

An act of grace

"A pardon is an act of grace," said the great Chief Justice Marshall 141 years ago in the first Supreme Court decision concerning the presidential pardoning power.

"... An act of grace," he continued, "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."

Marshall went on to set forth an important doctrine:

"A pardon is a deed to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."

In other words, a pardon isn't a pardon unless it's accepted, and no one is obliged to accept a pardon.

The reasoning behind that becomes more clear in another Supreme Court case four score years later. A fellow named Burdick had refused to testify before a grand jury on the grounds he would tend to incriminate himself. His testimony was considered so crucial that President Wilson offered him "a full and unconditional pardon for all offenses against the United States" which he might have committed.

Burdick rejected the pardon, and the Supreme Court supported him. "The grace of a pardon may be only a pretense," it said, "... involving consequences of even greater disgrace than those from which it purports to relieve... Escape by confession of guilt implied in the acceptance of a pardon may be rejected."

The thrust of these landmark decisions would seem to be that when ex-President Nixon accepted a pardon he did indeed forfeit the presumption of innocence.

President Ford's surprise pardon for Nixon caused many people to ask, "How can you pardon a man before he's been convicted or even charged with a crime?"

While pardon-in advance isn't the usual

procedure, it isn't unprecedented, as Wilson's attempt to pre-pardon Burdick illustrates.

And in the great leading case on the subject, Ex-parte Garland, the right to pardon at any time was explicitly spelled out. The Supreme Court ruled that the President can offer a pardon "either before legal proceedings are taken or during their pendency or after conviction and judgment."

The Garland case was an outgrowth of the Civil War. In 1865 Congress passed a law requiring attorneys desiring to practice in the federal courts to take an oath swearing they'd had no part in hostile acts against the Union.

Having been an active Southern sympathizer, Garland couldn't take the oath. But the same year that Congress passed the law President Andrew Johnson had granted Garland "a full pardon for all offenses by him committed, arising from participation, direct or implied, in the Rebellion."

The question was which took precedence, the oath law or the pardon? The Supreme Court came down heavily on the side of the presidential pardoning power.

"When the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense," it said.

In the troubled wake of the Nixon pardon, several senators have suggested a law limiting the pardoning power. Such a law would be unlikely to pass a constitutional test.

The Supreme Court consistently has held that the President's power to grant pardons cannot be restricted either by Congress or judges. In the Garland case the court said it "extends to every offense known to law" — with one exception. The Constitution itself denies him the power to grant pardons in the case of impeachment.

Like pardon - before - conviction, impeachment - after - resignation is unusual but not unprecedented. Watergate diehards may yet insist that's the only way left to go.