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THE POWER OF THE PRESIDENT TO GRANT A GENERAL PARDON OR AMNESTY FOR OFFENCES AGAINST THE UNITED STATES.

(*Continued from p.* 532.)

THE report of the Senate Judiciary Committee very justly says that the knowledge of these terms, *amnesty*, *pardon*, *reprieve*, and of their settled meaning and effect under the English system of government, must have existed in the Constitutional Convention of 1787; but then proceeds to insist that the Convention, by not using the word *amnesty* in the article conferring power on the President "to grant pardons," must be understood as intending not to invest him with any power to grant amnesty for offences against the United States. Of course, the intention of the framers of the Constitution is the chief thing to be regarded in the construction of any grant of power contained in the Constitution; but the claim that they, in conferring on the President the power "to grant pardons," did not intend to give him the power to grant amnesty is in clear and manifest conflict with the proceedings and debates of the Convention, as well as with the exposition of this article published in the Federalist while the Constitution was pending before the state conventions for ratification. From the proceedings and debates of the Convention and this contemporary exposition of this article, it is so clear as to be unquestionable that the framers of the Constitution not only intended to invest

the President with power to grant amnesty for offences against the United States, but understood that this power to grant amnesty was included in the power "to grant pardons."

The "Shays Rebellion" in Massachusetts occurred in the year next preceding the session of the Convention of 1787. Governor Bowdoin was then the chief magistrate of that Commonwealth, and by his wise and vigorous policy the rebellion was completely suppressed. At the annual state election in the spring of 1787, he was a candidate for re-election, but was defeated by Governor Hancock, who received the support of the Shays party, and of all who sympathized with them; and the result of the election was in fact a triumph of that party: 1 Holland's History of Western Massachusetts, p. 288. By the Constitution of Massachusetts of 1780, chap. 2, § 1, art. 8, the power of pardoning offences against the Commonwealth, except in cases of impeachment, was vested in the Governor, acting by and with the advice of the Executive Council, subject to this limitation, viz.: "But no charter of pardon granted by the Governor, with advice of the Council, before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein descriptive of the offence or offences intended to be pardoned."

This provision of the Constitution by which the executive power of pardoning is restricted still remains in force. As the governor and council could not pardon any offences until *after conviction*, they of course had no power to grant a general pardon or amnesty applicable to those who had been engaged in the rebellion.

These facts become peculiarly significant in view of the reference which was made to the Shays Rebellion, in the Convention of 1787, by Mr. Rufus King (who was then one of the delegates to that Convention from Massachusetts, and afterwards a distinguished Senator from New York), and by Mr. Madison and Col. George Mason in the Virginia State Convention, as well as in view of the remarks in the 74th number of the Federalist on the power given by the Constitution to the President "to grant pardons," as hereinafter mentioned.

In Mr. Madison's "Debates of the Federal Convention held in 1787," published in the volume supplementary to "Elliott's Debates," and usually referred to as the 5th volume of "Elliott's

Debates," there is a full account of the proceedings and debates in the Convention, so far as the article conferring the power to grant pardons was specially the subject of consideration; and this account is contained in the following extracts, viz. :—

"*In Convention, Saturday, August 25th*, 1787.—P. 480.

"*Mr. Sherman* moved to amend the "power to grant reprieves and pardons" so as to read "to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate."

Connecticut, aye, 1. New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, no, 8.

The words "except in cases of impeachment" were inserted *nem. con.* after "pardons."

Monday, August 27th, 1787.—P. 480.

Article 2, Sect. 2, being resumed,—

Mr. L. Martin moved to insert the words "after conviction" after the words "reprieves and pardons."

Mr. Wilson objected, that pardon before conviction might be necessary, in order to obtain the testimony of accomplices. He stated the case of forgeries, in which this might particularly happen.

Mr. L. Martin withdrew his motion.

Saturday, September 15th, 1787.—P. 549.

"Article 2, Sect. 2.

"He shall have power to grant reprieves and pardons for offences against the United States," &c.

Mr. Randolph moved to except "cases of treason." The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The traitors may be his own instruments.

Col. Mason supported the motion.

Mr. Gouverneur Morris had rather there should be no pardon for treason than let the power devolve on the legislature.

Mr. Wilson.—Pardon is necessary for cases of treason, and is best placed in the hands of the executive. If he be himself a party to the guilt, he can be impeached and prosecuted.

Mr. King thought it would be inconsistent with the constitutional separation of the executive and legislative powers, to let the prerogative be exercised by the latter. A legislative body is wholly unfit for the purpose. They are governed too much by the passions of the moment. In Massachusetts, one Assembly would have hung all the insurgents in that state: the next was equally disposed to pardon them all. He suggested the expedient of requiring the concurrence of the Senate in acts of pardon.

Mr. Madison admitted the force of objections to the legislature, but the pardon of treasons was so peculiarly improper for the President, that he should acquiesce in the transfer of it to the former rather than leave it altogether in the hands of the latter. He would prefer to either an association of the Senate, as a council of advice, with the President.

Mr. Randolph could not admit the Senate into a share of the power. The great danger to liberty lay in a combination between the President and that body.

Col. Mason:—The Senate has already too much power. There can be no danger of too much lenity in legislative pardons, as the Senate must concur; and the President moreover can require two-thirds of both houses.

On the motion of Mr. Randolph:—Virginia, Georgia, aye, 2; New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina, no, 8. Connecticut divided."

In the objections of George Mason to the Constitution, as adopted by the Convention, in which he assigns his reasons for not signing the same (Elliott's Debates, vol. 1, p. 494), he says:—"The President of the United States has the *unrestrained* power of granting pardon for treason; which 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." The subject of the President's power to grant pardon under the Constitution does not appear to have been the subject of consideration or allusion in any state convention except that of Virginia. In the state convention of Virginia, both Col. Mason and Mr. Madison were members, as they had also been members of the Federal Convention which framed the Constitution; and in the Virginia convention Col. Mason repeated his objections to the Constitution, and the following debate thereupon occurred (see Elliott's Debates, vol. 3, p. 497), viz.:—

"*Mr. Madison*, adverting to Mr. Mason's objections to the President's power of pardoning, said it would be extremely improper to vest it in the House of Representatives, and not much less so to place it in the Senate; because numerous bodies were actuated more or less by passion, and might, in the moment of vengeance, forget humanity. It was an established practice in Massachusetts for the legislature to determine in such cases. It was found," says he, "that two different sessions, before each of which the question came with respect to pardoning the delinquents of the rebellion, were governed precisely by different sentiments: the one would execute with universal vengeance, and the other would extend general mercy. * * *

Mr. Mason vindicated the conduct of the Assemblies mentioned by the gentleman last up. He insisted they were both right; for, in the first instance, when such ideas of severity prevailed, a rebellion was in existence. In such circumstance, it was right to be rigid. But after it was over, it would be wrong to exercise unnecessary severity.

Mr. Madison replied that the honorable member had misunderstood the fact; for the first Assembly was after the rebellion was over. The decision must have been improper in the one or the other case. 'It marks this im-

portant truth,' says he, 'that numerous bodies of men are improper to exercise this power. The universal experience of mankind proves it.'"

The above extracts show that all who participated in the debates on this subject, alike understood (however widely they differed in opinion in other respects) that this article conferring the power "to grant pardons," included the power to grant a general pardon or amnesty in cases of treason; and, in view of the reference to the general pardon or amnesty which was granted in the case of the Shays Rebellion, it is a "clear conclusion" that the framers of the Constitution intended to place this power to grant a general pardon in cases of treason in the hands of the President alone, and not to allow to the legislative branch of the government any share in the exercise of it. This conclusion is impregnably fortified by the contemporary construction of the power "to grant pardons," which was given by the friends of the Constitution while that instrument was pending before the state conventions for ratification.

The only reference made in the Federalist to the subject of the President's power "to grant pardon," is contained in the following extract from its 74th number (No. 73 in Dawson's edition), which was written by Hamilton, viz.:—

"The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason. *This, it has been urged, ought to have depended upon the assent of one or both of the branches of the legislative body.*

I shall not deny that there are strong reasons to be assigned for requiring in this particular the concurrence of that body or of a part of it. As treason is a crime levelled at the immediate being of the society, when the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of an act of mercy towards him to the judgment of the legislature. And this ought the rather to be the case, as the supposition of the connivance of the chief magistrate ought not to be entirely excluded.

But there are also strong objections to such a plan. It is not to be doubted that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatever. *It deserves particular attention, that treason will often be connected with seditions which embrace a large proportion of the community; as lately happened in Massachusetts.* In every such case, we might expect to see the representation of the people tainted with the same spirit which had given birth to the offence. And when parties were pretty equally matched, the secret sympathy of the friends and favorers of the condemned person, availing

itself of the good nature and weakness of others, might frequently bestow impunity where the terror of an example was necessary. On the other hand, when the sedition had proceeded from causes which had inflamed the resentments of the major party, they might often be found obstinate and inexorable, when policy demanded a conduct of forbearance and clemency.

But the principal argument for reposing the power of pardoning in this case in the chief magistrate is this: 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 tranquillity of the Commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal. If it should be observed that a discretionary power, with a view to such contingencies, might occasionally be conferred upon the President, it may be answered in the first place, that it is questionable whether, in a limited constitution, that power could be delegated by law; and in the second place, that it would generally be impolitic beforehand to take any step which might hold out the prospect of impunity. A proceeding of this kind, out of the usual course, would be likely to be construed into an argument of timidity or of weakness, and would have a tendency to embolden guilt."

There are three precedents or instances in our history of the grant by the President of a general pardon by proclamation, without the authority or assent of Congress, each occurring when the men who framed the Constitution were actors in public life. In neither case was the propriety of this exercise of the pardoning power challenged or questioned.

The *first* of these instances was in the case of the insurrection in the western counties in Pennsylvania in 1794, obstructing the execution of the acts for raising a revenue on distilled spirits and stills, known as the "Whiskey Insurrection." By his proclamation, dated July 10th 1795, President Washington granted "a full, free, and entire pardon to all persons (excepting as hereinafter excepted), of all treasons, misprisions of treason, and other indictable offences against the United States, committed within the fourth survey of Pennsylvania before the said 22d day of August last past, excepting and excluding therefrom, nevertheless, every person who refused or neglected to give and subscribe the said assurances" [of submission to the laws of the United States, which were required as terms for the pardon, as mentioned in the preamble or recital of the proclamation], "in the manner aforesaid (or having subscribed, hath violated the same), and now standeth

indicted or convicted of any treason, misprision of treason, or other offence against the United States; hereby remitting and releasing unto all persons, except as before excepted, all penalties incurred or supposed to be incurred for, or on account of, the premises." This proclamation may be found published at length in Sparks' Writings of Washington, vol. 12, p. 134.

The *second* instance of the grant of a general pardon by the President was in the case of the insurrection in the counties of Northampton, Montgomery, and Bucks, in Pennsylvania in 1798, to prevent the execution of the law directing the valuation of houses and lands and the enumeration of slaves, and levying taxes on the same, which is known as the "House Tax Insurrection." Three persons in that particular district of country, Fries, Heyney, and Getman, were convicted of treason, committed in obstructing the execution of this law, and sentence of death was passed upon them. In the cabinet of President John Adams, Attorney-General Lee (who was also acting as Secretary of State *pro tempore*), and Stoddert, Secretary of the Navy, recommended that Fries only should be left for execution. Wolcott, Secretary of the Treasury, recommended that *all three* should be executed. Lee and Stoddert expressed their opinion that it would be more just and wise that *all* should suffer the sentence of the law than that *all* should be pardoned. See their letters to the President, dated 20th May 1800, in the Life and Works of John Adams, vol. 9, pp. 59–60.

The President, "taking on himself the responsibility of one more appeal to the humane and generous natures of the American people," directed a pardon to be issued to *all three*, and also directed Secretary Lee to prepare "a proclamation of a general pardon of all treasons and conspiracies to commit treasons, heretofore committed in the three offending counties, in opposition to the law laying taxes on houses, &c., that tranquillity may be restored to the minds of those people, if possible." See his letter to Lee, Secretary of State, *pro tempore*, dated 21st May 1800: Id., same vol., p. 60. This proclamation of a general pardon was dated and issued on the 21st May 1800, and is published at length in the same volume last referred to, p. 178. It grants a full pardon to all persons who had been engaged in the insurrection, and remits and releases unto all such persons all pains and penalties incurred or supposed to be incurred for or on account of the premises, in terms as ample as those used in the proclamation of

President Washington in the case of the Whiskey Insurrection, before referred to.

In his letter X., to the printers of the Boston Patriot, President Adams, referring to his course in this matter, says:—"In all great and essential measures, he (the President) is bound by his honor and his conscience, by his oath to the Constitution, as well as his responsibility to the public opinion of the nation, to act his own mature and unbiassed judgment, though unfortunately it may be in direct contradiction to the advice of all his ministers. This was my situation in more than one instance. It had been so in the nomination of Mr. Gerry; it was afterwards so in the pardon of Fries; two measures that I recollect with infinite satisfaction, and which will console me in my last hour." He also, in another reference to the same matter, in a letter to James Lloyd, dated 31st March 1815 (Id., vol. 10, pp. 152–154), says that "his judgment was clear that their crime" (referring to Fries, Heyney, and Getman) "did not amount to treason. They had been guilty of a high-handed riot and rescue, attended with circumstances hot, rash, violent, and dangerous, but all these did not amount to treason. And I thought the officers of the law had been injudicious in indicting them for any crime higher than riot, aggravated by rescue."

The *third* instance of a grant of a general pardon by the President was in the case of the proclamation of President Madison, dated February 16th 1815, concerning certain foreigners and citizens, known as "the Barataria pirates," who had co-operated in forming a large establishment at an island in Lake Barataria, near the mouth of the river Mississippi, for the purpose of a clandestine and lawless trade, in violation of the non-intercourse act, during the last war with England. The government of the United States had caused this establishment to be broken up, and proceeded to prosecute the offenders by indictment. For reasons set forth in his proclamation, President Madison granted to the offenders a full pardon of all offences against the laws touching the intercourse and commerce of the United States with foreign nations, and directed all suits, indictments, and prosecutions for fines, penalties, forfeitures, &c., to be discontinued and released. This proclamation bears date two days before the date of the proclamation of the treaty of peace with England, known as the treaty of Ghent, and was issued while Congress was in session.

It is admitted in the report of the Senate Judiciary Committee that these proclamations of Presidents Washington, John Adams, and Madison "purport to grant general pardon and remission of penalties," but it is claimed that "*they do not purport to grant amnesty* or any *restoration* of lost rights," as the recent proclamation of President Johnson does. Unless all recognised definitions are ignored and set at defiance, *amnesty* is the distinguishing feature and element in every act of general pardon; and where such a pardon is full and without exception or qualification, it is, *proprio vigore*, a complete and perfect *amnesty*.

It is certain that President Washington understood that his proclamation granted *amnesty*, and that he did not comprehend or understand the distinction attempted to be made in this report between *amnesty* and *pardon*. In his "speech" to both Houses of Congress on 19th November 1794—(there were no "*Messages*" from the President to Congress at the commencement of its annual sessions until President Jefferson's time)—in referring to the insurrection in the western counties of Pennsylvania, known as the Whiskey Insurrection, he speaks of his appointment of commissioners to confer with citizens in the insurgent district, and says that "*pardon* was tendered to them [the insurgents] by the Government of the United States and that of Pennsylvania, upon no other condition than a satisfactory assurance of obedience to the laws." In a subsequent reference in the same "speech" to this tender of *pardon* to the insurgents, he speaks of it as "the proffered terms of *amnesty*," being apparently unsuspicious that it would ever be claimed that *amnesty* and pardon are words which "are not synonyms or equivalents," or that these words "import, as they always have done, widely different things:" Sparks' Writings of Washington, vol. 12, pp. 47, 48.

In respect to the statement that the proclamations of a general pardon by Presidents Washington, John Adams, and Madison do not purport to grant "any *restoration* of lost rights as the one in question does" (referring to the recent proclamation of President Johnson), it may be observed that no rights can be considered as forfeited or "lost" until a conviction and judgment in due course of law, and that the effect of a pardon, when it is full and complete, is to remove every disability incident to the conviction and judgment, and to restore every right forfeited or lost by the con-

viction and judgment—the only limitation to its operation being that it does not restore offices forfeited, or property or interests vested in others, in consequence of the conviction and judgment.

The same form of expression, in respect to "the restoration of all rights of property," is contained in President Lincoln's proclamation of amnesty dated 8th December 1863, as hereinafter quoted. No act of amnesty could be *complete* without a restoration of rights lost or forfeited by the offender or offenders; and, if not expressed, it is necessarily implied in every such act that the offence and all of its incidents and consequences shall be blotted out "and put in utter oblivion." A necessary incident of an act cannot be regarded as being either objectionable or unauthorized, because it is expressed in the act instead of being left to be implied from it. But the objection which is made to the expression in the proclamation in respect to the "restoration of lost rights" does not touch the question whether the Constitution gives to the President or to Congress the power to grant a general amnesty or pardon; and this expression may be stricken from the proclamation without impairing its effect as an act of full, complete, and unconditional amnesty or pardon. So far as the proclamation is authorized by the Constitution, the courts will give effect to it as a legal and valid act; while so far as it assumes to do anything which is not within the constitutional prerogative of the President, it will, to that extent, and to that extent *only*, be treated as being illegal and void.

A reference is made in the report of the Senate Judiciary Committee to the 13th section of the Act of Congress of July 17th 1862, purporting to confer upon the President power to grant "pardon and amnesty in certain cases, which is now repealed as before mentioned; and it is stated that it was "under this plenary and sufficient authority of Congress that the proclamations of both Mr. Lincoln and the present Executive [Johnson], except the last one [three?] referred to in the message [the President's message to the Senate of 18th January 1869] were made."

It is true that this 13th section of the Act of July 17th 1862 was on the statute-book unrepealed when President Lincoln issued his proclamation of general pardon dated December 8th 1863; but if by this statement the idea is intended to be conveyed that he understood or regarded his authority to issue that

proclamation as derived, not from the constitutional provision investing the President with power "to grant pardons," but from the 13th section of the Act of July 17th 1862, above referred to, it is without any warrant, and conveys an impression which is in apparent conflict with the fact.

That proclamation is published at length in the Appendix to the 13th volume of the United States Statutes at Large. It commences with a recital of the provision of the Constitution giving the President "power to grant reprieves and pardons for offences against the United States except in cases of impeachment," and then recites the provisions of the 13th section of the Act of 17th July 1862, and then adds, with a *naïveté* which is remarkable as well as characteristic: "and whereas the Congressional declaration for limited and conditional pardon accords with the well-established judicial exposition of the pardoning power," &c. It grants "a full pardon," on certain conditions and with certain exceptions, "to all persons who have directly or by implication participated in the existing rebellion,"—"with the restoration of all their rights of property except as to slaves, and in property cases where the rights of third parties shall have intervened,"—and does not even once use the word *amnesty* except as it is contained in the recital of the 13th section of the Act of July 17th 1862. If the power to issue this proclamation was derived from the Act of Congress, and not from the pardoning power vested in the President by the Constitution, why did President Lincoln commence the proclamation with a recital of the provision of the Constitution in respect to the pardoning power, or make any reference whatever to it? and why did he refer to this 13th section of the Act of July 17th 1862 as a "Congressional *declaration* for limited and conditional *pardon*," and speak of it as being in "accord with the well-established judicial exposition of the *pardoning* power?"

On the day after this proclamation was issued (9th December 1863), he transmitted his annual message to the two Houses of Congress; and, in that message, he refers to this proclamation, and says that "the *Constitution* authorizes the *Executive* to grant or withhold the pardon at his own *absolute* discretion, and this includes the power to grant on terms, as is fully established by judicial and other authorities," and again, in the same message, he says that it is believed that the *Executive* may lawfully claim

the performance of the condition required in the proclamation "in return for pardon and the restoration of forfeited rights, which he has clear *constitutional* power to withhold altogether, or grant upon the terms he shall deem wisest for the public interest." While thus referring *ex industria* to the authority vested in him by the Constitution for the exercise of the power of pardon in the manner in which it was exercised by his proclamation, he makes no allusion whatever in his message to "the congressional *declaration;*" and it would seem very clear that he regarded his power to issue that proclamation as resting solely on the authority of the provision of the Constitution which invested him with the pardoning power, and not at all on "the congressional *declaration,*" or on any delegated *legislative* authority whatever.

The proclamation of President Johnson, dated May 29th 1865, which was issued before the 13th section of the Act of July 17th 1862 was repealed, makes no reference whatever to that section.

It cannot be questioned that all the effects of an amnesty may legitimately result from other acts than the President's proclamation of a general pardon, as, for example, an amnesty may result from the provisions of a treaty of peace, or from the operation of the Statute of Limitations, or from a repeal of the laws defining the offence and prescribing its punishment. But this result from the exercise of unquestioned constitutional powers cannot be considered as interfering with or derogating from the exclusive pardoning power which is vested in the President by the Constitution.

Under the Constitution the power to grant a general pardon or amnesty is either a purely presidential prerogative, or else it is a legislative power. If it is a legislative power it can only be exercised by or under an Act of Congress, and must be subject to be regulated thereby; and, by a two-thirds vote in each House, it may be exercised in defiance of any objection by the President. By the Constitution (Art. 1, Sect. 1), it is provided that "all legislative powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives;" and Congress can exercise no other powers than such as are "granted" to it in the Constitution. The powers thus "granted" are such as are in terms expressly conferred on Congress in the Constitution, and such implied powers "as shall

be necessary and proper for carrying into execution" the powers expressly mentioned as granted to Congress, "and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof:" Art. 1, Sect. 8. All of the legislative powers which are "granted" or recognised in the Constitution are included within these limits. There is not only no express grant to Congress of power over the subject of a general pardon or amnesty, but no such power can rightfully be derived by implication as being necessary to carry into execution any power expressly granted by the Constitution; and the proceedings and debates of the Federal Convention of 1787 conclusively show that the framers of the Constitution intended that Congress should not be invested with this power.

No fancied analogy from the powers or prerogatives of Parliament can be regarded as lending any assistance to the claim that this power is a legislative power and is vested in Congress; because the power of Parliament is unlimited and sovereign, while Congress can exercise only limited or expressly granted legislative power. Parliament may pass a bill of attainder, or an *ex post facto* law, but under our Constitution this cannot be done by Congress or by any state. No Act of Parliament can be unconstitutional—an Act of Congress may be. The "clear conclusion" would seem to be that the power to grant a general pardon or amnesty for offences against the United States is an executive and not a legislative power, and that it cannot be created, exercised, or controlled by any Act of Congress. This conclusion is in entire harmony with all of the judicial expositions of the nature or limits of the pardoning power conferred on the President by the Constitution, as well as with the avowed purpose of the framers of that instrument; and the power to grant pardon to a whole class of offenders is surely no higher in degree than the unquestioned executive power to grant pardon to every individual in that class.

L. C. K.