The original documents are located in Box 2, folder "Nixon Pardon - Legal Precedents" of the Benton L. Becker Papers at the Gerald R. Ford Presidential Library.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Colorado in favor of plaintiff in an action upon a municipal certificate of indebtedness. Affirmed.

See same case below, 118 C. C. A. 256, 200 Fed. 28.

The facts are stated in the opinion.

Messrs. **Charles R. Brock**, William H. Ferguson, I. N. Stevens, Milton Smith, Charles S. Thomas, and William H. Bryant for petitioner.

Messrs. **John Maxey Zane**, Charles W. Waterman, and Charles F. Morse for respondent.

*103 *Mr. Justice **Holmes** delivered the opinion of the court:

This is an action brought by the respondent upon a certificate of indebtedness and an interest coupon attached to the same, against the petitioner. There was a verdict and judgment for the plaintiff and the circuit court of appeals affirmed the judgment. 118 C. C. A. 256, 200 Fed. 28. The plaintiff held the instrument by indorsement, and was found to have purchased it in good faith before maturity, but the defendant denied the authority to issue the certificate in negotiable form, and sought to raise the question by its third defense, which set up failure of consideration. There was a demurrer to this defense, which was sustained by the circuit court, and the trial took place upon the other issues. The circuit court of appeals declined to consider *104 the correctness of this ruling because no exception was taken to it. But no exception or bill of exceptions is necessary to open a question of law already apparent on the record, and there is nothing in the record that indicates a waiver of the defendant's rights. Therefore we must consider the merits of the defense. Nalle v. Oyster, 230 U. S. 165, 57 L. ed. 1439, 33 Sup. Ct. Rep. 1043.

The certificate recites the allowance of a claim for ballot machines by the board of county commissioners of the city and county of Denver, and goes on, "the board of county commissioners being authorized thereto by the laws of the state of Colorado, act of 1905, hereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of $11,250, with interest on this sum, from the date hereof, at the rate of 5 per cent per annum; the said interest payable semi-annually, as per two (2) coupons hereto attached." This certificate was one of ten issued to provide for the payment for ballot machines, and the Constitution of the state authorized provision for payment in such case "by the issuance of interest-bearing bonds, certificates of indebtedness, or other obligations, which shall be a charge upon such city, city and county, or town; such bonds, certificates, or other obligations may be made payable at such time or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold at less than par." Art. 7, § 8, as amended November 6, 1906. A statute in like words previously had been passed, to be effective if the amendment to the Constitution should be adopted, as it was. Laws of 1905, chap. 101, § 6. See Rev. Stat. 1908, § 2342. The defense that we are considering is that the foregoing words did not warrant making the certificates of indebtedness negotiable, relying especially upon Brenham v. German-American Bank, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559. But the argument seems to us to need no extended answer. The power to issue certificates of indebtedness *105 or bonds is given in terms, and it is contemplated that these instruments may be sold to raise money for the purpose named. But, however narrowly we may construe the power of municipal corporations in this respect, when they are authorized to raise money by the sale of bonds we must take it that they are authorized to put the bonds in the form that would be almost a necessary condition to obtaining a purchaser,—the usual form in which municipal bonds are put upon the market. Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 270, 43 L. ed. 689, 698, 19 Sup. Ct. Rep. 390. What is true about bonds is true about certificates of indebtedness. Indeed, it is difficult to see any distinction between the two as they are commonly known to the business world. The essence of each is that they contain a promise under the seal of the corporation, to pay a certain sum to order or to bearer. We are of opinion that the board of county commissioners was authorized to issue certificates in the negotiable form. Carter County v. Sinton, 120 U. S. 517, 525, 30 L. ed. 701, 703, 7 Sup. Ct. Rep. 650; Gelpcke v. Dubuque, 1 Wall. 175, 203, 17 L. ed. 520, 524; Cadillac v. Woonsocket Inst. for Sav. 7 C. C. A. 574, 16 U. S. App. 545, 58 Fed. 935, 937; Ashley v. Presque Isle County, 8 C. C. A. 455, 16 U. S. App. 656, 709, 60 Fed. 55, 67; D'Esterre v. Brooklyn, 90 Fed. 586, 590; Dill. Mun. Corp. 5th ed. § 882.

Judgment affirmed.

1914. BURDICK v. UNITED STATES. 300.

(236 U. S. 79)

GEORGE BURDICK, Plff. in Err.,
v.
UNITED STATES.

PARDON (§ 8*)—EFFECT—NECESSITY OF ACCEPTANCE.

1. A pardon from the President, to be effective, must be accepted by the person to whom it is tendered.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 10, 14, 15; Dec. Dig. § 8.*]

WITNESSES (§ 303*) — PRIVILEGE — EFFECT OF REJECTED PARDON.

2. The tender of a pardon from the President does not destroy the privilege of a witness against self-crimination, but he may reject the pardon and refuse to testify on the ground that his testimony may have an incriminating effect.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1049, 1050; Dec. Dig. § 303.*]

[No. 471.]

Argued December 16, 1914. Decided January 25, 1915.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment for contempt for refusing to testify before the grand jury. Reversed, with directions to dismiss the proceedings and discharge the plaintiff in error from custody.

See same case below, 211 Fed. 492.

The facts are stated in the opinion.

Messrs. **Henry A. Wise** and **Henry W. Sackett** for plaintiff in error.

Solicitor General **Davis** for defendant in error.

*84 *Mr. Justice **McKenna** delivered the opinion of the court:

Error to review a judgment for contempt against Burdick upon presentment of the *85 Federal grand jury for refusing to answer certain questions put to him in an investigation then pending before the grand jury into alleged custom frauds in violation of §§ 37 and 39 of the Criminal Code of the United States [35 Stat. at L. 1096, chap. 321, Comp. Stat. 1913, §§ 10201, 10203].

Burdick first appeared before the grand jury and refused to answer questions as to the directions he gave and the sources of his information concerning certain articles in the New York Tribune regarding the frauds under investigation. He is the city editor of that paper. He declined to answer, claiming upon his oath, that his answers might tend to criminate him. Thereupon he was remanded to appear at a later day, and upon so appearing he was handed a pardon which he was told had been obtained for him upon the strength of his testimony before the other grand jury. The following is a copy of it:

"Woodrow Wilson, President of the United States of America, to all to whom these presents shall come, Greeting:

"Whereas George Burdick, an editor of the New York Tribune, has declined to testify before a Federal grand jury now in session in the southern district of New York, in a proceeding entitled, 'United States v. John Doe and Richard Roe,' as to the sources of the information which he had in the New York Tribune office, or in his possession, or under his control at the time he sent Henry D. Kingsbury, a reporter on the said New York Tribune, to write an article which appeared in the said New York Tribune in its issue of December 31st, 1913, headed, 'Glove Makers' Gems May Be Customs Size,' on the ground that it would tend to incriminate him to answer the questions; and,

"Whereas, the United States attorney for the southern district of New York desires to use the said George Burdick as a witness before the said grand jury in the said proceeding for the purpose of determining whether any employee of the Treasury Department at the *customhouse, New York *86 city, has been betraying information that came to such person in an official capacity; and,

"Whereas, it is believed that the said George Burdick will again refuse to testify in the said proceeding on the ground that his testimony might tend to incriminate himself;

"Now, therefore, be it known, that I, Woodrow Wilson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant unto the said George Burdick a full and unconditional pardon for all offenses against the United States which he, the said George Burdick, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter, or thing concerning which he may be interrogated in the said grand jury proceeding, thereby absolving him from the consequences of every such criminal act.

"In testimony whereof, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed. Done at the city of Washington this fourteenth day of February, in the year of our Lord One Thousand Nine Hundred and Fourteen, and of the Independence of the United States the One Hundred and Thirty-eighth."

He declined to accept the pardon or answer questions as to the sources of his information, or whether he furnished certain reporters information, giving the rea-

son, as before, that the answers might tend to criminate him. He was presented by the grand jury to the district court for contempt, and adjudged guilty thereof and to pay a fine of $500, with leave, however, to purge himself by testifying fully as to the sources of the information sought of him, "and in event of his refusal or failure to so answer, a commitment may issue in addition until he shall so comply," the court deciding that the President has power to pardon for a crime of which the individual has not been convicted and which he does not admit, and that acceptance is not necessary to toll the privilege against incrimination.

Burdick again appeared before the grand jury, again was questioned as before, again refused to accept the pardon, and again refused to answer upon the same grounds as before. A final order of commitment was then made and entered, and he was committed to the custody of the United States marshal until he should purge himself of contempt, or until the further order of the court. This writ of error was then allowed.

The question in the case is the effect of the unaccepted pardon. The Solicitor General, in his discussion of the question, following the division of the district court, contends (1) that the President has power to pardon an offense before admission or conviction of it, and (2) the acceptance of the pardon is not necessary to its complete exculpating effect. The conclusion is hence deduced that the pardon removed from Burdick all danger of accusation or conviction of crime, and that, therefore, the answers to the questions put to him could not tend to or accomplish his incrimination.

Plaintiff in error counters the contention and conclusion with directly opposing ones, and makes other contentions which attack the sufficiency of the pardon as immunity and the power of the President to grant a pardon for an offense not precedently established nor confessed nor defined.

The discussion of counsel is as broad as their contentions. Our consideration may be more limited. In our view of the case it is not material to decide whether the pardoning power may be exercised before conviction. We may, however, refer to some aspects of the contentions of plaintiff in error, although the case may be brought to the narrow question, Is the acceptance of a pardon necessary? We are relieved from much discussion of it by United States v. Wilson, 7 Pet. 150, 8 L. ed. 640. Indeed, all of the principles upon which its solution depends were there considered and the facts of the case gave them a peculiar and interesting application.

There were a number of indictments against Wilson which were for obstructing the mail and others for robbing the mail and putting the life of the carrier in jeopardy. They were convicted on one of the latter indictments, sentenced to death, and Porter was executed in pursuance of the sentence. President Jackson pardoned Wilson, the pardon reciting that it was for the crime for which he had been sentenced to suffer death, remitting such penalty with the express stipulation that the pardon should not extend to any judgment which might be had or obtained against him in any other case or cases then pending before the court for other offenses wherewith he might stand charged.

To another of the indictments Wilson withdrew his plea of not guilty and pleaded guilty. Upon being arraigned for sentence the court suggested the propriety of inquiring as to the effect of the pardon, "although alleged to relate to a conviction on another indictment." Wilson was asked if he wished to avail himself of the pardon, to which he answered in person that "he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid sentence in this particular case, of the pardon referred to."

The judges were opposed in opinion and certified to this court for decision two propositions which were argued by the district attorney of the United States, with one only of which we are concerned. It was as follows: "2. That the prisoner can, under this conviction, derive no advantage from the pardon, without bringing the same judicially before the court by plea, motion, or otherwise." There was no appearance for Wilson. Attorney General Taney (afterwards chief justice of this court) argued the case on behalf of the United States. The burden of his argument was that a pardon, to be effective, must be accepted. The proposition was necessary to be established, as his contention was that a plea of the pardon was necessary to arrest the sentence upon Wilson. And he said, speaking of the pardon, "It is a grant to him [Wilson]; it is his property; and he may accept it or not, as he pleases;" and, further: "It is insisted that unless he pleads it, or in some way claims its benefit, thereby denoting his acceptance of the proffered grace, the court cannot notice it, nor allow it to prevent them from passing sentence. The whole current of authority establishes this principle." The authorities were cited and it was declared that "the necessity of pleading it, or claiming it in some other manner, grows out of the nature of the grant. He must accept it."

There can be no doubt, therefore, of the

curately the response of the court to it. The response was complete and considered the contention in two aspects: (1) a pardon as the act of the President, the official act under the Constitution; and (2) the attitude and right of the person to whom it is tendered. Of the former it was said that the power had been "exercised from time immemorial by the executive of that nation [England], whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." From that source of authority and principle the court deduced and declared this conclusion: "A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the *private* [italics ours] though official act of the executive magistrate, delivered to the individual for whose benefit it is intended." In emphasis of the official act and its functional deficiency if not accepted by him to whom it is tendered, it was said: "A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on."

Turning, then, to the other side, that is, the effect of a pardon on him to whom it is offered, and completing its description and expressing the condition of its consummation, this was said: "A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."

That a pardon by its mere issue has automatic effect resistless by him to whom it is tendered, forcing upon him by mere executive power whatever consequences it may have or however he may regard it, which seems to be the contention of the government in the case at bar, was rejected by the court with particularity and emphasis. The decision is unmistakable. A pardon was denominated as the "private" act, the "private deed," of the executive magistrate, and the denomination was advisedly selected to mark the incompleteness of the act or deed without its acceptance.

Indeed, the grace of a pardon, though good its intention, may be only in pretense or ignorance in pretense as having purpose quences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected,—preferring to be the victim of the law rather than its acknowledged transgressor,—preferring death even to such certain infamy. This, at least theoretically, is a right, and a right is often best tested in its extreme. "It may be supposed," the court said in United States v. Wilson, "that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment."

The case would seem to need no further comment, and we have quoted from it not only for its authority, but for its argument. It demonstrates by both the necessity of the acceptance of a pardon to its legal efficacy, and the court did not hesitate in decision, as we have seen, whatever the alternative of acceptance,—whether it be death or lesser penalty. The contrast shows the right of the individual against the exercise of executive power not solicited by him nor accepted by him.

The principles declared in United States v. Wilson have endured for years; no case has reversed or modified them. In Ex parte Wells, 18 How. 307, 310, 15 L. ed. 421, 423, this court said: "It was with the fullest knowledge of the law upon the subject of pardons and the philosophy of government in its bearing upon the Constitution when this court instructed Chief Justice Marshall" to declare the doctrine of that case. And in Com. v. Lockwood it was said by Mr. Justice Gray, speaking for the supreme judicial court of Massachusetts, he then being a member of that court, it is within the election of a defendant "whether he will avail himself of a pardon from the executive (be the pardon absolute or conditional)." 109 Mass. 323, 339, 12 Am. Rep. 699. The whole discussion of the learned justice will repay a reference. He cites and reviews the cases with the same accurate and masterful consideration that distinguished all of his judicial work, and the proposition declared was one of the conclusions deduced.

United States v. Wilson, however, is attempted to be removed as authority by the contention that it dealt with conditional pardons, and that, besides, a witness cannot apprehend from his testimony a conviction of guilt, which conviction he him-

ly to him, when he himself has the power to prevent it by accepting the immunity offered him. In support of the contentions there is an intimation of analogy between pardon and amnesty, cases are cited, and certain statutes of the United States are adduced whereby immunity was imposed in certain instances, and under its unsolicited protection testimony has been exacted against the claim of privilege asserted by witnesses. There is plausibility in the contentions; it disappears upon reflection. Let us consider the contentions in their order:

(1) To hold that the principle of United States v. Wilson was expressed only as to conditional pardons would be to assert that the language and illustrations which were used to emphasize the principle announced were meant only to destroy it. Besides, the pardon passed on was not conditional. It was limited in that—and only in that—it was confined to the crime for which the defendant had been convicted and for which he had been sentenced to suffer death. This was its emphasis and distinction. Other charges were pending against him, and it was expressed that the pardon should not extend to them. But such would have been its effect without expression. And we may say that it had more precision than the pardon in the pending case. Wilson had been indicted for a specific statutory crime, convicted, and sentenced to suffer death. It was to the crime so defined and established that the pardon was directed. In the case at bar nothing is defined. There is no identity of the offenses pardoned, and no other clue to ascertain them but the information incorporated in an article in a newspaper. And not that entirely, for absolution is declared for whatever crimes may have been committed or taken part in "in connection with any other article, matter, or thing concerning which he [Burdick] may be interrogated."

It is hence contended by Burdick that the pardon is illegal for the absence of specification,—not reciting the offenses upon which it is intended to operate; worthless, therefore, as immunity. To support the contention cases are cited. It is asserted, besides, that the pardon is void as being outside of the power of the President under the Constitution of the United States, because it was issued before accusation, or conviction or admission of an offense. This, it is insisted, is precluded by the constitutional provision which gives power only "to grant reprieves and pardons for offenses against the United States," and it is argued, in effect, that not in the imagination or purpose of executive magistracy can an "offense against the United States" be established, but only by the [illegible]

individual or the judgment of the judicial tribunals. We do not dwell further on the attack. We prefer to place the case on the ground we have stated.

(2) May plaintiff in error, having the means of immunity at hand, that is, the pardon of the President, refuse to testify on the ground that his testimony may have an incriminating effect? A superficial consideration might dictate a negative answer, but the answer would confound rights which are distinct and independent.

It is to be borne in mind that the power of the President under the Constitution to grant pardons and the right of a witness must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both,—to leave to each its proper place. In this as in other conflicts between personal rights and the powers of government, technical—even nice—distinctions are proper to be regarded. Granting, then, that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it, as we have seen; and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted; and the reasons for his action were personal. It is true we have said (Brown v. Walker, 161 U. S. 601, 605, 40 L. ed. 822, 824, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644) that the law regards only mere penal consequences, and not "the personal disgrace or opprobrium attaching to the exposure" of crime, but certainly such consequence may influence the assertion or relinquishment of a right. This consideration is not out of place in the case at bar. If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, not necessarily in fact, not at all in theory of law. It supposed only a possibility of a charge of crime, and interposed protection against the charge, and, reaching beyond it, against furnishing what might be urged or used as evidence to support it.

This brings us to the differences between legislative immunity and a pardon. They are substantial. The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is noncommittal. It is the unobtrusive act of the law given protection against a sinister use of his testimony, not like a pardon, requiring him to confess his guilt in order to avoid a conviction of it.

It is of little service to assert or deny an [illegible]

95 U. S. 149, 153, 24 L. ed. 442, 443, said that "the distinction between them is one rather of philological interest than of legal importance." This is so as to their ultimate effect, but there are incidental differences of importance. They are of different character and have different purposes. The one overlooks offense; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the state, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the state. Amnesty is usually general, addressed to classes or even communities,—a legislative act, or under legislation, constitutional or statutory,—the act of the supreme magistrate. There may or may not be distinct acts of acceptance. If other rights are dependent upon it and are asserted, there is affirmative evidence of acceptance. Examples are afforded in United States v. Klein, 13 Wall. 128, 20 L. ed. 519; Armstrong's Foundry, 6 Wall. 766, 18 L. ed. 882; Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426. See also Knote v. United States, supra. If there be no other rights, its only purpose is to stay the movement of the law. Its function is exercised when it overlooks the offense and the offender, leaving both in oblivion.

Judgment reversed, with directions to dismiss the proceedings in contempt, and discharge Burdick from custody.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

(236 U. S. 96)

WILLIAM L. CURTIN, Plff. in Err.,
v.
UNITED STATES.

This case is governed by the decision in Burdick v. United States, ante, 267.

[No 472.]

Argued December 16, 1914. Decided January 25, 1915.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment for contempt for refusing to testify before the grand jury. Reversed, with directions to dismiss the proceedings and discharge the plaintiff in error from custody.

See same case below, 211 Fed. 492.

The facts are stated in the opinion.

Messrs. Henry A. Wise and Henry W.

Mr. Justice McKenna delivered the opinion of the court:

This writ of error was argued and submitted at the same time as Burdick v. United States, just decided [236 U. S. 79, 59 L. ed. —, 35 Sup. Ct. Rep. 267]. Its purpose is to review a judgment for contempt against Curtin upon presentment of the Federal grand jury for refusing to answer certain questions in the same proceeding considered in the Burdick Case in regard to a certain article published in the New York Tribune. Curtin is a reporter on that paper. He declined to answer the questions, on the ground that the answers would tend to incriminate him. At a subsequent hearing a pardon issued by the President was offered him (it was the same in substance as that offered Burdick), and he was again questioned. He declined to receive the pardon or to answer the questions, on the same ground as before. He was, on presentment of the grand jury, adjudged guilty of contempt, fined as Burdick was, with the same leave to purge himself of the contempt, the court deciding that the pardon was valid and sufficient for immunity. Upon Curtin again refusing to answer, the judgment was made absolute and he was committed to the custody of the United States marshal.

It will be observed, therefore, the case is almost identical in its facts with the Burdick Case and exactly the same in principle. On the authority of that case, therefore, the judgment is reversed and the case remanded, with instruction to dismiss the proceedings in contempt and discharge Curtin from custody.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

(236 U. S. 146)

UNITED STATES, Plff. in Err.,
v.
CLARA HOLTE.

CONSPIRACY (§ 28*) — AGAINST UNITED STATES — WHITE SLAVE TRAFFIC — GUILT OF WOMAN.

A woman may conspire "to commit an offense against the United States" within the meaning of the provision of the Criminal Code of March 4, 1909 (35 Stat. at L. 1096, chap. 321, Comp. Stat. 1913, § 10,201), § 37, although the object of the conspiracy is her own transportation in interstate commerce for purposes of prostitution, contrary to the white slave act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8812).

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. § 28.*]

[No. 628.]

ing the propriety of his conduct in the public opinion. A direct and categorical negative has something in the appearance of it more harsh, and more apt to irritate, than the mere suggestion of argumentative objections to be approved or disapproved by those to whom they are addressed. In proportion as it would be less apt to offend, it would be more apt to be exercised; and for this very reason, it may in practice be found more effectual. It is to be hoped that it will not often happen that improper views will govern so large a proportion as two thirds of both branches of the legislature at the same time; and this, too, in spite of the counterposing weight of the Executive. It is at any rate far less probable that this should be the case, than that such views should taint the resolutions and conduct of a bare majority. A power of this nature in the Executive, will often have a silent and unperceived, though forcible, operation. When men, engaged in unjustifiable pursuits, are aware that obstructions may come from a quarter which they cannot control, they will often be restrained by the bare apprehension of opposition, from doing what they would with eagerness rush into, if no such external impediments were to be feared.

This qualified negative, as has been elsewhere remarked is in this State vested in a council, consisting of the governor, with the chancellor and judges of the Supreme Court, or any two of them. It has been freely employed upon a variety of occasions, and frequently with success. And its utility has become so apparent, that persons who, in compiling the Constitution, were violent opposers of it, have from experience become its declared admirers.*

I have in another place remarked, that the convention, in the formation of this part of their plan, had departed from the model of the constitution of this State, in favor of that of Massachusetts. Two strong reasons may be imagined for this preference. One is that the judges, who are to be the interpreters of the law, might receive an improper bias, from having given a previous opinion in their revisionary capacities; the other is that by being often associated with the Executive, they might be induced to embark too far in the political views of that magistrate, and thus a dangerous combination might by degrees be cemented between the executive and judiciary departments. It is impossible to keep the judges too distinct from every other avocation than

* Mr. Abraham Yates, a warm opponent of the plan of the convention, is of this number. — PUBLIUS

that of expounding the laws. It is peculiarly dangerous to place them in a situation to be either corrupted or influenced by the Executive.

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HAMILTON

THE MILITARY AND PARDONING POWERS OF THE PRESIDENT

To the People of the State of New York:

THE President of the United States is to be "commander-in-chief of the army and navy of the United States, and of the militia of the several States *when called into the actual service* of the United States." The propriety of this provision is so evident in itself, and it is, at the same time, so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.

"The President may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective officers." This I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office.

He is also to be authorized to grant "reprieves and pardons for offences against the United States, *except in cases of impeachment*." Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to

the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his *sole fiat*, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government, than a body of men.

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, wher policy demanded a conduct of forbearance and clemency. Bu the principal argument for reposing the power of pardoning ir this case to the Chief Magistrate is this: in seasons of insurrec tion or rebellion, there are often critical moments, when a well timed offer of pardon to the insurgents or rebels may restore th tranquillity of the commonwealth; and which, if suffered to pas unimproved, it may never be possible afterwards to recall. Th dilatory process of convening the legislature, or one of its branches for the purpose of obtaining its sanction to the measure, woul frequently be the occasion of letting slip the golden opportunity The loss of a week, a day, an hour, may sometimes be fatal. I it should be observed, that a discretionary power, with a view t such contingencies, might be occasionally conferred upon th President, it may be answered in the first place, that it is question able, whether, in a limited Constitution, that power could b delegated by law; and in the second place, that it would generall be impolitic beforehand to take any step which might hold ou the prospect of impunity. A proceeding of this kind, out of th usual course, would be likely to be construed into an argument o timidity or of weakness, and would have a tendency to embolde guilt.

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HAMILTON

THE PRESIDENT AND THE TREATY POWER

To the People of the State of New York:

THE President is to have power, "by and with the advice an consent of the Senate, to make treaties, provided two-thirds o the senators present concur."

Though this provision has been assailed, on different ground with no small degree of vehemence, I scruple not to declare m firm persuasion, that it is one of the best digested and mos unexceptionable parts of the plan. One ground of objection i the trite topic of the intermixture of powers; some contendin that the President ought alone to possess the power of makin treaties; others, that it ought to have been exclusively deposite in the Senate. Another source of objection is derived from th

have a Lieutenant-Governor, chosen by the people at large, who presides in the Senate, and is the constitutional substitute for the Governor, in casualties similar to those which would authorize the Vice-President to exercise the authorities and discharge the duties of the President.

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COMPARISON OF THE PRESIDENT WITH OTHER EXECUTIVES

To the People of the State of New York:

I PROCEED now to trace the real characters of the proposed Executive, as they are marked out in the plan of the convention. This will serve to place in a strong light the unfairness of the representations which have been made in regard to it.

The first thing which strikes our attention is, that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.

That magistrate is to be elected for *four* years; and is to be reëligible as often as the people of the United States shall think him worthy of their confidence. In these circumstances there is a total dissimilitude between *him* and a king of Great Britain, who in an *hereditary* monarch, possessing the crown as a patrimony descendible to his heirs forever; but there is a close analogy between *him* and a governor of New York, who is elected for *three* years, and is reëligible without limitation or intermission. If we consider how much less time would be requisite for establishing a dangerous influence in a single State, than for establishing a like influence throughout the United States, we must conclude that a duration of *four* years for the Chief Magistrate of the Union is a degree of permanency far less to be dreaded in that office, than a duration of *three* years for a corresponding office in a single State.

The President of the United States would be liable to be

impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.

The President of the United States is to have power to return a bill, which shall have passed the two branches of the legislature, for reconsideration; and the bill so returned is to become a law, if, upon that reconsideration, it be approved by two thirds of both houses. The king of Great Britain, on his part, has an absolute negative upon the acts of the two houses of Parliament. The disuse of that power for a considerable time past does not affect the reality of its existence; and is to be ascribed wholly to the crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses, to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation. The qualified negative of the President differs widely from this absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the council of revision of this State, of which the governor is a constituent part. In this respect the power of the President would exceed that of the governor of New York, because the former would possess, singly, what the latter shares with the chancellor and judges; but it would be precisely the same with that of the governor of Massachusetts, whose constitution, as to this article, seems to have been the original from which the convention have copied.

The President is to be the "commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He is to have power to grant reprieves and pardons for offences against the United States, *except in cases of impeachment*; to recommend to the consideration of Congress such measures as he shall judge necessary and expedient; to convene, on extraordinary occasions, both houses of the legislature, or either of them,

and, in case of disagreement between them *with respect to the time of adjournment*, to adjourn them to such time as he shall think proper; to take care that the laws be faithfully executed; and to commission all officers of the United States." In most of these particulars, the power of the President will resemble equally that of the king of Great Britain and of the governor of New York. The most material points of difference are these: — *First.* The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor. *Second.* The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, — all which, by the Constitution under consideration, would appertain to the legislature.* The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commanders-in-chief, as well of the army as navy; and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a President of the United States. *Third.* The power

* A writer in a Pennsylvania paper, under the signature of TAMONY, has asserted that the king of Great Britain owes his prerogative as commander-in-chief to an annual mutiny bill. The truth is, on the contrary, that his prerogative, "in this respect, is immemorial, and was only disputed, "contrary to all reason and precedent," as Blackstone, vol. i., page 262, expresses it, by the Long Parliament of Charles I.; but by the statute the 13th of Charles II., chap. 6, it was declared to be in the king alone, for that the sole supreme government and command of the militia within his Majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, EVER WAS AND IS the undoubted right of his Majesty and his royal predecessors, kings and queens of England, and that both or either house of Parliament cannot nor ought to pretend to the same.

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of the President, in respect to pardons, would extend to all cases, *except those of impeachment*. The governor of New York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the governor, in this article, on a calculation of political consequences, greater than that of the President? All conspiracies and plots against the government, which have not been matured into actual treason, may be screened from punishment of every kind, by the interposition of the prerogative of pardoning. If a governor of New York, therefore, should be at the head of any such conspiracy, until the design had been ripened into actual hostility he could insure his accomplices and adherents an entire impunity. A President of the Union, on the other hand, though he may even pardon treason, when prosecuted in the ordinary course of law, could shelter no offender, in any degree, from the effects of impeachment and conviction. Would not the prospect of a total indemnity for all the preliminary steps be a greater temptation to undertake and persevere in an enterprise against the public liberty, than the mere prospect of an exemption from death and confiscation, if the final execution of the design, upon an actual appeal to arms, should miscarry? Would this last expectation have any influence at all, when the probability was computed, that the person who was to afford that exemption might himself be involved in the consequences of the measure, and might be incapacitated by his agency in it from affording the desired impunity? The better to judge of this matter, it will be necessary to recollect, that, by the proposed Constitution, the offence of treason is limited "to levying war upon the United States, and adhering to their enemies, giving them aid and comfort"; and that by the laws of New York it is confined within similar bounds. *Fourth.* The President can only adjourn the national legislature in the single case of disagreement about the time of adjournment. The British monarch may prorogue or even dissolve the Parliament. The governor of New York may also prorogue the legislature of this State for a limited time; a power which, in certain situations, may be employed to very important purposes.

The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and

of every other description. It has been insinuated, that his authority in this respect is not conclusive, and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification, of Parliament. But I believe this doctrine was never heard of, until it was broached upon the present occasion. Every jurist * of that kingdom, and every other man acquainted with its Constitution, knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plentitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction. The Parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination, that its coöperation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause: from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws, to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature. It must be admitted, that, in this instance, the power of the federal Executive would exceed that of any State Executive. But this arises naturally from the sovereign power which relates to treaties. If the Confederacy were to be dissolved, it would become a question whether the Executives of the several States were not solely invested with that delicate and important prerogative.

The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.

The President is to nominate, and, *with the advice and consent*

* *Vide* Blackstone's "Commentaries," vol. i., p. 257. — PUBLIUS

of the Senate, to appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution. The king of Great Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure; and has the disposal of an immense number of church preferments. There is evidently a great inferiority in the power of the President, in this particular, to that of the British king; nor is it equal to that of the governor of New York, if we are to interpret the meaning of the constitution of the State by the practice which has obtained under it. The power of appointment is with us lodged in a council, composed of the governor and four members of the Senate, chosen by the Assembly. The governor *claims*, and has frequently *exercised*, the right of nomination, and is *entitled* to a casting vote in the appointment. If he really has the right of nominating, his authority is in this respect equal to that of the President, and exceeds it in the article of the casting vote. In the national government, if the Senate should be divided, no appointment could be made; in the government of New York, if the council should be divided, the governor can turn the scale, and confirm his own nomination.* If we compare the publicity which must necessarily attend the mode of appointment by the President and an entire branch of the national legislature, with the privacy in the mode of appointment by the governor of New York, closeted in a secret apartment with at most four, and frequently with only two persons; and if we at the same time consider how much more easy it must be to influence the small number of which a council of appointment consists, than the considerable number of which the national Senate would consist, we cannot hesitate to pronounce that the power of the chief magistrate of this State, in the disposition of offices, must, in practice, be greatly superior to that of the Chief Magistrate of the Union.

Hence it appears that, except as to the concurrent authority of the President in the article of treaties, it would be difficult to

* Candor, however, demands an acknowledgment that I do not think the claim of the governor to a right of nomination well founded. Yet it is always justifiable to reason from the practice of a government, till its propriety has been constitutionally questioned. And independent of this claim, when we take into view the other considerations, and pursue them through all their consequences, we shall be inclined to draw much the same conclusion. — PUBLIUS

determine whether that magistrate would in the aggregate, possess more or less power than the Governor of New York. And it appears yet more unequivocally, that there is no pretence for the parallel which has been attempted between him and the king of Great Britain. But to render the contrast in this respect still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer group.

The President of the United States would be an officer elected by the people for *four* years; the king of Great Britain is a perpetual and *hereditary* prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable. The one would have a *qualified* negative upon the acts of the legislative body; the other has an *absolute* negative. The one would have a right to command the military and naval forces of the nation; the other, in addition to this right, possesses that of *declaring* war, and of *raising* and *regulating* fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of treaties; the other is the *sole possessor* of the power of making treaties. The one would have a like concurrent authority in appointing offices; the other is the sole author of all appointments. The one can confer no privileges whatever: the other can make denizens of aliens, noblemen of commoners: can erect corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation; the other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church! What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism. PUBLIUS

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HAMILTON

ADVANTAGES OF A SINGLE EXECUTIVE

To the People of the State of New York:

THERE is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the Executive are

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NEW YORK POST, TUESDAY, APRIL 3, 1979

How Haig paved the way for Nixon's pardon

What Ford thought of Kissinger, Rocky, Reagan and Co.

By Richard Gooding

Gerald Ford reveals for the first time in his forthcoming memoirs that Gen. Alexander Haig raised the idea of a presidential pardon a week before Nixon resigned from the presidency.

According to The Nation

The Nation.

April 7, 1979 $1

THE FORD MEMOIRS

BEHIND THE NIXON PARDON

In his memoirs, *A Time to Heal*, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Nelson Rockefeller for Vice President, and that he regretted his "cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger.

The Nation obtained the 655-page typescript before publication. Advance excerpts from the book will appear in *Time* in mid-April and in *The Reader's Digest* thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.

Ford was deeply hurt by Haig's revela-

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GLOBAL MONOPOLY

MONEY GAMES NATIONS PLAY

WILLIAM K. TABB

The international economy these days is best understood as a complex game of chicken. The name of this global game is international capitalism, and the way it is played hasn't changed all that much over the last couple of centuries. Yet the playing field looks more confused than usual. In the immortal words of Bud Abbott and Lou Costello, "Who's on first?" It indeed is difficult to tell the players without a score card, or what they're doing without a rule book. There are mixed teams of shifting membership. The main players are nations, bankers, corporations, political parties and trade unions. Each will form alliances with other players for temporary goals. To the spectator the action of the playing field is confusing. And, of course, it is really not a game. This year is, after all, the golden anniversary of the 1929 Great Depression. Rivalries like these in the past have resulted in trade wars, not to mention world wars.

The biggest gamesters are trying to win by convincing everybody else that the game is really quite stupid and everyone should stop playing. These sophisticated players are the global corporations. Their game is free trade and, as their weaker competitors complain, they really want to play by their ow[illegible] rules.

In Europe a once-again expansionist Germany plays a new version of the balance-of-power game, calling for a new European money unit and a European Monetary Fund. This is, in effect, an end-run around the United States-controlled International Monetary Fund. Yet the Germans are in turn imposing the I.M.F. rules of the game on their weaker European

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