

On Pardons and Testimony

By I. F. Stone

WASHINGTON — Before they question President Ford, House Judiciary Committee members ought to look at an obscure clause in Article II, Section 2, of the Constitution. It says that the President may pardon "except in cases of impeachment."

That exception goes back to 17th-century England. In two cases that read like a preview of Watergate, the Crown was subjected to Parliamentary control. The impeachment of the Duke of Buckingham under Charles I established the principle that, though the King could do no wrong, miscreant ministers could not avoid impeachment by pleading that they were merely carrying out his orders.

There still remained a loophole, and a second case closed it. The Earl of Danby tried to block his own impeachment with a pardon granted in advance by Charles II. The Commons refused to honor the pardon. It ruled that to permit "a pardon to be a bar to an impeachment" would defeat its purpose and thereby "the chief institution for the preservation of the Government would be destroyed." The King could pardon after, but not before, an impeachment had been completed.

Our Federal Constitution, and most state constitutions, go further and do not permit a pardon even after an impeachment. Did not Mr. Ford's pardon of Richard M. Nixon in advance of full investigation violate the spirit and purpose, if not the letter, of this ancient constitutional exception to the pardoning power?

Congress sought the full truth about Watergate by two modes of procedure, by impeachment and by a special prosecutor. President Nixon promised he would "not exercise his constitutional powers" to interfere with the special prosecutor. The pardon frustrated the mandate insofar as full investigation of President Nixon's own part was concerned. Indeed had Mr. Ford not been stopped by public outcry he was ready with a general Watergate pardon. Its effect would have been to get rid of the special prosecutor's office altogether.

In a speech Mr. Ford made in 1963, he said that President Kennedy's assertion of executive privilege to hide the full truth about the Bay of Pigs was "akin to the divine right of kings."

The Kings of England long ago lost any divine right of pardon. The royal pardon is no longer the result of a royal soliloquy with the royal conscience. Pardon in practice is granted by the Home Secretary with aid from the Court of Criminal Appeals.

A similar safeguard was adopted here. The encyclopedic "American Jurisprudence" says that while the pardoning power of the President "is less restricted than that of an English King, it has been seldom abused because ordinarily applications are required to be presented through or referred to the Department of Justice."

In the Department of Justice, there is an office of the pardon attorney. Federal regulations with the force of law spell out the procedures he must follow in investigating "all applications to the President for a pardon." Why was this safeguard short-circuited by Mr. Ford in granting the

Nixon pardon?

Mr. Ford as a lawyer must have had this safeguard in mind when questioned by chairman Howard W. Cannon of the Senate Rules Committee at his confirmation hearing last November. If he succeeded to the Presidency, Mr. Cannon asked, would he use the pardoning power "to prevent or to terminate any investigation or criminal prosecution" of Mr. Nixon? After replying that the public wouldn't stand for it, Mr. Ford added that "the Attorney General, in my opinion, would be the controlling factor."

The Attorney General has said that he was consulted neither on the pardon nor on the tapes agreement accompanying it which gave Mr. Nixon custody of the tapes and the right eventually to destroy them. Why did

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Mr. Ford avoid the regular channels? Was he afraid the Attorney General might object to the pardon and the tapes agreement, perhaps as fresh steps in a continuing cover-up?

Abuse of the pardoning power is an impeachable offense. At least one state governor, John C. Walton of Oklahoma in 1923, has been removed by impeachment for pardon abuses. Pardons may be challenged in the courts.

Blackstone said pardons tainted by fraud are voidable. Pardons granted by prior agreement under circumstances contrary to public policy may be revoked by the courts, according to "American Jurisprudence." A pardon may also be a link in a conspiracy to obstruct justice. All these matters cry out for full airing by the House Judiciary Committee.

By Stephen M. Stathis

WASHINGTON — President Ford's announcement that he would voluntarily appear before the House Judiciary Committee about his pardon of former President Nixon has sent scholars scurrying to determine if this is a historical precedent.

It is known that President Washington did appear before the full Senate on Aug. 22 and 24, 1789, to obtain the advice and consent on terms of a treaty to be negotiated with the Creek Indians. A more famous legend has placed President Lincoln before the House Judiciary Committee in 1862.

In December, 1861, The New York Herald prematurely published long verbatim excerpts from President Abraham Lincoln's State of the Union Message, a document that was supposed to be secret until its delivery. Almost immediately, suspicions arose that Chevalier Henry Wikoff, a charming, unprincipled adventurer and social dilettante, and the President's wife, were co-conspirators in the early release of the message. Mrs. Lincoln allegedly had given the document to Mr. Wikoff, a paid informer for The Herald, who was believed to have sent it by telegraph to New York for publication.

Two months later, the controversy over The Herald's disclosure encircled the First Family when it reached the House Judiciary Committee. On Feb.

12, 1862, Mr. Wikoff admitted before the committee that he had telegraphed the printed portions of the President's message to The Herald, but was unwilling to divulge the source of his information. Thereupon, he was arrested by the sergeant-at-arms for contempt and placed under lock and key in the Capitol.

The events following Mr. Wikoff's arrest remain a point of speculation. The New York Tribune of Feb. 14, 1862, reported that President Lincoln had the previous day "voluntarily appeared before the House Judiciary Committee and gave testimony in the matter of the premature publication in The Herald of a portion of his last annual message." It said: "Chevalier Wikoff was then brought before the committee and answered the question which he refused to answer yesterday, stating, as is rumored, that the stolen paragraph was furnished to The Herald by Watt, the President's gardener . . ."

Ben "Perley" Poore, The Boston Journal's noted Washington correspondent, stated in his two-volume memoirs ("Perley's Reminiscences of the National Metropolis") that President Lincoln "visited the Capitol and urged the Republicans on the Committee to spare him disgrace . . ." Mr. Wikoff was released shortly thereafter and the improbable Watt story was accepted.

According to Mr. Poore's account, Mr. Lincoln apparently met only with the Republicans on the committee in an informal setting. The New York Tribune and at least four other contemporary newspapers, however, suggested that the President appeared before the entire committee. The discrepancy between the two versions leaves unanswered the question of exactly whom Lincoln met with.

An exhaustive search among the diaries, letters, memoirs and the unpublished records of the committee at the National Archives fails to confirm the generally accepted view that

Lincoln appeared before the full committee.

Mr. Lincoln's supposed appearance in 1862 is only one of at least ten instances in which he has been placed before Congressional committees. Although each appearance has been cited as a historical precedent, primary sources show that these assertions are also without firm foundation.

As Carl Sandburg aptly wrote in recalling an account of President Lincoln defending his wife against charges that she was a Confederate spy before another Congressional committee. "So the story goes, though vaguely authenticated."

Until documentation to the contrary is discovered, Mr. Ford will stand alone as the only President to appear before a Congressional committee. Mr. Ford, upon assuming the Vice Presidency, quipped that "I am a Ford, not a Lincoln." However, in deciding to appear before a Congressional committee he has eclipsed all of his predecessors, including Mr. Lincoln.

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