ESSAY

THE IRAN-CONTRA PARDON MESS

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I.

Let us begin at the beginning: The presidential pardon power is plenary. If a good President uses it to clear the record of civil rights protesters, convicted years ago, let us say, of trespassing on federal land, neither the Congress nor the courts may sit in review. If a wicked President uses it to shield white supremacists from a courageous federal prosecutor, there is no recourse. If the President uses the power to make amends for the society’s unwillingness to acknowledge religious differences, as President George Bush did on Christmas Eve of 1992, no entity but the public can bring him to book; and if he uses it to prevent the prosecution of those who carried out a controversial and probably illegal policy, as President Bush also did on Christmas Eve of 1992, that is his right. In particular, there is nothing even constitutionally fishy in the President’s use of the pardon power to frustrate the will of the other branches, or to limit their ability to inquire into executive affairs—as President Bush plainly did when he granted pardons to several of the major figures in the Iran-Contra scandal. To say that it cannot be used that way is as silly as saying that the Congress should not use its legislative power to criminalize policy disputes with the executive branch—the rather thin explanation that President Bush offered for his last-minute decision.

The idea that the Congress usurps executive authority

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when it enacts restrictions on the use or raising of funds is absurd, but this idea enjoys much currency on the right (or did, when the President was a Republican). The idea that the President usurps congressional authority when he pardons those the Congress would rather see punished is also absurd, but this idea enjoys much currency on the left (or did, when the President was a Republican). However, the simple truth is that the powers of the branches of the federal government are part of a system of checks and balances that each must use in constant battle with the others. This system reflects how the Founders thought that policy struggles would be carried on. Not only would they be unsurprised by the Boland Amendment or the Christmas Eve pardons, they would probably conclude that both the executive and legislative branches were doing their jobs.

In contemporary America, we often have trouble envisioning the three branches of the federal government as the Founders did, as independent power centers, each struggling for supremacy over the others. We tend to think of them as parts of a machine that should work smoothly together, an image that helps explain all the talk about government gridlock. Gridlock would not have bothered the Founders very much, for they, like Montesquieu, feared that a government prepared to use all of its power for a single end always risked tyranny—as I fear ours sometimes does.

So if the Congress wants to hamstring the President, or the President wants to frustrate the Congress—or if, for that matter, the Supreme Court wants to interfere with either or both, we ought to understand that we are seeing the dream of the Founders in action. The only legal rule that should apply to such battles is that each branch must be exercising a power that the Founders actually granted it—otherwise, the original working balance of the political departments (Charles Black's fine phrase) is upset, and the justification for whatever the branch may be doing becomes tenuous.¹ Some scholars have disputed this proposition,² but they have, as a rule, offered little to put in its place. One might of course envision a federal government that can deploy its many powers in any way that it deems efficient, but one needs no Constitution to create it. Ours, however, is constitutionally created, a fact that

should cabin, not expand, the forms through which powers may be exercised.

The Supreme Court seemed to understand this for a brief but exciting historical moment, as it struck down, for example, the legislative veto and the automatic budget sequestering provisions of the Gramm-Rudman-Hollings Act, both of which were efforts to circumvent the cumbersome constitutional procedures that sometimes make it so hard for interest groups to get their programs enacted (the definition of gridlock). Critics screamed that the Justices were being too formalistic, but only law professors consider that epithet an insult; judges should be pleased to be accused of seeing the law as followed instead of manipulated. More recently, the Court has fallen down on the job a bit, sustaining such dubious innovations as the Sentencing Guidelines Commission, to which the Congress has delegated the legislative power to bind the sentencing discretion of judges, and the independent counsel provisions of the Ethics in Government Act, which create a class of federal prosecutors answerable to no authority.

II.

All of which brings us back to the Christmas Eve pardons. To say that the President's pardoning power is plenary—not subject to review—and that it is part of the system of checks and balances—available to frustrate the other branches—is not to say that every use of the pardon power is a good use of the pardon power. The pardons to the Iran-Contra defendants were defensible but, obviously, not on the ground that the President offered.

Was another ground available? The answer is surely yes—the pardons could be defended; but in order to find the reason, it is first necessary to discard a few lemons.

Lemon No. 1—Caspar Weinberger deserved a pardon because of his long and dedicated service to the nation. Actually, unlike many in academia, I think this is a reasonable ground for a pardon, especially for a man who is well on in years and in health and whose crime was, at worst, rather marginal. However, the excuse remains a lemon because not all of the pardoned defendants fit the category and the

President took no steps to remove the stain of partisanship (or self-protection) from his actions, as he might have done, for example, by offering a simultaneous pardon to the estimable Clark Clifford.\(^7\)

*Lemon No. 2*—The pardons were justified because *all of the defendants were victims of an overzealous prosecutor who long ago overstepped his bounds*. The trouble is, there is no way to tell whether a prosecutor is overzealous unless one knows in advance of trial who is guilty and who is not. Under our system, one does not actually know. Of course, this demonstrates a difficulty with the independent counsel legislation itself. In ordinary cases, if the President or the Attorney General believes a prosecutor is going too far, the prosecutor will be reined in. The independent counsel statute is designed to ensure that nobody can rein in the independent counsel. (The Supreme Court suggested in 1988 that the law provides some limits on prosecutorial freedom,\(^8\) but that was an error.)\(^9\)

*Lemon No. 3*—The pardons were justified because the statute providing for the appointment of independent counsels is unconstitutional. As it happens, I believe the premise of this statement to be true—I do think the independent counsel law is unconstitutional because it transfers the executive and therefore politically controllable power of prosecution to an investigator-cum-prosecutor who is independent of presidential control. I will not here detail the reasons for this view, having discussed it in detail elsewhere, except to note that nothing in the Supreme Court’s decision sustaining it has convinced me of the contrary.\(^10\) Moreover, it is certainly within the President’s authority to use the pardon power to show his disagreement with the Court. Therefore, had President Bush placed the pardons on that ground—the unconstitutionality of the underlying statute—he would almost have made a convincing case.

The reason for the “almost” is that President Bush did not issue pardons for all individuals ever prosecuted by independent counsels appointed pursuant to the Ethics in Government Act. He limited the pardons to the special favorites of the right and in so doing made the stand on principle just about impossible.

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7. News accounts indicated that some political aides urged on President Bush precisely this course. Unfortunately, hotter heads prevailed.

8. *See* *Morrison*, 487 U.S. at 695-96.


10. *See* *id.* at 110-11.
Lemon No. 4—The pardons were justified because they were part of an effort to heal the divisions over a hard-fought question of national policy. Although it has little to do with law, this explanation is one that a person would most wish were true of these or any other pardons. On the same day as the Iran-Contra pardons, for example, President Bush pardoned two Jehovah’s Witnesses—one from the World War II era, one from the Korean War era—each of whom had been convicted of refusing to register for the draft. The refusal in each case involved a religiously motivated understanding that war is wrong. (The law allows one to register and then claim conscientious objector status, but not to refuse to register at all.) By expanding, as it were, our national tolerance of moral and religious visions outside the mainstream, the President sent a true message of healing.

Similarly, although it was politically wrenching at the time, President Ford probably made the right decision in pardoning Richard Nixon shortly after Nixon’s resignation. Although our national anger seemed to demand punishment for Nixon’s crimes, Ford believed that in the long run, the national interest would be better served by enabling the ex-President to avoid prosecution, leaving him untouched by legal proceedings that would otherwise have kept alive our national obsession with Watergate, which, in retrospect, it was plainly time to put aside.

Do President Bush’s Iran-Contra pardons fit this model? One important distinction is that Ford, unlike Bush, faced the voters after his decision. Put otherwise, the “healing” rationale would have carried more weight had Bush handed down his pardons on the 1991 rather than the 1992 Christmas list, for he could then have faced the judgment of the American people on his action. Indeed, the wrath or approbation of the voters is one of the very few checks on the pardon power that exist. The principal other check is the judgment of history. For that, we will have to wait.