

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 9: Liberalism Divided—Separation of Powers/Power to Pardon

Mary C. Lawton, **Presidential or Legislative Pardon of the President** (1974)¹

In the summer of 1972, several individuals associated with President Richard Nixon's re-election campaign were caught attempting to wiretap the offices of the Democratic National Committee in the Watergate Hotel in Washington, D.C. In the fall of 1972, President Nixon defeated Democratic presidential nominee George McGovern in a landslide. In the spring of 1973, federal prosecutors determined that the Watergate burglars were encouraged to commit perjury to hide the extent of White House involvement in the plan to spy on the Democratic campaign, leading to the resignation of senior White House aides. In the fall of 1973, the White House was under siege from investigating congressional committees and special prosecutors. The special prosecutor investigating the case contemplated a number of possible criminal charges against Nixon, including obstruction of justice. When several aides were indicted for obstruction of justice and the courts gained access to White House audiotapes indicating the extent of the president's personal involvement in the cover-up, Nixon's position became untenable. In the face of likely impeachment and conviction, President Nixon resigned from office on August 9, 1974.

Gerald Ford served the remainder of Richard Nixon's term as president. A month after Nixon's resignation, Ford granted a pardon to the former-president for any criminal offenses he might have committed during his last years in office. Ford defended the pardon as necessary to put an end to the national controversy over Watergate, but it likely played a role in the defeat of Ford's own effort to win election as president in 1976. In the days before Nixon's resignation, the acting assistant attorney general Mary Lawton in the Office of Legal Counsel was asked to produce an opinion examining whether President Nixon had the constitutional power to issue a pardon to himself for any violations of federal criminal law. She concluded that he did not.

Pursuant to Article II, Section 2 of the Constitution, the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment," is vested in the President. This raises the question whether the President can pardon himself. Under the fundamental rule that no one may be a judge in his own case, it would seem that the question should be answered in the negative.

The necessity doctrine would not appear applicable here. That doctrine deals with the situation in which the sole or all judges or officials who have jurisdiction to decide a case are disqualified because they belong to a class of persons who have some interest in the outcome of the litigation, thus depriving the citizen of a forum to have his case decided. In that situation the disqualification rule is frequently relaxed to avoid a denial of justice. *Evans v. Gore* (1920). . . . It is, however, extremely questionable whether that doctrine is pertinent where the deciding official himself would be directly and exclusively affected by his official act.

A different approach to the pardoning problem could be taken under Section 3 of the Twenty-Fifth Amendment. If the President declared that he was temporarily unable to perform the duties of his

¹ Excerpt taken from Mary C. Lawton, "Presidential or Legislative Pardon of the President" (1974).

office, the Vice President would become Acting President and as such he could pardon the President. Thereafter the President could either resign or resume the duties of his office.

The question whether Congress has the power to enact legislation in the nature of a pardon or of an amnesty has not been authoritatively decided. However, recently, in connection with several bills pertaining to an amnesty to Vietnam War resisters, the Department of Justice has taken a very strong position to the effect that Congress lacks the power to enact such legislation. . . .

It should be noted, however, that Deputy Assistant Attorney General [Leon] Ulman's testimony was based on the theory that Congress cannot enact amnesty or pardoning legislation because to do so would interfere with the pardoning power vested expressly in the President by the Constitution. This would permit the argument that Congress can enact such legislation in those areas where that power is not vested in the President. A congressional pardon granted to the President would not interfere with the President's pardoning power because, as shown above, that power does not extend to the President himself.

The suggestion has been made that Congress could enact legislation to the effect that impeachment, removal by impeachment, or even a recommendation of impeachment by the House Judiciary Committee could be pleaded in bar to criminal prosecution.

While it has been the position of the Department of Justice that Congress can-not enact pardoning legislation, it has conceded that Congress has the power to enact legislation establishing defenses or pleas in bar to the prosecution in certain circumstances. However, in the present circumstances it would seem that such legislation would be identical with a legislative pardon unless it is of fairly general application. The proposal of such legislation by the Administration therefore could undercut the sincerity of its opposition to legislative pardons.

Moreover, it could be argued that such legislation would be inconsistent with the language, if not the spirit, of Article I, Section 3, Clause 7 of the Constitution pursuant to which in case of impeachment "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment according to Law." In our view this clause does not require subsequent criminal proceedings; it merely provides that they would not constitute double jeopardy. To read this clause as being mandatory would, of course, preclude any kind of pardon.

. . .

Title 18, section 6005 of the U.S. Code (1970) establishes a procedure to grant immunity to witnesses testifying before congressional committees. That immunity, however, is limited to the use of the testimony or other information given by the witness or to any information directly or indirectly derived from that testimony or information. It does not bar prosecution with respect to the subject matter of that testimony. The scope of 18 U.S.C. §§ 6002 and 6005 therefore would not bar any prosecution based on evidence other than that obtained from the witness.