



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Separation of Powers

William Wirt, *Pardons* (1820)¹

William Wirt was one of the great United States attorneys general of the early republic. A Jeffersonian, Wirt was influential both with his arguments to the Supreme Court and with his legal opinions offered to the other members of the executive branch. Among those influential opinions was his elaboration of the presidential pardoning power. At the request of President James Monroe, Wirt explained that the pardon power included a right to attach conditions to the pardon and to pardon individuals before conviction. He warned, however, that conditions were hard to enforce and thus could only be used in limited circumstances.

What are the limits on the presidential power to pardon? Are there conditions that the president could not constitutionally impose on those seeking to receive a pardon? Can the president pardon for crimes not yet committed? What factors should affect the presidential willingness to pardon before conviction?

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The power of pardon, as given by the constitution, is the power of absolute and entire pardon. One the principle, however, that the greater power includes the less, I am of opinion that the power of pardoning absolutely includes the power of pardoning conditionally. There is, however, great danger lest a conditional pardon should operate as an absolute one, from the difficulty of enforcing the condition, or, in case of a breach of it, resorting to the original sentence of condemnation; which difficulty arises from the limited powers of the national government. For example: you could not pardon on a condition to be enforced by the officers of a State government . . . because you have no political connection with these officers, and, consequently, no control over them. But suppose a pardon granted on a condition to be executed by officers of the federal government – as, for example, to work on a public fortification – and suppose this condition violated, by running away; where is the power of arrest, in these circumstances, given by any law of the United States? And suppose the arrest should be made; where is the clause in any of our judiciary acts that authorizes a court to proceed in such a state of things? . . .

I understand from Judge Duvall that convicts have been pardoned by the President of the United States on condition of joining the navy of the United States. . . . This is a safe and practicable condition; for although in case of desertion the original sentence of condemnation could not be resorted to, yet the new offense of desertion leads to the same catastrophe. If a condition can be devised whose execution would be certain, I have no doubt that the President may pardon on such conditions. All conditions precedent would be of this character; e.g., pardon to a military officer under sentence of death, on the previous condition of resigning his commission.

On the second question, whether pardon can precede condemnation, I am of the opinion that the President may, if he chooses, grant such a pardon. There is nothing in the terms in which the power of pardon is granted which requires that it shall be preceded by a sentence of conviction on the verdict of a jury. There is nothing in the force of the term *pardon* which implies a previous condemnation. A pardon pre-supposes an offense, and nothing more. . . . [I]t is proper to suggest . . . that it would be much safer, as a general rule, to require a previous trial and condemnation; because all previous pardons must be granted on *ex parte* representations, by which the President may be deceived; whereas, on a full trial on the plea of not guilty, the court and jury will never fail to recommend to mercy, if there be any ground for

¹ Excerpt taken from "Pardons," 1 Op. Att'y. Gen. 341 (1820).



such recommendation; and the President will thus be placed on a sure footing. The latter course, too, so far as I am informed, is more consonant with the general practice of both the State and federal governments, and is least exposed to discontent and censure, of which there is always danger from the adoption of a new, although a legal course.

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