

## Not Unpardonable by Dan Jacoby

At noon on Tuesday, George W. Bush's tenure in the Oval Office comes to an end. Until then, he still retains the constitutional "Power to grant Reprieves and Pardons for Offences against the United States." Putting aside for the moment whom Bush might pardon (because we won't actually know until he does it), let's ask if any pardons he issues can be undone, and if so, whether there is a limit to how long after a pardon is issued it can be revoked.

Recently, Bush "unpardoned" New York developer Isaac Robert Toussie the day after he issued the pardon. This provoked a lot of newspaper articles, but very little in the way of actual facts, based on actual history. There appear to be three Supreme Court rulings that may have some effect on this possible situation.

The first case concerns one Moses DuPuy, who was pardoned by Andrew Johnson on the last day of his Presidency. Three days later, the newly-minted President Grant revoked that pardon. A federal court ruling (not the Supreme Court), based on the 1833 Supreme Court decision *United States v. Wilson*, was that Johnson's pardon had not been delivered and accepted by DuPuy, so it could be revoked. In the 1833 decision, Chief Justice Marshall wrote, "A pardon is a deed to the validity of which delivery is essential, and delivery is not complete without acceptance."

The second case dates from the 1914 Supreme Court case *Burdick v. United States*. In this case, George Burdick, the city editor of the New York Tribune, refused to answer questions from a grand jury, citing his fifth amendment protection from self-incrimination. When recalled to the grand jury, he was handed a pardon from President Wilson, and was ordered to answer questions, having been pardoned for any crime his testimony might reveal. He refused to accept the pardon, and continued to refuse to answer the grand jury's questions.

In this case, the Supreme Court ruled that a person may refuse to accept a pardon, and in doing so the pardon has no effect. Their ruling strengthened the *Wilson* ruling. (Note: The Court also ruled that in refusing the pardon Burdick could still assert his fifth amendment protection without consequence. This was why Burdick refused to accept the pardon; he didn't want to answer the questions.)

The third case, *Biddle v. Perovich*, dates from 1927. In this case, Vuco Perovich had been convicted of murder and sentenced to death. President Taft commuted his sentence to life imprisonment, and Perovich was transferred from an Alaska prison to a prison in Washington state, and eventually to one in Kansas. Later, he filed a habeas corpus petition, claiming that the commutation was carried out without his consent.

The Court decided that the *Burdick* case did not extend to the ability to refuse to accept a commutation. The difference here is that in order to accept a pardon one must also implicitly admit wrongdoing, whereas acceptance of a commutation involves no such admittance, so a commutation cannot be refused.

So a pardon must be delivered and accepted before it takes effect, but a commutation cannot be refused. How does this affect the possibility that President Obama might undo pardons issued by an outgoing President Bush?

It appears that any pardons issued by President Bush would be delivered with sufficient speed to ensure that President Obama will be unable to revoke any of them. With the history of the Supreme Court rulings, the abilities of modern communication and transportation technology, and the determination of George W. Bush to have his decisions carried out, it is virtually certain that any pardons he issues will be delivered before Barack Obama takes the oath of office.

But...

For any pardon to take effect, it must be accepted. If accepted, thanks to the *Burdick* decision, anyone accepting a pardon could be required to testify to any acts, even criminal acts, that he or she might have committed. After all, if someone has already been pardoned, there is no official self-incrimination from which that person would need fifth amendment protection.

The refusal of Bush administration members to admit to any wrongdoing, especially George W. Bush's own refusal to admit wrongdoing on his or any of his subordinates' parts, could override anyone's urge to ask for a pardon, and Bush's desire to protect those subordinates from possible future prosecution for crimes he doesn't think they have committed.

Additionally, President-elect Obama's noncommittal statements concerning possible future investigations of Bush administration acts might give Bush a false sense of security. It's even possible (though not highly probable) that Obama was so noncommittal exactly for that purpose.

In any event, should George W. Bush issue pardons in the final days of his Presidency, any pardons that are accepted will certainly be impossible to undo.

One more thing – what if George W. Bush issued advance “reprieves” that limited the possible punishments that could be meted out to anyone for crimes they might be charge with? Would such pre-commutations hold up in court?

Copyright 2009, Dan Jacoby