

ESSAY

BEGGING BUSH'S PARDON

Harold Hongju Koh

By pardoning the last Iran-Contra defendants, George Bush violated a central norm of our National Security Constitution: that foreign policy exigencies do not authorize the President to nullify the rule of law for his own administration. That everyone had long tired of Lawrence Walsh's lengthy investigation of the Iran-Contra affair was entirely beside the point. This country cannot make foreign policy democratically or constitutionally if unelected executive branch officials lie or conceal crucial information from the elected congressional officials with whom they share foreign policy powers. By statute, Congress and the President had together chosen to criminalize such lies and concealment, and the Independent Counsel had charged the Iran-Contra defendants with violating those criminal laws. Whether the defendants would ultimately have been held responsible for such acts rested with the courts, which had previously meted out more-than-temperate sentences to those who had been fully tried.

President Bush justified his Christmas Eve pardons on the ground that the defendants had suffered enough and were in any event motivated by patriotism and loyalty to their superiors. But these reasons, too, wholly missed the mark. Our executive officials swear oaths not of patriotism and personal loyalty, but of fidelity to our Constitution and laws. It is from that fidelity, not that loyalty, that their authority derives. The pardons came just as some of George Bush's own colleagues in the Reagan Administration had again called into question his own role, as Vice-President, in the Iran-Contra affair.¹ Thus, for

* Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale University.

1. See, e.g., GEORGE P. SHULTZ, *TURMOIL AND TRIUMPH: MY YEARS AS SECRETARY OF STATE* 809 (1993) (memoirs of Reagan's Secretary of State challenging Bush's assertion that he was "not in the loop" during the Iran-Contra affair).

Bush, like the defendants he pardoned, the issue was never his unquestioned loyalty or patriotism, but whether he had himself partaken in the manifest abuse of constitutional authority that this affair represented.²

The prosecution would have answered, or at least cast light upon, these critical questions of constitutional fidelity. But in one fell swoop, the pardons ended judicial examination of Bush's role, switched the issue from legality to loyalty, and shifted the final decision from the courts to the President.

Aborting the judicial process will exact its price. Constitutional history will remember the Iran-Contra defendants not as public servants who acted lawfully, but as supplicants who successfully begged the President's pardon. Bush himself, who wisely (if reluctantly) sought congressional approval for the Gulf War, deeply tarnished his own constitutional legacy.³ Far from being remembered as a President who learned the Iran-Contra affair's central lesson—the need to reinforce a system of shared power and responsibility in foreign policymaking—he will be recalled as one who never learned that the Constitution grants presidents the pardon power so that they can forgive, not forget.

2. See generally HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

3. For a discussion of this important piece of quasi-constitutional custom, see Harold Hongju Koh, *Presidential War and Congressional Consent: The Law Professors' Memorandum in Dellums v. Bush*, 27 *STAN. J. INT'L L.* 247, 253 (1991).