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The President's Broad Power to Pardon and Commute

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Editor's Note: Since President Bush's commutation of the prison sentence of former vice presidential advisor I. Lewis "Scooter" Libby, Jr., last week, critics of the President have accused him of abuse of the "power of pardon" granted in the Constitution. House Judiciary Committee Chairman John Conyers (D-MI) has scheduled a hearing for this Wednesday to air such accusations. Members of Congress should remember that the Constitution grants the Executive an extremely broad power to pardon and commute the sentences of those accused or convicted of federal crimes. Whatever the merits of President Bush's decision to commute Mr. Libby's sentence, there is little doubt that it was a permissible act under the Constitution and strays little from previous exercise of this power.

"The President...shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."

(Article II, Section 2, Clause 1)

The power to pardon is one of the least limited powers granted to the President in the Constitution. The only limits mentioned in the Constitution are that pardons are limited to offenses against the United States (i.e., not civil or state cases), and that they cannot affect an impeachment process. A reprieve is the commutation or lessening of a sentence already imposed; it does not affect the legal guilt of a person. A pardon, however, completely wipes out the legal effects of a conviction. A pardon can be issued from the time an offense is committed, and can even be issued after the full sentence has been served. It cannot, however, be granted before an offense has been committed, which would give the President the power to waive the laws.

The presidential power to pardon was derived from the royal English Prerogative of Kings, which dated from before the Norman invasion. The royal power was absolute, and the king often granted a

pardon in exchange for money or military service. Parliament tried unsuccessfully to limit the king's pardon power, and finally it succeeded to some degree in 1701 when it passed the Act of Settlement, which exempted impeachment from the royal pardon power.

During the period of the Articles of Confederation, the state constitutions conferred pardon powers of varying scopes on their governors, but neither the New Jersey Plan nor the Virginia Plan presented at the Constitutional Convention included a pardon power for the chief executive. On May 29, 1787,

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Charles Pinckney introduced a proposal to give the chief executive the same pardon power as enjoyed by English monarchs, that is, complete power with the exception of impeachment. Some delegates argued that treason should be excluded from the pardon power. George Mason argued that the President's pardon power "may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime and thereby prevent a discovery of his own guilt." James Wilson answered that pardons for treason should be available and successfully argued that the power would be best used by the President. Impeachment was available if the President himself was involved in the treason. A proposal for Senate approval of presidential pardons was also defeated.

The development of the use of the pardon power reflects its several purposes. One purpose is to temper justice with mercy in appropriate cases, and to do justice if new or mitigating evidence comes to bear on a person who may have been wrongfully convicted. Alexander Hamilton reflects this in *The Federalist* No. 74, in which he argues that "humanity and good policy" require that "the benign prerogative of pardoning" was necessary to mitigate the harsh justice of the criminal code. The pardon power would provide for "exceptions in favor of unfortunate guilt."

Chief Justice John Marshall in *United States v. Wilson* (1833) also commented on the benign aspects of the pardon power: "A pardon is an act of grace, 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. It is the private, though official act of the executive magistrate...." Another purpose of the pardon power focuses not on obtaining justice for the person pardoned, but rather on the public-policy purposes of the government. For instance, James Wilson argued during the Convention that "pardon before conviction might be necessary in order to obtain the testimony of accomplices." The public-policy purposes of the pardon were echoed by Justice Oliver Wendell Holmes in *Biddle v. Perovich* (1927): "A pardon in our days is not a private act of grace from an individual happen-

ing to possess power. It is a part of the constitutional scheme."

Pardons have also been used for the broader public-policy purpose of ensuring peace and tranquility in the case of uprisings and to bring peace after internal conflicts. Its use might be needed in such cases. As Alexander Hamilton argued in *The Federalist* No. 74, "in seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall." Presidents have sought to use the pardon power to overcome or mitigate the effects of major crises that afflicted the polity. President George Washington granted an amnesty to those who participated in the Whiskey Rebellion; Presidents Abraham Lincoln and Andrew Johnson issued amnesties to those involved with the Confederates during the Civil War; and Presidents Gerald R. Ford and James Earl Carter granted amnesties to Vietnam-era draft evaders.

The scope of the pardon power remains quite broad, almost plenary. As Justice Stephen Field wrote in *Ex parte Garland* (1867), "If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching [thereto]; 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.... A pardon reaches both the punishment prescribed for the offence and the guilt of the offender...so that in the eye of the law the offender is as innocent as if he had never committed the offence." A pardon is valid whether accepted or not, because its purposes are primarily public. It is an official act. According to *United States v. Klein* (1871), Congress cannot limit the President's grant of an amnesty or pardon, but it can grant other or further amnesties itself. Though pardons have been litigated, the Court has consistently refused to limit the President's discretion. Chief Justice Warren E. Burger, however, in *Schick v. Reed* (1974), seemed to limit the Court's restraint to pardons under "conditions which do not in themselves offend the Constitution."

The possibility of a President pardoning himself for a crime is not precluded by the explicit language of the Constitution, and, during the summer of 1974, some of President Richard M. Nixon's lawyers argued that it was constitutionally permissible. But a broader reading of the Constitution and the general principles of the traditions of United States law might lead to the conclusion that a self-pardon is constitutionally impermissible. It would seem to violate the principles that a man should not be a judge in his own case; that the rule of law is supreme and the United States is a nation of laws, not men; and that the President is not above the law.

The pardon power has been and will remain a powerful constitutional tool of the President. Its use has the potential to achieve much good for the polity or to increase political conflict. Only the wisdom of the President can ensure its appropriate use.

—James Pfiffner, Ph.D., is University Professor in the School of Public Policy at George Mason University. This essay is excerpted from *The Heritage Guide to the Constitution*,¹ a line-by-line analysis of the original meaning of each clause of the United States Constitution, edited by David Forte and Matthew Spalding.

SUGGESTIONS FOR FURTHER RESEARCH

David Gray Adler, *The President's Pardon Power*, in *INVENTING THE AMERICAN PRESIDENCY*, Thomas E. Cronin, ed. (1989)

Edward S. Corwin, *THE PRESIDENT: OFFICE AND POWERS* (1940)

William Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977)

Brian C. Kalt, Pardon Me? *The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996)

SIGNIFICANT CASES

United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833)

Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867)

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871)

Biddle v. Perovich, 274 U.S. 480 (1927)

Schick v. Reed, 419 U.S. 256 (1974)

1. www.heritage.org/about/bookstore/constitutionguide.cfm