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# Pardons and Presidential Powers

In 1954 Maurice Schick, then a soldier stationed in Japan, murdered an 8-year-old girl. Twenty years later Schick, an obscure federal prisoner, provoked one of those small constitutional arguments which often go unremarked, but which involve remarkably important principles. On Dec. 23 Schick became a footnote in the history of the doctrine of the separation of powers.

A court martial sentenced Schick to death in 1954. Presidents are required to review such cases. In 1960 President Eisenhower commuted Schick's sentence to life imprisonment. And Eisenhower added: This commutation is made on the condition that Schick will never be eligible for parole.

Surely Schick was pleased, in spite of the no-parole provision. But without that provision he would have been eligible for parole in 1969. So after 1969 he began contesting the constitutionality of that provision.

Schick's argument was not frivolous, but it was not successful either. The Supreme Court on Dec. 23 ruled against him, 6-3. But his argument compelled the Court to speak with special preciseness about a presidential power.

Schick noted that the Court has made retroactive its 1972 ruling about capital punishment. That ruling voided all pending death sentences on the ground that they had been handed out without reference to clear standards.

You might wonder how this could help Schick. Capital punishment did not lack constitutional validity in 1954. And Schick was not under sentence of death in 1972. But Schick convinced three Justices (Thurgood Marshall, William Douglas, and William Brennan) that the retroactive application of the 1972 ruling should void the no-parole provision of his commutation.

Marshall said that since 1972 a court "must insure a prisoner the same treatment he would have been afforded had the death penalty not been imposed initially." He added: ". . . the imposition of the death sentence was the indispensable vehicle through which Schick became subject to his present sentence. . . . The no-parole condition could not now exist had the court martial . . . not imposed the death penalty."

Military law provides only one alternative to the death sentence in such cases—a life sentence, with the prisoner eligible for parole. So Marshall agreed with a lower court justice that Schick "has suffered and continues to suffer the enhancement of punishment—the loss of his statutory right to be considered for parole—as a result of an illegally imposed death sentence."

But in order to invest Schick with a "right" to be considered for parole, Marshall had to argue that Eisenhower's no-parole condition—a condition not prescribed by any legislation—went beyond the President's constitutional power to "grant reprieves and pardons." Thus Marshall cited Chief Justice John Marshall's statement that "the power of punishment is vested in the legislative . . . department. It is the legislature . . . which is to define the crime and ordain its punishment."

Thurgood Marshall argued that the President "is not imbued with the constitutional power to create unauthorized punishments," and that Eisenhower's no-parole provision was an "extralegal" usurpation of the legislative power to "ordain" punishments for crimes.

Chief Justice Warren Burger, speaking for the majority, denied that a President's power to attach conditions to clemency is restricted by congressionally prescribed parameters of punishment.

Burger insisted that because "the pardoning power derives from the Constitution alone, it cannot be modified, abridged, or diminished" by Congress: "The pardoning power is an enumerated power of the Constitution and its limitations, if any, must be found in the Constitution itself."

Burger said that in 1787 the Constitutional Convention rejected language that would have made the President's powers of clemency subject to Senate control. Noting that Alexander Hamilton (in Federalist Paper 69) and Chief Justice Marshall both compared the President's pardoning power to that of the British king, Burger said that in 1787 British law was that "the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit. . . ."

Thus did a crime set in train events that were to produce, 20 years later, a refined assessment of a constitutional power. Burger's argument about the separation of powers was convincing. And it was an intriguing coda to a year of constitutional argument, a year in which other crimes caused the Republic to reflect, as rarely before, about the kingly pretensions of Presidents.