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THE PRESIDENT'S POWER TO PARDON: A CONSTITUTIONAL HISTORY

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INTRODUCTION

The Constitution of the United States specifically invests the President with the power "to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."¹ This power is not among the most awesome powers of the American Chief Executive; it is, at best, his most benevolent power. This capacity for benevolence, however, has not inspired this study. The Article was prompted, rather, by the complacent acceptance of an apparently benign executive gift that cannot be checked by the other branches of government. This lack of restriction on the exercise of the power suggests that it is time to consider alteration of the President's pardoning power.

This Article, primarily a constitutional and legal history, explores one facet of the United States' Executive's power to pardon. The political history surrounding the power is not discussed except insofar as it affected the form of the power and insofar as it aids in an understanding of the prerogative. Section I commences with the history of the development of the power in medieval England, then examines the form of the power in the American colonies and embryo states. In Section II the operation of the pardon clause will be analyzed in a discussion of the progressive definition supplied by the Supreme Court, the form in which the power "to grant reprieves and pardons for offenses against the United States" may be exercised, the effect of the presidential exercise on the other branches, the exclusivity of the power, and the offenses that come within its scope. In conclusion, the adoption of an amendment to rid the pardoning power of its apprehensible novelty will be suggested.

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1. U.S. CONST. art. II, § 2.

I. THE POWER TO PARDON: THE BRITISH HERITAGE

Early English Origins

Although one may encounter numerous references to the exercise of the prerogative of mercy in Mosaic Law,² Greek Law,³ and Roman Law,⁴ this study commences with the statutory history of the power in early England. The pardoning power of England was applied in the American colonies, and subsequently was incorporated into the United States Constitution. The power of Article II, section 2, therefore, finds its root in early England.

The prerogative of mercy made its debut on the statutory rolls of the Anglo-Saxon monarchs during the reign of King Ine of Wessex (668-725 A.D.). Section 6 of the Laws provided: "If any one fight in the king's house, let him be liable in all his property, and be it in the king's doom whether he shall or shall not have life."⁵ This theme, which later was to appear in the laws of Alfred (871-901),⁶ Ethelred (978-1016),⁷ and Cnut (1017-1035),⁸ probably was fashioned more to facilitate the king's safety than to spare him the sight of insolent behavior. Alfred expanded the proscription to include the drawing of a weapon; the subordinate rationale inspired the extension of the rule by Ethelred to include places of worship.⁹ The laws of Ine also placed the holding of a shire by any "ealdorman" who "takes a thief, or to whom one taken is given, and [who] lets him go, or conceals the theft" at the mercy of the sovereign.¹⁰ Others who engaged in the forbidden activity were merely to pay for the thief according to his "wer," the value placed on his life. This principle later appeared in section 4 of Ethelstan's Laws (924-940):

And he who oft before has been convicted openly of theft, and shall go to the ordeal, and is there found guilty; that he be slain,

2. See, e.g., 2 Samuel 19:23; Luke 23:16-17.

3. See e.g., PLUTARCH, DEMOSTHENES 27 (M. Holden ed. 1893); PLUTARCH, LIVES OF SOLON AND NICIAS ch. 19 (R. Patterson ed. 1930).

4. See, e.g., T. MOMMSEN, ABRISSE DES ROMISCHEN STRAATRECHTS 351 (1893); John 19:10.

5. 1 B. THORPE, ANCIENT LAWS AND INSTITUTES OF ENGLAND 107 (London 1840).

6. *Id.* at 67.

7. *Id.* at 331.

8. A. ROBERTSON, THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I 205 (1925). See also B. THORPE, *supra* note 5, at 409.

9. This proscription later was incorporated into the laws of King Cnut: "Then is it very right, that God's church-'grith' within walls, and a Christian king's hand-'grith' stand equally inviolate; and let him who infringes either forfeit land and life, unless the king will be merciful to him." B. THORPE, *supra* note 5, at 359.

10. *Id.* at 125.

unless the kindred or the lord be willing to release him by his 'wer' and by the full 'ceap-gild,' and also have him in 'borh' that he thenceforth desist from every kind of evil. If after that he again steal, then let his kinsmen give him up to the reeve to whom it may appertain, in such custody as they before took him out of from the ordeal, and let him be slain in retribution of the theft. But if any one defend him, and will take him, although he was convicted at the ordeal, so that he might not be slain; then he should be liable in his life, unless he should flee to the king, and he should give him his life¹¹

Ethelstan's Laws also placed at the mercy of the king those who avenged a thief, those who committed assaults, and those who attacked travelers on the highway.¹²

The power to pardon for other offenses later was recognized in the laws of King Edmund (940-946)¹³ and King Ethelred (978-1016).¹⁴ King Edgar's laws (959-975) placed notorious thieves and those found plotting against the sovereign within the jurisdiction of his prerogative of clemency.¹⁵ King Cnut issued a proclamation guaranteeing that "as great mercy as possible shall be shown to him" who "zealously desires to turn from lawlessness to observance of the law."¹⁶ Following the Norman conquest of England, the power to pardon was incorporated into the Codes of William the Conqueror (1066-1087).¹⁷ William's son Henry I (1100-1135) enlarged the scope

11. *Id.* at 229, 231 (footnote omitted).

12. *Id.* at 231.

13. "Also we have ordained, respecting 'mund-brice' and 'ham-socns;' that he who shall do it after this forfeit all that he owns, and be it in the king's doom whether he shall have his life." *Id.* at 251.

14. "And the moneyers who work within a wood, or elsewhere; that they be liable in their lives, unless the king will be merciful to them." *Id.* at 299.

15. *Id.* at 269. See also *id.* at 267.

16. A. ROBERTSON, *supra* note 8, at 207.

17. William, not known for his dedication to the novel, sought to confirm the traditional. Section 63 of his Codes stated: "This we also command that all our Subjects have and enjoy the Laws of King Edward in all Things; with the Addition of those which we have appointed for the Benefit of the English." R. KELHAM, *THE LAWS OF WILLIAM THE CONQUEROR* 86-88 (London 1799). One must assume that if the subjects were allowed the same rights and privileges enjoyed previously, then the sovereign must have had benefit of the powers held by former sovereigns. In addition, section 41 stated:

Let those, whose office it is to pronounce Judgment, take particular Care they judge, in like Manner as they pray; when they say—"Forgive us our trespasses." And we forbid any one to sell a Christian out of the Land, but more especially into a Paganish Country; let us take care that the Soul which God redeemed with His own Life, be not lost. Whosoever promotes Injustice, or pronounces false Judgment, through Anger, Hatred, or Avarice, shall forfeit to the King 40

of the king's pardon to facilitate the expeditious administration of justice. Under the *Leges Henrici Primi*, pleas concerning serious offenses that merited heavy punishment were assigned to the justice and mercy of the sovereign alone "so that more abundant pardon [could] be had for those seeking it and more abundant retribution for those transgressing."¹⁸ The pardon was thus extended to

breach of his peace which he gives to anyone by his own hand; contempt of his writs and anything which slanders injuriously his own person or his command; causing the death of his servants in a town or fortress or anywhere else; breach of fealty and treason; contempt of him; construction of fortifications without permission; the incurring of outlawry (anyone who suffers this shall fall into the king's hand, and if he has any bocland it shall pass to the King's possession); manifest theft punishable by death.¹⁹

It is in the laws of Henry I that the first mention of compensation in return for a pardon is discovered.²⁰

The annals of the royal prerogative of mercy are replete with suggestions of the power's propensity for abuse. The benefits of the power were rarely ever available to those condemned to death in error. In other respects, however, it was disproportionately overemployed.²¹ The power to pardon was especially useful in the early periods when peace was never of long duration. Edward I was the first English monarch to employ the pardon as an instrument of conscription. L. O. Pike has noted:

As soon as war was declared, it was the custom to issue a proclamation, in which a general pardon of all homicides and felonies was granted to everyone who would serve for a year at his own cost. The terms were readily accepted, and the king increased his force by a number of men who would perhaps be inferior to none in courage, though they might not improve the discipline of the army.²²

s.; and if he cannot prove he did not know how to give a more right Judgment, let him also lose his Franchise, unless he can redeem it at the King's good Pleasure" *Id.* at 63, 65.

18. L. DOWNER, *LEGES HENRICI PRIMI* §§ 11, 16a, at 115 (1971).

19. *Id.* §§ 13, 1, at 117. Other offenses that presumably placed an individual at the king's mercy are listed in sections 13, 2-13, 12, at 117-118, *id.*

20. *Id.* §§ 79, 2, at 247.

21. See N. HURNARD, *THE KING'S PARDON FOR HOMICIDE BEFORE A.D. 1307* vii (1969): "Criminals were pardoned before trial from motives which were unrelated to the circumstances of their crimes, with no suggestion of extenuation, and in complete disregard to maintain the deterrent force of prospective punishment."

22. 1 L.O. PIKE, *A HISTORY OF CRIME IN ENGLAND* 294 (1873). Other than pardons for

Many of the defects in the practice of pardoning rested in the criminal justice system of which it was a part. Prior to the sixteenth century, the common law treated all homicides as felonies.²³ In a society with no other means of flexibility, the pardon served as the sole instrument of justice for those who should not be punished. In 1249, for instance, four year old Katherine Passcavant was imprisoned in the abbot of St. Alban's gaol because, in opening a door, she accidentally pushed a younger child into a vessel of hot water, killing the child.²⁴ Because of the inexorable system, subjects like Katherine could not be acquitted by the courts; they required the king's grace. Therefore subjects filed petitions of pardon immediately after accidents or sudden death from natural causes. Of course, only those who could pay for the pardon could secure one.²⁵ This worked harshly on those unable to afford a pardon. Although "innocent," they were forced to flee, and consequently were labeled outlaws.²⁶

The power of pardoning was employed on such various pretexts that it was felt by members of Parliament to be a national reproach. They responded to the excessive use of the power with a series of petitions requesting the king to exercise his gift more prudently. The first formal complaint against the pardoning power was registered in 1309, during the reign of Edward II.

military purposes, pardons were granted for equally irrelevant reasons. *See, e.g.*, 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 448, 459, 476 (4th ed. 1936). In 1376, Edward III granted a "general and special pardon for all crimes, treason itself not excepted, without any fine, or paying fees for the seal; and set all debts to the crown, and prisoners for criminal matters at liberty" to celebrate his fiftieth year of rule. 50 Edw. 3 c. 3 (1376). Of course, in commemoration of special occasions, the monarch customarily proclaimed a general pardon as a means of extending the regal occasion to the ranks of the lower classes.

23. 24 Henry 8, c. 5 (1532) settled the ambiguity of the need for a pardon for killing an evildoer in self-defense. Not until the eighteenth century, however, did justices begin to allow juries to return verdicts of "not-guilty" in cases in which technical guilt was established, yet mitigating circumstances warranted a dismissal of guilt. In 1828 Parliament enacted a statute providing that "no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defense, or in any other manner without felony." 3 J. STEPHEN, HISTORY OF CRIMINAL LAW IN ENGLAND 77 (1883) (construing 9 Geo. 4, c. 31, § 10 (1828)).

24. *See* N. HURNARD, *supra* note 21, at viii.

25. *See* J. BELLAMY, CRIME AND PUBLIC ORDER IN ENGLAND IN THE LATER MIDDLE AGES 191-94 (1973).

26. N. HURNARD, *supra* note 21, at 41. Especially in the case of a fugitive from justice, the king preferred payment in advance, though on occasion he accepted an offer of deferred payment. For such transactions, terms and dates have been recorded carefully. *See, e.g.*, CHRONICLES OF LONDON 28 (C. Kingsford ed. 1905); THE CHRONICLES OF NEWGATE CALENDOR 22 (C. Pelham ed. 1887). Pardons often were purchased for a price and later the king would ask for additional payments beyond the negotiated price. CHRONICLES OF LONDON, *supra* at 28.

Though graciously endowed with physical agility and strength, Edward II lacked the mental coordination of his father.²⁷ He relied heavily upon favorites, but unfortunately he was a poor judge of character. The first of his favorites was Peter Gaveston, a foster brother, banished during the reign of Edward I. The barons of the kingdom perceived Gaveston as "a Gascon upstart who sharpened his wit on their foibles and flaunted his power over the king."²⁸ Their hatred for Gaveston, in conjunction with their distrust of Edward, the proliferation of government, the problems of foreign affairs, and the aftermath of the conflict during the reign of Edward I,²⁹ caused the barons to threaten to impede the coronation of Edward in 1308 unless he incorporated into the coronation oath a promise to "hold and keep the laws . . . which the community of your realm shall have chosen."³¹

In 1309, Parliament made a grant to the king that was conditioned upon his meeting eleven grievances embodied in the Stamford Articles.³² One of the Articles complained of the use of petitions and royal writs to interfere with criminal and civil proceedings.³³

27. T.F. TOUT, *THE PLACE OF THE REIGN OF EDWARD II IN ENGLISH HISTORY* 9 (1914).

28. B. WILKINSON, *THE LATTER MIDDLE AGES IN ENGLAND* (1216-1485) 118 (1969).

29. *See id.* at 102-16.

30. B. WILKINSON, *THE CORONATION IN HISTORY* 13 (1953). The coronation oath was essentially the only limitation on the early kings.

31. G.B. ADAMS, *CONSTITUTIONAL HISTORY OF ENGLAND* 198 (1921).

32. The Stamford Articles are significant because they represent the first "comprehensive commons petition," a petition of several requests. *See* 1 *Rotuli Parliamentorum* 443-45. *See generally* G.B. ADAMS, *supra* note 31.

33. Article 9 complained of liberal grants of charters of pardon for felonies:

Que par la ou larons sont enditez de larcines, roberies, homicides, et autres felonies faites, trop legierement purchacent la Chartre le Roi de sa pees, par quoi ceux qi les ont enditez ne osent demorer en lour pais pur doute ce ceux larons, et plusurs se rentreent de enditementz faire, p^r cele encheson: dont le poeple prie remedie.

Le Roy voet, qe desoremes ne soit graunte pardoun de felonie, fors q^e en cas ou auncienement soliet estre grantez, c'est a saver, se hom tue autre par mesaventure, ou soy defendant, ou en deverie, et ce soit trove par Record de Justices.

([T]hat in cases where robbers are accused of robberies, larcenies, homicides, and other crimes which have been committed, they too easily obtain the King's Charter of reconciliation, with the result that those who accused them do not dare remain in their country for fear of these robbers, and many refrain from bringing accusations for this reason: wherefore the people petition for a remedy.

The King wills, that henceforth no pardon be granted for crimes, except in cases where it formerly was accustomed to be granted, to wit, if one kills another by accident, or in self-defense, or in a rage, and it be established by Judicial Inquiry.)

(All translations are by Don A. Monson, Ph.D., University of Chicago. Assistant Professor of Modern Languages, College of William and Mary.)

Edward agreed to remedy the abuses; in 1310 the barons pressed their advantage and compelled the king to appoint twenty-one of their number as "Lord Ordinances" to supervise the implementation of the royal promises.³⁴ Ordinances concerning the realm were issued the following year.³⁵ The barons insisted upon the acceptance of the Ordinances and warned that

unless the king conceded their demand, they would no longer hold him as their king, nor keep the fealty they had sworn him, especially since he himself would not keep the oath which he had sworn at his coronation, for both law and natural reason warn that faith will not be kept with him who does not himself keep faith.³⁶

The Ordinances dealt with such things as the exile of Gaveston, the monarch's power to wage war, the appointment and dismissal of counsellors, and the power to pardon:

Forasmuch as the People do feel themselves much aggrieved in this, that Persons are emboldened to kill and rob others, because that the King by evil advice giveth so lightly his Peace against the form of Law; We do ordain, that no Felon or Fugitive be from henceforth protected or defended from any manner of Felony, by the King's Charter of his Peace granted to him, unless in a case where the King can give grace according to his Oath, and that by Process of Law and the Custom of the Realm, and if any Charter be from henceforth granted and made in any other manner to any one, it shall avail nothing, and be holden for none; And that no open evil doer against the Crown and the Peace of the Land, be by any one aided or maintained.³⁷

34. The objective of the Ordinances and Ordainers has been somewhat in dispute. Apparently, however, the Ordainers had no quarrel with the household system of administration. Their grievance was that the system was not being operated effectively. Wilkinson, concurring in the opinion of William Stubbs, maintains that the aims of the lords were merely to restrict royal power by insisting on traditional counsel and consent in the appointment of officers of the king and in other ways insisting on the subjugation of the king's government to the dictates of custom and law. Although election privileges may have given the magnates influence in the selection of personnel for the important offices of government, it did not give them control over the officer's daily activities, which depended ultimately on the commands of the king or on authority delegated by the Crown. 2 B. WILKINSON, *CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND 1216-1399* 116 (1952). For a discussion of the issues in the debate see *id.* at 112-21.

35. 1 *ROTULI PARLIAMENTORUM* 281 (Ordinances of 1311).

36. 2 *CHRONICLES OF EDWARD I AND EDWARD II* 163, reprinted in B. WILKINSON, *supra* note 34, at 122.

37. Ordinances of 1311, 5 *Edw.* 2, c. 28.

Edward and Gaveston defied the Ordinances from the beginning. Gaveston, who violated his mandated exile, was captured on May 19, 1312, and despite an agreement to the contrary, was executed by the barons. This was the wedge Edward needed to fragment the barons and secure public support. Tension between the magnates and royalists continued to escalate and climaxed in the bloody defeat of the baron party in 1322. Parliament was summoned to York on May 2, 1322. The product of the Parliament, the so-called Statute of York, denounced the restraints placed upon the sovereign power by the Ordinances, noting that they had led to "Troubles and Wars . . . whereby the Land hath been in Peril." It therefore was enacted by "the King, . . . Prelates, Earls, and Barons, and the whole Commonalty of the Realm" that the Ordinances cease to be part of the law of the land, and that the order in effect prior to the Ordinances be reconstituted.³⁸

The next attempt by Parliament to curtail the liberal clemency policy of the Crown came in 1328 in the Statute of Northampton:

38. The Statute continued:

And that for ever hereafter, all manner of Ordinances or Provisions, made by the Subjects of our Lord the King or of his Heirs, by any Power or Authority whatsoever, concerning the Royal Power or our Lord the King or of his Heirs, or against the Estate of our said Lord the King or of his Heirs, or against the Estate of the Crown, shall be void and of no Avail or Force whatsoever; But the Matters which are to be established for the Estate of our Lord the King and of his Heirs, and for the Estate of the Realm and of the People, shall be treated, accorded, and established in Parliaments, by our Lord the King, and by the Assent of the Prelates, Earls, and Barons, and the Commonalty of the Realm; according as it hath been heretofore accustomed.

Statute of York, 15 Edw. 2 (1322). Stubbs has implied that the Statute of York meant that the full cooperation of all the estates of Parliament was "necessary for the establishment of any measure touching the king and the realm." 2 W. STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND: ITS ORIGIN AND DEVELOPMENT* 628-29 (4th ed. 1898). J.C. Davies, concurring in the position advanced by Stubbs, concluded that the Statute "refer[red] to matters which ha[d] a direct bearing upon the whole kingdom, legislation, administration, taxation." J. DAVIES, *THE BARONIAL OPPOSITION TO EDWARD II* 515 (1918). Those in accord with Stubbs and Davies concentrate on the last sentence of the Statute. Wilkinson, however, suggested that the "annulment of the Ordinances was accomplished in the first paragraphs. Nothing else was necessary if this annulment was all that Edward required. Nevertheless, there was another paragraph, dealing with a different though related matter." Therefore, according to Wilkinson, the Statute was more than a simple negation of the Ordinances of 1311. B. WILKINSON, *supra* note 34, at 140. Haskins, however, concluded that the statute neither created any new rights nor denied any existing Parliamentary privilege. This position is supported by the state of Parliamentary development at the time; Parliament could assert only that which it had asserted previously. G. HASKINS, *THE STATUTE OF YORK AND INTERESTS OF THE COMMONS* 25 (1935).

Whereas Offenders have been greatly encouraged, because the Charters of Pardon have been so easily granted in Times past, of Manslaughters, Robberies, Felonies and other Trespasses against the Peace; (2) it is ordained and Enacted, That such Charter shall not be granted, but only where the King may do it by his Oath, that is to say, where a Man slayeth another in his own Defense, or by Misfortune³⁹

The number of times the Statute had to be reissued leads one to believe that it had little, if any, effect on the king's use of the pardoning power. The first reenactment came only two years later,⁴⁰ and an act similar to the Act of 1330 was passed in 1336.⁴¹ Failures toughened the language of Parliament, and in 1340, the lawmakers warned that henceforth no pardon should be granted by the king in violation of his oath, a fortiori, in violation of the statutes of Parliament. If such a pardon were granted, it would "be holden for none."⁴² This statute met with similar failure. Petitions filed in 1347⁴³ and 1351⁴⁴ also proved ineffective in dissuading the king from

39. 2 Edw. 3, c. 2 (1328).

40. 4 Edw. 3, c. 13 (1330): "Because divers Charters of Pardon have been granted of Felonies, Robberies, and Manslaughters, against the Form of the Statute lately made at Northampton, containing that no Man should have such Charters out of the Parliament, whereby such Misdoers have been the more bold to offend; (2) it is enacted, That from henceforth the same Statute shall be kept and maintained in all Points."

41. 10 Edw. 3, s. 1, c. 2 (1336).

42. 14 Edw. 3, s. 1, c. 15 (1340).

43. 2 ROTULI PARLIAMENTORUM 172.

AN'RE Seignr le Roi et son Conseil prie sa Commune, Qu come plusours murdres, emblers des gentz, roberies, homicidies, et ravissementz des femmes, et autres felonies et mesfaitz, sont faitz et meintenuz en Roialme saunz nombre, et tantz favoiez p Chartres de pdoun et procurez deliverance, q̄ les mesfesours, ne meintenous de la Lei, n'ount cure, ne la doutent, a grante Destruction du Poeple. Pleise a nre Seigneur le Roi tiel remeide p Estatut ordener, q̄ tiels mesfesours et meintenours p null des causes susdites peussent estre comfotez n'embaudez. Et q̄ Chartres des pdouns ne soient as tiels grantez faunz assent du Parlement.

(To Our Lord the King and his Council the Common petitions, that since several murders, kidnappings, robberies, homicides, and rapings of women, and other crimes and misdeeds, are done and maintained in the Realm without number, and so much favored by Charters of Pardon and procured deliverance, that the evil doers, and [those] who do not uphold the Law, have no concern and do not fear it [the Law], to the great Distress of the People. May it please our Lord the King to ordain by Statute such a remedy, that such evil doers and [non-]upholders may not by any of the abovesaid causes be comforted or emboldened. And may Charters of Pardon not be granted to such without the assent of Parliament.)

Id.

44. *Id.* at 229.

using the power so abusively. Parliament recognized that this evil was not merely an abuse of the royal attribute of mercy or a defect of the ordinary process of justice, but a regularly systematized perversion of prerogative by which the great people of the realm, whether as maintainers or otherwise, attempted to secure for their retainers and for those who could purchase their support an exemption from the operation of the law. Responding to this new perspective, Parliament enacted a statute requiring that in every charter of pardon granted as a result of the request of an intermediary, his name and the purpose for the pardon were to be recorded, and if the stated cause subsequently was found to be untrue, the charter was void. Upon discovery of a false suggestion, the justices before whom the feigned pardon was pleaded inquired into all preceding charters granted by the king at the request of the tainted advocate. All future charters procured by the intermediary's services were likewise suspect.⁴⁵

ITEM prie la dite Commune, q̄ come altre foith feust ordeigne p Estatut, Que nules Chartres de pdouns de mort de homme, ne de felonies nortories, ne seroient grantez a nulli, sinoun en cas ou le Roi poist sauver son Serement; nientcontrestean cel Estatut, diverses Chartres ount estre grauntez au diverses cōmunes Felonues et Murdrers; et auxi bien en general come en cas especial; et a les uns deux Chartres outriez; Par quoi les Manfaisours sount trop esbaudes de meffaire, en espoir de tieux pdouns avoir, q̄ son poeple est en grant affray de vivre: Et pur la multitude des tiels Chartres les gentex de Countees ne osent les Malfesours enditer, a grant esclandre du Roi, et au grant meschief du poeple. Par quoi plesse a n̄re Seign̄r le Roi, q̄ Tiels Chartres ne soient desormes grauntes au communs Malfesours et Mourdours, ne a nulli, sinoun en cas la ou n̄re Seign̄r le Roi purra sauver son Serement et sa Conscience: Mes tiels communes Meffaisours et Mourdours estoient a la Lei, pur la quiete de sa Commune et la Pees maintenir.

(Likewise, the said Commons petitions, that as was formerly ordained by Statute, that no Charters of Pardon be granted to anyone for homicide or for notorious crimes, except in cases where the King can "protect" [(take back)] his Oath; notwithstanding this Statute, diverse Charters have been granted to diverse common Criminals and Murderers; and in general as well as in special cases; and to some two Charters have been given; with the result that the Evil doers are very much emboldened to do mischief in the hopes of having such Charters of Pardon, that his [the King's] people is very hard put to live: And because of the multitude of such Charters the people of the Counties do not dare accuse the Evil doers, to the great scandal of the King and to the great misfortune of the people. Wherefore may it please our Lord the King, that such Charters be not granted henceforth to common Evildoers and Murders, nor to anyone, except in cases where our Lord the King will be able to "protect" [(take back)] [his oath].)

Id.

45. A Statute Against Annnullers of Judgments of the King's Court, 27 Edw. 3, s. 1, c. 2 (1353).

In 1389, Parliament again aimed its attention at the pardon-broker. A petition recorded in that year requested that if any archbishop or duke petitioned for a pardon, he should forfeit £1000; a bishop or an earl should forfeit 1000 marcs; a prior, baron, or banneret should forfeit 500 marcs; and a clerk, knight bachelor, or person of lesser estate should forfeit 200 marcs or be imprisoned for one year. The king answered that he would "saver sa liberte et regalie comes ses progenitours out faitz devaunt ce heures (protect his liberty and royal prerogatives as his forebearers have done up to now)." ⁴⁶ Although there was a modified assent, ⁴⁷ the Act was repealed three years later. ⁴⁸

In the 1389 act, Parliament tried to debase the king into a more prudent posture. The statute sought to remove from the purview of the clemency power pardons granted for "outrageous" crimes. With the unwilling support of Richard II, it was enacted that "no Charter of Pardon from henceforth shall be allowed before any Justice for Murder, or for the Death of a Man slain by Await, Assault, or Malice prepensed, Treason, or Rape . . . , unless the same Murder, Death . . . [etc.] . . . be specified in the same Charter" ⁴⁹ Parliament could not conceive that the king would ever pardon an offense by name that was attended by such aggravations, ⁵⁰ but the check proved ineffective on an executive with power to dispense as well as power to pardon. Parliament soon realized the futility of the Act, and in 1403 enacted a statute affixing a financial penalty on the intermediary. ⁵¹

Parliament was equally unsuccessful when it attempted to control the use of the pardoning power through restrictions on the beneficiary of the executive gift. For example, a statute passed in 1336 ⁵² mandated that the validity of a pardon would expire unless the grantee could find six mainpernors within three months who would enter into bonds for his good behavior. This statute also was rendered defunct by the executive's dispensatory power. ⁵³

46. 3 ROTULI PARLIAMENTORUM 268.

47. 13 Rich. 2, s. 2, c. 1 (1389).

48. 16 Rich. 2, c. 6 (1392).

49. 13 Rich. 2, s. 2, c. 1 (1389).

50. E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 236 (London 1747).

51. 5 Hen. 4, c. 2 (1403). The statute stated *inter alia* that "if he to whom such Charter is granted, after his Deliverance becometh a Felon again, that . . . same Person which did so pursue for his Charter, shall incur the Pain of an C 1. to be levied to the King's Use."

52. 10 Edw. 3, s. 1, c. 3 (1336).

53. The statute was repealed in 1694 (5 & 6 W. & M. c. 13).

There were limitations to the king's power to pardon. These limitations were delineated by the rule that the king could not interfere with the rights guaranteed to third persons.⁵⁴ In 1673, a judicial tribunal recognized the traditional parameters on the royal prerogative.⁵⁵ The court noted that historically the king could not dispense with laws that affected a man's life, liberty, or estate; the king could not grant a man a dispensation to annoy or damage another; he could not grant a man a dispensation to avoid doing that which he was required to do for the public benefit; and he could not grant a dispensation that would deprive a third party of an advantage that would have accrued to that party had the dispensation not been granted.⁵⁶ Thus even a royal pardon could not relieve one convicted of homicide from prosecution by a revengeful kinsman or from the payment of reparations to the kinsman.⁵⁷ The kinsman had the right of appeal.⁵⁸ The pardoning power could not, therefore, deprive a private individual of his remedy at law.⁵⁹

Relatively little control of the king's power to pardon was attempted during the reign of the Tudors. On the contrary, in 1535 Parliament solidified the king's jurisdiction over the power to pardon by removing the clemency power from all others:

Where divers of the most ancient Prerogatives and Authorities of Justice appertaining to the Imperial Crown of this Realm have been served and taken from the same by sundry Gifts of the King's most noble Progenitors, Kings of this Realm, to the great Diminution and Detriment of the Royal Estate of the same and to the Hinderance and great Delay of Justice; . . . be it enacted by authority of this present Parliament that no person or persons of what estates or degrees soever they be of, from the first day of July which shall be in the year of our Lord 1536 shall have any power or authority to pardon or remit any treasons, murders,

54. The origin of this rule probably had its legal basis in Chapter XXIX of the Magna Charta, which guaranteed against the divestment of property without a lawful judgment by a "jury" of one's peers or by the law of the land. If a pardon worked to deprive a third person of his property, the Magna Charta would apply. 9 Hen. 3, c. 29 (1224).

55. *Thomas v. Sorrell*, 89 Eng. Rep. 100 (1673).

56. *Id.* at 100-01.

57. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 482-83 (2d ed. 1898).

58. The word "appeal" in this context is not used in its modern connotation, but signifies an accusation or challenge, that is, an original suit brought by an individual because of his own peculiar damage rather than for an offense against the public.

59. See 1 W. HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* ch. 60, § 17, at 129 (London 1716). See also N. HURNARD, *supra* note 21, at chapter VII.

manslaughters or any kinds of felonies . . . or any outlawries for such offenses afore rehearsed, committed, perpetuated, done, or divulged, or hereafter to be committed . . . by or against any person or persons in any parts of this Realm, Wales, or the Marches of the same; but that the King's Highness, his heirs and successor 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 appertaineth, any grants, usages, prescriptions, act or acts of Parliament, or other things to the contrary thereof notwithstanding.⁶⁰

Thus, prior to the seventeenth century, the English monarch's power to pardon was absolute. His royal prerogative was as sacred to him as the "rights of Englishmen" were to the individual; so sacred, in fact, that not even the king could diminish the royal tradition.⁶¹ Whatever part of the power was diminished was completely restored by the 1535 Act. Not until the late seventeenth century was the attack upon the power so great and the relative power of the Parliament so increased that an enduring limitation on the power was established.

The Impeachment of Thomas Osborne, Earl of Danby

The greatest constitutional crisis involving the executive power to pardon was occasioned by the impeachment of the Earl of Danby,

60. Act for continuing certain liberties in the crown, 27 Hen. 8, c. 24, cl. 1 (1535). Although the centralization of the pardon power appears as part of a statute that attempted to reform the judicial system, one can conclude that this pardoning clause was directed primarily against the Catholic Church because the Church was the greatest loser in the restructuring. This Act culminated several attempts to thwart the Church's power to pardon.

The short Parliament of 1529 was responsive to the anticlerical mood of the country, see 1 W. COBBETT, *PARLIAMENTARY HISTORY OF ENGLAND* 501-07 (London 1806), and enacted a series of laws restricting the economic advantages of the clergy. See 21 Hen. 8, c. 5, c. 6, c. 13 (1529). Dissatisfied by these meager measures, the Parliament of 1532 continued the attack on the financial base of the clergy by initiating a bill to enjoin the payment of Annates to Rome, 1 H.L. JOUR. cxxxiv-cxxxvi, and also presented a petition condemning the "unjust" heresy trial. The Commons further denounced the convocation's power to enact canon law repugnant to the laws of the realm, thereby diminishing the royal prerogatives. As a result, new canons could be enacted only with consent of the king; furthermore, all canon law was to be reviewed by a committee appointed by the king. 25 Hen. 8, c. 19 (1533).

In 1534 the Act of Annates, the "Bill for the First Fruits, with the Yearly Pensions to the King," was passed. 26 Hen. 8, c. 3 (1534). More importantly, the Act of Supremacy was passed, 26 Hen. 8, c. 1 (1534), fortified by the Statute of Treason which made it high treason to deny the king's supremacy "by words or writing, or by craft imagine." 26 Hen. 8, c. 13 (1534). The Church, under attack, could not retain a power to pardon.

61. See 3 EYRE OF KENT, 6 & 7 EDWARD 2 (1313-1314), in 8 YEAR BOOKS OF EDWARD II 172-73 (1913).

Thomas Osborne, Lord High Treasurer of England from 1673 to 1679. The resolution of the constitutional question raised by the Danby impeachment gave form to the pardoning power for almost three centuries.

The resolve to impeach Danby of high treason and other high crimes and misdemeanors was taken by the Commons on December 20, 1678.⁶² The impetus for the impeachment proceedings was the revelation of a letter from Danby to Montague, the English minister at the Court of Versailles, written only five days after passage of an appropriation act to raise supplies for conducting a war with France, empowering Montague to make an offer of neutrality between France and Holland for a price of 600,000 livres.⁶³ Danby's actions were only ministerial. Charles II appeared before the House of Lords March 22, 1679 and testified to Danby's innocence by informing the Lords that the letter to Montague had been written at his direction.

The word of Charles II was tainted. The underlying reason for the impeachment was no doubt the suspected pro-French, pro-papist proclivities of the king and his entourage. But only the prejudicially blind members of Parliament could have believed that Danby was pro-papist, though many rightly suspected Charles, and even more feared that James was so inclined.⁶⁴ Because the King was beyond reach,⁶⁵ Parliament settled for the apologist of the prerogative and the skillful manager of finance. Members of Parliament were not to be persuaded by the argument that Danby was acting merely as a faithful servant. Englishmen had long come to detest Danby for blindly following the commands of a king whose policies were incongruent with the notion of "constitutional balance."⁶⁶

62. For the Articles of Impeachment presented against Danby, see 4 W. COBBETT, *supra* note 60, at 1067-69.

63. See 2 G. BURNET, *HISTORY OF HIS OWN TIME* 178 (Edinburgh 1823).

64. 1 A. BROWNING, *THOMAS OSBORN, FIRST EARL OF DANBY AND DUKE OF LEEDS: 1632-1712* 324-25 (1951).

65. Joseph Chitty has observed that "the law supposes it impossible that the King himself can act unlawfully or improperly. It cannot distrust him whom it has invested with supreme power: and visits on his advisors and ministers the punishment due to the illegal measures of government." J. CHITTY, *A TREATISE ON THE LAW OF THE PREROGATIVE OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT* 5 (1820).

66. Sir Robert Howard wrote: "If obedience is the excuse of all ill acts, it ceases to be a good duty." Sir Philip Warwick noted: "If the Prince's own counsels cast what is settled into danger, or make it to be obtained by extremities (though not illegalities) upon his own subjects, a good man would rather make his retreat and die obscurely than see His Majesty and his country run a great risk." *Reprinted in* C. ROBERTS, *THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND* 223 (1966).

On the same day Charles admitted ordering Danby to send the letter, he informed the Lords that he had issued Danby a royal pardon.⁶⁷ The scope of the prerogative of mercy became crucial: Could an impeachment be prevented by a pardon? To the list of those who were determined to find Danby guilty (those who found fault with his reforms at the Treasury and his administration of finances, those who viewed his conduct of foreign affairs as designed for the profit of the Crown rather than as a means to check the French, and those whose hatred stemmed from the "normal" political jealousies)⁶⁸ was added a fourth class—those who were interested in a more balanced government.

The members of Parliament who believed that the power of impeachment was a means to establish a better government were ready to force the constitutional confrontation. For them, impeachment had become the method whereby the most powerful aides of the Crown were brought to their knees before the Lords. Mr. Bennett remarked that if Danby were unpunished, "it will always be thus, whilst after an Impeachment of High Treason, any man should go at large. It was for the safety of the King and the Nation, that a Minister be afraid of this House."⁶⁹ Sir Thomas Clarges feared that because those about the king "ha[d] his ear and represent[ed] things to him," then "not two or ten [could] protect the king" if such men could intercept the king's grace.⁷⁰ Sir Francis

67. Browning, in his biography of Danby, claims that, characteristically, Danby never would have stooped to a pardon. Had he desired clemency, he could have secured a pardon the previous December when the Montague attack was imminent. The pardon, Browning suggests, was the king's contribution to the resolution of a difficult problem. Charles was aware that hearings into Danby's conduct would produce numerous disclosures regarding the bribes he was receiving from the French. 1 A. BROWNING, *supra* note 64, at 317 n.1. See also Z. CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787* 130-31 (1956).

The pardon itself was issued in an unusual manner. It was kept secret, for it was doubtful whether the normal chain of ministers would have concurred in its issuance. All preliminary offices were by-passed. When the king summoned Lord Chancellor Finch to affix the Great Seal to the pardon, Finch refused and the king commanded Finch's secretary to do so. At the debates that followed, Sir Harbottle Grimstone suggested that because of the irregular manner in which the pardon was obtained, it was null and void. 7 A. GREY, *DEBATES OF THE HOUSE OF COMMONS* 176 (London 1763). Sir Thomas Clarges insisted that the law did not permit the king to do any ministerial act; thus the pardon was invalid. C. ROBERTS, *supra* note 66, at 225. See also 7 A. GREY, *supra*, at 183-84 (remarks of Mr. Vaughn). During the debates, several moved that the pardon should not be attacked on the basis of irregularity, but rather on the illegality of any pardon that attempted to frustrate an impeachment.

68. 7 A. BROWNING, *supra* note 64, at 300.

69. 7 A. GREY, *supra* note 67, at 20.

70. *Id.* at 23.

Winnington continued the argument and added that "[i]f such great men exorbitances with Pardon, it takes away *culpa* as well as *pena*. There's an end of all Justice among men if such Pardons are allowed."⁷¹ Colonel Titus, following the theme of equal justice, predicted that if the Danby pardon were pleaded to the House of Commons and made valid, "ours will be like the *Athenian* Laws, to catch flies, while wasps and hornets break out."⁷² In response to an appeal from the king, Mr. Booth observed: "The King has told us, that it is usual for him to pardon his servants when he discharges them, etc. If it be the custom, it is an ill one, and the worst that it can be."⁷³ Others feared that pardons would silence all testimony and thus suppress the truth of any plot.⁷⁴ Parliament presumed that a sovereign would benefit by a complete investigation; if the evidence supported the charge against his heretofore trusted servant, the king would abandon him. One member suggested that this use of the king's mercy was a violation of his duty to be merciful to his people.⁷⁵ Others feared the precedent such a pardon would establish.⁷⁶

Suggesting that the pardon was contrary to abstract concepts of justice, however, would not stop the pardon. The Commons had to find something illegal about it to preserve the constitutional integrity of the House and the concept of accountability before that body. Sir John Knight thought that the pardon was pleaded at the wrong time.⁷⁷ To this Mr. Sterne commented: "We have spent much time in talking of the Treasurer's Pardon. Everyone knows the king's power of pardoning [is unlimited]; in cases of appeal only excepted; but if you will have a Bill to restrain the power in them, that may prevent it for the future."⁷⁸ But there were members of Parliament who thought the future too far off, and Danby had many enemies. According to Barillon, Charles would have surrendered the power to pardon, in principle, if thereby he could prevent Danby's

71. *Id.* at 134.

72. *Id.* at 135.

73. *Id.* at 21. Indeed, it was common during the reign of Charles II for a statesman to take out a pardon upon his departure from office. All of the members of the "Cabal" had done so before meeting with Parliament in 1673.

74. *Id.* at 24 (remarks of Mr. Harbord).

75. *Id.* at 30 (remarks of Mr. Vaughn).

76. *Id.* at 136 (remarks of Mr. Sacheverrell). See also *id.* at 174-75 (remarks of Mr. Player).

77. Knight argued that "[w]hen a man comes to be tried, then is his proper time to plead his Pardon. This man must come to be tried, to show the world, how ill a minister he has been to the king." *Id.* at 21.

78. *Id.* at 24.

trial. Barillon wrote: "The King agrees to a law by which those impeached in the future may have no pardon, if only Danby's is allowed."⁷⁹ Parliament finally agreed that the strongest position to take was based on the lack of precedent for such a pardon, and thus concluded that a pardon would be no bar to impeachment.⁸⁰ The Committee presented the following reasons:

2. The Setting up of a Pardon to be Bar of Impeachment defects the whole Use and Effect of Impeachments: For should this Point be admitted, or stand doubted, it would totally discourage the Exhibiting any for the future; whereby the chief Instrument for the Preservation of the Government would be destroyed, and consequently the Government itself

And, without restoring to many Authorities of greater Antiquity, the Commons desire your Lordships to take notice, with the same Regard they do, of the Declaration which that excellent Prince King Charles the First,^[81] of blessed Memory, made in his Behalf, in Answer to Nineteen Propositions of both Houses of Parliament: wherein, stating the several Parts of this regulated Monarchy, he says, "The King, the House of Lords, and the House of Commons, have each particular Privileges:" And, amongst those which belong to the King, he reckons Power of Pardoning: After the Enumerating of which, and other of his Prerogatives, he said, . . . That "the Prince may not make use of this high and perpetual Power, to the Hurt of those whose Good he hath it; and make use of the Name of publick Necessity for the Gain of his private Favourites, to the Detriment of his People."

The House of Commons (an excellent Conserver of Liberty) is solely interested with the First Proposition concerning the Levies of Monies, and the Impeaching of those, who, for their own Ends, though countenanced by any surreptitiously gotten Command of

79. C. ROBERTS, *supra* note 66, at 235 n.2.

80. 9 H. C. JOUR. 606: "We find no Precedent, that ever any Pardon was granted to any Person impeached by the Commons of High Treason, or other High Crime, depending the Impeachment."

81. The Commons were here referring to the same Charles I who was the subject of Sir R. Philips' attack in Parliament in 1628:

If ever there came here a business of the like consequence, I have lost my memory: if ever king of England was abused in his mercy, it is our king. What persons are pardoned? even the greatest enemies to the church and state, that were standing under the judgment of the parliament, and they are pardoned between parliaments: . . . You see offenders complained of, and instead of punishment, grace; the goodness of our king is thus abused.

2 W. COBBETT, *supra* note 60, at 458.

the King, have violated the Law, which he is bound (when he knows it) to protect; and to the Protection of which they are bound to advise him, at least not to serve him in the contrary:

And the Lords being interested with the Judicatory Power, are an excellent Screen and Bank between the Prince and the People, to assist each other against any Incroachments of the other; and by just Judgment, to preserve that law which ought to be the Rule of every one of the Three.

Therefore the Power, equally placed in both Houses, is more than sufficient to preserve and restrain the Power of Tyranny.

3. Until the Commons of *England* have Right done them against this Plea of Pardon, they justly apprehend; That the whole Justice of the Kingdom, in the Case of the five Lords, may be obstructed and defeated by Pardons of this Nature.

4. An Impeachment is virtually the Voice of every particular Subject of this Kingdom, crying out against an Oppression, by which every Member of that Body is equally wounded; And it would prove a Matter of ill Consequence, That the Universality of the People should have Occasion ministred and continued to them to be apprehensive of utmost Danger from the Crown, whereby they of Right expect Preservation.⁸²

Not all members were satisfied that no precedent for such a pardon existed. Dissenting from the opinion of the Committee of Secrecy's report was Sir John Trevor, who suggested two precedents.⁸³ Sargeant Ellis distinguished these pardons because they were issued subsequent to some judgment or resolution of impeachment.⁸⁴ Sir Winnington added:

[G]reat men commit great exorbitances; and when the fact is proved by the Commons . . . that is all the Commons can do, and the Lords give Judgment thereupon, and if the Party be reduced to Judgment, a right of his Forfeiture accrues to the King, and all is vested in the King, and the King may pardon his part. I conceive, without any scruple, that the Common's right is to have justice by Trial. As for the Fine of 2000 marks, in Lord Latimer's Judgment, that came to the King's coffers, and the King may pardon it.⁸⁵

Winnington went onto draw an analogy between a prosecution for a

82. 9 H. C. JOUR. 633; 13 H. L. JOUR. 592-93.

83. 7 A. GREY, *supra* note 67, at 153-54.

84. *Id.* at 154.

85. *Id.* at 155.

felony and an impeachment proceeding. If a king could not deprive a private person of his remedy at law, then he obviously did not have the power to arrest an impeachment at the suit of the whole Commons of England.⁸⁶

Prior to the Danby impeachment, the king's prerogative of mercy always had been known to be absolute.⁸⁷ Although Parliaments had tried often to restrain the power, they always had failed. No act on the statute books limited the royal attribute of mercy in cases of impeachment.⁸⁸ Advocates, such as John Trevot,⁸⁹ of the position that no act could be found that might limit pardons in cases of impeachment were ignored. Political passions would not hear legal arguments in the Commons.

The Lords were much less excited by the pardon.⁹⁰ Whereas the Commons on May 9, 1679, had voted not to allow Danby's lawyers

86. *Id.* at 155-56.

87. By definition, prerogative was the king's "power to do all things which were not expressly forbidden him by law . . ." G.B. ADAMS, *supra* note 31, at 78.

88. The issue of pardon in bar of impeachment, however, had been debated twice before in the Parliament. In 1348, Parliament investigated fraudulent merchants and requested that no pardon be granted them. 1 ROTULI PARLIAMENTORUM 438. This is the first time the word "impeachment" is found on the Rolls of Parliament. At that time, and at the time of the Danby pardon, impeachments were considered indictments for offenses against the king. See C. HILL, *THE CENTURY OF REVOLUTION 1603-1714* 60-66 (1961). In 1376, the following entry appeared on the Rolls of Parliament:

Item prie la Commune a nre dit S^r le Roi, q^e nule Pardon soit grante a nully persone, petit ne grande, q'ont este de son Conseil et serementez, et sont empeschez en cest present Parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des Terres, Tenemenz, Biens, ou Chateux, lesqueux sont ou serront trouez en aucun default encontre leur ligeance, et la tenure de leur dit serement; mais q'ils soient duement puniz felonc leur desert: Ne q'ils ne sorront jammes Conseillers ne Officers du Roi; mais en tout oustez de la Courte le Roi et de Conseil as touz jours. Et sur ceo soit en present Parlemnet fait Estatut s'il plect au Roi, et de trouz autres en temps a venir en cas semblable; pur profit du Roi et de Roialme.

(Likewise the Commons petitions our said Lord the King, that no Pardon be granted to any person, great or small, who have sat on his Council and sworn an oath, and who are seized by this present Parliament of life or of member [of] money or of real estate, of confiscation of Lands, Possessions, Goods, or Castles, and who are or will be found in any breach of their allegiance and the keeping of their said oath; but let them be duly punished according to their deserts: Nor will they ever be Counselors or Officers of the King; but completely removed from the King's Court and from the Council forever. And concerning this, let a Statute be made in the present Parliament, if it please the King, and of all others in similar cases in the future; for the profit of the King and his Realm.)

2 ROTULI PARLIAMENTORUM 355.

89. 7 A. GREY, *supra* note 67, at 136.

90. See L.O. PIKE, *A CONSTITUTIONAL HISTORY OF THE HOUSE OF LORDS* 223-34 (1894).

to argue the validity of the pardon,⁹¹ the Lords ordered the debate. Thus Danby's attorneys were placed in the precarious position of either violating the will of the Commons or acting contrary to the order of the Lords.⁹² Infuriated by the attitude of the Lords, the Commons passed a series of resolutions to give effect to their own position.⁹³

This was not the first time the two Houses had clashed over the Danby pardon. In late March the Lords attempted an alternative solution to the constitutional crisis by voting a bill of banishment. The Commons were unwilling to let Danby off so readily, and on April 1 voted that Danby surrender himself by the tenth of the month.⁹⁴ The issue was resolved in favor of the lower House whose argument centered on three points:

- 1) That Banishment is not the Legal Judgment in case of high Treason. And the Earl of Danby being Impeached by the Commons of high Treason, and fled from Justice, hath thereby confest the charge and therefore ought to have Judgment of high Treason for his Punishment.
- 2) That Banishment being not the Punishment the law inflicts upon those Crimes; the Earl of Danby might use this remission of his Sentence, as an Argument, That either the Commons were distrustful of their Proofs against him, or else that the Crimes are not in themselves of so high a Nature as Treason.
- 3) That the Example of this would be an encouragement to all Persons that should be hereafter Impeached by the Commons, to withdraw themselves from Justice, which they would always be ready to do if not prevented by a Committment upon their Impeachment, and thereby hope to obtain a more favorable Sentence in a legislative way, than your Lordships would be obligated to pass upon them in your judicial capacity.⁹⁵

91. See 9 H.C. JOUR. 614-18. See also 13 H.L. JOUR. 555-56. The Commons resolved that no commoner (thus peers were excluded) should consider the pardon valid, and that any "person so doing shall be accounted betrayers of the liberties of the Commons of England."

92. Roberts suggests four reasons for the more liberal attitude on the part of the Lords: a sense of their responsibility as judges of the highest court of the land, a reverence for the high estate of the king, a distrust for popular causes, and a belief that they might someday be appointed ministers of the king, and thus might also need his royal mercy. C. ROBERTS, *supra* note 66, at 220-21.

93. For example, they voted that a joint committee rather than a committee of the upper House should arrange Danby's trial and that the Bishops, who had a stronger attachment to the Crown, should not participate in the vote on the legality of the pardon because the issue tangentially affected "life or limb." (Almost two-thirds of the Lords voted to allow the Bishops to participate). *Id.* at 221.

94. See 9 H.C. JOUR. 578-81; 13 H.L. JOUR. 471-81.

95. F. SMITH, DEBATES . . . RELATING TO . . . THOMAS, EARL OF DANBY 1005 (London 1679).

The Lords were forced to acknowledge "that Banishment [was . . . not the legal judgment in any case whatsoever." However, they saw "no reason why the Legislative Authority should always be bound to act to the utmost Extent of their Power" and they offered to assure that Danby's pardon could not be used as precedent for future cases of the kind.⁹⁶ The Commons had the strongest legal position in the battle, but before a clear victor could be declared, Charles prorogued Parliament. Although Charles did not wish to lose a trusted and effective servant, Danby was not worth another civil war. The unlimited power of pardon was at stake, not the life or death of Danby. Danby was to spend five years in the Tower, untried, with a full pardon. The impeachment was never resumed.⁹⁷

From the Danby Pardon to 1700

Between 1679 and 1700 the power of pardon was given much attention. In 1679 Parliament passed the Habeas Corpus Act,⁹⁸ which applied a minor, but nevertheless the first, effective limitation on the power. Section II of the Act made it an offense (a praemunire) for any person causing the King's subjects to be imprisoned beyond the realm, and prohibited clemency in such cases. In 1686, however, the absolutist view of the king's prerogative resurfaced in *Godden v. Hales*,⁹⁹ in which Sir Edward Hales pleaded a pardon to an accusation of failure to take the oath of supremacy and failure to receive the sacraments of the Church of England. Lord Chief Justice Herbert held the pardon valid: "[T]he Kings of England [are] absolute Sovereigns; . . . the laws [are] the King's laws; . . . the King [has] a power to dispense with any of the laws of Government as he [sees] necessary . . . he [is] the sole judge of that necessity; . . . no act of Parliament [can] take away that power."¹⁰⁰

Further, in 1689 Parliament dropped a clause from the Declaration of Rights that redefined the responsibility of ministers of state

96. 13 H.L. JOUR. 505.

97. Danby was bailed in February, 1684.

98. 31 Car. 2, c. 2 (1679).

99. 89 Eng. Rep. 1050 (K.B. 1686).

100. *Id.* at 1050-51. The decision thus established the supremacy of the dispensing power over the Test Act, 25 Car. 2, c. 2 (1685). James used this power in an attempt to catholicize the government. *Godden* was a pyrrhic victory for James, for the only choice left Parliament was to force James to vacate the throne. See 5 W. COBBETT, *supra* note 60, at 36-111. See also 10 H.C. JOUR. 14-15; 14 H.L. JOUR. 110-20.

and denied them the right to plead the king's pardon in bar of an impeachment.¹⁰¹ The Bill of Indemnity, however, did contain a clause declaring that the king's pardon was no bar to an impeachment.¹⁰² The clause was inserted in response to William's appointment of the Marquis de Carmarthen, who lay under an impeachment, as Lord President of his Council.¹⁰³ The Bill, however, failed to pass the House of Commons. On the third reading of the Bill of Rights, a group of willful Whigs in the House of Lords attempted to add a rider declaring null and void any pardon pleadable to an impeachment. The rider was rejected;¹⁰⁴ the 1688 enactment, however, did contain the following clauses:

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.
2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.¹⁰⁵

There is a technical distinction between pardon and suspension: pardon frees the guilty party from the effect of a violation of the law; suspension makes legal a formerly illegal act. Although pardons could be exercised to nullify a law, the Act of 1688 eliminated the loophole Parliament found so frustrating in its early attempts to limit the pardoning power.¹⁰⁶

The issue of pardon in bar of impeachment finally was resolved by the 1700 Act of Settlement.¹⁰⁷ The Act stated "[t]hat no pardon under the great seal of England [shall] be pleadable to an impeachment by the commons in parliament."¹⁰⁸ The Act left intact the power to pardon subsequent to sentence.¹⁰⁹ Clayton Roberts has

101. 4 L. VON RANKE, A HISTORY OF ENGLAND 513-14 (1875).

102. 10 H.C. JOUR. 165. See also 9 A. GREY, *supra* note 67, at 280-86.

103. C. ROBERTS, *supra* note 66, at 252-53. The Marquis de Carmarthen was none other than Thomas Osborne. Osborne, as Duke of Leeds, was impeached again in 1695 and charged with corruption. However, the charge never was carried to completion because the principal witness fled.

104. 10 H.C. JOUR. 162. See also 9 A. GREY, *supra* note 67, at 353-55 (especially remarks of Mr. Clarges).

105. 1 W. & M. c. 36 (1688).

106. See notes 27-53 *supra* & accompanying text.

107. 13 H.C. JOUR. 625; 16 H.L. JOUR. 738.

108. 12 & 13 Will. 3, c. 2 (1700).

109. This right was exercised by the king in 1716. After six Scottish lords were impeached and tried, the Lords recommended mercy for those who deserved the king's mercy. The upper

labeled the Act "tardy and unnecessary, for there existed no likelihood that an impeached minister would ever again rely on the King's pardon."¹¹⁰ Twenty-two years is sufficient time for the legislation to be branded "tardy"; "unnecessary," however, it was not.

The British Colonies in America

When England broadened its boundaries to the "New World," the pardoning power followed. The prerogative was delegated by the Crown to the executive authority in the colony, with few limitations on the power. The Virginia Charter of 1609 granted the governor "full and absolute Power and Authority to correct, punish, pardon, govern, and rule all such the Subjects of Us, our Heires, and Successors as shall from Time to Time adventure themselves" into the colony.¹¹¹ In 1624, Virginia became a royal colony and all executive authority was placed in the royal governor.

The Charter of New England (1620) was much like the second Virginia Charter of 1609; "full and absolute Power and Authority to correct, punish, pardon, govern, and rule" was bestowed upon the "Council and their Successors, and to such Governors, Officers, and Ministers, as shall be by the said Council constituted and appointed."¹¹² Before a government was organized, the Council for New England was replaced by the Massachusetts Bay Company, whose 1629 charter empowered the Governor and Company to exercise "full and Absolute Power and Authority to correct, punish, pardon, govern, and rule."¹¹³ In 1635, the charter was surrendered to the king.¹¹⁴ Under Governor Winthrop, however, the *Body of Liberties* circumscribed the executive power by giving the governor

House affirmed the king's power to pardon in cases of impeachment but said "though clemency is one of the biggest virtues that adorn and support a crown . . . [it] should be exercised with discretion, and only on proper subjects . . ." Three lords were pardoned consequently. 7 W. COBBETT, *supra* note 60, at 238.

Power to pardon not pleadable in bar of an impeachment was different from the unrestrained power. Wooddeson, in lecture, explained that pardon subsequent to impeachment "comes too late to clear away the consequences of attainder; the blood ceases to be inheritable, and cannot be completely restored but by act of parliament; the king may indeed release forfeitures and confer new titles, but cannot revive the family honours in their ancient state of precedence." 2 R. WOODDESON, *A SYSTEMATIC VIEW OF THE LAWS OF ENGLAND* 615 (London 1792). See also *id.* at 619.

110. C. ROBERTS, *supra* note 66, at 303.

111. 7 F. THORPE, *AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS* 3800-01 (1909).

112. 3 *id.* at 1883.

113. *Id.* at 1858.

114. See *id.* at 1860-61.

and deputy governor jointly consenting, or any three Assistants concurring in consent, only the power to reprieve a condemned malefactor until the next quarter or General Court. The General Court had exclusive power to pardon.¹¹⁵ Sir Edmund Andros was commissioned by the Crown in 1688 and was given

full power where [he] shall see cause and shall judge any offender or offenders in capital and criminal matters, or for any fines or forfeitures due unto us, fit objects of our mercy, to pardon such offenders and to remit such fines and forfeitures, treason and wilful murder only excepted, in such case [he] shall likewise have power upon extraordinary occasions to grant reprieves to the offenders therein until and to the intent our pleasure may be further known.¹¹⁶

The Charter of 1691 provided for a governor appointed by the king who represented the Crown in all things in the colony, and thus dispensed the royal prerogative of mercy.¹¹⁷

Both Baron Baltimore in Maryland¹¹⁸ and Sir Ferdinando Gorges in Maine¹¹⁹ were given full and absolute power to pardon. In 1664, Maine was granted to James, Duke of York, who possessed "power and authority to correct, punish, pardon, govern, and rule."¹²⁰ After 1677, Maine was governed by the Charters of New England. The colonists of both Connecticut¹²¹ and Rhode Island¹²² provided the General Assembly with the power to pardon, provided that the governor and six executive assistants were present.

The Lord Proprietors of North Carolina were given power "to remit, release, pardon and abolish (whether before judgments or after) all crimes and offences whatsoever."¹²³ The Charter of 1665 renewed the power.¹²⁴ The Fundamental Constitution of Carolina (1669), written in part by John Locke, empowered the palatine's court, which consisted of the palatine and seven proprietors, to issue

115. THE BODY OF LIBERTIES OF 1641, No. 72, reprinted in W. WHITMORE, A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY 49 (1890).

116. 3 F. THORPE, *supra* note 111, at 1866.

117. *See id.* at 1870-86.

118. *Id.* at 1680 (Charter of 1632).

119. *Id.* at 1629 (Charter of 1639).

120. *Id.* at 1638.

121. 1 *id.* at 533-34 (Charter of 1662).

122. 6 *id.* at 3215 (Charter of 1663).

123. 5 *id.* at 2746 (Charter of 1663).

124. *Id.* at 2764.

pardons.¹²⁵ The constitution gave the proprietors' court the power to mitigate all fines and to suspend all executions in criminal causes before or after sentence.¹²⁶

The proprietors of New Jersey were authorized in 1664 to pardon or to command execution of a sentence.¹²⁷ The Quaker Fundamental Law of 1676, operating in Western New Jersey, contained a pardoning power clause unique among the colonies:

That all and every person and persons whatsoever, who shall prosecute or prefer any indictment or information against others for any personal injuries, or matter criminal, or shall prosecute for any other criminal cause, (treason, murther, and felony, only excepted) shall and may be master of his own process, and have full power to forgive and remit the person or persons offending against him or herself only, as well before as after judgment, and condemnation, and pardon and remit the sentence, fine and punishment of the person or persons offending, be it personal or other whatsoever.¹²⁸

The Fundamental Constitution for the Province of Eastern New Jersey (1683) vested the pardoning power in the twenty-four proprietors; eighteen concurring votes were necessary for an effective pardon. The governor, in conjunction with four proprietors, judges of the Court of Appeals, could grant a one month reprieve.¹²⁹ In 1702, New Jersey became a royal colony, and the power to pardon rested with the royal governor.

William Penn, proprietor of Pennsylvania and Delaware,¹³⁰ had power to "remit, release, pardon, and abolish whether before Judgment or after all Crimes and Offenses whatsoever committed within the said Country against the said Laws, Treason and willful and malicious Murder only excepted, and in those Cases to grant Reprieves," until the king's pleasure was made known.¹³¹ The governors of New York were endowed with similar power.¹³²

125. *Id.* at 2776.

126. *Id.* at 2778. However, see The North Carolina Act of 1749, "An Act to Put in Force in this Province the several Statutes of the Kingdom of England, or South-Britain . . .," which incorporated 10 Edw. III c. 2 and 12 & 13 Will. III c. 2.

127. 5 F. THORPE, *supra* note 111, at 2540.

128. *Id.* at 2551.

129. *Id.* at 2578.

130. See 1 *id.* at 557-61 (Charter of 1701).

131. 5 *id.* at 3038 (Charter of 1681).

132. See J. GOEBEL & R. NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 748-59 (1944).

The power to "sell, impose and inflict, reasonable pains and penalties upon any offender . . . and to mitigate the same" was given the Corporation of Georgia in 1732.¹³³ When Georgia became a royal colony, the pardon power was given the royal governor.

After the Revolutionary War, the states, bound by a weak confederacy, drastically curtailed the powers of their suspect executives. No national pardoning power existed. Most states provided for the ascendancy of the legislative branch and the executive power to pardon was weakened. For example, Article XIX of the Georgia Constitution (1777) provided that "[t]he governor shall, with the advice of the executive council, exercise the executive powers . . . save only in the case of pardons and remission of fines, which he shall in no instance grant . . .," though he was given the power to reprieve a criminal or suspend a fine until the next meeting of the assembly.¹³⁴

The confederation Constitution of Delaware (1776) gave the executive pardoning and reprieving powers "except where the prosecution shall be carried on by the house of assembly, or the law shall otherwise direct, in which cases no pardon or reprieve shall be granted, but by a resolve of the house of assembly."¹³⁵ The Constitutions of Virginia (1776)¹³⁶ and North Carolina (1776)¹³⁷ contained similar provisions.

The New Hampshire Constitution of 1784 provided that the "power of suspending the laws, or the execution of them, ought never to be exercised but by the legislature, or by authority derived therefrom, to be exercised in such particular cases only as the legislature shall expressly provide for."¹³⁸

The Massachusetts Constitution of 1780 allowed pardons only after conviction and eliminated impeachments from the scope of the power.¹³⁹ Pennsylvania (1776)¹⁴⁰ and New York (1777)¹⁴¹ were guided by constitutions that excluded from the purview of pardons cases of treason and murder, which the governor could reprieve until the

133. 2 F. THORPE, *supra* note 111, at 770.

134. *Id.* at 781.

135. 1 *id.* at 563.

136. 7 *id.* at 3817.

137. 5 *id.* at 2791.

138. 4 *id.* at 2457.

139. 3 *id.* at 1901.

140. 5 *id.* at 3087-88.

141. *Id.* at 2633.

next session of the legislature. Pennsylvania further excepted cases of impeachments.

The 1776 Constitution of New Jersey provided for the annual legislative election of the governor who, along with the executive council, composed the court of last resort in all cases of law. This court was empowered to grant pardons subsequent to condemnation.¹⁴²

After a long season of irresponsible executive authority in the realm of, among other things, the power to pardon, the young states reacted with a variety of restraints on the executive power. Simultaneously, forces were mounting in favor of a more centralized government with a strong chief executive.

The Convention of 1787

The debate on the "failure" of the Confederation will not be continued here.¹⁴³ In 1787 a convention assembled at Philadelphia to establish a more perfect union. The delegates agreed that the new government called for a chief executive. Although the major plans (the Virginia Plan and the New Jersey Plan) did not contain a power of pardon, Charles Pinckney, Alexander Hamilton, and John Rutledge fought for and won inclusion of a pardoning power. A preliminary draft of the clause was quite similar to the 1700 Act of Settlement; the power of pardoning vested in the Chief Executive but his pardon shall not be pleadable in bar of an impeachment.¹⁴⁴

The convention failed to approve a motion introduced by Roger Sherman to limit the power "to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate".¹⁴⁵ George Mason averred that the Senate already had too much power. A motion to insert "exception in cases of impeachment" after "pardon" and to remove the words "but his pardon shall not be pleadable in bar" of an impeachment was passed.¹⁴⁶ Luther Martin moved to insert "after conviction" after the words "reprieves and pardons," but withdrew the motion after the persuasive argument

142. *Id.* at 2596.

143. Compare J. Fiske, *THE CRITICAL PERIOD OF AMERICAN HISTORY 1783-1789* (1888) with M. Jensen, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION* (1950).

144. 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 380 (J. Elliot ed. 1845).

145. *Id.* at 480.

146. *Id.*

of Mr. Wilson that a "pardon before conviction might be necessary, in order to obtain the testimony of accomplices."¹⁴⁷ Thereafter Edmund Randolph sought to amend the articles to except "cases of treason" from the pardoning power.¹⁴⁸ Randolph considered the power too great to be entrusted to one man because the President himself might be guilty and the traitors might be his own instruments. During the debates that followed the Constitutional Convention, Mason elaborated upon the objection: "The President of the United States has the unrestrained power of granting pardons for treason; which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt."¹⁴⁹ In answer to the objection, James Iredell replied:

Nobody can contend upon any rational principles, that a power of pardoning should not exist somewhere in every government, because it will often happen in every county that men are obnoxious to a lawful conviction, who yet are entitled, from some favorable circumstances in their case, to a merciful interposition in their favor. The advocates of a monarchy have accordingly boasted of this, as one of the advantages of that form of government, in preference to a republican. . . . [It is a wise aim], in forming a general government for America, to combine the acknowledged advantages of the British constitution with proper republican checks to guard as much as possible against abuses, and it would [be] . . . strange if [the power of pardon is omitted] . . . ([I]t could scarcely be avoided, that when arms were first taken up in the cause of liberty, to save us from the immediate crush of arbitrary power, we should lean too much rather to the extreme of weakening than of strengthening the Executive power in our own government. In England, the only restriction upon this power in the King . . . is, that his pardon is not pleadable in bar of an impeachment. But he may pardon after conviction, even on an impeachment; which is an authority not given to our President, who in case of impeachments has no power either of pardoning or reprieving).¹⁵⁰

The initial part of Iredell's reasoning, the need for flexibility in a

147. *Id.*

148. *Id.* at 549.

149. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 350 (P. Ford ed. 1968) [hereinafter cited as PAMPHLETS].

150. *Id.* at 350-51.

criminal justice system so that it operates in congruence with the end of all government — justice, is sound. Today, however, the criminal justice system of the United States is steeped in flexibility. At each step in the process, arrest, prosecution, and sentencing, discretion exists.¹⁵¹ When the power to pardon first evolved, the punishment for many crimes was death. In 1787 the situation was changing; today it is drastically different. In addition, Iredell's parenthetical remarks for vesting the power in the Executive are misleading. In England, impeachment extends not only to removal from office but also to the more severe forms of punishment. The latter development of the impeachment process empowered the king, after the Danby affair, with a wide latitude in pardoning. Thus, because the President may abort any criminal proceeding, including one that may be subsequent to and directly initiated because of an impeachment proceeding, the power of the English monarch of the eighteenth century and the power of the President of the United States are essentially equivalent.¹⁵²

Iredell continued his faulty analysis by adding:

When a power is acknowledged to be necessary, it is a very dangerous thing to prescribe limits to it. . . . The probability of the President of the United States committing an act of treason against his country is very slight. . . . Such a thing is however possible, and accordingly he is not exempt from a trial. . . . I entirely lay out of the consideration of the probability of a man honored in such a manner by his country, risking like General Arnold, the damnation of his fame to all future ages. . . . One of the great advantages attending a single Executive power is the degree of secrecy and dispatch with which on critical occasions such a power can act.¹⁵³

151. One found guilty at the trial level in the United States' court system also is given one appeal as of right. In England the criminal justice system did not provide for adequate judicial review of the judgments of criminal courts until 1908. The Criminal Appeals Act of 1907, 7 Edw. 7, c. 23, s. 3, established the Court of Criminal Appeals. Accordingly, the method of rectifying any injustice before that time was via a grant of pardon. This was still a limited appeal, however, though section 19 of the Act gives the Home Secretary the privilege of referring a case to the Court of Criminal Appeals before considering the desirability of pardoning. See O. Marshall, *The Prerogative of Mercy*, 1948 *CURRENT LEGAL PROBLEMS* 107.

152. It was the more lenient extent of the impeachment power in America that motivated the insertion of the word "except" for the phrase "in bar of" noted above. In English law, although the king could not pardon to block an impeachment, he could pardon subsequent to impeachment and conviction. In the United States, impeachment extends only to removal from office; thus there was no humane reason for extending the power to impeachment cases at all.

153. PAMPHLETS, *supra* note 149, at 351-52.

The greatest safeguard of American liberties has been the concept of "checks and balances." The framers provided for such checks and limitations on all other powers set forth in the Constitution because they recognized the "encroaching nature" of power.¹⁵⁴ As Madison explained, in a government of limited powers "[a]mbition must be made to counteract ambition."¹⁵⁵ He continued:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹⁵⁶

Experience, admittedly not available to Iredell, has shown that a President could partake in a subversion of the Constitution and risk "the damnation of his fame to all future ages." Iredell also overlooked the possibility that an ex-President, through the use of the power in question, exercised by himself before departing from office,¹⁵⁷ or by his successor, might be exempt from trial. The argument fails to recognize the disadvantages connected with secrecy and the pardoning power: "[I]f the history of civilization proves nothing else, it proves that where secrecy cloaks the use of power it also cloaks the abuse of power."¹⁵⁸

Randolph's motion was defeated largely because of the imperfect reasoning of his colleagues. The power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, was ready to be displayed to the states.

There was little discussion of the pardoning power at the state ratifying conventions. One critic argued that the President not be given the power;¹⁵⁹ another suggested that pardons for treason should not be allowed without Congressional consent.¹⁶⁰ Because the

154. THE FEDERALIST No. 48 (J. Madison).

155. THE FEDERALIST No. 51 in THE FEDERALIST PAPERS 322 (1961) (J. Madison).

156. *Id.*

157. President Ford revealed in testimony before a House subcommittee that this was a possibility under consideration by former President Nixon.

158. Clark, *The Impact of Mass Communications in America*, 1968 ANNALS 68-73.

159. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 497 (J. Elliot ed. 1836) (Mr. Mason, Virginia Debates).

160. 2 *id.* at 408 (Mr. Livingston, New York Debates).

power could be used before indictment, it was obvious to some that great opportunities existed for the President, via the pardoning power, to subvert the Constitution, stop investigations, and thus avoid detection. Speaking to the people of New York, Alexander Hamilton¹⁶¹ attempted to quell those apprehensions:

Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. . . .

The reflection that the fate of a fellow-creature depended on [the President's] *sole fiat* would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government than a body of men. . . . I shall not deny that there are strong reasons to be assigned for requiring in this particular the concurrence of [the Congress], or of a part of it. As treason is a crime levelled at the immediate being of the society, when the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of the act of mercy towards him to the judgment of the legislature. And this ought the rather to be the case, as the supposition of the connivance of the Chief Magistrate ought not to be entirely excluded. But there are also strong objections to such a plan. It is not to be doubted that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatever. . . . But the principal argument for reposing the power of pardoning in . . . the Chief Magistrate is this: in seasons of insurrection and rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; . . . The dilatory process of convening the legislature,

161. Hamilton's initial plan was to give the executive "the power of pardoning all offenses except Treason; which he shall not pardon without the approbation of the Senate." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 292 (M. Farrand ed. 1911).

or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity.¹⁶²

The power was adopted unchanged. With little discussion, and arguments not strong enough to meet the test of time, the Philadelphia Convention, with the concurrence of the state ratifying conventions, incorporated into the Constitution, by nondefinitive language, the presidential power to pardon.

II. THE POWER TO PARDON: THE AMERICAN LAW

The Meaning and Operation of the Power

Judicial Interpretation

Because of the imprecise language of Article II, section 2, one is forced to look to the courts to discover the meaning and operation of the clause. Although the Constitution confers the pardoning power on the President in general terms, the judiciary has served as the supreme interpreter of the scope of constitutional powers¹⁶³ since *Marbury v. Madison*.¹⁶⁴ In *United States v. Wilson*,¹⁶⁵ Chief Justice Marshall defined the power:

162. THE FEDERALIST NO. 74 (A. Hamilton).

163. After a pardon has been issued by the executive branch, the judicial branch formulates the clemency program, thereby determining the scope of the power. For example, President Lincoln sent a message to a judge in San Francisco on December 15, 1863, informing him that the amnesty oath, required by his proclamation, was "not for those who may be constrained to take it in order to escape actual imprisonment or punishment." 6 WAR OF REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 705 (2d ser. F. Ainsworth & J. Kirkley ed. 1899). Lincoln later remarked that his offer of amnesty did "not extend to Prisoners of War, or to persons suffering punishment under the sentence of military courts, or on trial or under charges for military offenses." *Id.* at 802. A federal court, however, subsequently extended the proclamation "not only to those who joined the Rebellion in arms, but those who have been in any way implicated in it." In *Re Greathouse*, 10 F. Cas. 1057, 1061 (C.C.N.D. Cal. 1864) (No. 5, 741). Greathouse initiated a habeas corpus proceeding, claiming that he was entitled to the benefits of the December 8, 1863 proclamation. See text accompanying notes 178-180 *infra*. In granting the application, District Judge Hoffman observed that the court's "plain duty is to construe the proclamation like any other public act or law, and to apply to it the well-settled rules of interpretation, irrespective of any opinion, or even knowledge, of the private but unexpressed intention of its author." 10 F. Cas. at 1061. Of course, the President had only to issue another proclamation to bring court interpretation in line with his intention. Nevertheless, the example illustrates the nature of courts' powers in this area.

164. 5 U.S. (1 Cranch) 137 (1803).

165. 32 U.S. (7 Pet.) 150 (1833).

The Constitution gives to the President in general terms, "the power to grant reprieves and pardons for offenses against the United States."

As this power has been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate¹⁶⁶

Justice Wayne supplemented the definition twenty-two years later: pardon is "forgiveness, release, remission." He further noted that historically, "a pardon [was] . . . a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical."¹⁶⁷

Voicing a strong dissent to the use of English precedent, Justice McLean noted in *Ex parte Wells* that "[t]he executive office in England and that of this country is so widely different, that doubts may be entertained whether it would be safe for a republican chief magistrate, who is the creature of laws, to be influenced by the exercise of any leading power of the British sovereign."¹⁶⁸ McLean based his dissent on a decision the Court had rendered only five years earlier when Chief Justice Taney explained:

It is true that most of the States have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason

166. *Id.* at 159-60.

167. *Ex parte Wells*, 59 U.S. (18 How.) 307, 311 (1855).

168. *Id.* at 318.

from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of government are brought into question. Our own Constitution and form of government must be our only guide.¹⁶⁹

Despite this opinion, the courts have looked to English jurisprudence for the meaning of a presidential power that corresponds to a power of the English Crown,¹⁷⁰ including the power to pardon. As Justice Wayne explained:

At the time of our separation from Great Britain, the power had been exercised by the king, as the chief executive. Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books At the time of the adoption of the constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown.¹⁷¹

Hence, when the words "to grant pardons" were used in the Constitution, they connoted the authority as exercised by the English Crown or by its representatives in the colonies.

Because of the emphasis Marshall placed upon grace and the private character of the presidential action in *Wilson*, mercy became, in strict legal theory, the reason for a pardon. The Court in 1915 formally adopted Marshall's definition.¹⁷² In 1927, however, the

169. *Fleming v. Page*, 50 U.S. (9 How.) 603, 618 (1850).

170. Because the framers were aware of the constitutional struggles in England at this time, constitutional history and English precedents are valuable for determining the meaning of the various clauses of the Constitution. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30-31 (1971). See also C. WARREN, *A HISTORY OF THE AMERICAN BAR* 188 (1912).

The influence . . . of these English-bred lawyers . . . was most potent. The training which they received in the Inns, confined almost exclusively to the Common Law, based as it was on historical precedent and customary law, the habits which they formed there of solving all legal questions by the standards of English liberties and of rights of the English subject, proved of immense value to them when they became . . . leaders of the American Revolution

The services rendered by the legal profession in the defense and maintenance of the people's rights and liberties, from the middle of the eighteenth century to the adoption of the Constitution, had been well recognized by the people in making a choice of their representatives; for of the fifty-six signers of the Declaration of Independence, twenty-five were lawyers; and of the fifty-five members of the Federal Constitutional Convention, thirty-one were lawyers, of whom four had studied in the Inner Temple and one at Oxford, under Blackstone

Id. at 188, 211.

171. *Ex parte Wells*, 59 U.S. (18 How.) 307, 311 (1855).

172. *Burdick v. United States*, 236 U.S. 79 (1915).

Court set aside these elements and provided a more solid base for the power:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.¹⁷³

Incidental Powers

A definition of "pardon" is incomplete without a consideration of the powers incident to it. One such incidental power is the authority to issue amnesties.¹⁷⁴ Prior to the Civil War, the power of the President to grant amnesties was unquestioned. The Civil War and Reconstruction period provided the first controversial exercise of the Executive power to pardon in the United States. The bounds of the power were given extensive examination during this period; many constitutional queries surrounding the pardoning power were treated by the courts and tested by the Congress.

By 1790, death was the legitimate prescription for treason.¹⁷⁵ The early act was reinforced on July 17, 1862 by the "Confiscation Act,"¹⁷⁶ which provided that "every person who shall be adjudged guilty thereof, shall suffer death . . ." It was obvious, however, that the treason statutes could not be enforced on the scale demanded by the Civil War. The pardoning power was a necessity in this season of insurrection and rebellion, as both the executive and legislative branches recognized. In 1863 Congress enacted a law providing that if a person were sentenced to both pecuniary and corporeal punishment, "the President shall have full discretionary power to pardon or remit, in whole or in part, either one of the two kinds of punishment, without in any manner impairing the legal validity of the other kind . . ."¹⁷⁷

173. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

174. "Amnesty differs from pardon in that it applies to a whole class of persons or communities rather than to individuals. It also differs from pardon in that it is granted regardless of proof of the fact of guilt. . . ." J. MATHEWS, *THE AMERICAN CONSTITUTIONAL SYSTEM* 176 (1940). See also *Brown v. Walker*, 161 U.S. 591 (1896).

175. Act of Apr. 30, 1790, ch. 9, § 1, 1 Stat. 112.

176. Act of July 17, 1862, ch. 195, § 1, 12 Stat. 589.

177. Act of February 20, 1863, ch. 46, § 1, 12 Stat. 656. In 1861, Congress had passed a series of acts that substituted punishments other than death for actions that could be construed as treasonous. See, e.g., Act of July 31, 1861, ch. 33, 12 Stat. 284 (anyone found guilty of conspiracy to overthrow the government or interfere with the laws to be punished by a fine

Lincoln intended to use the power only if "the favorable fortunes of war should promise it some effectiveness in persuading waverers to resume their former loyalties."¹⁷⁸ Lincoln issued the first amnesty ten months after the Congressional sanction:¹⁷⁹

Whereas, in and by the Constitution of the United States, it is provided that the President "shall have power to grant reprieves and pardons . . . , except in cases of impeachment;" and

Whereas, a rebellion now exists whereby the loyal state governments of several states have for a long time been subverted, and many persons have committed, and are now guilty of treason against the United States; and

Whereas, with reference to said rebellion and treason, laws have been enacted by congress, declaring forfeitures and confiscations of property and liberation of slaves, all upon terms and conditions therein stated, and also declaring that the President was thereby authorized at any time thereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any state or part thereof, pardon and amnesty, with such exceptions and at such times and on such conditions as he may deem expedient for the public welfare; and

Whereas, the congressional declaration for limited and conditional pardon accords with well-established judicial exposition of the pardoning power; and

Whereas, with reference to the said rebellion, the President of the United States has issued several proclamations in regard to the liberation of slaves; and

Whereas, it is now desired by some persons heretofore engaged in said rebellion to resume their allegiance to the United States, and to reinaugurate loyal state governments within and for their respective states:

of not less than five hundred dollars and not more than five thousand dollars or imprisonment); Act of August 6, 1861, ch. 56, 12 Stat. 317 (anyone guilty of recruiting soldiers or sailors to serve against the United States to be fined and imprisoned); Act of August 6, 1861, ch. 60, § 1, 12 Stat. 319 (property used for insurrectionary purposes to be seized). The discretionary power of the courts to substitute fines and imprisonment for the death penalty was subsequently authorized. Act of July 17, 1862, ch. 195, § 1, 12 Stat. 589.

178. E. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 143 (1960).

179. Individual pardons were granted before December 8, 1863. On February 14, 1862, Secretary of War Stanton, directed by President Lincoln, issued the release of all political prisoners and other persons held in military custody "on their subscribing to a parole engaging themselves to render no aid or comfort to the enemies of the United States." 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1895, 102-04 (J. Richardson ed. 1896). [hereinafter cited as *MESSAGES AND PAPERS*].

Therefore I, ABRAHAM LINCOLN, President of the United States, do proclaim, . . . to all persons who have, directly or by implication, participated in the existing rebellion, . . . that a full pardon is hereby granted to them and each of them, with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened, and upon the condition that every person shall take and subscribe an oath
¹⁸⁰

The proclamation excluded six classes, and in March of 1864, Lincoln added a seventh class to those excepted.¹⁸¹ Most members of Congress had little quarrel with this proclamation, for as Lincoln's private secretary, John Hay, observed, it was within the Constitution and the amnesty clause of the Act of July 17, 1862.¹⁸² Lincoln's address, however, contained a clause that increasingly concerned the radicals: "Saying that on certain terms, certain classes will be pardoned, with rights restored, it is not said that other classes or other terms will never be added."¹⁸³ The assassination was a godsend for many in Congress and in the North. More and more leaders in the North had become disenchanted with the lenient policy of Lincoln, and they looked to Andrew Johnson for a more desirable course.

There was good reason for many to expect Johnson to follow a hard line toward the South. In the early days of the rebellion he remarked: "[W]ere I the President . . . I would do as Thomas Jefferson did, in 1806, with Aaron Burr: I would have them arrested; and, if convicted, . . . by the Eternal God I would execute them."¹⁸⁴ In an interview on April 24, 1865, he said:

It is time that our people were taught that treason is a crime, not a mere political difference, not a mere contest between two parties, in which one succeeded and the other simply failed. They must know it is treason; for if they had succeeded, the life of the nation will have been reft from it, the Union would have been destroyed.¹⁸⁵

180. Pres. Proc. No. 11 of Dec. 8, 1863, 13 Stat. 737.

181. Pres. Proc. No. 14 of Mar. 26, 1864, 13 Stat. 741. The Proclamation of December 8, 1863 was limited to those who were yet at large and should come forward and take the oath. See note 163 *supra*.

182. LINCOLN AND THE CIVIL WAR IN THE DIARIES AND LETTERS OF JOHN HAY 131-32 (T. Dennett ed. 1939).

183. Pres. Proc. No. 11 of Dec. 8, 1863, 13 Stat. 737.

184. CONG. GLOBE, 36th Cong., 2d Sess. 1354 (1860).

185. Quoted in C. CHADSEY, THE STRUGGLE BETWEEN PRESIDENT JOHNSON AND CONGRESS OVER RECONSTRUCTION 32 (1896).

This was the record emphasized when, in his brief inaugural address, Johnson warranted: "The only assurance that I can give of the future is reference to the past. The course which I have taken in the past in connection with the rebellion must be regarded as a guarantee of the future."¹⁸⁶

A month and a half after taking the oath of office, Johnson issued his first amnesty. It was much like the amnesty proclamation of his predecessor:

[W]hereas many persons who had so engaged in said rebellion have, since the issuance of [President Lincoln's] proclamation, failed or neglected to take the benefits offered thereby; and whereas many persons who have been justly deprived of all claim to amnesty and pardon thereunder by reason of their participation, directly or implied, in said rebellion and continued hostility to the Constitution of the United States since the date of said proclamations now desire to apply for and obtain amnesty and pardon.

To the end, therefore, that authority of the Government of the United States may be restored and that peace, order, and freedom may be established, I, ANDREW JOHNSON, President of the United States, do proclaim and declare that I hereby grant . . . amnesty and pardon . . .¹⁸⁷

Johnson's amnesty doubled the number of excepted classes, but the proclamation stipulated that special applications could be made to the President for pardons. Radicals were delighted with the number of exceptions, for all those the radicals believed should be punished were excluded from the executive blanket. The large number of exceptions, however, operating with the legacy of leniency of the Lincoln Administration, yielded a substantial number of special pardons. The list of pardons released on July 19, 1867 included 3600 names;¹⁸⁸ the list issued the following December contained 6400 names.¹⁸⁹ The radicals soon realized that Lincoln's program was still in effect.

Not only would a lenient policy allow many to go free whom the Northern Republicans felt should be punished, but it would permit former secessionists back into the government. Congress easily

186. 6 MESSAGES AND PAPERS, *supra* note 179, at 305.

187. Pres. Proc. No. 37 of May 29, 1865, 13 Stat. 758.

188. H.R. EXEC. DOC. No. 32, 40th Cong., 1st Sess. (1867).

189. H.R. EXEC. DOC. No. 16, 40th Cong., 2d Sess. (1867).

could keep them from the legislative branches simply by refusing to seat them,¹⁹⁰ but that was insufficient for most. The scope of the exclusion was extended well beyond the Houses of Congress by section 3 of the fourteenth amendment:

No person shall be a Senator or a Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as any member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.¹⁹¹

Between the introduction and adoption of the fourteenth amendment, there were other attempts by the radicals to curtail the scope of the presidential "general pardons."

Early in 1866, Congress began to question the nature of the presidential pardoning power. On June 18, 1866, the Joint Committee on Reconstruction issued a report on the effect of the President's clemency program.¹⁹² The Committee concluded that the pardons and amnesties were undermining the authority and prestige of the federal government and producing an atmosphere of bitterness and defiance. On December 4, 1866, Senator Chandler introduced a bill to repeal section 13 of the Confiscation Act.¹⁹³ The purpose of the repeal, according to Senator Howard, was to prevent the President from restoring confiscated property to its former owners who participated in the rebellion. Senators Johnson and Fessenden argued that the repeal was at least superfluous and at most self-defeating, because if the President did not have the power to grant "general pardons" by the Constitution alone, he was specifically empowered to grant individual pardons. Further, because the President had ten

190. U.S. CONST. art. I, § 5 provides:

Each house shall be the Judge of the Election, Returns, and Qualifications of its own Members Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member.

But see Powell v. McCormack, 395 U.S. 486 (1969) (the House has no power to exclude a member-elect who meets the Constitution's membership requirements).

191. U.S. CONST. amend. XIV, § 3.

192. JOINT COMM. REPORT ON RECONSTRUCTION, 39th Cong. 1st Sess. 18 (1866).

193. CONG. GLOBE, 39th Cong., 2d Sess. 8 (1866). *See* text accompanying note 176 *supra*.

days in which to accept or veto a bill, immediate passage could prompt the President to grant a "general pardon" in the interim, thus inducing what the repeal was seeking to prevent. Nevertheless, Chandler insisted on immediate passage of the legislation:

It is alleged that hundreds of millions of dollars worth of property confiscated under the law have under that section been restored by the President It is alleged that pardons are for sale for money around the streets of this town by women of at least doubtful reputation If the President has powers under the Constitution, let him exercise them; but in God's name give him no greater power than he possesses under the Constitution, to exercise as they have been exercised for the last twelve months

. . . .¹⁹⁴

When asked for the opinion of the Judiciary Committee on the nature of the presidential pardoning power, Senator Trumbull, chairman of the Committee, replied that the power of the executive branch to pardon and grant restoration of property would be as broad after passage of the repeal bill as before. He acknowledged that it was beyond the power of Congress to deprive the President of his prerogative and that pardons could be granted before as well as after conviction, and further, that they could be absolute or conditional. Nevertheless, he recommended repeal as an expression of the opinion of Congress and, more importantly, because he considered the "thirteenth section . . . broader than the Constitution; it authorized the President . . . to grant pardon and amnesty. . . . The President has already issued general proclamations of amnesty and pardon; there can be no occasion for the exercise of that power hereafter" ¹⁹⁵

Senator Johnson dissented and insisted that the power of Article II, section 2 of the Constitution was "as comprehensive as the words can make it." He observed that the Constitution was silent with respect to the proper form of the presidential power:

194. CONG. GLOBE, 39th Cong., 2d Sess. 8-9 (1866). The following day, Chandler repeated his allegation: "[I]t is a notorious fact, as notorious as the records of a court, that pardons have been for sale around this town, for sale by women and more than one [A]ny Senator who desires to stop that disgraceful business, desires that the clause be instantly repealed." *Id.* at 14. To this Dixon replied that the bill certainly must go to committee, for if such a charge be true, "I need not say, [it] renders [Johnson] . . . liable to impeachment." *Id.* at 15.

195. *Id.* at 144.

Whether he is to do it in each particular instance of a man who has committed an offense, or whether, where there is a class of offenders, he may do it in some form so as to include the entire class, the Constitution says nothing about. [W]here the power is conferred upon him absolutely, in general terms, it is for him to decide as to the manner in which he will execute it or as to the number of cases in which he will exercise it; as to the manner, whether he will execute it by granting it to each one a pardon for the alleged offense, or to those who may be included in it, whether he will grant a pardon to the whole collectively¹⁹⁶

The measure became law on January 21, 1867, without the signature of the President.¹⁹⁷ Nevertheless, Johnson was to announce three more amnesties.¹⁹⁸

This act was not the last attempt by the legislators to deny the President power to grant "general pardons." The next attack followed Johnson's Christmas Proclamation of 1868.¹⁹⁹ New life was given the argument by an end to hostilities. According to Senator Conkling:

The argument is not that the President of the United States, as a Commander-in-Chief, or in any other capacity during a war, may make terms with public enemies or military offenders; but that in time of peace, as to any felony whatsoever, murder on the high seas, rifling the mails, or the other acts denounced as crimes in the national jurisprudence, he may interpose in no case in particular, but in all cases in general, without in any way individualizing them by a public act or edict, in effect by a public law of amnesty, and forego, and forever bar all prosecutions for past offenses.²⁰⁰

Senator Ferry picked up on the argument two weeks later. He first drew a distinction between pardon and amnesty by describing amnesty as the obliteration of the offense and pardon as forgiveness of the offense.²⁰¹ Senator Ferry further claimed that no President before Johnson had undertaken to grant a general pardon without the

196. *Id.* Senator Johnson continued his constitutional analysis in subsequent debates. *Id.* at 267-69.

197. Act of Jan. 21, 1867, ch. 8, 14 Stat. 377.

198. Pres. Proc. No. 3 of Sept. 7, 1867, 15 Stat. 699; Pres. Proc. No. 6 of July 4, 1868, 15 Stat. 702; Pres. Proc. No. 15 of Dec. 25, 1868, 15 Stat. 711.

199. Pres. Proc. No. 15, Dec. 25, 1868, 15 Stat. 711.

200. CONG. GLOBE, 40th Cong., 3d Sess. 169 (1869).

201. *Id.* at 438.

prior sanction of Congress. Even Lincoln's pardons, observed the Senator, were "issued while a law stood upon your statute books expressly authorizing the President to make them."²⁰² Upon the repeal, that power, "so far as amnesty was concerned, exercised by the President, fell with the law, and Andrew Johnson alone among the Presidents of the United States has ever attempted to issue a proclamation of amnesty without previous sanction of Congress."²⁰³

Senator Ferry's argument was inaccurate. In 1795, Washington issued a Proclamation of Amnesty to the "Whiskey Rebels" without legislative sanction;²⁰⁴ Adams proclaimed a general amnesty to Pennsylvania insurgents in 1800;²⁰⁵ and in 1815 Madison granted a "general pardon" to the Barataria pirates.²⁰⁶ And, although Lincoln did have legislative approval for the proclamation of December 8, 1863,²⁰⁷ his proclamation was worded to deny the need for legislative sanction.²⁰⁸ Further, when the Supreme Court considered Lincoln's 1863 amnesty in *United States v. Padelford*,²⁰⁹ the Court, too, seemed to imply that legislative sanction might have been superfluous:

This proclamation, if it needed legislative sanction, was fully warranted by the [A]ct of July 17, 1862 That the President had power, if not otherwise yet with the sanction of Congress, to grant a general conditional pardon has never been seriously questioned.²¹⁰

202. CONG. GLOBE, 40th Cong., 3d Sess. 439 (1869).

203. *Id.*

204. 1 MESSAGES AND PAPERS, *supra* note 179, at 181.

205. *Id.* at 303-04.

206. *Id.* at 558-60.

207. Pres. Proc. No. 11 of Dec. 8, 1863, 13 Stat. 737.

208. *Id.* See text accompanying note 180 *supra*. The argument against proof by Presidential precedent should be noted. To give precedent conclusive weight is to hold that usurpation of power, if repeated often enough, accomplishes an amendment to the Constitution and a transfer of power. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 90 (1974). This merely restates an earlier Court opinion: "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969). But see *Edward's Lessee v. Darby*, 27 U.S. (12 Wheat.) 206, 209 (1827) in which the Court noted that the construction of a doubtful and ambiguous law by those charged with its execution was entitled to great respect. See, e.g., *United States v. Midwest Oil Co.*, 236 U.S. 495 (1914); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 496 (1840); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

209. 76 U.S. (9 Wall.) 531 (1870).

210. *Id.* at 542 (emphasis supplied). The Attorney General sent President Johnson an opinion stating that "[t]he right and power of the President to pardon and to issue any proclamation of amnesty are derived from the clauses in the Constitution and the Act of Congress [Act of July 17, 1862]" 11 OP. ATT'Y. GEN. 227 (1865). There is evidence, however, that

Whether the Senate was serious or not, the Judiciary Committee submitted a report²¹¹ accompanied by the following resolution:

Resolved, That in the opinion of the Senate the proclamation of the President of the United States of the 25th of December 1868, purporting to grant pardon and amnesty to all persons guilty of treason and acts of hostility to the United States during the late rebellion with restoration of rights, etc. was not authorized by the Constitution or laws.²¹²

The Committee relied in part on English law, which seemed to deny the power to the Crown and grant it to the Parliament. An examination of the list of early English amnesties quickly reveals the error in that conclusion.²¹³ Moreover, the absence of the word "amnesty" from Article II, section 2 was convincing proof to some that the framers intended to withhold the power of amnesty from the executive office. To illustrate the conclusion, they noted the words of Chief Justice Marshall that a "pardon . . . exempts the individual . . . from punishment."²¹⁴

As noted earlier, the king's prerogative of mercy, including the "King's most Gracious general and Free pardon" goes back to early England. In England Parliament shared this power with the king and its power proceeded from the king.²¹⁵ Parliament exercised the power as it would have exercised any other legislative act via a bill enacted with the consent of the Crown. Sending a "general pardon"

Johnson himself felt that he was without power to grant amnesty without legislative sanction and would have vetoed the repeal bill as an unconstitutional infringement on the President's pardon power had he been more certain of his power. 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 247 (1939).

211. S. REP. NO. 239, 40th Cong., 3d Sess. (1869).

212. CONG. GLOBE, 40th Cong., 3d Sess. 1281 (1869).

213. The King's first general pardon was embodied in the *Charta Forestae*, 9 Hen. 3, c. 15 (1225). A general pardon was granted to celebrate the fiftieth year of Edward III's reign, 50 Edw. 3, c. 3 (1376), and was confirmed by 1 Rich. 2, c. 10 (1377). In 1382, the King granted a pardon to all his subjects after the late insurrection, 6 Rich. 2, c. 13, § 1 (1382), followed by a "more large Pardon" 6 Rich. 2, c. 1, § 1 (1382). Charles II's restoration was accompanied by a general pardon. Act of Free and General Pardon, 12 Car. 2, c. 11 (1660). In 1672 there was the Act for the King's Majesties Most Gracious, General and Free Pardon, 25 Car. 2, c. 5 (1672). General pardons subsequently were issued in 1690, 2 W. & M., c. 10, § 1 (1690); 1695, 6 & 7 Will. 3, c. 20 (1695); 1716, 3 Geo. 1, c. 19 (1716); and 1747, 20 Geo. 2, c. 52 (1747).

214. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1883) (emphasis supplied).

215. Chief Justice Holt noted that the king's pardon was as effective as a Parliamentary pardon; both prevented all corruption of the blood. If, however, the convict had been attainted (condemned or outlawed), his blood was corrupted and could not be purged by pardon. In such a case only an Act of Parliament could restore him to blood. *Rookwood's Case*, 90 Eng. Rep. 1277 (K.B. 1696).

with the king's assent affixed in advance to Parliament for endorsement was common²¹⁶ because parliamentary sanction enhanced the benefit of the pardon; if Parliament assented, the pardon did not have to be pleaded because it was a public act and all courts were required to take judicial notice of it. Further, parliamentary sanction could "restore the blood" when corrupted; the king's charter alone could not.²¹⁷

By arguing that the Parliament rather than the king had the power to grant amnesties, the Senate implied that they, rather than the President, possessed the power. This argument is strange indeed. It is easier to reason that the framers adopted the theory of pardon from the English executive's authority and applied that theory to the President than it is to suggest that the theory followed for the legislative body. The power of the legislative body of England is neither limited by a written constitution nor held in check by a judicial reviewing power.²¹⁸ Moreover, the Constitution of the United States confers on the President the "executive Power" in undefined terms,²¹⁹ but the Congressional powers are carefully enumerated. Article I further provides that Congress is to exercise only those powers "herein granted."²²⁰

The Judiciary Committee report was never considered by the Senate. Solicitor General William Howard Taft, when asked in 1892 for his official advice on the power of the President to grant amnesties, was of the opinion that the President obviously had such power, for if the President may grant pardons separately to 10,000 individuals, which no one doubts he may do, why can he not, by one general

216. Although the basis for ratification is obscure, it slowly became the established practice. *E.g.*, 51 & 52 Hen. 3, c. 5 (1266); 42 Edw. 3, c. 2 (1368); 1 Rich. 2, c. 2 (1377).

Early Parliaments usually acted as a rubber stamp, but the potential for conflict existed. After the death of Lord Chancellor Wolsey who stood impeached before the Commons in 1531, the King had a writ of praemunire entered against the clergy. Because praemunire was a simple law to apply, laymen were apprehensive that it might be used against them as easily as it was used against the clergy. Therefore, when the king granted a pardon to the clergy for £100,000, 22 Hen. 8, c. 15 (1531), no member of the Commons would vote to confirm the pardon without an assurance that they too would receive a grant of mercy. The king granted the Commons a pardon shortly thereafter. 22 Hen. 8, c. 16 (1531). See 1 W. COBBETT, *PARLIAMENTARY HISTORY OF ENGLAND* 514-15 (London 1806).

217. See *Rookwood's Case*, 90 Eng. Rep. 1277 (K.B. 1696); note 215 *supra*.

218. For a general description of English law, see S. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* (1971).

219. U.S. CONST. art. II, § I, cl. I states: "The executive Power shall be vested in a President of the United States of America."

220. U.S. CONST. art. I, § I states: "All legislative powers herein granted shall be vested in a Congress of the United States"

pardon or amnesty, grant such clemency to those offenders as a group?²²¹

It is most likely, however, that the framers considered the power to grant amnesties as incidental to the power to pardon. This theory is bolstered by Hamilton's justification for the existence of the power in the executive department: "[I]n seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the *insurgents* or *rebels* may restore the tranquillity of the commonwealth"²²²

Furthermore, the Supreme Court specifically upheld the President's power to grant amnesties without legislative consent in *Armstrong v. United States*.²²³ By the Abandonment and Captured Property Act²²⁴ Congress provided for the restoration of property lost during the Civil War upon proof that the claimant had never given aid or comfort to the rebellion. After Armstrong fled south from the approaching Union army, her cotton was confiscated. She sought to recover the proceeds but the Court of Claims, holding that Armstrong's flight south evidenced aid to the rebellion, denied her claim. To the Supreme Court, however, Armstrong's move south was irrelevant; the Court held that Lincoln's universal and unconditional amnesty²²⁵ absolved Armstrong of any rebellious act and entitled her to recover the proceeds of her confiscated cotton.²²⁶ Today the power of the executive to grant amnesties is established.

By reasoning similar to that which extended the power to pardon

221. 20 OP. ATT'Y GEN. 330 (1892). This argument was advanced also by Senator Doolittle during the Senate debates on the pardon power in 1869. CONG. GLOBE, 40th Cong., 3d Sess. 169 (1869). Arguably, however, Taft failed to note a difference between the two acts; a pardon of 10,000 individuals is a series of executive acts whereas the power to grant an amnesty to a group of 10,000 is a legislative action. See text accompanying note 195 *supra*.

222. THE FEDERALIST No. 74, in THE FEDERALIST PAPERS 449 (1961) (A. Hamilton) (emphasis supplied).

223. 80 U.S. (13 Wall.) 154, 156 (1871).

224. Act of March 3, 1863, ch. 120, 12 Stat. 820.

225. Pres. Proc. No. 15 of Dec. 25, 1868, 15 Stat. 711.

226. See *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 543 (1869), in which the Court held that the amnesty "purged [petitioner] of whatever offence against the laws of the United States he had committed . . . and relieved [him] from any penalty which he might have incurred."

After this decision, Congress enacted a law disallowing evidence of any pardon or amnesty in support of any claim in the Court of Claims or appellate court. Ch. 251, 16 Stat. 230 (1870). The Supreme Court refused to give effect to the act, stating that it was an unconstitutional attempt "to deny to pardons granted by the President the effect which this court had adjudged them to have." *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145 (1871).

to cover amnesties (the greater includes the lesser),²²⁷ the power to grant conditional pardons also is considered an incidental power. The power to grant conditional amnesties probably is also incidental power although it has never specifically been ruled on by the courts. However, courts have upheld claims that never would have been sustained without the operation of a conditional amnesty.²²⁸ Indeed, it is unusual for an amnesty not to be granted conditionally.²²⁹

Although the Court qualified *Ex parte Wells*²³⁰ in *Biddle v. Perovich*,²³¹ it did not overrule the holding of *Wells* on the basic issue: Can the President grant a conditional pardon?²³² After receiving and accepting a conditional pardon, Wells challenged it by claiming that the Constitution empowered the President to issue only full pardons. Wells reasoned that attaching the condition was tantamount to legislating and was therefore a power reserved to a co-equal branch. The Supreme Court rejected the argument and held that the power to pardon on condition is incidental to the general pardoning power.²³³

The power to pardon has been held to extend also to granting commutations²³⁴ and remissions of fines and forfeitures imposed by the United States.²³⁵ Commutation is the substitution of a lighter

227. See *Semmes v. United States*, 91 U.S. 21 (1875); *Vitale v. Hunter*, 206 F.2d 826 (10th Cir. 1953); *Kavalin v. White*, 44 F.2d 49 (10th Cir. 1930); *In re Ruhl*, 20 F. Cas. 1335 (D. Nev. 1878) (No. 12,124).

228. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

229. For a discussion of early English precedent, see 5 M. BACON, A NEW ABRIDGEMENT OF THE LAW 292-93.

230. 59 U.S. (18 How.) 307 (1855). See text accompanying note 172.

231. 274 U.S. 480 (1927). See text accompanying note 173.

232. A conditional pardon is "[a] pardon which does not become operative until the grantee has performed some specific act, or [one which] becomes void when some specific event transpires." BLACK'S LAW DICTIONARY 1269 (Rev. 4th ed. 1968).

233. The use of the conditional pardon is identifiable in statutory form as early as 1336 (10 Edw. 3, c. 3, repealed in 1694 by 5 W. & M., c. 13), by which beneficiaries of the king's mercy were required to find sureties for their good behavior. It was used to an excess in England during the seventeenth and eighteenth centuries, first as a means of colonizing and later as a tool for manning the navy. 11 W. HOLDWORTH, A HISTORY OF ENGLISH LAW 570-72, 575-76 (1938). A statistical study has shown that the eighteenth century English criminal law claimed fewer lives than in earlier periods, in spite of the growth in trade and population, the increased number of convictions, and the continual creation of new capital crimes. The decrease was attributed to the "increasing use of the royal pardon, by which transportation could be substituted for hanging." D. HAY, P. LINEBOUGH, J. RULE, E. THOMPSON, & C. WINSLOW, ALBIANS FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND 22 (1975).

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

235. *Osborn v. United States*, 91 U.S. 474 (1875); *The Laura*, 114 U.S. 411 (1885).

punishment for a heavier one. Although for a pardon to be effective it usually must be accepted, commutation is effective without acceptance.²³⁶ In *Chapman v. Scott*,²³⁷ the President granted a commutation to "time-served" to a convict so that he would be available for prosecution in a state court on a capital case. The convict refused the commutation and argued that it was not effective until accepted, but the court held that a commutation did not require acceptance:

Although power to commute is logically derivable from power to pardon, . . . commutation is essentially different from pardon. Pardon exempts from punishment, bears no relation to term of punishment, and must be accepted, or it is nugatory. Commutation merely substitutes lighter for heavier punishment It removes no stain, restores no civil privileges, and may be effected without the consent and against the will of the prisoner.²³⁸

Nonexclusivity of the Power

The Supreme Court has held that the power to pardon is not exclusively vested in the President.²³⁹ The Constitution specifically speaks of the power, however, in Article II only, and in fact, the framers even rejected legislative confirmation of the prerogative.²⁴⁰ Further, the Court ratified the exercise of the power by Congress despite statements in previous opinions that "[t]o the executive

236. In *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833), Chief Justice Marshall, for the Court, held that acceptance was necessary. It has been argued that Marshall erred in his examination of history and that the decision

rested on a misconception of early English decisions which actually turned on points of pleading. The king's pardon, being a private act of grace, was not a subject of judicial notice. Under old English rules of pleading, a plea of guilty waived the pardon, and it could thereafter be availed of. Marshall expanded this rule of pleading into a substantive rule, that which required acceptance. No such rule is laid down by any of the English authorities. On the contrary, where a pardon was properly brought to the attention of the Court, whether by pleading or judicial notice as in the case of a legislative pardon: the convict was not permitted to waive it.

3 ATTORNEY GENERAL'S SURVEY 80 (1939). The distinction between procedural and substantive law was immaterial if the defendant before the bench pleaded the case with something other than a pardon. See also 5 M. BACON, *supra* note 229, at 294: "The party . . . must insist on the benefit of [the King's] . . . pardon; and therefore it hath been held to be error, to allow a man the benefit of a pardon under the great seal, unless he plead it."

237. 10 F.2d 156 (D. Conn. 1926).

238. *Id.* at 160, quoting from *In re Howard*, 115 Kan. 323, 325, 222 P. 606, 608 (1924).

239. *Brown v. Walker*, 161 U.S. 591 (1896); *The Laura*, 114 U.S. 411 (1885).

240. See text accompanying note 145 *supra*.

alone is intrusted the power of pardon"²⁴¹ and that the power is "not subject to legislative control."²⁴²

In *Brown v. Walker*²⁴³ the Court specifically affirmed the power of Congress to pass acts of general pardon. Brown, the auditor for the Alleghany Valley Railroad Company, was subpoenaed to appear as a witness before a grand jury investigating violations of the Interstate Commerce Act. When asked if he knew whether or not Alleghany transported coal for the Union Coal Company at prices below established rates, Brown pleaded the fifth amendment guarantee against self-incrimination. The Court refused to allow Brown to fail to testify because an act of Congress afforded him amnesty from prosecution. According to the act:

[N]o person shall be excused from attending and testifying or producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding . . .²⁴⁴

The Supreme Court also observed that "if the witness has already received a pardon, he cannot longer set up his [fifth amendment] privilege, since he stands with respect to such an offense as if it had never been committed."²⁴⁵ The Court held that although the Constitution vests the executive with the power to pardon, "this power has never been held to take from Congress the power to pass acts of general amnesty."²⁴⁶

In a government of limited power under a Constitution that carefully defines the powers of Congress, advocates of exclusive executive pardoning power may have difficulty comprehending the Court's willingness to give the presumption of constitutionality to

241. *United States v. Klein*, 80 U.S. 128, 147 (1871).

242. *Ex parte Garland*, 71 U.S. (9 Wall.) 333, 380 (1866).

243. 161 U.S. 591 (1896).

244. Act of Feb. 11, 1893, 27 Stat. 443-44.

245. 161 U.S. at 599.

246. *Id.* at 601.

the Congressional power advocates and the burden of proof to the apologist for exclusive presidential power. This is even more difficult to understand in light of *Ex parte Garland*,²⁴⁷ in which the Supreme Court stated:

The Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment"

The power thus conferred is unlimited, with the exception stated This power of the President is not subject to legislative control . . . [and] cannot be fettered by any legislative restrictions.²⁴⁸

If the executive issued an amnesty excepting a group of offenders or attaching a condition to the general pardon and Congress thereafter issued a complete, full, and unconditional amnesty, denying Congressional interference would be difficult.

In England, Parliament held the power concurrently with the king and a parliamentary pardon was often more beneficial than an executive charter alone.²⁴⁹ But Congress, unlike Parliament, is limited in its powers. The Court in *Brown* did not take note of the difference; in fact, it gave little support at all for its conclusion. It relied heavily on state court opinions and on the opinion of a former Court in *The Laura*.²⁵⁰

In *The Laura*, a revenue statute empowering the Secretary of the Treasury to remit or mitigate any fine or penalty relating to steam vessels or to discontinue any prosecution seeking to recover penalties was challenged. It was argued that the presidential power to grant pardons included the power to remit fines and forfeitures imposed for the commission of offenses against, or for violation of the laws of, the United States.²⁵¹ Further, it was argued that such a power is vested exclusively in the President, and its exercise by any subordinate officer of the government is an encroachment upon the constitutional prerogative of the Chief Executive.²⁵²

Justice Harlan, speaking for the Court, agreed that the power to remit fines, penalties, and forfeitures was incidental to the power of

247. 71 U.S. (9 Wall.) 333 (1866).

248. *Id.* at 380, quoting U.S. CONST. art. II, § 2, cl. 1.

249. See note 215 *supra*.

250. 114 U.S. 411 (1885).

251. See note 235 & accompanying text.

252. 114 U.S. at 413.

the President to pardon, but he did not find the power exclusively vested in the President. The opinion was based on previous practice and acquiescence in such practice for nearly a century:²⁵³

[The] practice commenced very shortly after the adoption of [the Constitution], and was, perhaps, suggested by legislation in England, which, without interfering with, abridging, or restricting the power of pardon belonging to the Crown, invested certain subordinate officers with authority to remit penalties and forfeitures arising from violations of the revenue and customs laws of that country.²⁵⁴

The opinion is not well reasoned. It is dangerous jurisprudence for a court to rely upon past actions that may have been unconstitutional as authority. The doctrine of *Powell v. McCormack* "[t]hat an unconstitutional action has taken place before surely does not render that same action any less unconstitutional at a later date,"²⁵⁵ cannot be overemphasized. Additionally, that the practice began shortly after the adoption of the Constitution does not strengthen the Court's argument. The 1797 act was merely legislation enacted by the same generation divided over the vital issue of judicial review. Finally, that the Parliament vested the power in executive ministers is completely irrelevant because of the difference between the two systems.

In addition to these examples of clemency power outside the executive office, the courts exercise power consanguineous to a power of pardoning. Although as a general principle the courts have no power to grant clemency,²⁵⁶ they do have the power to commute sentences²⁵⁷ and remit fines during the term in which the sentence or fine was rendered.

253. By an act passed on March 3, 1797, 1 Stat. 506, the Secretary of the Treasury was authorized to mitigate or remit any fine, penalty, forfeiture, or disability arising from any law providing for the laying, levying, or collecting of duties or taxes, or any law concerning the registration and recording of ships or vessels, or the enrolling or licensing of ships or vessels employed in the coasting trade or fisheries if in his opinion the same was incurred without the willful negligence, or fraudulent intention by the person or persons subject to the same. That act expired on February 11, 1800. It then was renewed without limitation. 2 Stat. 7.

254. 114 U.S. at 414. For the English legislation referred to by Justice Harlan, see 27 Geo. 3, c. 82 (1787); 51 Geo. 3, c. 96 (1811); 54 Geo. 3, c. 171 (1814).

255. 395 U.S. 486, 546-47 (1969).

256. *Ex parte United States*, 242 U.S. 27 (1916).

257. *United States v. Benz*, 282 U.S. 304 (1931).

The Extent of the Power

The extent of the presidential power must be considered: Which offenses fall within its scope? The scope of the power, it is submitted, is broad enough to allow the executive to shield himself from the checking power of the other branches.²⁵⁸

First, impeachments are specifically excluded from the scope of the power. As Chief Justice Story, commenting on the Constitution, concluded: "[I]f the power of pardon extended to impeachments, . . . the latter might be wholly ineffective, as a protection against political offenses. The Party accused might be acting under the authority of the President, or be one of his corrupt favorites."²⁵⁹ One court has held that the exception in cases of impeachment strengthens the argument that the framers meant to include everything else.²⁶⁰

Secondly, the Constitution also limits the President's pardon power to offenses against the United States. This clause precludes the President from pardoning offenses against the individual states

258. Some once viewed impeachment as a check on the pardoning power. In 1867, Representative Ashley charged President Johnson with "high crimes and misdemeanors" for "usurpation of power and violation of law" by "corruptly us[ing] the pardoning power." CONG. GLOBE, 39th Cong., 2d Sess. 320 (1867). After investigation, the Committee on the Judiciary found no evidence of corrupt use of the power. H.R. REP. No. 7, 40th Cong., 1st Sess. (1867).

Impeachment is actually no check at all on the powers of the President; it is a check on the individual President. If convicted, an impeached President is removed from office, but the powers of the executive branch are left undisturbed. Furthermore, the pardon remains effective despite removal of the President for issuing it. Once delivered, a pardon cannot be revoked. In re DePuy, 7 F. Cas. 506 (S.D.N.Y. 1869) (No. 3,814). When Oklahoma Governor Walton was impeached for abusing the pardoning power, the pardons remained in force despite the abundant evidence of abuse. See 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 150-52 (1939).

It might be asked whether removal via impeachment is a desirable course of action against a President who issues a pardon because of incompetent advice or through his own misjudgment. Is impeachment probable against an executive who utilizes the pardoning power only once during his administration, although that act sufficiently disturbs the body politic? Was impeachment designed to create a sanction for misjudgment or as a means to settle policy disputes, or was it designed rather for "higher purposes?" Further, if after receiving feedback from the body politic, the President realizes the folly of his exercise, what can be done about the pardon? And finally, is it not possible that a President, liable to impeachment for a reason other than abusive use of the pardon, could, via the power, suppress a thorough investigation? Lower level accomplices, having behind them the security of the executive office, complete with the power to pardon, would not need the inducements of Congress to testify. A check on the power, then, is yet to be incorporated into the American constitutional scheme.

259. I J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 172 (1851).

260. United States v. Thomasson, 28 F. Cas. 82 (D. Ind. 1869) (No. 16,479).

and from intervening in civil suits.²⁶¹ The former limitation is based upon the American federal system; the latter upon accepted historical limitation. As noted earlier, if a suit was for the king's branch of a law only and not to the particular damage of any third party, the king could pardon or dispense; if the suit was not only for the king's benefit but for the profit or safety of a third person, the king could not release the party.²⁶² Even if a pardon were granted, it could not relieve an individual from prosecution by the affected party, or in the case of the death of a man, from revengeful kinsmen.²⁶³ This issue often arose in the United States in property confiscation cases decided after the Civil War.²⁶⁴

Time is a third limitation on the power. Because the power to pardon is given only for "offenses against the United States," the crime must precede the pardon; it may not be anticipated. Otherwise the power that allows presidential clemency for the consequence of a violation would be a power to dispense with the observance of the law. But, as the Court said in *Ex parte Garland*,²⁶⁵ the pardoning power "may be exercised at any time after [the commission of the offense], either before legal proceedings are taken, or during their pendency, or after conviction and judgment."²⁶⁶

Whether contempt of court is a pardonable crime is an important issue in determining the scope of the power. In *Ex Parte Grossman*²⁶⁷ the Court considered only criminal contempt.²⁶⁸ Grossman violated

261. Therefore, the only possibility that former President Nixon's full involvement in Watergate will be uncovered is through state criminal proceedings and civil suits.

262. *Thomas v. Sorrell*, 89 Eng. Rep. 63, 100 (K.B. 1673). See text accompanying notes 55-59 *supra*.

263. See note 59 *supra* & accompanying text.

264. Compare *Knote v. United States*, 95 U.S. 149 (1877) with *Osborn v. United States*, 91 U.S. 474 (1875). In *Knote* the Court held that a pardon could not restore proceeds paid to whom the law assigned them. 95 U.S. at 155. In *Osborn* the Court held that if the proceeds are not lawfully distributed to a party entitled to receive them or paid into the Treasury, no vested right accrued to prevent a pardon from restoring them to the claimant. 91 U.S. at 477.

265. 71 U.S. (9 Wall.) 333 (1866).

266. *Id.* at 380. See also *United States v. Burdick*, 211 F.492 (S.D.N.Y. 1914), in which Judge Learned Hand remarked: "I have no doubt whatever that the President may pardon those who never have been convicted. The English precedents are especially pertinent." *Id.* at 493.

267. 267 U.S. 87 (1925).

268. One commentator, considering the distinction between civil and criminal contempt in detail, has noted that for civil contempt the punishment is "remedial" whereas for criminal contempt the punishment is "punitive." That is, the former is directed at aiding a third party, the complainant, and the latter, to vindicate the authority of the court. Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161 (1907). See also *McCrone v. United States*, 307 U.S. 61 (1939).

an injunction entered on behalf of the United States and was arrested, found guilty of contempt of court, and sentenced to one year in jail and a fine of \$1000. Thereafter, he was granted a pardon by President Coolidge. Grossman accepted the pardon, paid the fine, and was released. Six months later the District Court recommitted him to the House of Correction to serve his sentence notwithstanding the pardon.

On behalf of the lower court, special assistants to the Attorney General argued that the power to punish for contempt is inherent in, and essential to, the very existence of the judiciary. Were the President allowed to substitute his discretion for that of the court he would become the ultimate source of judicial authority. Such a holding, argued the prosecutors, would be a distortion of the cardinal principle of American government that the executive, legislative, and judicial branches are independent and co-equal.²⁶⁹ The special assistants also suggested that contempt of court is not an offense "against the United States" and thus is not within the purview of the power of the President to pardon.²⁷⁰

The Court rejected this argument and adopted the plaintiff's contention that the power to pardon for contempt is inherent in the pardoning power.²⁷¹ The Court ordered Grossman released and held that the President's power extended to pardons of criminal contempt of court:

The king of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court just as he did ordinary crimes and misdemeanors In the mind of a common-law lawyer of the eighteenth century the word "pardon" included within its scope the ending by the king's grace of the punishment of such derelictions, whether it is

269. 267 U.S. at 98.

270. *Id.* at 93-95.

271. Attorney General Stone, as *amicus curiae*, argued that the history of the power to pardon for criminal contempts establishes that the grant of the pardoning power to the President by the Constitution "was intended to embrace criminal contempts in the phrase 'offenses against the United States'." *Id.* at 102. See also 3 OP. ATT'Y GEN. 622 (1841) ("A pardon has been held to extend to a contempt committed in Westminster Hall, under circumstances not materially different . . ."); 4 OP. ATT'Y GEN. 317 (1844) (the power vested in the President to grant reprieves and pardons for offenses against the United States is sufficient to authorize him to remit a fine imposed upon a citizen for contempt in neglecting to serve as a juror); 19 OP. ATT'Y GEN. 476 (1890) (the President has power to grant a pardon to a prisoner undergoing punishment for contempt of court).

imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had.²⁷²

Moreover, the Court noted that criminal contempts of a federal court had been pardoned for eighty-five years.²⁷³

The Supreme Court thus ratified a power of the executive that had been and can be used to frustrate powers essential to the operation of the judiciary, power a lower court described earlier as "as inherent and indispensable as a judge."²⁷⁴ The contempt power is essential to the preservation of order in judicial proceedings and to the enforcement of judgments, orders, and writs; consequently, it is essential to the due administration of justice. "A Court without the power effectually to protect himself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recalcitrant parties before it, would be a disgrace to the legislation and a stigma upon the age which invented it."²⁷⁵ Yet the President has the unchecked power to frustrate this essential authority of the court. The argument is not that courts erred in their reading of jurisprudential history, but that the framers overlooked the need to hold the power to pardon in check. The holding of *Grossman* arms the President with a power that enables him to shield his subordinates against judicial interference.

America always has been vigilant in preserving her liberties. Speaking of the system of "mixed governments" in England, Bolingbroke observed: "It is by this mixture of . . . [power], blended together in one System, and by these three Estates balancing one

272. 267 U.S. at 110. William Howard Taft, who served as President and later as Chief Justice, suggested in a lecture:

Where a court is seeking to enforce a decree or a judgment against a contumacious party and puts him in prison for the purpose of compelling him to comply with the judgment or decree, then I do not think the President could pardon a man or relieve him from the effect of such an order because he would really be obstructing the cause of justice. But where the court is merely vindicating its own authority by punishing a man for a past contempt, and where an imprisonment is not a continuing duress for the purpose of compelling obedience, it seems to me that the punishment inflicted is for an offence against the United States, to wit, a defiance of judicial authority, and therefore that it does come within the range of the power of pardon by the President.

W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 120-21 (1916).

273. 267 U.S. at 118. *But see* *The Laura*, 114 U.S. 411 (1885), decided forty years before *Grossman*. There the Court noted in dictum that the pardoning power was unlimited "except in cases of impeachment and where fines are imposed by a co-ordinate department of the government for contempt of its authority . . ." *Id.* at 413.

274. *In re Nevitt*, 117 F. 448, 455 (8th Cir. 1902).

275. *Id.* at 455.

another, that . . . [the] free Constitution of Government hath been preserved so long inviolate. . . ."²⁷⁶ The founding fathers were steeped in this type of literature. They were surrounded not only by the writing of Bolingbroke but also by the works of such eminent writers as Cicero and Montesquieu. The early American constitutionalists were well aware that liberty was to be preserved only by maintaining institutional restraints and a just division of powers. The simplest government would not ensure the maximum freedom. But a government of law, guaranteeing optimum liberty, required numerous limitations and qualifications on the powers of government. The founders of the American government were no doubt the greatest innovators of the theory of "mixed governments," but in their desire to protect society from inflexible laws²⁷⁷ and, ironically enough, to establish a means of facilitating complete investigations,²⁷⁸ they allowed one enumerated power to proceed unfettered.²⁷⁹

The query naturally suggested by *Grossman* is whether a contempt of Congress constitutes a pardonable offense. Story suggests that it is necessary that the branches be independent and have the ability to discharge their duties: "If the executive should possess the power of pardoning any . . . offender [who interrupts the affairs of Congress], . . . [the legislature] would be wholly dependent upon [the executive's] good will and pleasure for the exercise of their own powers."²⁸⁰ But the argument based on the ground of separation of powers no longer seems feasible in light of *Grossman*.²⁸¹ The power of the "Grand Inquest of the Nation" to compel testimony via a contempt citation is easily frustrated if the executive branch so pleases.²⁸²

276. N. BOLINGBROKE, A DISERTATION UPON PARTIES 158 (5th ed. London 1739).

277. 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 110-12 (J. Elliot ed. 1836) [hereinafter cited as DEBATES].

278. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 426 (M. Farrand ed. 1911) [hereinafter cited as RECORDS].

279. The courts have not yet considered whether the President may pardon civil contempts of court. Perhaps, however, to pardon for civil contempts would be an interference with the rights of third parties. In *Grossman*, the Court stated: "For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it." 267 U.S. at 111 (dictum). See also text accompanying notes 56-59 *supra*.

280. J. STORY, *supra* note 259, at 551-52.

281. See 267 U.S. at 119-20.

282. Even though the courts have not spoken to this issue, the executive has issued pardons for Congressional contempts, e.g., the 1938 pardon by Franklin D. Roosevelt of Dr. Francis Townsend, leader of an old age pension group, who was found guilty of contempt for refusal to testify.

The power may be used in other ways to suppress a constitutional action by Congress. The most obvious exercise of the power to impede Congressional authority is the pardoning of all individuals convicted under a statute the President opposes. In a preliminary draft of his first address to Congress, Jefferson included a declaration that the Sedition Act was "a palpable and qualified contradiction to the Constitution" and announced that he intended, pursuant to the powers vested in him by Article II, section 2, to pardon those convicted under the Act.²⁸³ Inasmuch as the President is free to exercise the pardoning power for good reason, bad reason, or no reason at all, the clause was considered superfluous and was eliminated from Jefferson's final draft.²⁸⁴ In sum, even if a presidential veto is overridden by two-thirds of Congress, the executive still possesses the dominating power.²⁸⁵

The Nixon Pardon

I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.²⁸⁶

With these words, the power of the presidency was displayed awesomely. In an analysis of the President's power to pardon, it is difficult to overlook the most recent controversial exercise of the power in American history, although the exercise of the prerogative of mercy by Gerald Ford is much more significant in a political history of the United States than in a constitutional history.²⁸⁷

Nixon had been forced from office by the threat of being the first

283. E. CORWIN, *THE PRESIDENT: OFFICE AND POWER* 350 n.59 (4th ed. 1957).

284. *Id.*

285. For a further discussion of the potential conflict between the branches caused by the pardoning power, see Morris, *Some Phases of the Pardoning Power*, 12 A.B.A.J. 183, 184-86 (1926).

286. Pres. Proc. 4311, 39 Fed. Reg. 32601-02 (1974).

287. To many the pardon of Richard Nixon seemed to be a great perversion of the power that violated the intention of the framers. During the formation conventions Iredell remarked that "pardon in a Republican government was not to protect felons with powerful friends, but to protect society from ineffective laws." 4 DEBATES, *supra* note 277, at 110-12. Wilson believed that the pardoning power should facilitate rather than circumvent a thorough investigation. 2 RECORDS, *supra* note 277, at 426.

President removed from the presidency by the Congress.²⁸⁸ His resignation was followed thirty days later by a pardon from his chosen successor. To many the pardon smacked of a deal between Gerald Ford and Richard Nixon.²⁸⁹ To dispel this apprehension, Ford volunteered to appear before the House Judiciary Committee's Subcommittee on Criminal Justice.²⁹⁰

Before the Committee Ford emphasized that there was no deal between the former President and himself.²⁹¹ The pardon was granted, according to the President, to "change our national focus . . . to shift our attention from the pursuit of a fallen President to the pursuit of the urgent needs of a rising nation."²⁹² Some members of the Committee, notably Elizabeth Holtzman, were unsatisfied with Ford's answers. One question asked by Representative Holtzman and unanswered by Ford sought an explanation for the President's failure to specify any of the crimes for which Nixon was pardoned.

Holtzman's query is not only an important political issue, but it raises an interesting legal problem: Is a pardon that does not specify an offense valid? The answer must begin with an explicit statement of the time-honored canon of constitutional interpretation that words used in a constitution or charter carry with them the meaning of their origin.²⁹³ To the mind of the eighteenth century statesman, the word "pardon" conveyed the power exercised by the Crown in England.²⁹⁴ Of the thirty-one lawyer-delegates attending the Convention of 1787, five had received their legal education at the Mid-

288. See *Report of the Committee on the Judiciary, House of Representatives*, H. R. REP. No. 1305, 93d Cong. 2d Sess. (1974).

289. Stone, *Pardons and Testimony*, N.Y. Times, Oct. 9, 1974, at 43, col. 2.

290. The appearance was in response to resolutions introduced by Representatives Abzug and Conyers. H.R. Res. 1367, 93d Cong., 2d Sess. (1974); H.R. Res. 1370, 93d Cong., 2d Sess. (1974). More than seventy members of Congress had sponsored similar bills and resolutions.

291. If pardons are granted because removal is punishment enough, as Ford answered when queried before the subcommittee, see *Testimony Before House Judiciary Subcommittee*, reprinted in N.Y. Times, Oct. 18, 1974, at 18-20, Art. I, sec. 3, cl. 7 of the Constitution, which states that the impeached and removed official "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment according to Law", is in effect defunct. See Firmage & Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023; Macgill, *The Nixon Pardon: Limits on the Benign Prerogative*, 7 CONN. L. REV. 56 (1974).

292. N.Y. Times, Oct. 18, 1974, at 18, col. 4.

293. "Words of art bring their art with them. They bear the meaning of their habitat" Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

294. See notes 170-71 *supra* & accompanying text.

dle Temple, four at the Inner Temple.²⁹⁵ There can be little doubt that the others were at least familiar with the great works of the leading English writers. The courts have given great weight to that fact.

The Supreme Court never has been called upon to judge the validity of an open pardon like the Nixon pardon. If it must do so in the future and if it continues to view Article II, section 2 in light of the meaning the framers intended it to have, the evidence raises a reasonable doubt of the constitutionality of the Nixon pardon.

Under examination by the Subcommittee, Ford admitted that he had no knowledge of anything that "rises to the level . . . to prove even a probable criminal violation."²⁹⁶ He had only the September 4th memorandum from Deputy Special Prosecutor Ruth to Special Prosecutor Jaworski listing ten "possibilities"²⁹⁷ and had no knowledge "of any other potential or possible criminal charges."²⁹⁸

To guard against fraud on the part of persons seeking to secure a pardon, it was a general rule in England "that wherever it appeare[d] by the recital of the pardon, that the king was misinformed, or not rightly apprised both of the heinousness of the crime, and also, how far the party stands convicted upon the record, the pardon [was] void . . ."²⁹⁹ The reasoning behind the rule was that the king was entrusted with the high prerogative upon a special confidence that he would spare only those whose cases "the Law itself may be presumed willing to have excepted out of its general Rules, which the Wit of Man cannot possibly make so perfect as to suit every particular Case . . ."³⁰⁰ Hawkins added further:

It hath been holden, That anciently a Pardon of all Felonies, included all Treasons, as well as Felonies whatsoever, and might be pleaded to an Indictment for them: And it seems to be taken for granted, in many Books, that a Pardon of all Felonies in general, without describing any one particular Felony, may even at this Day, if the Party be neither attainted or indicted, be pleaded in Bar of any Felony whatsoever, coming within the general Limitations of the Pardon, except Murder or Rape, and that

295. R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 87 n.160 (1973).

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

297. *Id.*

298. *Id.* at col. 5.

299. 5 M. BACON, *A NEW ABRIDGEMENT OF THE LAW* *290.

300. W. HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* ch. ____, § 8, at 382-83 (London 1716).

the only Reason why it cannot be also pleaded to Murder or Rape, is because the Statute of 13 R. 2 . . . , requires an express Mention of them. But I find this Point no where solemnly debated; neither doth it seem easy to reconcile it with the general Rules concerning Pardons, agreed to be good in other Cases; 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 be well intended that he was *not* apprised of it at all.³⁰¹

Of course, it could be argued that because Ford had the available information on the ten "possibilities" at the time of the pardon, it is valid insofar as it applies to those ten areas.³⁰² At the time, however, these ten "possibilities" were even beyond proof by the Special Prosecutor's Office, although to President Ford, Nixon's acceptance was tantamount to an admission of guilt.³⁰³ But only courts can pass judgment on the guilt or innocence of an individual; as long as the courts have not agreed on the meaning of acceptance, it is dangerous to maintain that acceptance implies guilt in every case.³⁰⁴

The implication of acceptance is the second interesting constitutional issue raised by the pardon of President Nixon. As noted earlier, in *Ex parte Garland*³⁰⁵ the Supreme Court noted that a pardon "blots out of existence the guilt" and makes the offender "as innocent as if he had never committed the offense."³⁰⁶ A half century after that decision, the Court said that acceptance of a pardon was an acknowledgement of one's guilt.³⁰⁷ Viewed together, the two statements are indeed paradoxical. By ascension from the hell of guilt to the heaven of innocence, one is compelled to admit his guilt to become an innocent man.

301. *Id.* at § 9, at 383-84 (footnotes omitted).

302. Macgill, *supra* note 291, at 84-85.

303. N.Y. Times, Oct. 18, 1974, at 20, col. 5.

304. The courts have shifted back and forth from the "new man" theory to the "implication of guilt" theory to suit the needs of an individual case. Compare, e.g. *Illinois Cent. R.R. Co. v. Bosworth*, 133 U.S. 92 (1890); *United States v. Klein*, 80 U.S. 128 (1872); *Ex parte Garland*, 71 U.S. 333 (1866); *Ex parte Hunt*, 10 Ark. 284 (1850) with *in re Spencer*, 22 F. Cas. 921 (C.C.D. Ore. 1878) No. 13,234; *Manlove v. State*, 153 Ind. 80 (1899); *Roberts v. State*, 160 N.Y. 217 (1899); *Cook v. Freeholders*, 26 N.J.L. 326 (1857).

305. 71 U.S. 333 (1866).

306. *Id.* at 380.

307. *Burdick v. United States*, 236 U.S. 79 (1915). See also *Carlesi v. New York*, 233 U.S. 51 (1914) and the opinion in *Roberts v. State*, 160 N.Y. 217 (1899): "A pardon proceeds not upon the theory of innocence, but implies guilt. If there was no guilt, theoretically at least, there would be no basis for pardon." *Id.* at 221.

The root of the confusion may be traced to the origin of the power. The effect of a pardon in the mid-thirteenth century was, as Bracton stated:

[A] person is not restored to the King's peace alone, that he may go and return and contract anew, for that which has been dissolved by the outlawry cannot be joined anew by the inlawry without a new intention on the part of those who have contracted . . . he is like a new born infant and a new man, as it were, lately born.³⁰⁸

In other words, those placed outside the law were given back their legal capacity; they were "new born" in the eyes of the law, not innocent.

The fires of confusion may also have been fed by the opinion of Chief Justice Hobart in *Cuddington v. Wilkins*.³⁰⁹ Cuddington sued Wilkins for slander after Wilkins called him a thief. Because Cuddington had been pardoned of theft, the Court held for him, stating:

Now when the King had discharged it and pardoned him of it, he hath cleared the person of the crime and infamy, wherein no private person is interested but the commonwealth, whereof he is the head, and in whom all general wrongs reside, and to whom the reformation of all general wrongs belongs.³¹⁰

Further, Hawkins has stated that a pardon makes an individual "a new Man, and gives him new Capacity and Credit."³¹¹ The phrase has become familiar to readers of American constitutional law. These early legal commentators did not mean to imply that a pardon operates as a dismissal of the fact. Chief Justice Hobart's reasoning is analogous to the case of an individual cured from a form of leprosy; although it would be nothing short of a lie to call that person a leper, it would be perfectly valid to call him a former leper. This reasoning is congruent with the effect of a pardon on the competency of a witness who is a pardoned felon. Such a witness has the capacity to testify although the jury must weigh his credibility.³¹² This reasoning also comports with the decision of the Supreme

308. 3 H. DE BRACTON, DE LEGIBUS ET CONSUEUDINEBUS ANGLIANE 371 (S. Thorne trans. 1879).

309. 80 Eng. Rep. 231 (1615).

310. *Id.* See also *Searle v. Williams*, 80 Eng. Rep. 433 (1618).

311. W. HAWKINS, *supra* note 300, at 395.

312. *Boyd v. United States*, 142 U.S. 450 (1892).

Court in *Carlesi v. New York*,³¹³ in which the Court held it proper for the trial court to consider a pardoned crime when prescribing penalties for a later offense.

The confusion continues to plague American law because the policy of granting pardons for a variety of reasons lingers. They are granted for both innocence and guilt.³¹⁴

CONCLUSION

One element in the nature of the pardoning power is predominant when that power is analyzed through American constitutional theory. Alone among the powers enumerated in the Constitution, the power to pardon proceeds unfettered. Thus, of all the powers of the United States' tripartite system of government, this power has the greatest potential for abuse, for from "power unrestricted, comes impunity to delinquency in all shapes"³¹⁵ Neither the Congress nor the courts can question the motives of the President in the use of the power. Although nothing higher than the laws should exist in a democracy, one constitutionally-sanctioned exception to this noble theorem permeates the American system. "To the executive alone is entrusted the power, and it is entrusted without limit."³¹⁶ The only "rule" governing the use of the power is that the President shall not exercise it against the public interest,³¹⁷ though he alone is given the discretion to define the public interest.

Naturally it is more difficult to be constructive than it is to be critical. There are four alternative methods of dealing with the pardoning power. First, one might leave the power as it is, unchecked, and hope that the American electorate continues to select, with just as few exceptions as in the past, highly ethical leaders. The people are, as Madison observed, the primary check, but he hastened to add that alternative checks are no doubt necessary.³¹⁸ Usurpations of power often build too slowly for any to see but the jealous eye of a co-equal partner.

313. 233 U.S. 51 (1914).

314. Henry Weihofen suggests that a distinction be made between pardons granted for innocence and those granted for other reasons. "A pardon for innocence is an acquittal, and must be given all the effects of an acquittal. A pardon for other reasons . . . leaves the determination of the convict's guilt stand, and only relieves him from the legal consequences of that guilt." Weihofen, *The Effects of a Pardon*, 88 U. PA. L. REV. 177, 179 (1939).

315. 1 J. BENTHAM, WORKS 530 (Edinburgh 1843).

316. *United States v. Klein*, 80 U.S. 128, 147 (1871).

317. W. TAFT, *THE PRESIDENCY* 95 (1916).

318. THE FEDERALIST No. 51, in THE FEDERALIST PAPERS 322 (1961) (J. Madison).

Second, the power might be eliminated totally. In the United States, an individual is assured due process of law. He is allowed to confront his accuser and is permitted benefit of counsel. Indigents are given court-appointed attorneys. There are strict rules of evidence and procedure which, if disregarded, permit a motion for a mistrial. The accused is given the presumption of innocence in a trial before twelve of his peers, "good and true." There is one right of appeal and the possibility for further appeals. Arguably, pardons only produce an atmosphere of disrespect for the laws. In addition, it has been suggested that in a perfect system of laws, there is no need for a pardon: "To praise the clemency of the sovereign . . . is to praise the surgeon who allows his patient to perish by not cutting off a gangrened finger."³¹⁹

There is, however, a natural repugnance of the irretrievable and irrevocable that springs from man's recognition of his own fallibility. As Justice Story observed, "no man in his senses will contend, that any system of law can provide for every possible shade of guilt a proportionate degree of punishment."³²⁰ Different circumstances in similar "crimes" often require necessary distinctions in degrees of punishment and guilt. To eliminate this means of mitigation would be unjust.

Third, the power of clemency might be concentrated in another branch of government. Beccaria argued that "clemency is the virtue of the maker, not executor of the laws"³²¹ It would be difficult, however, for a group as large and diverse as a legislative body to dispense mercy as effectively as a single executive. For such a group to debate each individual pardon would bring to a halt the urgent matters that require the forum of the legislative chambers. Alternatively, the power might be given to the judiciary; after all, justice is meant to be dispensed by the judicial tribunals. But the judiciary has a poor vantage point for observing the "political thicket." The principal reason, however, for not vesting the power in the other branches is that the power provides a needed check on the powers of the judiciary and legislature. It would serve the system of "checks and balances" little good if an unchecked power were eliminated while the existing forces operating against the branches other than the executive were diminished. The power can be used to correct the

319. 1 J. BENTHAM, *supra* note 315, at 520.

320. J. STORY, *supra* note 259, at 548.

321. M. DE BECCARIA, AN ESSAY ON CRIME AND PUNISHMENT 131-32 (1768).

decisions made by a judicial department lacking total flexibility. It can be employed also to correct the inherent limitations of the legislative branch: the intrinsic inability of a legislative body to identify every combination of cases.

Iredell's query, "where could [the pardoning power] be more properly vested, than in a man who had received such strong proofs of his possessing the highest confidence of the people,"³²² together with an analysis of the other choices, forces the solution. It is possible to leave the power in the executive office and yet bring it into balance with the otherwise poetic system of "separation of powers" and "checks and balances" proven so beneficial. The optimum solution lies in the adoption of the amendment proposed by Senator Mondale in the 93rd Congress. "No pardon granted an individual by the President under section 2 of Article II shall be effective if Congress by resolution, two-thirds of the members of each House concurring therein, disapproves the granting of the pardon within 180 days of its issuance."³²³

The proposal would provide a sufficient check on the prerogative of the executive which need be invoked only in controversial cases. "The dilatory process of convening the legislature, or one of its branches . . . [and] letting slip the golden opportunity"³²⁴ would be avoided. The effect of the pardon need not await the sanction of Congress, for the Congress is given the burden of going forward with the process. The proposed check is analogous to the courts' powers of judicial review, by which legislation is given complete effect until adjudicated unconstitutional.³²⁵

Many may contend that the case for change has not been made here or that the need cannot be proven in the United States because the power has never been abused to such an extent as to require adoption of an alternative method. Obviously, the word "abuse" has an individual meaning, and to some, the political uses of the power during the Reconstruction period and the aftermath of Watergate may not connote abusive exercises. But when one proposes adjust-

322. 4 DEBATES, *supra* note 277, at 111.

323. S.J. Res. 240, 93d Cong. 2d Sess. (1974).

324. THE FEDERALIST No. 74, in THE FEDERALIST PAPERS 449 (1961) (A. Hamilton).

325. The adoption of this proposal would eliminate the need for an amendment restricting use of the power to individuals already convicted. If the timing of the pardon seemed incongruent with the goals of the United States, Congress could, under the Mondale proposal, initiate nullifying procedures. A resolution suggesting that the power be limited to postconviction stages was introduced by Senator Proxmire. S.J. Res. 239, 93d Cong., 2d Sess. (1974).

ments to the system to bring it into conformance with the basic doctrine of American constitutionalism, the presumption rests with the apologists for constitutional balance. The constitutional framers of 1787 did not find it necessary to wait for unfortunate incidents to employ the safeguards of liberty. The Nixon pardon comes close enough to abuse to force speculations and inspire just apprehensions.