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Comments

On Executive Clemency: The Pardon of Richard M. Nixon

I. FACTUAL BACKGROUND

On June 17, 1972, James W. McCord, Jr., Bernard Barker, Frank A. Sturgis, Virgilio R. Gonzales, and Eugenio R. Martinez were caught with cameras, electronic surveillance equipment, and sequenced one hundred dollar bills within the Democratic National Committee Headquarters in the Watergate Hotel.¹ This was the fourth attempted break-in at Democratic National Committee Headquarters, the previous three attempts having taken place on May 26, May 27, and May 28, 1972. For almost a year thereafter, the Nixon Administration absolutely denied White House involvement in the break-in.

On March 21, 1973, the flat denials of White House involvement were beginning to become somewhat qualified as more evidence regarding the break-in was adduced. President Richard M. Nixon stated that he had begun intensive new inquiries after new charges had been brought to his attention, and that he had personally ordered all those conducting the investigation into the break-in to

1. All factual sequences, unless otherwise cited, are drawn from Linda Amster's "Chronology of Watergate Related Events", found in *THE WHITE HOUSE TRANSCRIPTS* (New York Times Co., Ed., Bantam Books, Inc., 1974) at 813-77.

get all the facts and report them directly to him. The three principal investigators, L. Patrick Gray, Acting Director of the FBI, Richard G. Kleindienst, United States Attorney General, and Henry E. Petersen, Assistant Attorney General in charge of the Justice Department's Watergate inquiry, all denied receiving such a directive.

Further qualifications of White House involvement were forthcoming: all previous White House comments on Watergate were rendered inoperative on April 17, 1973; the denial of involvement was limited to the President and key aides on April 23, 1973; President Nixon accepted responsibility for the break-in and coverup but denied involvement on April 30, 1973; President Nixon on June 26, 1973 denied knowing of the coverup until March 21, 1973; and President Nixon denied guilt on August 15, 1973. During this time, a number of key personnel (Jeb Stuart Magruder, Deputy Director for the Committee to Re-elect the President, John D. Erlichman, chief domestic affairs advisor to the President, H. R. Haldeman, White House Chief of Staff, John W. Dean, counsel to President Nixon, Gray, and Kleindienst) departed from their administrative posts.

On July 16, 1973, Alexander P. Butterfield, former presidential appointments secretary, revealed that President Nixon had taped all his conversations and telephone calls since 1970. This was confirmed by Fred J. Buzhardt, Jr., the President's special counsel. Archibald Cox, who had been appointed Watergate Special Prosecutor on May 18, 1973, indicated his desire to listen to several of these conversations by obtaining a subpoena for eight of them on July 23, 1973, and a Show Cause Order on July 26, 1973 when the President would not comply with the subpoena. On August 29, 1973, United States District Judge John J. Sirica ordered President Nixon to turn over the subpoenaed tapes,² and on October 12, 1973, Judge Sirica's order was affirmed by the United States Court of Appeals, District of Columbia Circuit.³

On October 19, 1973, President Nixon proposed a compromise which Cox viewed as being unacceptable. Cox's particular view of the situation resulted in his termination from the federal payroll on October 20, 1973, but only after Elliot L. Richardson, United States Attorney General, and William D. Ruckelshaus, Assistant United States Attorney General, resigned from the Attorney Gen-

2. *In Re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973), *mod. and aff'd*, 487 F.2d 700 (D.C. Cir. 1973).

3. *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

eral's office rather than comply with President Nixon's order to fire Cox.

On October 22, 1973, the House Judiciary Committee began its inquiry regarding the possible impeachment of President Nixon. By April 25, 1974, the Committee was not only investigating the Watergate burglary and coverup, but also Nixon's personal finances, the ITT affair, the dairy industry fund, the Howard Hughes donation, and the Vesco contribution.

Between April 16 and 18, 1974, Leon Jaworski, who had been appointed as the second Watergate Special Prosecutor on November 1, 1973, requested and was granted a subpoena for tapes and documents of sixty-four presidential conversations.⁴ On April 30, 1974, although transcripts of the tapes were released by the White House, the White House announced that it would refuse to comply with Jaworski's subpoena. This dispute was eventually resolved by a unanimous United States Supreme Court on July 24, 1974, when it ordered Nixon to surrender the subpoenaed tapes and documents "forthwith".⁵

Shortly thereafter, between July 27 and July 30, 1974, the House Judiciary Committee approved Articles of Impeachment charging President Nixon with violations of his oath of office by obstruction of justice, abuse of his presidential powers, and contempt of Congress.⁶

4. *United States v. Nixon*, 377 F. Supp. 1326 (D.D.C. 1974), *aff'd*, 418 U.S. 683 (1974).

5. *United States v. Nixon*, 418 U.S. 683 (1974).

6. 32 CONG. Q., No. 31 at 2007-14 (Aug. 3, 1974). Three Articles of Impeachment were approved by the Committee.

Article I charged the President with obstruction of justice and was approved by a 27-11 vote on July 27, 1974.

Article II charged the President with abuse of his presidential powers, and was approved by a 28-10 vote on July 29, 1974. This Article essentially charged President Nixon with violations of the civil rights of various citizens by conduct which included:

1. Attempting to obtain confidential Internal Revenue Service records and attempting to cause audits or other discriminatory tax investigations of certain citizens;
2. Directing improper electronic surveillance by the FBI, Secret Service, and other personnel, and concealing the records thereof;
3. Authorizing and allowing the creation of the White House "Plumbers" unit;
4. Failing to act when he knew of illegal actions by his close aides and subordinates;

On August 5, 1974, while in the process of surrendering the subpoenaed tapes, President Nixon acknowledged facts which made him a party to obstruction of justice.⁷ On August 8, 1974, President Nixon announced his resignation from office because he "... no longer [had] a strong enough political base in the Congress..." to justify his continuing in office, thus becoming the first President in the history of the United States to resign.⁸

On September 8, 1974, President Gerald R. Ford, stating that

... it is common knowledge that serious allegations and accusations hang like a sword over our former President's head, and threaten his health as he tries to reshape his life, a great part of which was spent in the service of this country and by the mandate of its people ...⁹

... granted ... a full, free, and absolute pardon onto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 10, 1969 through August 9, 1974.¹⁰

5. Interfering with the FBI, the Justice Department, the Special Prosecutor, and the CIA in their lawful operations.

Article III (also called the McClory Act) charged the President with Contempt of Congress, and was approved by a 21-17 vote on July 30, 1974. The Article was based on President Nixon's refusal to produce subpoenaed materials relevant to "... presidential direction, knowledge, or approval of actions demonstrated by other evidence to be substantial grounds for impeachment." *Id.* at 2014.

7. 32 Cong. Q., No. 32 at 2071 (Aug. 10, 1974). A tape of a conversation with H.R. Haldeman on July 23, 1972, six days after the Watergate break-in, indicated that Nixon approved the invocation of CIA involvement as a means of obstructing the FBI's investigation of Watergate.

8. *Id.* at 2071-72. When announcing his resignation, President Nixon never mentioned the impeachment proceedings against him.

9. Los Angeles Times, Sept. 9, 1974, Part I at 12, col. 3. All citations to the Los Angeles Times are to the Morning Edition.

10. 39 Fed. Reg. 32601-02 (1974). The full text of the pardon is as follows:

"Richard Nixon became the thirty-seventh President of the United States on January 20, 1969 and was reelected in 1972 for a second term by the electors of forty-nine of the fifty states. His term in office continued until his resignation on August 9, 1974.

"Pursuant to resolutions of the House of Representatives, its Committee on the Judiciary conducted an inquiry and investigation on the impeachment of the President extending over more than eight months. The hearings of the Committee and its deliberations, which received wide national publicity over television, radio, and in printed media, resulted in votes adverse to Richard Nixon on recommended Articles of Impeachment.

"As a result of certain acts or omissions occurring before his resignation from the Office of President, Richard Nixon has become liable to possible indictment and trial for offenses against the United States. Whether or not he shall be so prosecuted depends on the findings of the appropriate grand jury and on the discretion of the authorized prosecutor. Should an indictment ensue, the accused shall then be entitled to a fair trial by an impartial jury, as guaranteed to every individual by the Constitution.

Mr. Nixon purportedly accepted the pardon in a statement in which he stated that he "... was wrong in not acting more decisively and forthrightly in dealing with Watergate . . .", and that he now understood how his own "mistakes and misjudgments" contributed to and seemed to support the belief that his "... motivations and actions in the Watergate affair were intentionally self-serving and illegal."¹¹

"It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States. The prospects of such trial will cause prolonged and divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States.

"NOW, THEREFORE, I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.

"IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of September, in the year of our Lord Nineteen hundred and seventy-four, and of the Independence of the United States of America the one hundred and ninety-ninth."

11. Los Angeles Times, Sept. 9, 1974, Part I at 13, col. 3-4. The full text of Mr. Nixon's statement is as follows:

"I have been informed that President Ford has granted me a full and absolute pardon for any charges which might be brought against me for actions taken during the time I was President of the United States.

"In accepting this pardon, I hope that his compassionate act will contribute to lifting the burden of Watergate from our country.

"Here in California, my perspective on Watergate is quite different than it was while I was embattled in the midst of the controversy, and while I was still subject to the unrelenting daily demands of the Presidency itself.

"Looking back on what is still in my mind a complex and confusing maze of events, decisions, pressures and personalities, one thing that I can see clearly now is that I was wrong in not acting more decisively and forthrightly in dealing with Watergate, particularly when it reached the stage of judicial proceedings and grew from a political scandal into a national tragedy.

"No words can describe the depths of my regret and pain at the anguish my mistakes over Watergate have caused the nation and the Presidency—a nation I so deeply love and an institution I so greatly respect.

"I know many fair-minded people believe that my motivations and actions in the Watergate affair were intentionally self-serving and illegal. I now understand how my own mistakes and misjudgments have contributed to

The pardon of Richard M. Nixon has raised many doubts and questions, not only as to the propriety of the pardon but also as to its validity. It is the purpose of this comment to examine Nixon's pardon and its acceptance in the light of historical and contemporary perspectives, and in the light of contemporary legal trends which have more accurately defined the executive power in general.

II. THE POWER TO PARDON

Without question, President Ford has the power to grant pardons. The United States Constitution provides that the President "... shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."¹² The power is said to be essentially the same as that exercised by the representatives of the British Crown, from which the United States derived its own system of Common Law,¹³ and it is also said to belong to the executive alone.¹⁴

A. Offenses Against the United States

Mr. Nixon's pardon was necessarily limited only to crimes he committed against the United States. The pardon will not excuse him for crimes which he might have committed against the individual states.¹⁵

There are indications that a state could refuse to give any effect

that belief and seemed to support it. This burden is the heaviest one of all to bear.

"That the way I tried to deal with Watergate was the wrong way is a burden I shall bear for every day of the life that is left to me."

12. U.S. CONST. art. II, § 2.

13. *Ex Parte Powell*, 73 Ala. 517, 519 (1883).

14. *United States v. Klien*, 80 U.S. 128, 147 (1871).

This observation is not entirely accurate as an absolute. At one time it was felt that the suspension of a sentence by a court was an interference with both executive and legislative authority as fixed by the Constitution. *Ex Parte United States*, 242 U.S. 27, 51-52 (1916). The federal courts now possess this power, except where the sentence is death or life imprisonment. 18 U.S.C.A. § 3651.

Further, it has been recognized that Congress has the power to pass general acts of amnesty, this situation being encountered most often in cases where statutory immunity is offered in exchange for testimony. See *Brown v. Walker*, 161 U.S. 591, 601 (1896). The legislature also exercises the power of clemency to a certain extent by making provisions for parole, which is essentially a commutation of sentence. See generally 18 U.S.C.A. § 4201; 18 U.S.C.A. § 4203(a).

15. The President has no power of pardon over a crime which is not an offense against the United States; such power lies only with the state. *In Re Bocchiaro*, 49 F. Supp. 37, 38 (W.D.N.Y. 1943).

to a presidential pardon. *People ex. rel. Prisament v. Brophy*¹⁶ involved the question of whether one who had committed a state offense could be sentenced as a second offender on the basis of a previous federal conviction which had been absolutely pardoned by the President of the United States. The Court held that the pardon was no bar to the imposition of such a sentence, and stated that

. . . the state may determine as it sees fit both the effect that shall be given to the previous conviction and the effect that shall be given to a presidential pardon for that offense.¹⁷

It may be argued that a state may logically apply this line of reasoning to the entire area of state affairs. If a state may determine as it sees fit the effect which shall be given a presidential pardon, in effect what is being said is that the pardon, at the state's option, may be held to be of no effect with regard to matters exclusively within the jurisdiction of the states. Thus, while a pardoned offender may be restored to rights and privileges guaranteed by the federal Constitution, with regard to rights and privileges which are not deemed so fundamental as to be applicable to the states, the states may continue to look at the pardoned offender as a convicted (or unconvicted, as the case may be) criminal.

The proposition is not as academic as it may seem. For example, the California State Bar Association had initiated disciplinary proceedings against Mr. Nixon on the basis of his role in the Watergate scandal. Mr. Nixon then attempted to resign from the State Bar, but the Board of Governors recommended rejection of his resignation because of his failure to acknowledge that there were disciplinary proceedings pending against him.¹⁸

The Board of Governors' actions impliedly expressed their opinion that Nixon's absolute pardon would not preclude his disbarment. At least in the eyes of the State Bar, Mr. Nixon was obviously not a "new man" because of his pardon.

Such an attitude on the part of the states serves their interests in that it protects their institutions from unscrupulous persons who

16. 287 N.Y. 132, 38 N.E.2d 468 (1941), *cert. den.* 317 U.S. 625 (1942).

17. *Id.* at 138, 38 N.E.2d at 471.

18. Nixon's resignation was eventually accepted when he acknowledged the pendency of disciplinary proceedings. See Los Angeles Daily Journal, Sept. 16, 1974, at 19, col. 6; Los Angeles Daily Journal, Sept. 19, 1974, at 20, col. 2.

have been fortunate enough to receive federal pardons for one reason or another.¹⁹ However, while the states may be able to protect their individual interests in this manner, the effect may be disadvantageous in other areas. For example, Mr. Nixon may still be able to claim his Fifth Amendment privilege against self-incrimination in a federal judicial proceeding in order to avoid testifying on the ground that his testimony may tend to incriminate him under state law.²⁰

B. Timing

There has been speculation that Mr. Nixon's pardon is invalid because it was granted before formal criminal charges had been brought against him.²¹ Phillip B. Kurland of the University of Chicago has stated,

A pardon is intended to relieve a person of liability from punishment, to moderate the harshness of the criminal justice system. But that assumes the system has worked. There is no authority to anticipate the possibility that criminal charges might sometime be brought.²²

With all due respect to Professor Kurland, and while conceding the point that possibly justice should not be tempered without first knowing what justice requires,²³ there is a formidable amount of authority indicating that a pardon may be issued at any time after the commission of the offense.

19. Pardons are not always granted because it is felt that a particular individual happens to be deserving of the benefit.

At early common law, a convicted felon was incompetent to testify in a judicial proceeding. If a prosecuting attorney's star witness was a convicted felon, the prosecutor could remove his disability by obtaining a pardon for the witness. For example, see *Boyd v. United States*, 142 U.S. 450 (1891); *United States v. Jones*, 26 F. Cas. 644 (No. 15,493) (C.C.D.N.Y. 1824).

However, the arbitrary refusal of a state to recognize a federal pardon could work injustice to individuals truly deserving of the benefits bestowed by a pardon. The problem could be solved by assuming that the state executive's power to grant pardons includes the power to restore an offender to the rights and privileges of state citizenship (since the state executive is without power to pardon a federal offense). See *People v. Bowen*, 43 Cal. 439 (1872), where the Court held that such a restoration was not a pardon, but nevertheless did not question the governor's authority to make such a grant.

20. See, *Brown v. Walker*, 161 U.S. 591, 623-25 (1896) (Shiras, J., dissenting).

21. See Nimmer, *Full Airing of Nixon Case Possible Despite Pardon*, Los Angeles Times, Sept. 22, 1974, Part IX at 3, col. 5-6.

22. Los Angeles Times, Sept. 9, 1974, Part I at 13, col. 1.

23. Nimmer, *Full Airing of Nixon Case Possible Despite Pardon*, Los Angeles Times, Sept. 22, 1974, Part IX at 3, col. 5-6.

The [pardon] power . . . extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.²⁴

The power exists so long as any of the legal consequences of an offense remain.²⁵ Certainly it is indisputable that the legal consequences of an offense—liability for criminal prosecution therefore—attach to the offender immediately after the commission of the offense, thus making the offender a proper subject for executive clemency. It will also be noted that Article II, Section 2 of the United States Constitution speaks only of “offenses”, and not “convictions for offenses”.

The rationale behind the idea that a pardon may be issued at any time after the commission of an offense is persuasive. It is said that it is

. . . of slight importance, whether the guilt of the offender be judicially ascertained or not, provided the executive is fully apprised of the nature of the offense pardoned; for the pardon goes upon the presumption that the offender, if not already convicted, will be; else he would not need to plead his pardon to the indictment, but would be saved under his plea of not guilty.²⁶

This is basically the same rationale used by Deputy Attorney General Laurence H. Silberman in his defense of the Nixon Pardon. He stated that once a pardon is deemed appropriate, it is difficult to justify indictment, trial, and conviction; that while critics state that Nixon could now claim he “. . . is innocent and that he was railroaded from office . . .”, this is “. . . incredible in the light of the unanimous action of the House [Judiciary] Committee [recommending impeachment] and the acceptance of the pardon.”²⁷ Thus:

24. *Ex Parte Garland*, 71 U.S. 333, 380 (1867).

Professor Kurland believes this statement to be dictum. *Los Angeles Times*, Sept. 9, 1974, Part I at 13, col. 2. This proposition will be discussed *infra*.

See also *Ex Parte Grossman*, 267 U.S. 87, 120 (1925), however, where the Court reaffirms the statement from *Garland*.

25. *Stetler's Case*, 22 F. Cas. 1314, 1315 (No. 13,380) (C.C.E.D. Penn. 1852).

26. *In Re Greathouse*, 10 F. Cas. 1057, 1060 (No. 5,741) (C.C.N.D. Cal. 1864).

27. *Los Angeles Times*, Sept. 20, 1974, Part I at 21, col. 1. In all fairness to Mr. Silberman, it should be noted that he is probably referring to the

The President . . . has . . . the power to grant a pardon as well before conviction as afterwards, because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of the crime.²⁸

These arguments have a great deal of validity when they are applied to pardons granted to individuals for specific offenses which they have committed. However, phrases such as "fully apprised of the nature of the offense pardoned" begin to cause some difficulty when applied to the pardon of Mr. Nixon, not because President Ford made a legal mistake in the timing of the pardon, but because the words of pardon give no indication whatsoever that President Ford was fully apprised of the nature of the offense (or offenses) pardoned.

C. The Recital Of Offenses

"In order to render a pardon valid, it must express with accuracy the crime intended to be forgiven."²⁹ It has been held that when a pardon misrecites an offense, the time of conviction, and/or the gravity of sentence, it is assumed that the pardoner was not fully apprised of the gravity of the crime, thus rendering the pardon void.³⁰ However, even if the offense is misrecited, the pardon can be effective if it can be shown that the pardon was intended to cover a particular crime.³¹

Giving effect to a mistaken pardon is based on the idea that the pardon is similar to a grant, and thus is to be construed most strictly against the grantor (or executive) and most beneficially for the grantee.³² However, the pardons which fall into this cate-

unanimity achieved by the Committee after Mr. Nixon's disclosures of August 5, 1974. However, the Committee was not unanimous when it recommended the Articles of Impeachment. See n.6, *supra*.

28. 6 OP. ATT'Y GEN. 20 at 20-21 (1853).

29. 4 Black. Com. 400. See also Annot., 34 A.L.R. 212 at 214; 59 AM. JUR. 2d, Pardon & Parole § 46 (1971). Note that in the latter two citations there is nothing contra to the proposition that the offenses pardoned must be recited in the pardon. One of the cited cases, *In Re Greathouse*, 10 F. Cas. 1057 (No. 5,741) (C.C.N.D. Cal. 1864), appears to be *contra*. However, a reading of the case shows that the issue involved was not whether the pardon must recite the offense (in fact, the pardon here did recite the offense—treason), but whether the persons pardoned must be individually identified. It was held that the pardon involved was an amnesty, and that the persons pardoned could be designated by class. *Id.* at 1061.

30. *Stetler's Case*, 22 F. Cas. 1314, 1316 (No. 13,380) (C.C.E.D. Penn., 1852).

31. Annot., 35 A.L.R.2d 1263, § 4.

32. *Carson v. Henslee*, 221 Ark. 248, 250, 252 S.W.2d 609, 610, 35 A.L.R.2d 1257, 1260 (1952); *Redd v. State*, 65 Ark. 475, 484, 47 S.W. 119, 121 (1898);

gory are merely ambiguous as opposed to being blatantly mistaken. The general rule is still that in order to be valid and of effect, a pardon must accurately describe the offense intended to be forgiven.³³

The rationale for the requirement that the offenses pardoned be recited in the pardon is based on the concept that in order for the executive to effectively pardon an individual for certain actions, he must be aware of what it is that he is pardoning.

[T]he kings of . . . England . . . could grant pardons before as well as after conviction, and before as well as after indictment. But although it was never asserted in terms that they had no power to pardon a man of all felonies in general without describing any one particular felony, the rule of constructing pardons had the practical effect of denying the existence of any such power. For whenever it could be apprised that the king, when he granted pardon, was not fully apprised of both the heinousness of the crime, and also how far the party stood convicted thereof upon record, the pardon was held void, as being gained by imposition upon the king.³⁴

Turning to Mr. Nixon's pardon, it is noted that the pardon purports to extend to ". . . all offenses against the United States which he . . . has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974." One must necessarily question whether the recital of offenses is specific or accurate enough to effectuate the pardon. It is painfully obvious that the pardon does not specify a single offense, and in fact seems to imply that an offense may not have been committed.

Of course, it could be argued that the pardon is somewhat specific in that paragraph 2 of the pardon's preamble mentions the fact

see also the argument of counsel, *Knote v. United States*, 95 U.S. 149, 151 (1877).

33. *Ex Parte Higgins*, 14 Mo. App. 601, 601 (1884); *State v. Leak*, 5 Ind. 359, 362 (1854).

34. *State of Nevada v. Foley*, 15 Nev. 64, 71 (1880). The proposition that fraud vitiates a pardon was questioned in *In Re Greathouse*, 10 F. Cas. 1057, 1059 (No. 5,741) (C.C.N.D. Cal. 1864), and expressly rejected in *In Re Francis B. Edymoin*, 8 How. Pr. 478, 484 (N.Y., Cayuga County Ct., 1853). However, in *People ex. rel. Pickard v. Sheriff*, 11 N.Y. Civ. Proc. 172 (Chautauga County Ct., 1886), the Court stated that Edymoin ". . . follows no authority when it attempts to lay down the rule that records, deeds and papers, fair on their face cannot be impeached." *Id.* at 180.

It should be noted that even *Greathouse* and *Edymoin* impliedly agree with the proposition that the pardon must recite the offense pardoned.

that the House Judiciary Committee voted in favor of certain recommended Articles of Impeachment.³⁵ Thus, it is possible that it could be contended that the offenses specified in the Articles of Impeachment are those which are pardoned. However, there are several flaws to this argument.

First, the preamble of the pardon strikes one as more of a brief history of events rather than a specification of offenses committed by Mr. Nixon. It will be noted that the third paragraph of the preamble states that as a result of certain acts or omissions, Nixon has become liable to possible indictment and trial. Yet, this paragraph never refers to the Articles of Impeachment, nor does it even infer that the acts or omissions referred to are the same or similar to acts or omissions which may have formed the basis for the Articles of Impeachment.

Further, the preamble's paragraph 2 mentions that the impeachment inquiry extended over more than eight months, and that it received wide publicity. Thus, this paragraph's primary purpose would appear to be to justify the assertion in paragraph 4 of the preamble, wherein it is stated that Nixon's trial, if any, could not fairly begin for over a year (President Ford stated that this was because of the Watergate atmosphere³⁶, the atmosphere undoubtedly having been affected by the impeachment proceedings), rather than to specify the offenses of which Nixon was being pardoned.

In addition, the actual words of clemency which appear in paragraph 5 of the Presidential Proclamation are devoid of any reference to the preceding four paragraph preamble. Nixon is simply pardoned for all offenses which he has committed, may have committed, or may have taken part in. It is submitted that the words of the executive grant of clemency are the words which determine the effect of the grant, and not the words of the preamble preceding the grant.

This view is strengthened by examining the pardon of George Burdick.³⁷ Here, the pardon's preamble specified an offense to an extent (apparently, obtaining confidential government information illegally), while the words of the executive grant of clemency were general as they are in Nixon's pardon. Burdick argued against the pardon's validity on the grounds that it was too general (this will be explored in greater depth, *infra*). Burdick's concern with the words of the preamble is demonstrated by the fact that in his argument, he never even considered them. While this might be seen

35. See n.10, *supra*.

36. See Los Angeles Times, Sept. 9, 1974, Part I at p.1, col. 6.

37. Burdick v. United States, 236 U.S. 79, 85-86 (1915).

as an oversight, the United States Supreme Court considered Burdick's argument at some length and, while declining to rule on the argument,³⁸ the Court made no mention of the preamble, and in fact did absolutely nothing to point out Burdick's "oversight". This would appear to indicate that the words of the preamble, or introductory paragraphs, are of little, if any, value in construing the words of the actual grant of clemency.

A matter of interest in the *Burdick* case was that it has been the only case in front of the United States Supreme Court which involved a pardon similar in its terms to the pardon of Richard Nixon. Burdick's pardon read in part:

... I . . . do hereby grant to the said George Burdick a full and unconditional pardon for all offenses against the United States which he . . . has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of information . . . concerning which he may be interrogated in the said grand jury proceeding.³⁹

Burdick refused to accept the pardon, and was held in contempt for refusing to testify in front of the grand jury. Among other things, Burdick's attorney argued that,

The interpretation of the language of the Constitution conferring the pardoning power upon the President contended for the United States stretches the actual language of the Constitution in that it makes the word 'offenses' connote conjectural or purely hypothetical offenses in addition to ascertained events.⁴⁰

Burdick further argued that the wording of the pardon was precluded by the constitutional provision giving power only "to grant reprieves and pardons for offenses against the United States", and that not in the imagination or purpose of the executive magistracy can an offense against the United States be established, but only by confession or conviction.⁴¹

While devoting some time to these arguments, the Court declined to rule on them. Instead, the holding that the pardon was ineffectual was based on Burdick's rejection of the pardon.

*Redd v. State*⁴² involved the ability of a witness to testify after receiving a

38. *Id.* at 93.

39. *Id.* at 86.

40. *Id.* at 81.

41. *Id.* at 93.

42. 65 Ark. 475, 47 S.W. 119 (1898).

. . . full and free pardon of and from the offenses of burglary and larceny, or burglary, or larceny, either grand or petit, and of all felonies of which he may have heretofore been convicted . . .⁴³

The Court stated that if it could have been shown that the witness had been convicted of offenses other than those named in the pardon, it could have been that the terms “. . . and of all felonies of which he may have been heretofore convicted . . .” would not have covered such offenses because the executive may not have been apprised of the heinousness of his crimes, “. . . but deceived in his grant . . .”⁴⁴

While the Arkansas Supreme Court, unlike the United States Supreme Court, approached the problem of the general pardon, it merely indicated what it might do in the event it were ever confronted with the situation. At this time there does not appear to be any court in this country which has decided one way or another on the validity of a general pardon.

However, given the rule that the offenses pardoned must be recited in the pardon, it would seem that the general pardon is in direct contravention of this rule. There are a staggering number of offenses which may be committed against the United States, and it is difficult to conceive that the President will be apprised of all crimes possibly committed by an individual, especially when that individual will not admit the commission of a single offense. In other words, had there been evidence that Nixon committed treason while in office, would President Ford have been so willing to extend a general pardon so quickly; could President Ford have contemplated the possibility that treason, or a multiplicity of other offenses, were committed by Nixon while he was President?

The pardon itself, while general, cannot indicate such contemplation. Further, Mr. Nixon's efforts to suppress any evidence of his guilt of or complicity in any questionable actions would seem to indicate that President Ford could not have been apprised of all offenses committed by Mr. Nixon. It would thus seem that on this basis, a general pardon, and the pardon of Richard Nixon, would be invalid.

D. Limitations On The Executive

“The ground for the exercise of the power [of pardon] is wholly within the discretion of the Executive.”⁴⁵ There are, however,

43. *Id.* at 484, 47 S.W. at 121.

44. *Id.* at 485, 47 S.W. at 121.

45. 20 OP. ATT'Y. GEN. 330 at 331 (1892).

several qualifications to this absolute statement. For instance, a pardon cannot be granted prior to the commission of an offense; it cannot be extended to a public nuisance, as there would then be no way to abate the nuisance; nor can it be used to stay impeachment proceedings.⁴⁶ Neither can a pardon operate retrospectively to abrogate events which have already occurred.⁴⁷

The obligations of the President may impose a limitation in themselves.

Before [the President] enter[s] on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States'.⁴⁸

Further, the President "... shall take Care that the Laws (of the United States) be faithfully executed . . ."⁴⁹

The power of executive clemency looms as an exception to the obligation of the executive to see that laws of the nation are faithfully executed. By exercising the power of executive clemency, the President is preventing the consequences of the law's execution. Insofar as the pardon of Richard Nixon is concerned, the pardon not only averted the criminal consequences of a judgment of conviction, but also precluded even the preliminary workings of the criminal justice system, the official bringing of charges.

The pardoning power is in derogation of the law. If the laws could always be enacted and administered so as to be just in every circumstance, there would be no need for pardons.⁵⁰ It follows that

46. *Ex Parte William Wells*, 59 U.S. 307, 312 (1855).

47. *In Re Spencer*, 22 F. Cas. 921, 923 (No. 13,234) (C.C.D. Ore. 1878).

Probably the most dramatic example of this limitation is where rights have vested in property prior to the granting of the pardon. "The power of pardoning is not an absolute unlimited power of dispensing with the operation of laws which vest an interest or right in a private citizen, or which are designed to secure to him the enjoyment of his property, or give him damages against a wrongdoer . . . Out of its legitimate sphere, a pardon is void . . . [T]he grantor of a pardon, cannot release, acquit, and abrogate a private right and interest vested in a third person." 5 Op. ATT'Y. GEN. 532 at 535-37 (1852).

See also, 10 Op. ATT'Y. GEN. 452 (1863); *Knote v. United States*, 95 U.S. 149, 153-54 (1877).

48. U.S. CONST. art. II, § 1.

49. U.S. CONST. art. II, § 3.

50. *Jamison v. Flanner*, 116 Kan. 624, 632, 228 P. 82, 86 (1924); see also, 67 C.J.S. Pardon § 2 (1950).

if the pardon power is in derogation of the law, it is also in derogation of the President's obligation to see that the laws are faithfully executed. Consequently, it appears that the power of executive clemency is limited by the executive's primary obligation of seeing that the laws are faithfully executed to the extent that executive clemency only be exercised in good faith for the purpose of preventing the injustice which would result from a blind administration of the law in every case.

The Court, in *Delany v. Shobe*,⁵¹ a case which involved state executive clemency, stated that the governors of most states are

. . . vested with a general power to reprieve, commute and pardon . . . The executive's prerogative of reprieve, commutation and pardon are at the governor's own discretion to be exercised without limitation, *except in good faith*, and for which he owes no accounting. [emphasis added]⁵²

It is not enough, however, to state that the power of executive clemency is subject to a requirement of good faith. The primary problem is what remedies are available in the event the power is exercised in bad faith. Unfortunately, the remedies, as they have thus far been enumerated, are rather limited.

In *Ex Parte Grossman*,⁵³ the Court dealt with the pardon of an individual who had been held in contempt of court. The Court stated:

To exercise [executive clemency] to the extent of destroying the deterrent effect of judicial punishment would be to pervert [the power of executive clemency]; but whoever is to make it useful must have full discretion to exercise it.⁵⁴

The Court went on to say that exceptional cases, such as where the President abused his constitutional power by granting excessive pardons which deprived the courts of power to enforce their orders ". . . would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President."⁵⁵

The remedy suggested by the Court may be appropriate in certain circumstances, but if it exists as the sole remedy, it is far too drastic.

51. 235 F. Supp. 662 (D. Ore. 1964).

52. *Id.* at 667. In California at least, the power is somewhat more limited. The governor must report each exercise of clemency to the legislature along with his reason for the exercise of the power. Further, the governor may not grant a pardon or commutation to a person twice convicted of a felony without the recommendation of the California Supreme Court, four justices concurring. See CALIF. CONST. art. V, § 8.

53. 267 U.S. 87 (1925).

54. *Id.* at 121.

55. *Id.* at 121.

Among other things, President Ford pardoned Nixon ostensibly for reasons of Nixon's health,⁵⁶ and also for the purpose of preventing a former President from being subjected to a long criminal prosecution after spending much of his life in the service of the country.⁵⁷

Whether these are valid reasons for a pardon is questionable. Undoubtedly there are many defendants in poor health who are still prosecuted. Of course, there are exceptions such as where a death sentence is stayed until the condemned prisoner recovers his health, or where a defendant becomes insane during the criminal proceedings, the proceedings are stayed and the defendant is committed to an institution until he recovers his sanity. However, none of these characteristics are present in the Nixon pardon, for here the legal machinery of the criminal justice system has been completely and permanently halted.

The desire that a former president not be prosecuted in conjunction with the health reason can be appealing, but when applied to the Nixon Pardon, a disturbing factor emerges. That is, President Ford became President solely by virtue of his appointment to the office of vice-president by former President Nixon. When this factor becomes a part of the picture, President Ford's subjective reasons for the pardon become less appealing, and the pardon begins to take the appearance of a returned political favor.⁵⁸ While there is no hard evidence that this is any more than coincidence and unfortunate appearance, one cannot escape the inference that there here existed a conflict of interest which could have only been resolved by an impartial determination of the propriety of this particular pardon.

While some of the stated reasons for the pardon (e.g., the desire to heal the divisiveness in the nation) are laudible, it appears probable (and, indeed, it is even understandable) that President Ford did not want to see the prosecution of the man who made his elevation to the office of President possible, and that this latter consid-

56. *Supra*, n.9.

57. Los Angeles Times, Sept. 9, 1974, Part I at 1, col. 6; *Id.* at 12, col. 3.

58. It has been reported that prior to the pardon, Nixon's acceptance draft was taken to the White House where it underwent extensive rewriting. The White House did not want Nixon saying something in his acceptance and then reneging a few sentences later. Los Angeles Times, Sept. 9, 1974, Part I at 13, col. 5.

eration played a part in deciding whether to grant the pardon. Understandable though it may be, it is submitted that this latter consideration is hardly a valid ground for the exercise of executive clemency.

If it is assumed that, because of this, President Ford exercised the power of executive clemency in bad faith, the Court in Grossman would still hold the pardon effective and further hold that the only remedy is the impeachment of President Ford. This might be justified if it could be shown that President Ford acted in flagrant and intentional disregard of his constitutional obligations, but this does not appear to be the case. At most, it would appear that President Ford is guilty of an emotional and subjective reaction to a situation, that is, the desire to save a man who conferred a great benefit upon him.

Impeachment is too drastic a remedy for what is probably at worst a judgmental error with its base in emotion, and is thus inadequate. It should be possible to examine the pardon on an objective basis, and thus establish its validity or invalidity. This will be further explored *infra*.

III. ACCEPTANCE

A. Acceptance As A Prerequisite

A presidential pardon has been analogized to a deed, to the validity of which delivery is essential, with delivery not being complete without an acceptance.⁵⁹ Thus, a pardon, to become effective, must be accepted.⁶⁰ While delivery and acceptance are essential to a valid pardon, the mere lack of an expressed affirmative accep-

59. *United States v. Wilson*, 32 U.S. 150, 161 (1833); see also 59 AM. JUR. 2d, Pardon & Parole, § 47 (1971).

60. *Ex Parte Perovich*, 9 F.2d 124, 125 (D.C., D. Kan. 1925). Even this rule is not absolute, however. The decision in *Ex Parte Perovich* was reversed by the Supreme Court in *Biddle v. Perovich*, 274 U.S. 480 (1926), where the Court stated that under certain circumstances the public welfare and not the individual's acceptance shall determine the effect of a pardon. *Id.* at 486. The case involved the reduction of a sentence from death to life imprisonment, and the prisoner's refusal to accept such a reduction.

An interesting point was made by the Court in *Ex Parte Perovich* when it stated that while a commutation (a reduction in the degree of punishment) is within the President's power, an entire change in the nature and character of the punishment is not. 9 F.2d at 125. The Court considered the reduction of sentence in this case as a change in the nature of punishment rather than a commutation.

In *Biddle v. Perovich*, the Court did not pass upon this question of power, but instead held that the reduction was a commutation, and that consent was not required for a commutation. 274 U.S. at 487.

tance does not necessarily invalidate the pardon, for as an absolute pardon is "... highly beneficial to the grantee, an acceptance of it . . . , in the absence of any proof to the contrary, must be presumed."⁶¹

However, a pardon may be rejected by the person to whom it is tendered. If it is rejected, it ordinarily cannot be forced upon him.⁶²

B. The Consequences of Acceptance

1. Ex Parte Garland

*Ex Parte Garland*⁶³ was a 5-4 decision involving a loyalty oath prescribed by Congress which was required of an attorney prior to his being admitted to practice before the federal courts. Garland had held office in the Confederacy during the Civil War, and after the war had received a presidential pardon for all offenses committed by his participation, direct or implied, in the rebellion.⁶⁴

The Court, in deciding that Garland could practice law before the federal courts, discussed the nature and effect of an accepted pardon, and stated:

[The pardon] power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders . . . A pardon reaches both the punishment prescribed for the offense 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 offense . . . [It] makes him, as it were, a new man, and gives him a new credit and capacity.⁶⁵

The problem with *Ex Parte Garland's* interpretation of the pardon power is that it was not necessary to the decision of the

61. *Redd v. State*, 65 Ark. 475, 485, 47 S.W. 119, 122 (1898); see also *Ex Parte Powell*, 73 Ala. 517, 519-20 (1883).

62. *Burdick v. United States*, 236 U.S. 79, 90 (1915).

63. 71 U.S. 333 (1867).

64. *Id.* at 333 and 375.

65. *Id.* at 380-81. See also *United States v. Klien*, 80 U.S. 128, 147 (1872); *Armstrong v. United States*, 80 U.S. 154, 155-56 (1872).

In *Brown v. Walker*, 161 U.S. 591 (1896), it was stated that if a witness had received a pardon, "... he cannot longer set up his privilege [against self-incrimination], since he stands with respect to such offense as if it had never been committed." *Id.* at 599.

case. Prior to discussing the pardon, the Court had already invalidated the loyalty oath on the grounds that it was a bill of attainder,⁶⁶ that it was *ex post facto*,⁶⁷ and that it constituted an unwarranted legislative incursion into the judicial power.⁶⁸ After invalidating the oath on these grounds, the Court stated, "This view is strengthened by a consideration of the effect of the pardon . . . and the nature of the pardoning power of the President."⁶⁹

With regard to whether a pardon blots out guilt, it should also be noted that Garland's counsel drew a distinction between pardon and amnesty, appearing to assume that amnesty rather than pardon was the basis for restoration of Garland's rights,⁷⁰ and he stated as follows:

[P]ardon is usually granted to an individual; amnesty to a class of persons . . . Pardon usually follows a conviction, and its effect is to remit the penalty. Amnesty usually precedes, but it may follow trial and conviction, and its effect is to obliterate the past . . . to place the offender exactly in the position which he occupied before the offense was committed.⁷¹

The effect of the *Garland* case is further undermined by a consideration of the time during which the case was decided. The Civil War had just ended and reconstruction was in process. During the time of the war and for a number of years following, there were a number of amnesties and pardons extended to the people of the Confederacy. It could be that the Court felt that in order to heal the wounds of division, it was required to construe the effect of a pardon as it did.⁷²

66. *Ex Parte Garland*, 71 U.S. 333, 377 (1867).

67. *Id.* at 377.

68. *Id.* at 378-79.

69. *Id.* at 380.

70. *Id.* at 348-52, generally. While the Supreme Court has generally stated that the distinction between pardon and amnesty is not recognized in the United States, it has still taken pains to point out the differences between the two concepts, the distinction being basically the same as that made by Garland's counsel. See *Brown v. Walker*, 161 U.S. 591, 601-02 (1896); *Knote v. United States*, 95 U.S. 149, 152-53. For further discussions of amnesty, see *In re Greathouse*, 10 F. Cas. 1057, 1060 (No. 5,741) (C.C.N.D. Cal. 1864); 20 OP. ATT'Y GEN. 330 (1892); 11 OP. ATT'Y GEN. 227, 228 (1865).

71. *Ex Parte Garland*, 71 U.S. 351 (1867).

72. As a matter of interest, one might analogize this latter consideration to the desire to heal the nation's divisiveness after Watergate. A pardon granted solely upon such considerations could be said to be in the public interest, and one cannot really quarrel with the propriety of such a reason, even if it is factually in error.

The section of this comment entitled "Limitations On The Executive", *supra*, does not take the position that such a reason would be an invalid ground for the exercise of executive clemency. Rather, it points out factors

2. Departure From *Garland*

In 1877, ten years after the decision in *Garland*, the Supreme Court in *Knote v. United States*⁷³ impliedly placed a limitation on the effect of a pardon, stating:

A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power . . . [I]t so far blots out the offense that . . . it cannot be imputed to him to prevent the assertion of his legal rights.⁷⁴

The language here indicates that a pardon will be construed to blot out guilt only so far as is necessary for the pardoned individual to regain his legal rights, rather than a complete obliteration of the offense. In 1926, the Supreme Court held:

A pardon . . . is not a private act of grace from an individual happening to possess power . . . 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.⁷⁵

Basically, this statement implies that hereafter a pardon will be construed only as remitting the consequences (either in whole or in part) of an offense, rather than obliterating the offense itself. Thus,

. . . a pardon exempts an individual from punishment which the law inflicts for the crime which he has committed; and generally

which would raise an inference of a conflict of interest and poses a hypothetical question of validity should these factors be the only true reasons behind the pardon.

It should also be noted that the divisiveness caused by the Civil War was vastly different than the divisiveness caused by Watergate. The former was characterized by a vicious hatred and warfare in which Americans killed other Americans in an attempt to physically split the nation into two separate, sovereign, political entities. The latter, on the other hand, was characterized by nonviolent (at least in terms of physical action) differences in opinion, a situation which, incidently, is supposed to characterize a free society.

Further, it should be noted that *Garland* did not involve the President's reasons for granting a pardon, or the validity of the pardon. Rather, it involved the issue of what effect should be given a valid absolute pardon when accepted.

For a discussion of the Civil War pardons, see 20 OP. ATT'Y. GEN. 330 at 334-39 (1892).

73. 95 U.S. 149 (1877).

74. *Id.* at 153.

75. *Biddle v. Perovich*, 274 U.S. 480, 486 (1926).

speaking, it also removes any disqualifications and disabilities which would ordinarily have followed from the conviction . . . [But a] person adjudged guilty of an offense is a convicted criminal, though pardoned . . .⁷⁶

The State of New York was perhaps the hardest on the *Garland* doctrine. In *People ex. rel. Prisament v. Brophy*,⁷⁷ a case where the defendant was sentenced as a second offender on the basis of a prior federal offense which had been absolutely pardoned, the Court said:

Literally, . . . an executive pardon cannot 'blot out the existence of guilt' of one who committed a crime. At most it can wipe out the legal consequences which flow from an adjudication of guilt . . . The Constitution . . . does not confer upon [the President] the power to wipe out guilt.⁷⁸

The New York Court of Appeals stated further that it felt that the United States Supreme Court had rejected the implications of *Garland*.⁷⁹

Thus, the current prevailing view would appear to coincide with the idea that a pardon " . . . does not restore an ex-convict to a state of innocence nor in any way represent that he is as honest, reliable, and upright as if he had constantly maintained the character of a law abiding citizen."⁸⁰ "[A] pardon of a convicted felon does not restore his character . . . It implies guilt and does not wash out the moral stain."⁸¹

It has been said that the grant of clemency ought not appear

76. *People v. Biggs*, 9 Cal. 2d 508, 511, 71 P.2d 214, 216 (1937). This case involved the sentencing of the defendant as a habitual criminal on the basis of two prior Texas felonies which had been pardoned by the governor of Texas. The Court stated that ". . . it is the second or subsequent offense which is punished, not the first . . . [I]n determining the nature of the penalty to be inflicted, the legislature is justified in taking into consideration the previous criminal conduct of the defendant." *Id.* at 512, 71 P.2d at 216.

See also, 8 CALIF. OP. ATT'Y. GEN. 87 (1946).

77. 287 N.Y. 142, 38 N.E.2d 468 (1941), *cert. den.* 317 U.S. 625 (1942).

78. *Id.* at 136-38, 38 N.E.2d at 470-71. See also, *Ex Parte Garland*, 71 U.S. 333, 396 (1867) (Miller, J., dissenting).

79. *People ex. rel. Prisament v. Brophy*, 287 N.Y. 132, 137, 38 N.E.2d 468, 470 (1941).

80. NOTE, 4 CALIF. L. REV. 236 at 237 (1916).

81. *People v. Biggs*, 9 Cal. 2d 508, 514, 71 P.2d 214, 217 (1937).

A related problem to character involves the credibility of a witness who was convicted of a felony and later pardoned. While it has long been recognized that a pardon removes a felon's disability to testify as a witness, *Boyd v. United States*, 142 U.S. 450, 453-54 (1891); *People v. Bowen*, 43 Cal. 439, 442 (1872), it has also been recognized that such a witness' credibility may still be suspect. *People v. Biggs*, *supra* at 514, 71 P.2d at 217; *United States v. Jones*, 26 F. Cas. 644, 648 (No. 15,493) (C.C.D.N.Y. 1824).

as a finding of innocence.⁸² A pardon would therefore carry an imputation of guilt while an acceptance of the pardon is a confession of guilt. The United States Supreme Court has made it clear that a pardon requires the grantee to "... confess his guilt in order to avoid a conviction of it."⁸³

There can be no pardon where there is no actual or imputed guilt. The acceptance of a pardon is a confession of guilt, or the existence of a state of facts from which a judgment of guilt would follow.⁸⁴

At this point, it would be appropriate to examine Mr. Nixon's acceptance of his pardon.

3. Nixon's Acceptance

Assuming a valid pardon and acceptance, Nixon's pardon more than likely means the end of his political and legal career.

... [W]hile [a] pardon dispenses with punishment, it cannot change character, and where character is a qualification for an office, a pardoned offense as much as an unpardoned offense is evidence of a lack of the necessary qualification.⁸⁵

One interesting development which has arisen is that Nixon is considering suing for the back taxes he paid,⁸⁶ presumably on the ground that the pardon covered any charges which might have been brought against him for tax evasion. The idea is clever, and if Nixon had not already paid the back taxes, it is possible that he might be in a position to resist their collection.

However, the money has already been paid to the Treasury.

[A pardon] does not make amends for the past. It affords no relief for what has been suffered by the offender ... it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. ...⁸⁷

82. 23 OP. ATT'Y. GEN. 360 at 370 (1901).

83. *Burdick v. United States*, 236 U.S. 79, 94 (1915).

84. 11 OP. ATT'Y. GEN. 227 at 228 (1865).

"All pardons, except in cases of illegal convictions, etc., proceed upon the hypothesis of the legal guilt of the person pardoned. If he be not guilty, it is presumed that he will be acquitted, and he has no need of a pardon. The pardon is granted on considerations which satisfy the executive that in the particular case, an offender, though guilty, should be pardoned." *In re Greathouse*, 10 F. Cas. 1057, 1060 (No. 5,741) (C.C.N.D. Cal. 1864).

85. Williston, "Does A Pardon Blot Out Guilt?," 28 HARV. L. REV. 645 at 657 (1915).

86. *Los Angeles Times*, Sept. 9, 1974, Part I at 11, col. 1.

87. *Knote v. United States*, 95 U.S. 149, 153-54 (1877).

The pardon power of the President cannot “. . . touch moneys in the treasury of the United States, except [as] expressly authorized by act of Congress.”⁸⁸

Thus, the back taxes paid by Nixon are out of President Ford's control. The pardon can have no effect on this money; Mr. Nixon has lost it forever.

Inasmuch as a pardon is an imputation of guilt and the acceptance of a pardon is a confession of guilt,⁸⁹ an interesting question is to what offenses has Mr. Nixon admitted guilt. It has been reported that the Special Prosecutor's office was investigating Nixon on ten separate matters.⁹⁰ Because of its generality, the pardon would necessarily include all ten matters, and Mr. Nixon's acceptance should theoretically admit his guilt or complicity in all these matters.

This question is not only made complicated by the generality of the pardon, but also by Nixon's acceptance, which at no point conceded criminal guilt.⁹¹ In fact, not only has it been reported that Nixon's attorney was holding out against any admission of legal guilt,⁹² but according to Alexander M. Haig, Jr., former White House Chief of Staff, Nixon “. . . still believes he is innocent of committing an impeachable offense”⁹³

88. *Id.* at 154. See also, 10 OP. ATT'Y. GEN. 452 at 453 (1863).

89. *Burdick v. United States*, 236 U.S. 79, 94 (1915).

90. *Los Angeles Times*, Sept. 11, 1974, Part I at 8, col. 1. The matters being investigated were:

1. Nixon's gift of his vice-presidential papers;
2. Nixon's use of campaign contributions for his own personal benefit;
3. The connection between a dairy industry promise of campaign contributions and an increase in the milk price support level;
4. The handling of FBI wiretap records;
5. Obstruction of justice in the Ellsberg break-in case;
6. Wiretapping allegedly directed at private citizens;
7. Misuse of Internal Revenue Service information;
8. Misuse of the Internal Revenue Service through attempts to initiate audits of political enemies;
9. Misuse of the Federal Communications Commission in a challenge to ownership of television stations by the Washington Post;
10. Nixon's involvement in false testimony given before the Senate regarding the ITT case.

91. *Supra*, n.11. See also *Los Angeles Times*, Sept. 9, 1974, Part I at 1, col. 6.

92. Halpern, "What The Pardon Tells Us About Mr. Ford," *Los Angeles Times*, Sept. 12, 1974, Part II at 7, col. 2.

93. *Los Angeles Times*, Sept. 15, 1974, Part I at 10, col. 1.

"All Nixon says is that he regrets not acting 'more decisively about Watergate', and he has never admitted to and will never admit to anything worse than indecision. Of course the June 23, 1972 tape shows that he acted

The attitude demonstrated by Mr. Nixon is not quite consistent with several principles behind the concept of a pardon. "When men have offended against the law, their appeal is for mercy, not justice."⁹⁴ A pardon "... is an act of sovereign clemency toward the guilty, and not of justice for the innocent..."⁹⁵

Even when confronted with the idea that acceptance of a pardon is presumed absent proof to the contrary,⁹⁶ here Mr. Nixon has demonstrated that he is not willing to confess any guilt whatsoever, an attitude which is directly opposed to the idea that an acceptance is a confession of guilt. A pardon "... is a deed of mercy given without other fee or reward than the good faith, truth, and repentance of the culprit."⁹⁷ Yet, if wrongdoing is denied, how can there be repentance; and if wrongdoing has in fact taken place, does not a denial of such wrongdoing constitute both a lack of good faith and a lack of truthfulness?

In *United States v. Wilson*,⁹⁸ the United States Attorney General argued that it was an ancient doctrine that a plea of not guilty waived a pardon; that such a plea is the equivalent of a refusal to accept the pardon.⁹⁹ Although the Court decided in favor of the United States on another ground (that the pardon must be pleaded in order to be effective), the argument is convincing, and it is submitted that Nixon, by his attitude with regard to the pardon, has demonstrated that he will continue to insist on his innocence, and that as a consequence, he has waived his pardon.

However, the question which must necessarily be considered is what was Nixon to do if he genuinely believed in his innocence, yet realized the risk of prosecution and public trial. The law is somewhat harsh in this respect, for it has been stated that if a person is not guilty, he has no need of a pardon, for it is presumed that he will be acquitted.¹⁰⁰

decisively to obstruct justice." Will, *Ford's Action Takes Its Toll on Our Principles*, Los Angeles Times, Sept. 13, 1974, Part II at 7, col. 4.

94. 11 OP. ATT'Y. GEN. 227 at 230 (1865).

95. NOTE, 4 CALIF. L. REV. 236 at 237 (1916).

96. *Redd v. State*, 65 Ark. 475, 485, 47 S.W. 119, 122 (1898); *Ex Parte Powell*, 73 Ala. 517, 520 (1883).

97. 11 OP. ATT'Y. GEN. 227 at 229-30 (1865).

98. 32 U.S. 150 (1833).

99. *Id.* at 156.

100. *In re Greathouse*, 10 F. Cas. 1057, 1060 (No. 5,741) (C.C.N.D. Cal. 1864).

While the pardon's validity does not appear to be affected by the timing of the pardon, *supra*, timing is the real problem here. If President Ford would (or could) have waited until a verdict had been rendered for or against Nixon (or at the very least, until indictment or plea), the dilemma of the uncertainty of Nixon's guilt or innocence may then have been obviated.

IV. THE SPECIAL PROSECUTOR

The establishing of the Office of the Watergate Special Prosecution Force¹⁰¹ poses another obstacle to Nixon's pardon. The regulation which governs the Special Prosecution Force gives the Special Prosecutor

. . . full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House Staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for . . . [d]eciding whether or not to prosecute any individual, firm, corporation or group of individuals . . .¹⁰²

On November 19, 1973, an amendment was added to the regulation, the amendment reading in part:

In accordance with assurances given by the President to the Attorney General that the President will not exercise his constitutional powers . . . to limit the independence that [the Special Prosecutor] is hereby given, . . . the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress (the Majority and Minority leaders and chairmen, and ranking minority members of the Judiciary Committees of the Senate and House of Representatives) and ascertaining that their consensus is in accord with his proposed action.¹⁰³

The regulation, in effect, delegates certain powers to the Special Prosecutor and guarantees that he will be independent in the use of that power. In fact, the Amendment of November 19, 1973 expressly limits the exercise of the President's constitutional powers when the exercise of such power would limit the Special Prosecutor's jurisdiction. The power of executive clemency is a constitu-

101. 38 Fed. Reg. 30738 (1973).

102. *Id.* at 30738-39.

103. *Id.* at 32805.

tional power, and to the extent that the exercise of that power would limit the Special Prosecutor's jurisdiction, the power falls within the terms of the regulation. Further, it has been said that

... the authority conferred on the special prosecutor [is] not only 'full' but exclusive, and ... matters within his authority were immune from interference from the ... President.¹⁰⁴

The United States Supreme Court in *United States v. Nixon*¹⁰⁵ considered the regulation governing the Special Prosecutor and held that so long as the regulation delegating to the Special Prosecutor the authority to represent the United States in the Watergate affair is existent,

... it has the force of law ... [T]he Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it.¹⁰⁶

This holding has been interpreted by some to be stating that by taking part in the promulgation of the regulation, the President has waived his constitutional powers to control matters within the jurisdiction of the Special Prosecutor's office.¹⁰⁷ While it may be argued that the constitutional powers of the Executive Branch of government cannot be infringed by a Congressional statute, the argument completely misinterprets the source of this regulation. The regulation is *not*, repeat, is *not* a Congressional statute. Rather, it is a declaration of policy enacted by the Executive Branch itself. The only part Congress played in this matter was that it enacted the statutes under which the Executive Branch claimed the power to promulgate the regulation.¹⁰⁸

In *Nader v. Bork*,¹⁰⁹ the Court, in considering an almost identical

104. Lazarus, "Nixon's Pardon Is Open To Legal Challenge," Los Angeles Times, Sept. 26, 1974, Part II at 7, col. 3.

The idea that the President would delegate or limit his power of executive clemency with regard to matters within the Special Prosecutor's sphere is not entirely novel (although the particular facts here involved may be). "[The] [p]ower of executive clemency ... has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or review boards." *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950), *reh. den.* 339 U.S. 926 (1950).

105. 418 U.S. 683 (1974).

106. *Id.* at 695-96.

107. Lazarus, "Nixon's Pardon Is Open To Legal Challenge," Los Angeles Times, Sept. 26, 1974, Part II at 7, col. 2.

108. See 5 U.S.C.A. § 301 (1967); 28 U.S.C.A. §§ 509-10 (1968).

109. 366 F. Supp. 104 (D.C.D.C. 1973).

regulation, stated that the regulation was binding on the body which issued it, and that by promulgating the regulation, the Attorney General had voluntarily limited his own broad authority.¹¹⁰ This concept was expanded to include the entire Executive Branch in *United States v. Nixon*.¹¹¹

In *United States v. Mitchell*,¹¹² the Court stated:

The current Special Prosecutor [Jaworski] is vested with the powers and authority of his predecessor [Cox] pursuant to regulations which have the force of law . . . The Special Prosecutor's independence has been affirmed and reaffirmed by the President and his representatives, and a *unique guarantee* of unfettered operation accorded him: 'the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting such members of Congress (the leaders of both Houses and the respective Committees on the Judiciary) and ascertaining that their consensus is in accord with his proposed action'.¹¹³ [emphasis added]

The Court went on to say that since the President (then Nixon) had not consulted such members of Congress, " . . . his attempt to abridge the Special Prosecutor's independence with the argument that he cannot seek evidence from the President by court process is a nullity . . ." ¹¹⁴ [emphasis added]

Never, at any time, did the President object to the regulation relating to the Special Prosecutor promulgated by the Attorney General, and these regulations clearly proscribed activities on the President's part which he was otherwise free to undertake. The President's silence with regard to the regulation promulgated by the branch of government over which he is the head can only be construed as his acquiescence in that regulation. Whether or not the President now feels that the regulation now in existence was a wise or an unwise limitation on his constitutional power, it still has the force of law, and the President is bound by the consequences of its enforcement.

. . . [T]he President is not above the law's command . . . Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen.¹¹⁵

110. *Id.* at 108. The Court further stated, "An agency's power to revoke its regulations is not unlimited—such action must be neither arbitrary nor unreasonable." *Id.* at 108.

The Court in this case held that, by virtue of the regulation, the firing of Archibald Cox, the first Special Prosecutor, was illegal. *Id.* at 109-10.

111. *Supra*, n.106.

112. 377 F. Supp. 1326 (D.C.D.C. 1974), *aff'd*, 418 U.S. 683 (1974).

113. *Id.* at 1329.

114. *Id.* at 1329.

115. *Nixon v. Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973).

It is thus submitted that the pardon of Richard Nixon deprived the Special Prosecutor of jurisdiction over a matter within his authority, that is, a potential defendant in a Watergate related prosecution. As such, the Special Prosecutor's jurisdiction was limited without resort to the procedures mandated by the regulation. Since the regulation has the force of law, it is further submitted that the exercise by the President of a constitutional power (that is, the power of executive clemency) in contravention of the regulation was invalid and of no effect.

V. CONCLUSION

Ideally, it is submitted that a pardon and the acceptance thereof should be construed as follows:

A pardon is an act of executive clemency exercised (except when it expressly states that it is the result of an illegal or mistaken conviction) as an act of sovereign mercy toward one guilty of an offense against the United States, where an impartial administration of the law and its consequences would result in unfairness, injustice, and undue harshness and hardship to the grantee of the pardon. The pardon must specifically identify the offenses pardoned in the words which are construed as the grant of clemency and, absent special circumstances which should be identified in the preamble of the pardon, the pardon should not be granted prior to the time of conviction and judgment.

The acceptance of a pardon is an acknowledgement by the grantee that he is guilty of the offenses contained therein. A denial of such guilt by the grantee will be construed to be a rejection of the pardon.

Further, if the Executive should voluntarily waive or limit his power of executive clemency in certain circumstances, such power may not be exercised under such circumstances absent a lawful rescission of such waiver or limitation.

One unfortunate aspect of this particular area of the law is that, while there are many decisions regarding pardons, many of these decisions are inconsistent and some are downright contradictory. Despite this, the United States Supreme Court has never expressly overruled or disapproved in any of its decisions a prior inconsistent Supreme Court decision on the pardon power. Because of this, one cannot predict with any certainty what the Supreme Court will do when confronted with another pardon case, but instead can only speculate as to what might happen.

One can be fairly certain that the Supreme Court would not

reject a pardon case at this time because it felt it did not have jurisdiction to review the scope of the President's power of executive clemency. A President's actions are not immune from judicial review merely because he is President.¹¹⁶ Further, "... it is emphatically the province and duty of the judicial department to say what the law is."¹¹⁷ Deciding whether one of the branches of government exceeds whatever authority has been committed by the Constitution "... is a responsibility of [the Supreme] Court as ultimate interpreter of the Constitution."¹¹⁸

This comment takes the position that the Nixon pardon is invalid and/or ineffective on the grounds that it does not recite the offenses pardoned, that the pardon was impliedly rejected by Nixon because of his assertions of innocence, and that the pardon was in direct contravention of the Special Prosecutor's regulation. However, the comment does not take the position that the pardon should be challenged in the courts. Rather, that decision is left to the conscience of the individual or individuals who may have standing to challenge the pardon, and this comment does not purport to state who might have such standing.

It is unfortunate that this area of the law is rather ambiguous, for as a result, no concrete guidelines can be stated for the exercise of the power of executive clemency. Possibly for this reason, judicial review of Nixon's pardon would be desirable with the view of obtaining a fresh determination of the constitutional scope of the pardon power, and the limitations which may be imposed upon it to preclude its abuse.¹¹⁹

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116. *Atlee v. Nixon*, 336 F. Supp. 790, 791 (E.D. Penn. 1972).

117. *United States v. Nixon*, *supra* n.105 at 703 and 705 (1974); *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

118. *United States v. Nixon*, *supra* n.106 at 704 (1974).

119. One argument which might be advanced is that the public has the right to know of any illegal activity in which their President has engaged during the period of time he held office. This is a public interest argument, and while it might seem to conflict with the public interest argument regarding the prevention of divisiveness in the nation, the conflict could be resolved by making the pardon specific as to the offenses pardoned.