

# Sweeping Power to Pardon Has Firm Historical Basis

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For a nation that has prided itself on not having a king, the United States through most of its history has given surprisingly broad sweep to the presidential pardoning power, treating it almost as a royal prerogative.

Congress apparently cannot punish in the face of a presidential pardon and even when the President appears to abuse his power, there appears to be no way for the courts to say he was wrong.

So secure is the traditional view of the pardoning power that even as they questioned the wisdom of the action, few of President Ford's critics were willing to question his authority to give Richard M. Nixon a full and complete reprieve for any and all White House crimes he may have committed.

Chief Justice John Marshall set an early example in looking to monarchical England for guidance on clemency. The power had been used "from time immemorial by the executive of that nation whose language is our language," said Marshall, so that "we adopt their principles . . . and look to their books" for the legal rules.

The Founding Fathers had a practical reason for the broad grant of power, a reason that explains President Ford's confidence in his right to grant a pardon in advance.

A motion in the Constitutional Convention to specify that pardons could be granted only "after conviction" was withdrawn after a delegate pointed out that "pardon before conviction might be necessary in order to obtain the testimony of accomplices."

Thus, said constitutional historian Edward S. Corwin, the pardoning power was viewed not only as an instrument of clemency, "the framers regarded it also as an instrument of law enforcement."

Alexander Hamilton expanded on this theme in *The Federalist*: "In seasons of insurrection or rebellion there are critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth." There might be no time to convene the legislature for such a move.

The Presidential prerogative survived its most severe challenge just after the Civil War when a Confederate sympathizer, Augustus H. Garland, sought to practice in the federal courts despite an 1865 law excluding

those who could not swear they had always supported the Union. The Supreme Court narrowly agreed with Garland — who went on to become U.S. Attorney General — that a pardon by President Andrew Johnson was his ticket of admission.

A pardon, said the high court, "blots out existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

"If granted before conviction," the court went on, "it prevents any of the penalties and disabilities conse-

quent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity."

In 1915, to forestall a claim of the Fifth Amendment's privilege against self-incrimination, President Wilson granted an advance reprieve to a journalist who had refused to tell a grand jury about crimes under investigation. In that case, *Burdick vs. United States*, the journalist nevertheless wriggled free under a doctrine, later repudiated by the Supreme Court, that an individual need not accept presidential grace.

Here are some of the questions surrounding President Ford's action and an attempt at some of the answers:

**Q.** Is Mr. Nixon now totally immune from prosecution?

**A.** The Constitution says only that the President may forgive "offenses against the United States," so Mr. Nixon remains vulnerable to any state prosecution that may develop.

**Q.** Can he be forced to testify in the Watergate cover-up trial?

**A.** Yesterday's action does not spare Mr. Nixon the duty to appear as a witness, though he is free to raise any objections he may have. Nor does the reprieve immunize him from civil suits.

**Q.** Can Mr. Nixon plead the Fifth Amendment and refuse to testify at the trial?

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**A.** Not as to any federal offenses, but possibly as to state crimes. If he claims he is in danger of incriminating himself in a state case, the prosecutor can confer "use immunity" and the judge can order him to testify on pain of contempt. Then any state prosecutor would have to prove that his evidence

was gathered independently of the compelled testimony.

**Q.** But does the pardon give him immunity from contempt of court?

**A.** Probably not, since its terms apply to the White House years. Besides, says Professor Corwin, a pardon can apply only to an offense already committed, even if the crime has not yet been discovered, "otherwise the power to pardon would be a power to dispense with observance of law."

**Q.** Is Mr. Nixon now immune from disbarment?

**A.** Again, the reprieve applies to federal crimes, and the right to practice law is ordinarily a state and local matter. The 1867 Garland case, of course, was a federal court disbarment case and thus, unless Mr. Nixon lost his underlying right to practice law in California or New York, his pardon gives him the right to appear as a lawyer in federal courts.

**Q.** Does the reprieve also exonerate the cover-up defendants?

**A.** As a legal matter, no. Defense attorneys already are raising arguments about equal treatment before the law, and that might impress a jury but it's not enough to get a judge to throw out the conspiracy indictment. The special prosecutor argued in the Supreme Court in July

that the defendants could be convicted of conspiring with Mr. Nixon even if the then President was constitutionally immune from prosecution.

**Q.** Is Congress totally powerless?

**A.** It is still possible to follow through on the impeachment proceedings that were aborted by Mr. Nixon's resignation.

**Q.** What good would that do?

**A.** For those who fear that Richard Nixon will emerge a martyred hero, it could represent the final Congressional judgment. A two-third Senate vote would convict and by a separate simple majority vote, the Senate could disqualify him from ever holding any federal public office.

**Q.** Can an office holder be impeached and convicted after resigning?

**A.** Congress did it to Secretary of War William W. Belknap in 1876 and asserted its right to do it in other cases.

**Q.** Did the President have power to attach conditions to the clemency?

**A.** The Justice Department argues vigorously that such conditioning power exists. A case now in the Supreme Court raises the issue as applied to a commuted death sentence. Former Teamster president James R. Hoffa is contesting the right of Mr. Nixon to condition his commuted sentence on a ban on union office.

**Q.** Can the Nixon pardon be tested in court?

**A.** Even Ralph Nader, who is ready to take anyone to court, admitted yesterday that it would be difficult. The special prosecutor seems to be the only one who has the requisite legal standing.