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ESSAY / By WILLIAM SAFIRE

Pardon Me, but...

WASHINGTON -- Former President Bill Clinton will never look out at us from behind bars. He will (1) escape indictment by the new grand jury; (2) be acquitted at trial; or (3) be pardoned in advance. With "Jail to the Chief" not an option, we can begin to weigh the arguments about prosecution.

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"The record demonstrates by clear and convincing evidence," decided Federal Judge Susan Webber Wright in the Paula Jones suit, "that the president responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process."

Judge Wright fined Clinton \$90,000 for civil contempt, leaving it to the independent counsel to pursue the criminal charge with no risk of double jeopardy. Wisely, Clinton did not appeal.

But the president had repeated his false testimony under oath to a federal grand jury. If any other citizen lies both in court and before a grand jury, prosecution follows.

After the House impeachment, the Senate voted largely on party lines not to remove him because his wrongdoing did not amount to "high crimes." Many senators voting to acquit explained that the wrongdoer could be prosecuted after he left office for these "lower" crimes of perjury and obstruction.

The general feeling was that he had been lying about extramarital sex, which so many do. What needed correcting was the privacy-invasive sexual harassment law that lets a plaintiff demand that a defendant reveal experience with others. It's a bad law.

But it is a law that Clinton signed, and when the oath is broken in plain view by the national leader sworn to uphold it, its enforcement becomes unavoidable. If a president is allowed to testify falsely with impunity, then so could everybody else -- and without equal compulsion to tell the truth, equal justice becomes a mockery.

How do we uphold the law when most of the country wants to "move on"? It's not enough to say the possible perjurer has been punished enough or that prosecution is expensive. The way to preserve the power of the oath to coerce truthful testimony is to apply the equal-justice standard -- but then to follow the Constitution's willingness to make it unequal.

Asked in April by newspaper editors about a presidential pardon by Clinton's successor, Al Gore said: "President Clinton is way ahead of you on this. He said publicly some time ago that he would neither request or accept a pardon." Before the same group a day later, Clinton left out the "accept" part: "The answer is I have no interest in it. I wouldn't ask for it."

Gore treats the question of pardon as mooted by Clinton's dismissal of the idea. And too many have bought the notion that a pardon must be sought or "accepted."

That's not so. Controlling legal authority is in *Biddle v. Perovich* (1927), a case in which a convict objected to the method of a presidential commutation of his sentence: "Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will," wrote Justice Holmes for the Supreme Court, "whether he liked it or not, the public welfare, not his consent determines what shall be done."

Nowhere is it written that a pardon must be requested; it can come on the president's initiative, as when Ford pardoned Nixon.

The pardoned person can refuse, but the merciful deed is done "in the teeth of his will." Prosecution stops. The accused or convicted is free -- martyrdom denied -- like it or not. (See Margaret Colgate Love's analysis in the June 2000 *Fordham Urban Law Journal*.)

This means Gore will have to stop dancing away from the question as if the pardon decision were somehow shared with the pardonee. It's time he chose the hard right over the easy wrong answer. (For Bush, it would be an opportunity to demonstrate nonpartisan compassion on a grand scale.)

Let the independent counsel and grand jury lay out detailed charges, if the evidence calls for it, with no political consideration or fear of

retribution -- as the law demands. That's the punishment of humiliation. Then, if need be, with no folderol about request or acceptance, let the new president intervene with a pardon -- as Article II, Section 2 of the Constitution gives him exclusive power to do.

That's constitutional justice. That's the system working.

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