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Constitution Gives President Power to Pardon Himself

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Speculation that President Nixon might soon resign from office has fostered a debate over the ways he might be protected, before leaving the White House, from criminal prosecution once he becomes an ordinary citizen.

The debate has included suggestions that Congress might pass an amnesty statute, or that Mr. Nixon might arrange a deal for immunity with the special Watergate prosecutor. Until lately, these two possibilities have obscured a simple and central fact: As President, Mr. Nixon could grant himself executive clemency.

According to some constitutional experts, a case might be made that such a "do-it-yourself" pardon contradicts the English common-law principal that a man may not sit in judgment in his own behalf.

A Justiciable Issue

Moreover, there is no doubt that the scope of the President's pardoning power is a justiciable issue, one properly brought before the courts. And presumably Leon Jaworski, the special Watergate prosecutor, could mount a challenge based on that common-law principle.

But every time the Supreme Court has spoken out on the pardoning power, it has been to uphold, and in some cases to broaden, its already sweeping scope.

Article II of the Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment."

The exception means that he cannot restore the standing of a Federal officer who has been impeached and removed from his position; it does not mean that a President cannot pardon himself before his own impeachment.

As the high court noted in an 1866 case now viewed as a landmark, the pardoning power is "unlimited" except for that exception; it "extends to every offense known to the law, and may be exercised at any time" after a criminal offense has been committed, even before an indictment has been issued.

That extended the power to its ultimate constitutional limit, since to go any further to per-

mit the President to pardon criminal acts before they occur would amount to giving him authority to set aside the law, and to invade the law-making functions of Congress.

By the same token, several legal experts said today, for Congress to pass an amnesty statute granting Mr. Nixon immunity from prosecution should he leave office would be an unwarranted invasion of the President's power to pardon.

Chief Justice John Marshall called the pardon "the private, though official act of the executive magistrate," and there is even now no requirement that a grant of executive clemency be made known publicly.

Thus, Mr. Nixon could have already conferred on himself a full and unconditional pardon for "all acts," or some equally inclusive phrase, committed during his White House tenure.

Saxbe's Comment

In a related development, Attorney General William B. Saxbe said today that nobody had officially suggested that the Justice Department interest itself in the question of legal immunity or clemency for the President if he should resign.

"We'd have to be asked," Mr. Saxbe said in a telephone conversation. "We are sure not volunteering."

If the Justice Department should begin to study the question, the Attorney General added, "it would lend weight to something that may not be on anybody's mind."

This was an allusion to the fact that Mr. Nixon has repeatedly denied persistent reports that he intends to resign.

There has been widespread speculation here that, if the President did intend to resign, he would try to guarantee himself against criminal prosecution, which would be permissible under the Constitution, after his resignation or removal from office.

Several methods of insulating the President have been suggested, including a deal with the special Watergate prosecutor.

When Mr. Saxbe was asked whether the Justice Department would join in any approach to Mr. Jaworski, he replied, "We don't think so."

Although the special prosecutor was appointed last Nov. 1 by Robert H. Bork, then acting Attorney General, Mr. Jaworski

was given full independence from the Justice Department in pursuing the Watergate investigation.

There is little disagreement among lawyers in and out of the Government that Mr. Jaworski now possesses evidence to support a charge against Mr. Nixon of obstruction of justice.

President's Statement

The overriding factor, in most of their minds, was the President's statement on Monday that he had attempted to use the Central Intelligence Agency to impede the Federal Investigation of the Watergate break-in, for fear of "public exposure of involvement by persons connected with" his reelection campaign.

But some well-placed lawyers said they had believed before this week that, if Mr. Nixon were not President, he might be brought to trial on matters apart from the cover-up, including his payment of Federal income taxes.

The President's power to pardon others in advance of a trial or conviction is generally considered unequivocal, and, in a news conference last March, Mr. Nixon left open the possibility that he might invoke it in the Watergate case.

While maintaining that he would not grant clemency to people only "because they happen to be involved in Watergate," Mr. Nixon said pointedly that "I am not ruling out granting clemency—depending upon a personal tragedy or something of that sort."

2 Court Decisions

Twice in this century, the Supreme Court has strengthened the pardoning power, once to mandate that the agreement of the individual being pardoned is not necessary to its validity, and again to expand the scope of the power to embrace the pardoning of contempt of court citations.

In the former case, the Court declared that "a pardon in our days . . . is part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."

These words, however, might well be cited by Mr. Jaworski or any other prosecutor who should find himself blocked

from bringing an indictment against a former President who had armed himself with a full pardon before leaving the White House.

Obstruction of Justice

Legal experts were in general agreement that pardons granted by the President to former White House aides or others involved in the Watergate case might constitute an obstruction of justice if the purpose was to induce them not to talk.

But some experts suggested that a "prophylactic" pardon granted by a President to himself or anyone else in advance of indictment, which would prevent the Government from acting, might fall into the same category.

Despite these caveats, the weight of judicial opinion appears to fall on the side of the President's virtually all-embracing power to pardon offenders of every class.

In its decision in 1866, *ex parte Garland*, the Supreme Court painted with broad strokes that have not been significantly modified since.

"A pardon," the Court said, "reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out the existence of the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence."

Resolution Suggested

One high Government official who also is a lawyer suggested today that the most efficacious resolution might be achieved by a Congressional resolution expressing the wish that Mr. Nixon be spared criminal prosecution after leaving office, whether by resignation or through the impeachment process.

Such a resolution of the "sense" of the Congress would have no legal force, the official conceded. But he said it would provide Mr. Nixon's successor with a solid political basis for his granting of clemency for Mr. Nixon.

The feeling of urgency for finding some workable solution appears to be heightened by the action of one of the Watergate grand juries earlier this year in naming the President an unindicted co-conspirator in the Watergate cover-up case.