

CONSTITUTIONAL REVISION AND THE PARDONING POWER

Current interest in constitutional revision in New Jersey, exhibited by those who desire to improve the constitutional framework in which we live, suggests that some attention be given to that power of government called "the pardoning power."¹

1. There are very few New Jersey cases on the subject. A good definition of a pardon is that of the United States Supreme Court: "An act of grace usually proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment which the law inflicts for a crime which he has committed." *U. S. v. Wilson*, 7 Pet. 160. Another frequently quoted one is that appearing in *Territory v. Richardsons*, 9 Okl. 579, 49 L.R.Q. 540: "It [a pardon] is a remission of guilt and a declaration of record by the authorized authority that a particular individual is to be relieved from the legal consequences of a particular crime."

"The effect of the pardon is to make the offender a new man, to acquit him of all forfeitures annexed to the offense for which he obtains his pardon, not so much to restore his former, as to give him a new credit and capacity." *In re N. J. Court of Pardons*, 97 N.J.Eq. 555 at page 558, 3 N.J.Misc. 585, 129 A. 624.

In the same opinion, pardons are classified as unconditional and conditional (limited). The line between an unconditional pardon and a parole which "may be revoked for cause" (page 572) is clear, but that between a conditional pardon and a parole shadowy, and involves constitutional difficulties as to the validity of parole legislation. The doctrine of the case is that just as the Legislature cannot impair the jurisdiction of a constitutional court, either by depriving it of its power or creating a co-ordinate authority to employ it [*Flanigan v. Guggenheim Smelting Co.*, 62 N.J.L. 647, 42 A. 674 (E. & A. 1898); *In re Thompson*, 85 N.J.Eq. 221, 96 A. 102 (Ch. 1915)], neither can it appropriate the jurisdiction of the so-called Court of Pardons. Having the inherent right to grant a parole, legislation authorizing the Court to do so is merely declaratory, p. 570 (e.g. R.S. 30:4-138). The question that arises is whether legislation authorizing *others* to exercise the power infringes upon its prerogatives, i.e., the various parole statutes. The Chancellor concluded, as had Attorney General Edmund Wilson

Originally vested in the Governor and Legislative Council,² this power has been exercised since 1844 by the Governor, the Chancellor and the six special judges of the Court of Errors and Appeals.³ Together they compose what has been termed the "Court of Pardons,"⁴ an expression not used in the Constitution itself, and one which has given rise to some confusion as to the nature of the power which they exercise. The constitutional provision on the subject, found in Article V, paragraph 10, is:

"The governor, or person administering the government,⁵ the chancellor and the six judges of the Court of Errors and Appeals, or a major part of them, of whom the governor shall be one, may remit fines⁶ and forfeitures,⁷

some years previously, that the parole acts were valid.

The related power to reprieve (i.e., suspend execution for an interval), is given to the Governor under Art. X, paragraph 9 of the Constitution. It has been held that the power to pardon does not include the power to reprieve. *Clifford v. Heller*, 63 N.J.L. 105, 42 A. 155, 57 L.R.A. 312 (S. Ct. 1899).

2. Constitution of 1776, Art. IX, the operation of which is discussed in *Clifford v. Heller*, note 1, *supra*.

3. Art. V, paragraph 10, printed in the text. The power is not exactly the same under the original and revised Constitutions, e.g., as to the restoration of a fine. *Cook v. Freeholders of Middlesex*, 26 N.J.L. 326 (S. Ct. 1857); 27 N.J.L. 637 (E. & A. 1858). Note 6, *infra*.

4. The most recent case to use the expression is *State v. Leaks*, 126 N.J.L. 115, 17 A. 2d 550 (E. & A. 1940). For an example of the statutory usage, see Chapters 197 and 198 of the Revised Statutes.

5. The President of the Senate, who in performing the duties required of the Chief Executive, where the latter has resigned, etc., retains his office as Senator. *Clifford v. Heller*, note 1, *supra*.

6. In the *Cook* case, the court held that the power to "remit" a fine does not include the power to "restore" one, i.e., once it has been paid it cannot be returned, as was done under the Constitution of 1776. Cf. *In re N. J. Court of Pardons*, note 1, *supra*, at page 561, where it is asserted that the power to "remit" a forfeiture includes the power to "restore" a person to the right of suffrage under Art. II, paragraph 1.

Our courts have taken the view that the power to pardon necessarily

and grant pardons after conviction, in all cases except impeachment."⁸

The name "Court of Pardons" was, in the words of the late Chancellor Walker, "bestowed by legislative fiat"⁹ on those vested with the pardoning power. This occurred upon the passage of Chapter II of the Laws of 1853, which provided in part:

"Be it enacted . . . that the officers of this state, in whom the power to remit fines and forfeitures and to grant pardons is vested by the Constitution, shall be called the Court of Pardons. . . ."¹⁰

From then on, the pardoning authority in New Jersey has had a name.

To describe the group as a "court" is to adopt a class term descriptive of those individuals possessed of the pardoning power, which is lacking in the Constitution itself. It is easier to say or write "Court of Pardons" than it is to repeat endlessly, "The Governor, the Chancellor and the six judges of the Court of Errors and Appeals." None of us would find fault with the adoption of an easier terminology. However, in this instance, the term chosen was unfortunate. "Board of Pardons" would more aptly describe the functions of the group.¹¹ The difference

includes the lesser powers of remission and commutation. Therefore, given the power to pardon, the court could remit a fine though the Constitution had not expressly provided that it could. *Cook v. Freeholders of Middlesex*, note 3, *supra*.

7. The power of the so-called Court of pardons to remit a forfeiture under Art. V, paragraph 10, gives it the exclusive power to restore suffrage under Art. II, paragraph 1. *In re N. J. Court of Pardons*, note 1, *supra*.

8. Impeachment is governed by Art. VI, sec. 3, paragraph 1.

9. *In re N. J. Court of Pardons*, note 1, *supra*, at page 557.

10. The statutory definition is continued in R.S. 2:10-5.

11. This alternative term was suggested by Chancellor Walker in

is more than one of words.

To describe those who exercise the pardoning power as a "court" suggests that their function is judicial in nature. Yet the power to grant pardons will be found in that article of the Constitution which deals with the executive powers of government.¹² Moreover, the fact that the granting of pardons is a non-judicial action is implicit in the manner in which the "Court" votes. The Constitution in effect gives the executive the power of veto, for though a majority¹³ of the "Court" votes in favor of a pardon, if he is opposed, no pardon may be granted. Although the converse is not true, since the Governor cannot grant a pardon if the majority is opposed, the fact remains that *individually* the Governor has a measure of authority which can be exercised by his associates only *collectively*. In denying a pardon, one man can overrule a majority; it takes a majority to overrule him. This is not the manner in which courts ordinarily operate. Furthermore, it seems clear that a petition for a pardon is essentially "an appeal to executive clemency," the very purpose of which is to *avoid* the action of the courts.¹⁴

In re N. J. Court of Pardons, 97 N.J.Eq. at page 557. He stated, however, that he considered Court of Pardons to be "quite appropriate." Cf. *Cook v. Freeholders of Middlesex*, 26 N.J.L. 326, at page 349, where "Court of Pardons" is classed as a "legislative misnomer"; also Vol. VIII N. Y. Constitutional Committee Reports, 1938, where in a comparative study of the pardoning authority throughout the United States, New Jersey is listed merely as having a board of pardons. The amendment proposed by the Governor's Committee on Revision in 1906 would, among other changes, have made Art. V, paragraph 10 read "Board of Pardons"; this was true of the Bourgeois Amendment proposed in opposition to the Committee Report, 29 L.J. 140, 276, 277.

12. Article V deals with the Executive; Art. VI with the Judiciary.

13. "A major part" under Art. V, paragraph 10 has been construed as the majority, not of a quorum, but of the entire membership. *In re* N. J. Court of Pardons, 97 N.J.Eq. 553 at page 560. The Chancellor cited *Cook v. Freeholders*, 26 N.J.L. 326, at page 327, and 27 N.J.L. 637 at page 639. The *Cook* case did not decide the point, however.

14. See the definitions of a pardon in note 1. It is incorrect to state

The danger in describing our pardoning authority as a "Court" lies in the field of psychological reaction. Suggestions in discord with fact, if constantly repeated, are apt to be believed. Today it seems that the Court of Pardons is not only *said* to be a court, but is also *believed* to be one. That this has gradually become true is apparent from a comparison of the opinions in three New Jersey cases:

The first to be considered, which, incidentally, is also the first to construe the nature of the pardoning power, is *Cook v. Freeholders of Middlesex*,¹⁵ wherein Justice Vredenburg stated:

"The Court of Pardons is in no judicial sense a court . . .
Whether we look to its origin, its prototype or its duties, it

that the power is necessarily inherent in the executive, for in England, the source of power was the Crown, which originally combined all powers and functions: Legislative, judicial and executive. N. Y. Constitutional Committee Reports, Vol. VIII, page 62. However, as Chancellor Walker pointed out: "In this state and country the pardoning power is, and has always been, a prerogative of the executive department. *In re N. J. Court of Pardons*, 97 N.J.Eq. 555 at page 556. If there was any doubt as to the King's sole possession of the power to pardon, it was apparently removed by 27 Hen. VIII, c. 24, cited by Blackstone, 4 Bl. Com. 230. A dramatic incident arising out of a dispute as to the power of the Crown in regard to pardons (in respect to its permitting a commutation of sentence) was taken by Chancellor Walker from Humes History of England, Ch. 68:

"After the conviction of Lord Stafford for treason, King Charles II remitted the hanging and quartering part of his sentence of death, but the sheriffs of London expressed doubt as to the King's power thus to commute the sentence, which doubt was proposed in the Houses of Parliament and was seconded in the Commons by Lord William Russell. Both the Lords and Commons rejected the doubt. . . Later, when Lord Russell was himself convicted of treason, King Charles II likewise remitted the more ignominious part of the sentence, namely the mutilation, saying: 'Lord Russell shall find that I am possessed of that prerogative which in the case of Lord Stafford he thought proper to deny me.'" at p. 561.

15. 26 N.J.L. 326 (S. Ct. 1857); 27 N.J.L. 637 (E. & A. 1858).

is in *no* sense a court."¹⁶

"Court of Pardons," he said, "is a legislative misnomer."¹⁷

The second, *In re N. J. Court of Pardons*,¹⁸ was written by the late Chancellor Walker at the suggestion of his associates on the Court of Pardons, who felt that in discussing "the creation, powers, and prerogatives of the Court of Pardons"¹⁹ further light might be shed by the Chancellor on a subject shrouded in some mystery. The Chancellor significantly chose as his opening words those of Justice Vredenburgh:

"The Court of Pardons is in no judicial sense a court."²⁰

He did not, however, advance to the same conclusion as had his predecessor, and in contrast to him, said that he considered the name "Court of Pardons" as "quite appropriate."²¹

The third case, *Rogers v. Taggart*,²² which is the most recent

16. 26 N.J.L. 326, at page 349. Italics are the writer's.

17. 26 N.J.L. 326 at page 349.

18. 97 N.J.Eq. 555. This is really an advisory opinion. The Chancellor addressed it to the members of the Bar, to the end that it might prove useful when questions as to pardons arose (p. 574). There are only a handful of cases construing Art. V, paragraph 10, and therefore this opinion, though advisory, assumes added importance. It has been argued, unsuccessfully, that there could be no judicial interpretation of Art. V, paragraph 10 on the theory that since the pardoning power is an executive power, the interpretation of it is a prerogative of the executive department. *Cook v. Freeholders of Middlesex*, 27 N.J.L. at page 643.

19. Chancellor Walker chose this as the title to his essay.

20. 97 N.J.Eq. 555 at page 557.

21. 97 N.J.Eq. 555 at page 557.

22. 118 N.J.L. 542, 194 A. 164 (S. Ct. 1937). A more recent case citing Art. V, paragraph 10, *State v. Leaks*, 126 N.J.L. 115, 17 A. 2d 550 (E. & A. 1940), holding that it is not error to charge a jury as to the existence of the Court of Pardons, does not consider the nature of the pardoning power.

case delving into the nature of the pardoning power, requires fuller consideration.

There the court was faced with a question arising out of the following constitutional provisions:

Article III, paragraph 1, which divides the powers of government, provides:

*"The powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except as herein expressly provided."*²³

Article V, paragraph 1, provides:

"The executive power shall be vested in a governor."

Article V, paragraph 10, makes the governor a member of the so-called Court of Pardons.

The question raised was how to explain the presence of the Governor on the Court of Pardons in view of Article III, paragraph 1, dividing the executive from the judicial. The court held that Article III, paragraph I, was drawn with Article V, paragraph 10, in mind, and that the combined exercise of the pardoning power by the executive and by members of the judiciary fell within its exception. The court, however, stated that "the *judicial* functions so exercised"²⁴ fell within the exception. That it might be a case of judges exercising an *executive* function, coming within the exception, seems not to have occurred to the court.

Summing up these three cases, it seems that judicial doctrine

23. Italics by the writer.

24. At page 545.

as to the nature of the Court of Pardons has evolved in the following manner:

1. The Court of Pardons is not a court in a judicial sense, or in any other sense. *Cook v. Freeholders of Middlesex* (1857).²⁵

2. The Court of Pardons is not a court in a judicial sense. In *re N. J. Court of Pardons* (1925).²⁶

3. The Court of Pardons is a court in a judicial sense, of which the Governor is nevertheless permitted to be a member by the Constitution. *Rogers v. Taggart* (1937).²⁷

In *Rogers v. Taggart*, the court went still further. It referred to one who exercises the pardoning power as a "judge of the Court of Pardons."²⁸ The court's own opinion defines a judge as "a public officer lawfully appointed to decide litigated questions according to law."²⁹ It is generally agreed that "every pardon is in *derogation* of the law."³⁰ In discussing the fundamental nature of a pardon in *Cook v. Freeholders of Middlesex*, above, the court said:

"Pardon implies guilt. If there be no guilt there can be no ground for forgiveness. It is an appeal to executive clemency. It is asked as a matter of favor to the guilty. It is granted not of right but of grace. A party is acquitted on the ground of innocence, he is pardoned through favor. And upon this very ground it is that *the pardoning power is never vested in a judge*. The effect as Montesquieu remarks, would be to confound all ideas of right, and render it impossible to tell whether a man was acquitted on the ground of innocence, or pardoned though guilty on the

25. 26 N.J.L. 326; 27 N.J.L. 637.

26. Note 1, *supra*.

27. 118 N.J.L. 542, 194 A. 164 (S. Ct. 1937).

28. 118 N.J.L. 542 at page 546.

29. 118 N.J.L. 542 at page 546. Italics by the writer.

30. See Bouvier "Pardon". Italics by the writer.

ground of mercy. *Montesquieu's Sp. of the Laws*, b. 6 Ch. 5.³¹

When a criminal petitions for a pardon, litigation is at an end; he stands convicted and seeks mercy to avoid the sentence which the law has imposed. The expressions "Court of Pardons" and "judge of the Court of Pardons" are logically self-contradictory.

Neither does the fact that seven out of eight of those entrusted with the pardoning power (the Chancellor and six judges) are judges *apart* from their activities in regard to pardons, warrant expressions which confuse the nature of a pardon. It does, however, raise the question whether it is desirable, as a matter of policy, that persons with judicial experience, or at least so many of them, should share the pardoning power. To what extent can a judge, accustomed as he is to following settled rules of law, change his attitude when the occasion arises to consider a case from a non-legal viewpoint? This question is all the more acute because the Court of Pardons has, through evolutionary changes in the Court of Errors and Appeals, assumed an aspect not contemplated by many of those who drew our revised Constitution. In 1844 it was popularly believed that the six special judges of the Court of Errors and Appeals would be laymen "to control or at least affect the technical tendency of those trained in the law, who constitute the other part of the Court."³² As

31. *Cook v. Freeholders of Middlesex*, 26 N.J.L. 326, at page 331. Italics are the writer's.

32. This was argued in *In re Hudson County*, 106 N.J.L. 62 at page 67, 144 A. 169 (E. & A. 1929), in which reference is made to proceedings in the Constitutional Convention. Whatever may have been the intention of those who framed Article VI, paragraph 2, section 1, in regard to whether the six judges of the Court of Errors and Appeals should be laymen or lawyers, the court held that there is no requirement in the Constitution itself that they be laymen. The opinion also points out that there is no constitutional requirement that the Chancellor be a lawyer, although he has always been one. Page 68.

laymen, they would express a layman's viewpoint, not only in deciding cases on the Court of Errors and Appeals, but also in deciding whether a pardon should be granted.

As the Court of Errors and Appeals, writing in 1929,³³ stated, once there was not a lawyer among its six special judges. In 1878 (50 years before its opinion) of the six judges, four were laymen, two were lawyers. By 1929, the ratio of 1878 had been reversed. Today five out of six are lawyers,³⁴ and a criminal applying for a pardon is therefore faced with six lawyers (the Chancellor and five "law" judges of the Court of Errors and Appeals) and two laymen (the Governor and the single "lay" judge of the Court of Errors and Appeals). The extreme possibility is that he might be faced with eight lawyers—were the Governor to be one, and also all the others.

The same practical considerations that have caused the six special judges of the Court of Errors and Appeals to evolve gradually from laymen to lawyers, suggest the opposite change in the "Court of Pardons."³⁵ Technical legal training helps in the decision of questions of law on the bench of the Court of Errors and Appeals, but when it comes to a pardon an absence of legal technicality is of paramount importance.³⁶

33. *In re Hudson County*, note 32, *supra*.

34. All except Judge Dear.

35. But not necessarily a change to a board composed of persons lacking other specialized training; for example, it would seem advantageous in administering the pardoning authority, to make use of the services of a skilled penologist.

36. It is interesting in this connection to note that Article VI, section 2, paragraph 6, provides:

"When a writ of error shall be brought, no justice who has given a judicial opinion in the cause in favor of or against any error complained of, shall sit as a member, or have a voice on the hearing, or for its affirmance or reversal; but the reasons for such opinion shall be assigned to the court in writing."

Thus the Constitution brings about a change of personnel when a case goes from the Supreme Court to the Court of Errors and Appeals. There is no similar disqualification existing between the Court of Errors

Article V, paragraph 10, specifically provides that seven out of eight of those entrusted with the pardoning power shall be judges. Overlooking the expressed understanding of those who framed it, in regard to whether those judges would be laymen or lawyers, the reasonable inference to be drawn—from the fact that a pardon is in derogation of the law—is that the power was thus granted in the expectation that the judges would be laymen, and therefore non-technical enough to exercise it, though judges.

This high probability becomes a virtual certainty when the pardoning authority in New Jersey is compared with that in the nation as a whole.³⁷ In twenty-eight states, the pardoning power is solely the governor's³⁸—not shared by any judge. Of greater interest is the fact that, although nineteen³⁹ of these states have advisory boards, the duties of which are investigation and recommendation to the governor, the constitution of none of them provides that a judge shall be a member of the advisory board.

Of the remaining twenty states wherein the governor is not

and Appeals and the Court of Pardons. Therefore, it is possible that a criminal will not only be faced with persons on the Court of Pardons of technical legal training, but also who have already decided the case against him.

37. The writer has obtained data on the national situation from the comparative survey appearing in the New York Constitutional Committee Reports, Vol. VIII, published in 1938, and has not brought the figures down to date, both because of the work involved, and because in the field of constitutional law, few if any changes are to be expected.

38. Alabama, Arkansas, California, Colorado, Georgia, Indiana, Illinois, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

39. Alabama, Arkansas, California, Georgia, Indiana, Illinois, Iowa, Kansas, Michigan, Missouri, New Mexico, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Washington, Wyoming.

sole possessor of the authority to grant a pardon,⁴⁰ four require the approval, not of the judiciary, but of the legislature or a branch of the legislature.⁴¹ Seven states⁴² have vested the pardoning authority in a pardon board, of which the governor is not a member. Of the seven, four have no judges on the board,⁴³ and three have one judge.⁴⁴ Eight states in addition to New Jersey have pardon boards of which the governor is a member.⁴⁵ Three of these have no judges on the board,⁴⁶ four have only one judge.⁴⁷

This wide divergence of the pardoning authority in New Jersey from the nation as a whole, insofar as the same is vested in seven judges and one person not a judge, calls for explanation. It seems obvious that the reason lies in the expectation of those

40. Arizona, Connecticut, Delaware, Florida, Idaho, Louisiana, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas, Utah.

41. Maine, Massachusetts, New Hampshire and Rhode Island.

42. Arizona, Delaware, Louisiana, Montana, Pennsylvania, South Dakota, Texas.

43. Arizona, Montana, Pennsylvania, Texas.

44. Delaware, Louisiana, South Dakota.

45. Connecticut, Florida, Idaho, Minnesota, Nebraska, Nevada, North Dakota, Utah.

46. Florida, Idaho, Nebraska.

47. Connecticut, Minnesota, Nevada, North Dakota. Utah, alone, appears comparable to New Jersey, with its Governor, Attorney General and Justices of the Supreme Court on the board.

48. Attempts were made to change the personnel of the Court of Pardons in 1885 and in 1906. In 1885, an amendment, offered by Mr. Parker and carried in the House, provided in effect that the judges of the Court of Errors and Appeals would cease to be members of the Court of Pardons at the end of their respective terms, when other persons would be appointed. 8 L.J. 127. In 1906, the Governor's Committee on Revision proposed an amendment which would have granted the pardoning power to the Governor, the Chancellor, the Chief Justice and two citizens of the State. An amendment proposed by Mr. Bourgeois in opposition to the Committee Report vested the pardoning power in the Governor and four citizens. 29 L.J. 276.

who framed our Constitution that six of the judges would be laymen. If this is true, the so-called Court of Pardons' composition today—six lawyers and two laymen—might be termed “an historical accident” which should be corrected by constitutional revision.⁴⁸

MARIUS GROSSO.