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Pardons: The Way They Usually Work

Post 9-12-74
A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.—Justice Oliver Wendell Holmes Jr., *Bidle v. Perovich* (1926).

The pardon power—like impeachment—once an exotic, little used and not widely understood legal process now is on everyone's mind. Despite a paucity of legal literature on the subject, there is a system and a procedure for negotiating that system which is clear, though it bears little resemblance to certain recent events.

A pardon sometimes exempts a convicted offender from punishment but most generally removes civil disabilities associated with his conviction. The pardon power is exercised by the chief executive: the governor where a state

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crime is involved; the President where a federal crime is concerned. Article II of the United States Constitution gives the President the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

A pardon is an act of grace and forgiveness which either totally or partially relieves the person pardoned from some of the ramifications of the punishment the law originally inflicted upon him. A pardon does not excuse an offense, it forgives it. A pardon is not a retroactive finding of innocence; as a rule it presumes guilt, though on rare occasions it is used to erase an unjust conviction.

After a person has been convicted of a crime and exhausted his judicial appeals, theoretically he may apply for a pardon at any time, whether he is in prison, on probation or parole or has been discharged completely. In a minority of states and in the federal system, a pardon may be granted before trial; but it is not done in practice. At present, the majority of pardons are granted to people who are no longer incarcerated but who wish to regain certain civil rights, such as the right to vote, testify, serve on a jury, hold public office, get certain jobs or practice a profession, or to obtain access to credit or insurance, which were lost or suspended as a result of their convictions.

The pardoning authority encompasses broad discretion to exercise this power to fit the circumstances of each individual case. The right to appeal from a criminal conviction is relatively recent. Before these developments in appellate procedure, almost the only recourse of an innocent man convicted of a crime was to apply for an executive pardon. Even today, cases arise in

which, because of the technical limitations on traditional, post-conviction remedies, no way exists other than the pardon power to rectify a wrongful conviction or excessive sentence. Before parole was established as a regular method of early release from prison, pardons were more necessary than they are today. Nowadays, the pardon power is used very conservatively.

Here is how the federal pardon process works for ordinary citizens. Approximately 500 to 600 applications for pardon are made each year to the office of the Pardon Attorney. [In the states, the governor is the ultimate pardoning authority though most state constitutions or statutes set up advisory boards to assist the chief executive.] To be eligible, an applicant

must wait three years after his release from prison or after conviction, if there was no imprisonment, before applying—unless his crime involved public trust, narcotics, income tax or perjury, for which the waiting period is five years. The petitioner fills out a detailed application describing his history and vital statistics and containing character affidavits. The application is sent to the FBI for an investigation which takes a month or two. Opinions are solicited from the U.S. Attorney, who prosecuted the individual, the sentencing judge and all correctional authorities in whose custody he spent time. The Pardon Attorney reviews the file and decides whether or not the applicant has rehabilitated himself since his release from custody. The Pardon Attorney advised me that he has been reversed by higher authorities only 5 per cent of the time.

In about one-half the cases that came his way, the Pardon Attorney has recommended the relief sought. However, few released prisoners ever seek clemency. For example, 15,491 prisoners were released from federal institutions in 1967. That same year only 222 federal pardons and 23 sentence commutations were granted. In one state (Kentucky) that year, some form of clemency was given two prisoners; 746 prisoners were paroled.

The Pardon Attorney then sends the whole file to the Attorney General, who reviews the case again and passes the file on to the White House. It is usually the Special Assistant to the Attorney General, with the help of other Justice Department officials where appropriate, who handles pardon applications for the Attorney General. The President himself rarely sees anyone's file. He relies on one of his Special As-

sistants, who reviews the file and the earlier findings and makes recommendations to the President.

The President receives the Attorney General's recommendations with a master warrant for his signature, granting the clemency requested for that group of cases. After the President's action, the Pardon Attorney notifies the applicant of the disposition. If the Attorney General recommends favorable action, it is ineffective until the President signs the warrant; where the Attorney General recommends negative action, the application is deemed denied if the President takes no action within 30 days.

I interviewed all the participants in this process on the staffs of the Pardon Attorney, the Justice Department and the White House during the Kennedy, Johnson and Nixon administrations. They all stated that they recoiled from political pressures, that an attempt at political influence in a pardon case made them extra-conservative and even caused perverse results, that the individual applicant's demonstrated rehabilitation was the beacon in

determining who got pardoned and when

While the President's pardoning power derives from a specific constitutional grant of power he spends only a minuscule amount of his time in exercising this power. President Truman criticized Attorney General Tom Clark for involving him in the process more than he wished to be: "Why send me cases to turn down?" One reason is that the pardoning power is generally a no-win situation for Presidents who rarely get credit for granting pardons, but frequently get criticized for having done so. LBJ just about stopped pardoning anyone after he was rebuked by the press in one case.

The chief reason, however, for the general inattention Presidents give to the pardoning process is that, relatively, it means so little. As one former Pardon Attorney told me, the President of the United States should not bother himself with "licensing bartenders in Kansas City." What he meant is that pardons generally are sought to enable former convicts to avoid civil disabilities imposed on them as a result of their convictions. Former convicts are prohibited in many places from obtaining licenses allowing them to engage in certain work. For them, a pardon is a bread-and-butter issue; for the executive official whose pardon is asked, the process is really a reward for rehabilitation after an individual's successful correctional experience.

Clemency is that part of the criminal justice system which deals with mercy more than justice. Along with the pardon power, clemency includes commutation, which is a lessening of the severity of a prescribed penalty (cutting a sentence from 20 years to 10 years to allow a sick inmate's incarceration to end); reprieve, which postpones execution of a sentence (typically used at the 11th hour to delay an electrocution so the governor can consider an inmate's appeal); and amnesty, which overlooks the crimes of a group of offenders (generally employed after a war).

That's generally the way it works for any private citizen who wants to be pardoned by the chief executive for his offenses. Or for any private citizen who doesn't happen to be Richard M. Nixon.

Herblock is on vacation.