a man acquitted by a jury which was bribed by him. He might be thereafter convicted of bribery, but he could not be convicted of a crime of which the verdict of the jury acquitted him." 12

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

SUMMARY AND CONCLUSION

Influenced by English and by American colonial and state ideas the Philadelphia Convention of 1787 vested in the President the power "to grant reprieves and pardons for offences against the United States, except in cases of impeachment" and tacitly adopted the English clemency law in so far as it could be applied to the United States. As the convention used non-definitive language in conferring pardoning power on the President, the courts of the United States, in determining the scope of the President's pardoning power, have from the beginning of the government to the present time, referred to English law and practice as the Constitution was adopted to discover the intent of the framers of the constitution. Hence the English ideas of clemency influenced not only the framers but also the judicial expounders of the pardon clause of the constitution.[1]

Agreeing on the final form of the pardon clause the framers of the constitution referred to only two forms of clemency, full pardon and reprieve, but the President has granted clemency to individuals in many forms, and to classes of individuals in two forms. The Supreme Court of the United States was held that the pardon clause empowers the President to grant to individuals not only full pardons and reprieves but also conditional pardons, commutations, and remissions of fines and forfeitures.[2]

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1. United States v. Wilson, 32 U.S. 150 (1833) and Ex Parte Grossman. 267 U.S. 87 (1925).

2. Although the Supreme Court of the United States has not directly considered the granting of remissions when accompanied by a pardon, uninterrupted exertion of the pardoning power in this form since 1789 points to the conclusion that the court would approve remissions unaccompanied by a pardon of the offence.

Aside from the constitutional limitation upon the pardoning power in the matter of impeachment and the possible exclusion of civil contempts of court and of contempts of legislature, the President's power "to grant reprieves and pardons" extends from the most trivial to the gravest offences against the United States. The exercise of the power lies in the absolute discretion of the President; neither the Congress nor Courts may fetter the pardoning power in any way. After the crime has been committed, the President may grant clemency at any time "either before legal proceedings are taken or during their pendency, or after conviction and judgment."[3] Moreover his authority persists so long as any legal consequences of the commission and the conviction of the crime remain.

Despite the full discretion of the President to grant acts of clemency, he cannot under existing law make a full pardon effective without the consent of the prisoner. The latter must be willing to receive and accept a full pardon before it can be put into effect. Besides, the prisoner must plead the full pardon to protect the rights depending upon it when the rights are questioned. The requirement of pleading an act of clemency is probably desirable, but the requirements of actual delivery and acceptance have not in practice been considered essential to the acts of unconditional clemency. The practice of not requiring actual delivery and acceptance of the acts of unconditional clemency suggests the propriety of reconsidering the decisions in United States v. Wilson and in Burdick v. United States in order to determine the requirements

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3. Ex Parte Garland, 71 U.S. 333-380 (1866).

which the convict must satisfy before he can receive the benefits of unconditional clemency.

For the handling of the applications for clemency, the pardon authorities follow a process which has largely evolved from administrative experience. This process permitting individual consideration of every application for clemency, centers in the department of Justice and is under immediate direction of the pardon attorney who represents the Attorney General. The case of an applicant for clemency passes through five fairly distinct stages. the prisoner first applies to the President for a form of clemency and sends his application to the Attorney General. Secondly, the Attorney General submits the application to the pardon attorney who promptly institutes an investigation of the case. If the investigation reveals that clemency must not be recommended for the applicant, the pardon attorney closes the case at this stage unless either the President or the Attorney General specially requests a report on it. Thirdly, if one of the officials consulted about the case recommends clemency, the staff in the office of the pardon attorney prepare the case for consideration and action by the Attorney General and by the President. Fourthly, the Attorney General and the President consider the case and the President decides either to grant or to refuse clemency. Fifthly, the staff in the office of the pardon attorney notifies the interested parties of the decision of the President.

On the applications upon which the President acted favourably prior to 1888, he granted clemency most frequently in the form of a full pardon. After 1900, however, the President resorted more and more to other forms which disturbed less drastically than full pardons the original sentences of the courts. From 1860 to 1936, the application for

clemency tended to become more numerous, though the increase has not been continuous. As the number of applications for clemency became larger, the acts of clemency became more numerous, but despite this growth in acts of clemency there was a proportional decrease in the acts of clemency in comparison with the enormous, continuous growth in average daily prison population. This proportional decrease in the number of acts of clemency is attributable to several factors, among which perhaps the most important were: the nature of the pardoning power, the influence of "good time" laws, of parole and probation, and the restraint of the pardoning authorities. These same factors occasioned an increase at one time and a decrease at other times in acts of clemency, as did the wars in which the country engaged and the shifting personnel which participated in the administration of the pardoning power.

In the recommendations submitted by the Attorney General for consideration by the President, a great variety of reasons for granting clemency exists. The approval of clemency by the virtue of government officials provided the most appealing reason for recommending clemency between 1860 and 1932. Among the great variety of reasons advanced were some unsound ones and some debatable ones. The award of clemency "solely on the ground of ill health of the convict" to the extent practiced during the portions of the period from 1885 to 1932 could hardly be justified. Offenders were imprisoned for the purpose of protecting other members of society. Releasing offenders in ill health might well endanger the safety and possibly the health of other members of the society. If conditions at the penitentiaries aggravated illness among prisoners and endangered the health of penitentiary officials, the government should have taken steps to eliminate these conditions rather than to release offenders whose health was impaired by such conditions. The other reasons

considered as most open to question are described by the terms "poverty of prisoner and family" and "clemency to an accessory because of clemency to the principle." Poverty probably had caused some prisoners to violate the law and thus to become prisoners. Releasing such prisoners for the reason that they were poor probably did not aid either the prisoners or their families unless the prisoners were provided remunerative work after release and were convinced by their punishment of the impropriety of criminal acts. Other members of the society hardly benefitted if they had to continue contributions to the support of the poverty stricken families or to funds required for re-taking such released prisoners as second offenders. The applications for clemency from poverty stricken offenders should be very carefully considered, for it would seem that the reason, described by the terms "poverty of prisoners and family," would be a sound one only when there is assurance that the prisoner shall not violate the law again and when the government is unable to provide for the families of the poverty stricken prisoners in any other way than by releasing the heads of such families. If clemency to the principal in a crime was warranted, there might be sound reason for granting clemency to an accessory. The extenuating circumstances in the case might be applicable alike to the accessory and the principal. Even so, the application of the accessory to a crime should be considered with regard to the character of the applicant. An accessory should not be favoured just because the principal received clemency. The approval of clemency for reasons described by terms such as "solicitation of friends," "respectability of family and relatives" and "intoxication at the occasion of the crime" should be regarded as non-convincing, since such reasons and motives are always questionable.

The other reason to pardon was as a method of righting legal wrongs, of freeing the innocent. Following this, a commutation of sentence or pardon became an acceptable way to correct unduly severe sentences, or to recognise mitigating circumstances which were not taken into consideration at the time of trial. The divergent views concerning the infliction of the death penalty have often been expressed in the use of the power of the executive to reduce the sentence to life imprisonment.

Yet another reason given for pardon has been case of the escaped prisoners who have rehabilitated themselves in the period after the escape; they may be pardoned in recognition of their exemplary lives during the period of freedom. The pardoning power is used to prevent the deportation of an alien, and sometimes in the form of amnesties or general pardons to achieve political purposes.[4] The pardoning power is also used to remove some of the direct consequences of conviction; for example, to restore a driver's licence lost upon conviction for drunken driving or to remit fines or forfeitures. Either alone, or in connection with special statutory proceedings, the pardoning power is now frequently used to remove the civil disabilities which are a collateral consequence of a conviction.

Pardon authorities are given broad and almost unrestricted discretion over [illegible]. This fact is one of the elements of strength in the proper administration of criminal justice. But it has sometimes led to abuse, especially in those states where one had the final determination

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4. For example the president of the United States has granted amnesty to all those who fled the United States to avoid services in the Vietnam war.

over clemency. Unscrupulous governors in the United States may build up their political careers by using the pardoning power to please people with political influence. Others, more honest, are influenced by the effect of their decisions on the electorate, rather than by the merits of the particular case.

While the discretion of pardon authorities is so broad that there exists no definite standard by which to determine whether the discretion is being abused, yet some situations have arisen which clearly show an abuse of discretion. The most notorious of these cases is that of the former Governor of Oklahoma, who was impeached because he frequently exercised his power to pardon, not on the merits of the case but rather as an accommodation for friends or for personal financial rewards.

The other case of the abuse of the pardon power is the validity of the Nixon pardon. Again the vagueness of the terms of pardon render it highly suspect in terms of historical understanding of the character of pardons. The limiting effect of the pardon upon the jurisdiction and power 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.

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 the members of the House of Representatives have standing, on the grounds that the abuse of the pardoning power might be grounds for impeachment, a determination the

House is constitutionally empowered to make.[5] 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.[6] 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 to 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

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5. U.S. Court art. 1, s. 2(5). In 1923, the Governor of Oklahoma was impeached for abuse of pardoning power. See 3 Att'y Gen. Surrey 150-153 (1939). Federal Courts have assumed that the President is similarly accountable in granting standing to members of Congress. Schlesinger v. Holzman, 414 U.S. 1321 (1973). See also Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).

6. Nader v. Bork appears to be the only case where the impeachment power was the sole basis on which the standing was granted. The war power and responsibility for appropriations figures in Holtzman v. Schlesinger and in Mitchell v. Laird. 488 F. 2d. 611 (D.C. Cir. 1973).

imperative. If the pardon seriously impeded significant aspects of investigations conducted by the Special Prosecutor's office, particularly in areas unrelated to Watergate, which were not scrutinized in the cover-up conspiracy trial, the Special Prosecutor has the 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, S. 2.

In spite of occasional abuse, however, it seems obvious that the power to pardon is a necessary part of American criminal jurisprudence in capital as well as non-capital cases. As long as a conviction can not be reversed after a period of time for newly discovered evidence proving the defendant's innocence, we need the power to pardon for innocence. There will always be cases of technical guilt but, because of extenuating circumstances, comparatively little moral fault. The pardon power, in other words, is necessary in cases where the strict legal rules of guilt and innocence have produced harsh or unjust results.

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

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