

Executive Grant of Clemency

Petitioner Richard M. Nixon is hereby fully and unconditionally pardoned and excused of all crimes, if any, committed while President of the United States.

Richard M. Nixon
President
Date: _____

—The Washington Post

Could Nixon Pardon Nixon?

By Timothy H. Ingram

Ingram is a Washington freelancer, a former associate producer of public television's "The Advocates" and a member of the D.C. bar.

WAR-GAMING the President's latest survival tactics has become permanent cocktail chatter for most Washingtonians. With the naming of the President as an unindicted co-conspirator, many speculate Mr. Nixon will have to negotiate a plea of some sort with the prosecutors, as Vice President Agnew did, to guarantee escape from indictment once he leaves office. But all this may be unnecessary if the President plays out a scenario which no one has yet talked about.

Mr. Nixon might pardon himself of

any crimes committed while President and wipe the books in advance of possible prosecution.

It is not farfetched. A number of government attorneys—including the President's own constitutional lawyer—believe he can legally grant himself clemency. The Constitution gives the Chief Executive power "to grant reprieves and pardons" for offenses against the United States. The wording of the clause appears to cover everyone. No class of offenders is excluded.

Generally known as executive clemency, it is the one presidential prerogative about which there has been no dispute. The President has absolute discretion in matters of clemency. If he says that a felon in a federal prison

should go free, not even the Supreme Court can overturn his decision.

Solicitor General Robert H. Bork is on record as believing the Chief Executive can grant himself amnesty.

The White House consultant on constitutional law, University of Texas law Prof. Charles Alan Wright, says he knows of no active consideration of the pardon option by the President's Watergate legal staff. But he agrees that Mr. Nixon has clemency power if he chooses to use it. Wright argues the President could legally pardon himself of any contempt of court citation—even a vote of contempt of Congress—growing out of the White House refusal to comply with recent subpoenas for tapes and documents.

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All clemency petitions are normally processed through the office of the pardon attorney in the Justice Department. Reed Cozart, pardon attorney under Presidents Eisenhower, Kennedy and Johnson, is a crusty, yarn-spinning Texan who lives in retirement in Alexandria. He is intrigued with the notion of the President outfoxing his pursuers by pardoning himself before he leaves office. "I would think he could do it. I guess he sure could." Cozart adds jocularly, "There is nothing to prevent Nixon from making midnight pardons of all those former staff members of his, either . . . He might just do it."

The President has specifically kept open the possibility of issuing clemency to his former aides—and potential accusers. At his latest press conference on March 6, Mr. Nixon responded directly to the question, saying, "I'm not ruling out granting clemency to any individual (on an individual basis)—depending upon a personal tragedy or something of that sort. . ."

Other presidents have used the pardon power to protect subordinates against judicial interference. Presidents Truman and Eisenhower pardoned FBI and CIA agents who had been sentenced for contempt after they refused to testify in court. Truman in his last weeks in office, also granted secret pardons to seven political friends.

President Nixon would not have to wait until he was criminally convicted, and out of office, to pardon himself. The Supreme Court noted in 1867 that a pardon, like amnesty, "may be exercised at any time after commission (of a crime), either before legal proceedings are taken, or during their pendency, or after conviction and judgment." If self-pardon is constitutionally acceptable, the Chief Executive could immunize himself from future prosecution while still in office.

The pre-prosecution pardon itself could be short and simple. Though a pardon generally implies guilt, it could contain the phrase, "crimes, if any." The wording could be further blunted by simply covering "all" offenses committed by the President since his first inauguration, without itemizing them. The document might not even have to be made public.

The present pardon attorney, Lawrence M. Traylor, concedes that such a pardon from President Nixon to citizen Nixon would be "delicate," but that he would be in no position to oppose it. "It seems legally open," Traylor asserts. "No precedents would preclude this. The Constitution just does



Associated Press

Charles A. Wright: The power is there.

not spell out and answer all of these questions."

Former Attorney General Elliot Richardson however, is aghast at the prospect, and says he is sure a court would share his spleen. "The President clearly can't commit a crime and then write a piece of paper saying, 'If ever after I'm removed from office or impeached or resign, I'm later convicted of the offense—here's this piece of paper, remit the sentence that is thereafter imposed.' That's absurd."

It would be like a judge setting aside his own sentence, rasps Albert Jenner, senior Republican counsel on the House Impeachment staff. "The notion of clemency is the forgiving of a third party," he says. "Self-pardon contradicts the prerequisite of a dispassionate executive official. You can't use the power . . . for your own benefit."

Washington attorney Ronald L. Goldfarb, a former Justice Department official who has written on clemency matters, vigorously agrees. "There's nothing in the Constitution saying the President is beyond the laws," Goldfarb argues, "and an interpretation of the clemency powers to allow him to make himself immune would amount to that. If the President walked up to the Senate Watergate Committee and shot Sen. Ervin dead on national TV, is there any doubt that he would be responsible for this act, and that he couldn't pardon himself of it?"

Goldfarb's question is rhetorical, but the Constitution gives only faint help.

A Pardon For the President?

There is no precedent for a President presenting a pardon to himself, and no rule can be found saying he can't. That audacious issue has never faced a court. The constitution's framers devoted little attention to the pardon clause, and made no attempt to define its terms or the forms in which it could be awarded.

Harvard impeachment authority Raoul Berger says that the writers of the Constitution never contemplated the possibility of the President being able to pardon himself, and the pardon clause's language does not compel such an interpretation.

But supporters of the self-pardon theory could cite the memorandum of law submitted last year by Solicitor General Bork in the case of Vice President Agnew. The President's power to pardon, Bork argued then, "is consistent only with the conclusion that the President must be removed by impeachment, and so deprived of the power to pardon, before criminal process can be instituted against him."

A Legal Vacuum

WHO IS RIGHT? Stanford criminal law Prof. John Kaplan puts it succinctly: "I can make the arguments on either side. But the only way to find out if Nixon can (pardon himself in advance) is to wait until he does . . . Anybody who tells you that he can think of what the answer is, just doesn't know what he's talking about."



The Washington Post

Elliot Richardson: "That's absurd."

Philip B. Kurland, a constitutional law authority at the University of Chicago, says, "Obviously there's no answer." I would be very surprised to find a court sustaining self-amnesty—but I don't know."

It is a legal vacuum into which a President with diminishing options might turn.

The remaining options are mentioned often because it is not difficult to see the nightmare that might occur if the President is impeached but his conviction in the Senate falls a vote or two short. The scene then may be of a politically paralyzed President holed up in the Oval Office until Jan. 20, 1977, staying there out of tenacity, out of fear of criminal indictments and out of dread of the indignity of being dragged into a dozen courtrooms.

To forestall this trauma, various amnesty proposals have been floated to negotiate the President's early exit. Calls for Mr. Nixon to step aside immediately have subsided, but undoubtedly will be pressed again if the House Judiciary Committee issues a report recommending impeachment. The proffered resignation trade-offs are by now familiar: a congressionally passed amnesty statute; Agnew-style plea bargaining; a pardon from Acting President Gerald Ford if Mr. Nixon steps down under the disability provision of the 25th Amendment.

A pardon by President Ford does not

seem promising. At his vice presidential confirmation hearing Ford was asked whether the next President could block criminal charges against Mr. Nixon. Ford replied simply, "I do not think the public would stand for it."

As ex-President, citizen Nixon might be prosecuted for one or more of the obstruction of justice charges already filed against his former aides, or for tax fraud in the claimed deductions for the allegedly backdated gift of vice presidential papers. Even if Mr. Nixon escapes impeachment conviction and departs office at the end of his natural term, he will still have these problems facing him. The statute of limitations will not have expired.

If the President can be self-clement, however, all the arguments for presidential amnesty in exchange for early retirement would be turned on their head. The resignation brokers would have nothing to barter. The President could unilaterally name his own terms for amnesty, and the act would be irrevocable.

The President's motive behind such a step might not be totally self-interest. When Mr. Nixon was informed that the Watergate grand jury had named him an unindicted co-conspirator, he reportedly responded. "They just don't have the evidence, and they are wrong."

Suppose he were genuinely alarmed that a dangerous precedent would be set if a runaway grand jury could intimidate a President, and smear him with the status of unindicted co-conspirator with no possibility of challenging the accusation in court. He could contend that the President was entrusted with the pardon power to override judicial abuses.

"Firestorm" Feared

POLITICAL considerations will determine the pardon's eventual use by Mr. Nixon in Watergate. Presidential consultant Wright says he would advise against it, and alludes to predictable outrage and cries of obstructing justice from Congress. But whether congressmen would view self-clemency as an impeachable offense is quite a separate issue from whether a judge would honor the pardon, and stay the hand of a pursuing prosecutor. A time may arise when the latter is more important.

Two maneuvers appear plausible: tacking amnesty onto a resignation, or granting it secretly.

In the first, imagine the President impeached, with conviction in the upper house a certainty. The night before the Senate vote he goes on television,

announces his resignation, and assumes full responsibility for all of Watergate.

Telling the nation to start afresh, and to forget Watergate, he proclaims an amnesty as his last official act, absolving himself and all of his aides of indictable crimes—in effect, disbanding the special prosecutor's office.

Or, the President might gamble on acquittal by the Senate—and, even if convicted, still be able to pardon himself of any criminal prosecution. (The Constitution does clearly prevent the President from pardoning an impeachment.)

Most legal authorities believe that a Senate impeachment conviction is not appealable in the courts, and that the President would be summarily removed from office. But there is no assurance that the President would not attempt a last-ditch appeal to the Supreme Court to review the grounds of the conviction and "due process" questions of a fair trial.

His lawyers could then ask the court for an order keeping him in the White House, or the Senate might accommodatingly extend his powers of office a reasonable time awaiting final judicial decision. During this legal twilight the (ex?)-President could afford to be as politically ruthless as he pleased, and might issue mass pardons.

White House counselors might calculate, however, that such a move would compel the special prosecutor's office to indict Mr. Nixon, if only to challenge his assertion of self-immunity. Doubts about the legal sufficiency of self-amnesty could also be raised, weighed against the realities of a "firestorm" following its publication. The question would arise: Could the self-pardon be granted secretly, and held in reserve?

According to Pardon Attorney Traynor there is nothing in the federal regulations which requires public notification. It is his opinion that the President could present himself with a written pardon during the next months, date it and quietly deposit it in a trust vault—ready to be pulled as a defense or waiver at any subsequent trial.

It will be argued that a pardon given prior to indictment is markedly different from the customary pardon since it blocks the government and a string of prosecutors from taking action. There is at least a responsibility to inform the Attorney General. But as Stanford criminal law expert Anthony Amsterdam observes, "If a court will swallow the whole camel of self-pardon, it should have no problem digesting a tail of self-notification."