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Federal Executive Clemency Power: The President's Prerogative to Escape Accountability

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CLEMENCY AND PARDONS NOTE

FEDERAL EXECUTIVE CLEMENCY POWER: THE PRESIDENT'S PREROGATIVE TO ESCAPE ACCOUNTABILITY

> [The President] shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.[1]
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> [I]n democracies . . . this power of pardon can never subsist, for there nothing higher is acknowledged than the magistrate who administers the laws.[2]

I. INTRODUCTION

The United States Constitution vests the President with "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[3] Although Virginia delegate Edmund Randolph raised concerns[4] about the executive branch possibly abusing the pardon power to conceal criminal conduct at the Constitutional Convention,[5] Randolph's colleagues relied upon the presumption that a president would not break the law[6] and defeated his motion to limit presidential pardon power to cases of treason.[7] Recently, the scandalous Iran-Contra

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1. U.S. CONST. art. II, § 2.

2. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 181 (5th ed. 1984) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 397-98).

3. U.S. CONST. art. II, § 2.

4. S. Doc. No. 34, 100th Cong., 2d Sess. 1690 (1989). Edmund Jennings Randolph was a Virginia delegate at the Constitutional Convention of 1787. A former member of the Continental Congress and Governor of Virginia, Randolph subsequently was selected by George Washington to serve as the first United States Attorney General. *See* JOHN J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY (1975).

5. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911). Randolph argued that "[t]he prerogative of pardon in these cases was too great a trust. The President himself may be guilty. The Traytors may be his own instruments." *Id.* at 626.

6. James Iredell responded to Randolph's concerns stating, "[t]he probability of the President of the United States committing an act of treason against his country is very slight." William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 503 (1977) (quoting PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 350, 351-52 (P. Ford ed., 1968)).

7. *Id.* at 502-03.

affair has demonstrated that, contrary to the Framers' expectations, presidents may circumvent or directly violate federal laws.

In the past, controversial uses of the executive's clemency power, such as Gerald Ford's decision to pardon Richard Nixon,[8] have generated public discussion and scholarly analyses. The legitimacy and scope of the president's power to remove individuals from the reach of the federal judiciary has been intensely debated. Former President Bush's recent pardon of six Reagan administration officials involved in the Iran-Contra affair raises anew questions concerning the compatibility of presidential clemency powers within the structure of a democracy. The scandal centered around possible presidential involvement in a scheme to violate express congressional directives by selling weapons to Iran and funneling the proceeds of the weapon sales to Nicaraguan rebels.[9] Although criminal proceedings were brought against executive branch officials, Bush ultimately pardoned the Reagan administration officials.[10]

The questions raised by the Iran-Contra affair provide incentive to reassess the nature and scope of the president's clemency powers. For perhaps the first time in United States history, an executive pardon may have been motivated by the self-interest of a president who halted criminal proceedings in order to suppress information concerning his own conduct.[11] The controversy suggests that a president could utilize his or her pardoning power to escape responsibility for illegal acts usually punished in a democracy.

Against the backdrop of former President Bush's pardoning[12] of six former Reagan administration officials, section two of this Note examines

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8. Proclamation No. 4311, 39 Fed. Reg. 32,601 (1974). President Ford's pardon of Richard Nixon began:

> I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2 of the Constitution, have granted and by these presents do grant a full, free and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.

Id.; see also REPORT OF THE HOUSE COMMITTEE ON THE JUDICIARY, H.R. REP. No. 1305, 93d Cong., 2d Sess. (1974) (finding the prospect of being the first President in American history to be removed from office by Congress forced Nixon to resign). For an excellent analysis of the Nixon pardon, see Duker, *supra* note 6, at 530-35.

9. Anthony Lewis, *The Presidential Pardon: Bush's Move Menaces the Constitution*, ST. PETERSBURG TIMES, Dec. 10, 1992, at 6A. *See infra* notes 126-39 and accompanying text.

10. *See infra* notes 135-47 and accompanying text.

11. William Schneider, *Bush's Pardons Break All the Rules*, L.A. TIMES, Jan. 3, 1993, at M2. Schneider wrote, "[t]hat's why Bush's Iran-Contra pardons are in a class by themselves. Not only did he pardon his political allies, he pardoned them for *illegal activities in which he himself may have been implicated.*" *Id.* (emphasis added).

12. President Bush's pardons of Caspar Weinberger and five other officials have generated divergent opinions concerning the appropriateness of his actions. *See Why Rush to*

the historical evolution of the president's pardoning power, from its birth in medieval England through its development in the United States. Next, section three examines mechanisms already present within the legislative and judicial branches of government for maintaining a modicum of accountability and control of the president's clemency powers. Section four details the circumstances surrounding the Iran-Contra controversy and the subsequent pardons of the government officials. Finally, section five proposes placing specific limitations on the president's ability to grant clemency. This Note also examines how implementation of these recommendations might have influenced Bush's decision.

II. THE HISTORICAL EVOLUTION OF CLEMENCY

When the drafters of the Constitution created the presidential power to "grant reprieves and pardons for offenses against the United States,"[13] they agreed that this authority would mirror the clemency powers vested in the English Crown.[14] However, United States Supreme Court rulings eventually expanded the federal executive clemency powers beyond those possessed by the Crown in Great Britain.[15]

A. *Clemency Defined*

In its broadest sense, the term "clemency" represents any manifestation of mercy.[16] However, this Note will employ the term to denote mercy or leniency in the official exercise of authority that removes all or some of the punitive consequences of a criminal conviction. In other words, the term "clemency" will refer to various forms of leniency extended by

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Pardon Weinberger?, N.Y. TIMES, Dec. 24, 1992, at A16 (criticizing the possibility of a Bush pardon for Caspar Weinberger on the grounds that Weinberger should be brought to trial so that information concerning the Iran-Contra scandal could be brought to light); *Iran-Contra — Bush Pardon Would Be Tantamount to Extending Pardon to Himself, Too*, THE SEATTLE TIMES, Nov. 15, 1992, at A19 (arguing that Bush's pardon of Weinberger would be equal to Bush pardoning himself); *Unpardonable Pardons*, ATLANTA J. & CONST., Dec. 29, 1992, at A8 (proposing that Bush would have suffered from the Iran-Contra trials); Bruce Fein, *Bush's Finest Hour: The Courageous Pardons of Iran-Contra*, RECORDER, Jan. 7, 1993, at 7 (applauding Bush's pardons of Weinberger and five other former Reagan administration officials as "courageous"); Richard A. Hibey, *No "Culture of Crime,"* WASH. POST, Jan. 9, 1993, at A19 (arguing that Bush's pardons were justified). *See generally Pardon has Proved a Divisive Force*, NEWSDAY (Nassau and Suffolk Edition), Dec. 26, 1992, at 4 (noting that exercise of the executive clemency power, because it is virtually unrestricted, is controversial).

13. U.S. CONST. art. II, § 2.

14. *See infra* notes 54-56 and accompanying text.

15. *See infra* notes 66-82 and accompanying text.

16. Clemency is defined as "[k]indness, mercy, forgiveness, leniency." BLACK'S LAW DICTIONARY 252 (6th ed. 1990).

branches of the government, most often the executive, to remit the punishment of those who have violated state or federal laws.

Clemency embraces five distinct forms of leniency commonly recognized in the American legal system: pardon, amnesty, reprieve, commutation, and remission of fines.[17] A pardon can take several forms.[18] An absolute pardon forgives the offense without any condition while a conditional pardon may limit forgiveness in time or upon the performance or nonperformance of acts specified by the executive.[19] A full pardon absolves the offender of most legal consequences,[20] whereas a partial pardon relieves the offender of only a portion of the legal ramifications of conviction. Pardons may be extended either before or after conviction and commonly are used to restore the civil rights and reputation of an individual who has completed his or her designated punishment and demonstrated rehabilitation.[21]

Amnesty typically is extended to individuals who are subject to trial but have not yet been convicted.[22] Although amnesty has largely the same legal effect as a pardon,[23] it does not eliminate from a person's record the offense for which punishment is being remitted.[24] A reprieve,[25] on the other hand, the most limited form of clemency, is the temporary post-

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17. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575 (1991).

18. Charles S. Clark, *Reagan Parsimonious in Use of Pardon Power*, CONG. Q., Nov. 3, 1984, at 2878. Chief Justice Marshall supplied the classic definition of a pardon when he stated, "[a] pardon is an act of grace, [of the Executive] . . . which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833). In Marshall's definition, the term "pardon" is used in its generic sense; it includes all forms of clemency. Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 THE AM. J. LEGAL HIST. 51 (1963) (quoting Christen Jensen, *Pardon*, 11 ENCYCLOPEDIA SOC. SCI. 570 (1933)).

19. *See* Patrick R. Cowlishaw, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149 (1975) (examining the potential for abuse rooted within the president's authority to attach conditions to pardons).

20. A pardon does not erase the commission of an offense for purposes of employment qualifications based on character. *See* Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968), *cert. denied*, 395 U.S. 981 (1969); Burdick v. United States, 236 U.S. 79, 94 (1915).

21. Kobil, *supra* note 17, at 576.

22. Reed Cozart, *Clemency Under the Federal System*, 23 FED. PROBATION 3 (1959).

23. Cowlishaw, *supra* note 19, at 150. The practical effect of amnesty is virtually identical to that of a pardon, and American law recognizes little distinction between the two.

24. Kobil, *supra* note 17, at 577. In Knote v. United States, 95 U.S. 149, 152-53 (1877), the Court explained:

> It is sometimes said that [amnesty] operates as an extinction of the offence of which it is the object, causing it to be forgotten, so far as the public interests are concerned, whilst [pardon] only operates to remove the penalties of the offense. This distinction, is not, however, recognized in our law.

Id. at 152.

25. The term "reprieve" is derived from the French word "reprendre," which means "take back." *Ex parte* United States, 242 U.S. 27, 43 (1916).

ponement of the execution of a sentence.[26] Unlike other forms of clemency, a reprieve does not defeat the eventual imposition of judgment. It merely withdraws the sentence for a specified time period.[27]

Commutation also is within the president's clemency powers. Commutation is the substitution of a lesser sentence for the original punishment imposed by a court.[28] Unlike a pardon, it does not disturb the legal consequences that may attach to a conviction.[29] Finally, the authority to remit fines and forfeitures which accrue from offenses against the United States is also within the broad ambit of the president's clemency powers.[30] The president's power to remit fines and forfeitures, however, is limited to monetary penalties which have not yet been paid to the United States.[31]

B. *The Development of the Clemency Power*

At common law, the King possessed broad powers to pardon offenses either before or after indictment, conviction, and sentencing.[32] The King could grant conditional or unconditional pardons based on the performance of a precedent or subsequent action.[33] In essence, these powers were designed to grant mercy where it was deserved.[34]

1. Clemency Power: An Absolute Royal Prerogative

Although clemency power ultimately became an exclusively royal prerogative, the Crown originally had many competitors vying for this

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26. *Id.* at 43-44.

27. *See* KATHLEEN D. MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 5 (1989). A reprieve usually is extended to afford an offender the opportunity to complete pending appeals. However, it also has been used to allow an unhealthy capital offender time to recover before being executed and to permit a pregnant mother to give birth to her child. 4 WILLIAM BLACKSTONE, COMMENTARIES 394. Blackstone maintained that extending a reprieve to a pregnant mother was "dictated by the law of nature." *Id.* at 395.

28. Clark, *supra* note 18, at 2878. The authority to commute sentences is a part of the general grant of pardoning power. Thus, if the entire offense may be pardoned, then a part of the punishment may be remitted or the sentence commuted. Biddle v. Perovich, 274 U.S. 480, 486-87 (1926); *Ex parte* Wells, 59 U.S. (18 How.) 307 (1855).

29. Kobil, *supra* note 17, at 577. For example, commutation does not restore civil rights, such as the privilege to vote or the competency to testify in court. *See id.*

30. The Laura, 114 U.S. 411, 413 (1885). The Court held that "the power of the President to grant pardons includes the power to remit fines, penalties, and forfeitures imposed for the commission of offenses against, or for the violation of the laws of, the United States." *Id.*

31. Knote v. United States, 95 U.S. 149, 154 (1877). In this case, the Court held that the president "cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress." *Id.*

32. FREDERIC W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 480 (1968).

33. *Id.* at 476.

34. *See* GEORGE B. ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND 78-79 (1921).

power.[35] However, by the time of Henry the Eighth in 1535, the power to extend clemency became the sole right of the Crown.[36] Clemency power was vested exclusively in the Crown because "nothing higher is acknowledged than the magistrate, who administers the laws; and it would be impolitic for the power of judging and pardoning to centre in one and the same person."[37] According to one commentator, "[a] Pardon is a work of mercy, whereby the King either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, Temporall or Ecclesiasticall. . . ."[38]

2. A Constitutional Crisis: The Impeachment of Osborne

The absolute vesting of clemency power in the Crown remained essentially unchanged until 1678. It was then that a controversy arose over whether Charles the Second could employ his power to grant clemency to frustrate Parliament's impeachment of Thomas Osborne, the Lord High Treasurer of England.[39] Osborne, in his official capacity as Lord High Treasurer of England, secretly had followed the King's directive to extend an offer of neutrality to France in exchange for a substantial monetary payment.[40] Since Osborne was carrying out the King's express orders, he was beyond the reach of Parliament in its struggle to control the conduct of foreign policy.[41] Consequently, Osborne was singled out by Parliament

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35. Grupp, *supra* note 18, at 55. Grupp notes that "the Church, the great earls, and the feudal courts" were among the contenders for the Crown's pardon prerogative. *Id.*

36. Comment, *Constitutional Law — Presidential Pardons and the Common Law*, 53 N.C. L. REV. 785, 788 (1975). In 1535, the British Parliament enacted a statute which granted the King exclusive authority to grant a pardon:

> That no person or persons, of what estate or degree soever they be . . . shall have any power or authority to pardon or remit any treasons, murders, manslaughters or any felonies whatsoever they be . . . but that the king's highness, his heirs and successors, kings of this realm, shall have the whole and sole power and authority thereof united and knit to the Imperial Crown of this realm, as of good right and equity it appertaineth; any grants, usages, prescriptions, act or acts of parliament, or any other thing to the contrary notwithstanding.

Grupp, *supra* note 18, at 55 (quoting An Act for Recontinuing Liberties in the Crown, 1535, 27 Hen. 8, ch. 24 (Eng.)).

37. BLACKSTONE, *supra* note 2. At common law, the King possessed great latitude and flexibility in exercising his pardoning power which ensured an unrestricted ability to bestow mercy. ADAMS, *supra* note 34, at 78-79.

38. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 233 (1817).

39. For an excellent narrative of Osborne's impeachment see Duker, *supra* note 6, at 487-95.

40. *Id.* at 488. This offer was made only five days after Parliament had passed an act to raise and appropriate funds for conducting a war with France. *Id.*

41. JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVE OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 5 (1820) (noting that "the law supposes it impossible that the King himself can act unlawfully or improperly. It cannot disturb him whom it has invested with supreme power."). *Id.*

for impeachment, which included not only removal from office, but also more severe types of punishment.[42]

A crisis over the scope of the Crown's clemency power occurred when Charles the Second frustrated Parliament by pardoning Osborne prior to the conclusion of the impeachment process.[43] An outraged Parliament questioned the legality of the pardon and considered measures to limit the scope of the royal pardoning prerogative.[44] A political compromise finally was reached. Osborne's impeachment was aborted, but he was imprisoned for five years in the Tower of London.[45]

3. The Aftermath of the Osborne Impeachment: Parliament Imposes Limitations Upon the King's Clemency Powers

Following the Osborne impeachment, Parliament restricted the King's authority to extend clemency by enacting three measures: the Habeas Corpus Act of 1679,[46] the 1689 Bill of Rights,[47] and the 1700 Act of Settlement.[48] The Habeas Corpus Act of 1679 prohibited royal clemency in cases in which persons were convicted of causing others to be imprisoned outside the realm, and, as a result, beyond the reach of English habeas corpus protection.[49] The 1689 Bill of Rights indirectly weakened the King's clemency power by depriving him of the power to suspend the op-

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42. Duker, *supra* note 6, at 488. The Parliament moved to impeach Osborne on counts of treason and other high crimes and misdemeanors. For the Articles of Impeachment presented against Osborne, see 4 WILLIAM COBBETT, PARLIAMENTARY HISTORY OF ENGLAND 1067-69 (1966).

43. The circumstances surrounding the Osborne impeachment and pardon are analogous to President Bush's pardons of Weinberger and five other Reagan administration officials. In both scenarios, a subordinate executive official acted secretly in compliance with executive desires to achieve certain foreign policy objectives. In so doing, the subordinate circumvented legislative measures promulgated expressly to prevent such action. When the clandestine activity surfaced, the executive pardoned the subordinate much to the legislative body's frustration. *See* Kobil, *supra* note 17, at 587 (comparing the Osborne pardon and the Iran-Contra scandal before the Bush pardons).

44. Duker, *supra* note 6, at 491-94. Prior to the impeachment of Osborne, the King's prerogative of mercy had always been considered absolute. ADAMS, *supra* note 34, at 78.

45. Duker, *supra* note 6, at 495.

46. Habeas Corpus Act, 1679, 31 Car. 2, ch. 2, § 11 (Eng.).

47. Bill of Rights, 1689, W. & M., ch. 2, § 2 (Eng.).

48. Act of Settlement, 1700, etc.; *see also* 13 H.C. JOUR. 625 (1700); 16 H.L. JOUR. 738 (1700).

49. 31 Car. 2, ch. 2, § 11 ((Eng.) 1679). Section 11 of the Habeas Corpus Act of 1679 prohibited arbitrary imprisonment and made it an offense against the King and his government (a praemunire) "to send any subject or prisoner beyond the seas." *Id.* In other words, the "Act made it an offense . . . for any person causing the King's subjects to be imprisoned beyond the English realm, and prohibited clemency in such cases." Duker, *supra* note 6, at 495. Duker characterizes this Act as a minor but effective limitation on the King's clemency powers. *Id.*

eration of a given law or to disregard its execution.[50] In the 1700 Act of Settlement, Parliament successfully prohibited the King's use of pardoning powers in impeachment cases, although it did not prohibit the monarch from pardoning an individual after the impeachment allegations had been heard and decided.[51] Finally, a legislative act passed in 1721 gave Parliament power concurrent with that of the Crown to grant pardons.[52]

The drafters of the United States Constitution convened after Parliament had imposed these restrictions upon the royal pardoning prerogative. Within this context of clemency practices, the Framers included presidential pardoning power in the Constitution.

C. *Clemency Power in the United States: Moving Beyond the Common Law*

Although incorporated into the United States Constitution as it existed in English common law,[53] presidential pardoning powers ultimately expanded beyond the royal prerogative. Indeed, early United States Supreme Court decisions gave great deference to the presidential pardoning powers, leaving this authority virtually unrestricted.

1. The Constitutional Convention

The relative paucity of debate at the federal Constitutional Convention concerning inclusion of the pardoning power in the Constitution[54] sug-

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50. Bill of Rights, 1689, W. & M., ch. 2, § 2. The enactment states:

> 1. That the pretended power of suspending the laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.
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> 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

1 W. & M. ch. 36 (Eng. 1688). *See also* Kobil, *supra* note 17, at 587-88.

51. Grupp, *supra* note 18, at 57; 4 HENRY J. STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 465 (photo. reprint 1979) (1845).

52. *See* Grupp, *supra* note 18, at 57.

53. Schick v. Reed, 419 U.S. 256, 262 (1974). Chief Justice Burger wrote that "[t]he history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law practice." *Id.*

54. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626-27 (Max Farrand ed., 1911) [hereinafter RECORDS]; *see also* John D. Feerick, *The Pardoning Power of Article II of the Constitution*, N.Y. ST. B. J. 7, 9 (Jan. 1975). The few reported exchanges at the Convention concerning the president's pardoning powers proposed limitations. One proposal, which was soundly defeated, was to restrict presidential power by allowing the executive to grant reprieves only until the ensuing session of the Senate. Pardons then would be extended only with the consent of the Senate. RECORDS, *supra*, at 419-20. Another motion, proposed by Luther Martin, sought to limit the exercise of the clemency power to the period "after conviction." Martin subsequently withdrew the proposal when another delegate, James Wilson, argued that pardoning should be permissible before conviction since the defendant's testimony might be necessary to obtain the conviction of accomplices. *Id.* at 426. A third motion, made by Edmund Randolph, suggested that the president's power to grant

gests that the delegates intended presidential clemency powers to mirror those of the English Crown.[55] Although the delegates recognized the potential breadth of the clemency power, all of the proposed limitations on the exercise of that power were ultimately defeated at the Convention.[56] Thus, the executive's clemency power, a privilege uncharacteristic of the constitutional framework of checks and balances and limited democracy, was incorporated into the Constitution.

2. Post-Convention Discussion

Shortly after the federal Constitutional Convention, critics of the proposed Constitution objected that the president's unrestrained power to grant clemency might be subject to abuse, particularly in cases of treason.[57] In response to this criticism, Alexander Hamilton justified the executive's right to pardon on grounds that "one man appears to be a more eligible dispenser of the mercy of the government than a body of men."[58] Moreover, Hamilton persuasively argued that:

> [h]umanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. . . .[59]

In this fashion, executive clemency power was adopted into the Constitution unchanged from the English common law pardoning privilege. With the concurrence of state ratifying conventions, the presidential power to pardon was incorporated into the Constitution with little discussion or debate.[60]

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clemency be withdrawn in cases of treason. Although a number of delegates agreed that the power to pardon treason should not rest exclusively in the president, Randolph was unwilling to agree that the president should share this power with the Senate. As a result, Randolph's motion failed. *Id.* at 626. *See also supra* notes 4-7 and accompanying text.

55. RECORDS, *supra* note 54, at 419-20. The Report of the Committee of Detail retained the president as the sole guardian of clemency power. The Report's language resembled the 1700 English Act of Settlement in providing that the presidential pardon "shall not be pleadable in Bar of an Impeachment." *Id.* at 172. Subsequently, this language was modified to its present form —"except in cases of impeachment" — without reported debate. *Id.* at 173.

56. See *supra* note 54.

57. RECORDS, *supra* note 54, at 639.

58. THE FEDERALIST No. 74, at 501 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

59. *Id.* at 500-01. An extensive discussion of the president's clemency powers appears in THE FEDERALIST No. 74.

60. *See* Duker, *supra* note 6, at 504; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 236 (4th ed. 1991).

3. The Supreme Court: Expanding the Scope of the President's Clemency Powers Beyond the Common Law

The power of the president to grant "[r]eprieves and [p]ardons for [o]ffenses against the United States, except in [c]ases of [i]mpeachment"[61] can be traced directly to the executive clemency powers exercised by the English Crown.[62] In *United States v. Wilson*,[63] the first Supreme Court decision to consider the scope of the president's pardoning power, Chief Justice Marshall expressly recognized the similarities between the English and American forms of clemency and emphasized the need for American courts to look to English common law for guidance. He wrote:

> As this power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt the principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.[64]

Since *Wilson* the Supreme Court has relied primarily upon English common law in determining the extent of the presidential clemency power.[65] Nevertheless, the Court has interpreted the executive's powers

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61. U.S. CONST. art. II, § 2, cl. 1.

62. Christopher C. Joyner, *Rethinking the President's Power of Executive Pardon*, 43 FED. PROBATION 16 (1979). *See also supra* notes 53-60 and accompanying text concerning the adoption of clemency powers into the Constitution.

63. 32 U.S. (7 Pet.) 150 (1833).

64. *Id.* at 160. Although American courts rely upon English common law for guidance regarding the presidential pardoning powers, the wisdom of this practice has been questioned. *See Ex parte* Wells, 59 U.S. (18 How.) 307, 318 (1855) (McLean, J., dissenting). In *Ex parte* Wells, Justice McLean objected to the use of English precedent, stating:

> [t]he executive office in England and that of this country is so widely different, that doubts may be entertained whether it would be safe for a republican chief magistrate, who is the creature of the laws, to be influenced by the exercise of any leading power of the British sovereign.

Id.

65. *See supra* note 53 and accompanying text; *see also* Schick v. Reed, 419 U.S. 256, 260-66 (1974); *Ex parte* Grossman, 267 U.S. 87, 99-121 (1925); Burdick v. United States, 236 U.S. 79, 82 (1915); Knote v. United States, 95 U.S. 149, 151 (1877); *Ex parte* Wells, 59 U.S. (18 How.) 307, 310-13 (1855).

expansively,[66] resulting in an American presidential pardoning power much broader than that of the English Crown.[67]

In addition to recognizing the executive's broad discretion to pardon, the Supreme Court also defined the nature of a pardon expansively. In *Wilson*, the Court defined a pardon as "an act of grace proceeding from the power entrusted with the execution of laws. . . ."[68] Under Marshall's "act of grace" characterization, acceptance of the pardon by the offender was required for the pardon to be valid.[69] As a result, most lower courts viewed the executive's grant of a pardon as a merciful act bestowing grace upon an individual.[70]

However, the Court abandoned its traditional approach in *Biddle v. Perovich*.[71] In an opinion written by Justice Holmes, the Court stated that a pardon was an act for the public welfare, "not a private act of grace from an individual happening to possess power."[72] Therefore, a

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66. *See Schick*, 419 U.S. at 256 (holding that the President is not limited to replacing a commuted sentence with another legislatively authorized sentence for the crime); Biddle v. Perovich, 274 U.S. 480 (1927) (deciding that clemency power extends to commutations of sentences regardless of whether the recipient accepted the commutation); *Ex parte* Grossman, 267 U.S. at 87 (ruling that the President has the power to pardon the offense of criminal contempt of court); Illinois Cent. R.R. v. Bosworth, 133 U.S. 92 (1890) (holding that the President can remit fines and forfeitures); United States v. Klein, 80 U.S. (13 Wall.) 128, 142 (1872) (determining that the President can grant conditional amnesty to specified classes or groups); Armstrong v. United States, 80 U.S. (13 Wall.) 128 (1871) (stating that the federal executive clemency powers include the ability to commute sentences); *Ex parte* Garland, 71 U.S. (4 Wall) 333, 380 (1866) (deciding that "[t]he [clemency] power . . . is unlimited"); *Ex parte* Wells, 59 U.S. (18 How.) at 313-14 (holding that the President could condition the grant of pardons on the recipient's acquiescence to virtually any terms).

67. 59 AM. JUR. 2D *Pardon and Parole* § 13 (1987); *see also* Kobil, *supra* note 17, at 596.

68. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833). Chief Justice Marshall provided the classic definition of a pardon when he wrote, "[a] pardon is an act of grace . . . which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate. . . ." *Id.*

69. In *Wilson*, Marshall emphasized the necessity of the defendant's acceptance of the pardon by stating:

> A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.

Id. at 161.

70. *Wilson*, 32 U.S. at 160-61. In *Wilson*, Chief Justice Marshall characterized a pardon as "the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court." *Id*; *see also Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) (stating that the president exercises a "benign power of mercy"); *Ex Parte* Wells 59 U.S. (18 How.) 307, 324 (1855) (characterizing the president's commutation of a sentence as an "act of mercy").

71. 274 U.S. 480 (1915).

72. *Id.* at 486. Justice Holmes stated:

valid pardon no longer required acceptance by the offender.[73] The Court based its opinion on logic instead of looking to common law principles.[74]

The importance of the *Biddle* Court's characterization of a pardon as an act for the public welfare and its repudiation of the pardon as an act of mercy is evident in light of *Burdick v. United States*,[75] a case decided in 1915, twelve years before *Biddle*. In *Burdick*, the Court held that acceptance of a pardon was necessary and that a witness in a grand jury proceeding could reject an offer of clemency and assert his privilege against self-incrimination.[76] The Court recognized that the stigma of a pardon might be more burdensome than the consequences of a conviction.[77] Therefore, a full pardon could not be forced upon a journalist whom the government wanted to have testify before a federal grand jury.[78]

Twelve years later in *Biddle*, however, the Court determined that a pardon is an act for the public welfare, not an act of mercy.[79] Therefore, the Court ruled that presidential commutation of a death sentence to life imprisonment was valid without an inmate's consent.[80] In the interest of the "public welfare," the president could impose clemency regardless of whether the offender chose to accept the pardon.

Subsequent Supreme Court decisions further defined the nature and effect of the president's pardoning powers. For example, in *Ex parte Gar-*

> A pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.

Id.

73. Although *Biddle* does not explicitly answer the question whether acceptance is necessary for an unconditional pardon to be valid, one commentator noted:

> Whether these words sound the death knell of the acceptance doctrine is perhaps doubtful. They seem clearly to indicate that by substantiating a commutation order for a deed of pardon, a president can always have his way in such matters, provided the substituted penalty is authorized by law and does not in common understanding exceed the original penalty.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 39, 88th Cong., 1st Sess. 457 (1964).

74. For example, concerning the validity of a pardon, Justice Holmes wrote, "[t]he only question is whether the substituted punishment was authorized by law — here, whether the change is within the scope of the words of the Constitution, Article II, section 2." *Biddle*, 274 U.S. at 487.

75. 236 U.S. 79 (1915).

76. *Id.* at 94.

77. *Id.* at 90-91.

78. *Id.* at 93-94.

79. *Biddle*, 274 U.S. at 486.

80. *Id.* at 487. Justice Holmes wrote that the prisoner "on no sound principle ought to have any voice in what the law should do for the welfare of the whole." *Id.*

land[81] the Court recognized that coordinate branches of government cannot limit the executive's clemency power. The Court ruled:

> [t]he [clemency] power thus conferred is unlimited, with the exception [of impeachment cases] . . . . It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed cannot be fettered by any legislative restrictions.[82]

In sum, early Supreme Court cases construed the president's clemency powers more broadly than those possessed by the English Crown. In spite of the Court's propensity to expansively interpret this power, the Court also imposed certain narrow restrictions upon the presidential pardoning powers.

4. Limitations Imposed Upon the President's Pardoning Powers

Despite the Court's expansive interpretation of the presidential pardoning power, certain narrow limitations on this power also have been judicially recognized. In *Knote v. United States*,[83] the Court noted that a pardon cannot compensate for personal injuries suffered by imprisonment, nor can a pardon affect any rights vested in third parties resulting from a judgment against the offender.[84] Similarly, the *Knote* Court held that the presidential pardoning power "cannot touch moneys in the Treasury of the United States, except [as] expressly authorized by act of Congress."[85] Otherwise, the appropriations power of Congress outlined in Article I of the Constitution would be violated.[86]

Although limited in a subsequent decision,[87] in *Burdick v. United States*[88] the Court ruled that the city editor of a newspaper could refuse acceptance of a presidential pardon which was extended to induce him into answering federal grand jury questions.[89] In so holding, the Court observed that the clemency power and the offender's Fifth Amendment rights "[b]oth have sanction in the Constitution, and it should, therefore,

81. 71 U.S. (4 Wall.) 333 (1866).
82. *Id.* at 380.
83. 95 U.S. 149 (1877).
84. *Id.* at 153-55.
85. *Id.* at 154.
86. *Id.* at 154-55.
87. Biddle v. Perovich, 274 U.S. 480, 488 (1927) (holding that the reasoning of *Burdick* "is not to be extended to the present case").
88. 236 U.S. 79 (1915).
89. *Id.* at 93-95. The *Burdick* Court indicated in dictum that "[a pardon] . . . carries an imputation of guilt; acceptance a confession of it." *Id.* at 94.

be the anxiety of the law to preserve both, — to leave to each its proper place."[90]

In *Schick v. Reed*,[91] the majority opinion emphasized that only the limits found in the Constitution itself can be imposed upon the presidential pardoning power.[92] To require the president to substitute a punishment already permitted by law would place unauthorized congressional restrictions on the pardoning power.[93] The *Schick* Court also recognized that the president is free to attach any condition on the pardon "which does not otherwise offend the Constitution."[94]

In *Hoffa v. Saxbe*,[95] the United States District Court for the District of Columbia upheld the validity of a commutation extended by President Richard M. Nixon to labor union leader Jimmy Hoffa on the condition "that the said James R. Hoffa not engage in direct or indirect management of any labor organization prior to March 6, 1980 . . . ."[96] Although the court emphasized the executive's need for flexibility in the exercise of his pardoning powers,[97] the court did limit the president's authority to attach conditions. The opinion explained that the "framework of our constitutional system" establishes "limits beyond which the President may not go in imposing and subsequently enforcing . . . conditions" on pardons.[98] Thus, any condition attached to a pardon must "directly relate to the public interest" and "not unreasonably infringe on the [offender's] constitutional freedoms."[99]

Decisions such as *Knote*, *Burdick*, *Schick*, and *Hoffa* illustrate that the federal judiciary did impose some limitations upon the exercise of presidential clemency powers. Despite the specific limitations found in each of these decisions, however, the overall impact of the Court's holdings expanded the presidential pardoning powers beyond those granted by the common law. Consequently, the president enjoys a power so broad and unchecked that it surpasses even that of a sovereign.

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90. *Id.* at 93-94.

91. 419 U.S. 256 (1974).

92. *Id.* at 267.

93. *Id.* at 266-67.

94. *Id.* at 266.

95. 378 F. Supp. 1221 (D.D.C. 1974).

96. *Id.* at 1224 (footnote omitted).

97. *Id.* at 1226. The court held that the King's authority to grant clemency had been sufficiently broad to encompass conditions not previously authorized by Parliament. *Id.* at 1229.

98. *Id.* at 1234-35.

99. *Id.* at 1236. The court found that conditions of clemency could not be "unlawful, unreasonable, immoral, or impossible of performance." *Id.* at 1236-37 (footnote omitted).

III. Checks on the President's Clemency Power

Although the president's pardoning powers are virtually unrestricted, the legislature and judiciary can sufficiently influence this executive prerogative to ensure the accountability of the president.[100] In addition to possessing concurrent powers of clemency, Congress also could amend the Constitution to restrict the president's authority to extend pardons. Furthermore, the judiciary may strike down pardons which contain unconstitutional conditions. Acting in concert, these two branches of government can help ensure the accountability of the president when he extends clemency to government officials.[101]

A. *Legislative Branch*

Supreme Court decisions suggest that the president's pardoning power is not subject to congressional restrictions.[102] In *Ex Parte Garland*,[103] the Court held that the "[pardon] power of the President is not subject to legislative control."[104] Years later, in *Schick v. Reed*,[105] the Court referred to the pardon power as "flow[ing] from the Constitution alone, not from any legislative enactments," and observed that the power "cannot be modified, abridged, or diminished by the Congress."[106]

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100. It is not suggested that the legislative and judicial branches can effectively override the president's pardoning powers in our current system of government. As Duker notes, the president's pardoning power "cannot be checked by the other branches of government." Duker, *supra* note 6, at 475. However, the legislative and judicial branches can affect the exercise of federal clemency powers to a degree.

101. As was illustrated by the events following President Bush's pardons in the Iran-Contra scandal, perhaps the sole fashion in which the other branches of government realistically can help ensure accountability from the executive is by expressing their reactions to the pardons in the media. Although congressional leaders expressed outrage and disappointment in response to the pardons, this did little to deter Bush, who as a lame duck president was unaccountable to the electorate. *See supra* note 12.

102. *See* Duker, *supra* note 6, at 513-18. After the Civil War, Congress attempted to restrict the president's clemency power. In 1867, Congress passed a measure which prevented the president from restoring confiscated property to people who had participated in the rebellion. *Id.* at 513-15. Two years later, the Senate Judiciary Committee passed a bill declaring President Andrew Johnson's "Christmas Proclamation of 1868" which pardoned "all persons guilty of treason and acts of hostility," unconstitutional. *Id.* at 517 (citing Cong. Globe, 40th Cong., 3d Sess. 1281 (1869)).

103. 71 U.S. (4 Wall.) 333 (1866).

104. *Id.* at 380. In *Ex Parte* Grossman, 267 U.S. 87 (1925), Chief Justice Taft, writing about the nature of the executive pardoning power, maintained that "whoever is to make [the pardoning power] useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it." *Id.* at 121. The "full discretion" to which Taft refers implies that the president's pardoning power is not subject to control by any other entity, even Congress.

105. 419 U.S. 256 (1974).

106. *Id.* at 266. Along similar lines, in United States v. Klein, 80 U.S. 128 (1871), the Court underscored the president's prerogative in the exercise of the pardon power:

Although Congress may not restrict the president's use of the pardoning power, this prerogative is vested concurrently in the Congress.[107] Thus, Congress could utilize its clemency powers to supplement existing executive clemency practices and to grant pardons to deserving applicants[108] if the president declined to exercise his clemency powers.[109]

In addition to enjoying concurrent clemency powers with the president, Congress may initiate the constitutional amendment process to restrict the president's authority to pardon executive branch personnel.[110] However, the amendment process is slow, arduous and easily thwarted by political interests within a minority of states.[111] As a result of difficulties imposed by the Constitution and because pardoning controversies arise infrequently, it is doubtful that a constitutional amendment limiting the executive clemency powers could generate sufficient political momentum to succeed.

> [i]t is the intention of the Constitution that each of the great co-ordinate departments of government — the Legislative, the Executive, and the Judiciary — shall be, in its sphere, independent of the others. *To the executive alone is intrusted the power of pardon; and it is granted without limit.*

Id. at 147 (emphasis added).

107. Brown v. Walker, 161 U.S. 591, 601 (1896). In *Brown*, the Court observed that, although the Constitution vests the president with pardoning power, "this power has never been held to take from Congress the power to pass acts of general amnesty." *Id. See generally* The Laura, 114 U.S. 411 (1885) (holding that the Secretary of the Treasury has the power to remit penalties); *Ex parte* United States, 242 U.S. 27 (1916) (holding that the judiciary has the power to pardon a sentence).

108. *See* Kobil, *supra* note 17, at 615 (noting that "[p]ossible problems could result from such a system, including questions as to what should happen when the two clemency procedures reach conflicting results in the same case"). *Id.* at 615 n.212.

109. Commentators have noted that President Reagan's refusal to extend pardons to Oliver North and John Poindexter may have resulted from the realization that granting clemency would appear to be an attempt to hide the coverup of the scandal. Thus, in similar situations, Congress has the option of extending clemency. *See, e.g.*, Garry Wills, *Bush Granting Pardons is Simply Unpardonable*, HOUS. CHRON., Dec. 28, 1992, at A13.

110. Subsequent to the pardoning of President Richard M. Nixon, Senator Walter Mondale of Minnesota proposed a constitutional amendment to allow congressional veto of presidential pardons by a two-thirds vote of each House. The proposed amendment provided that, "[n]o pardon granted an individual by the President under section 2 of Article II shall be effective if Congress by resolution, two-thirds of the members of each House concurring therein, disapproves the granting of the pardon within 180 days of its issuance." However, this proposal never received full consideration. Duker, *supra* note 6, at 537 (quoting S.J. RES. 240, 93d Cong., 2d Sess. (1974)). Duker applauded this proposal as "the optimum solution." *Id.*

111. One commentator observed:

> [The Framers] contrived an elaborate and difficult process for amending the Constitution, requiring a proposal by two-thirds of both the Senate and the House, and ratification by three-fourths of the state legislatures. (Such strictures operate with anti-majoritarian effect to this day. Thus, although national polls show a substantial majority of Americans support the Equal Rights Amendment, the proposal failed to make its way through the constitutional labyrinth.)

MICHAEL PARENTI, DEMOCRACY FOR THE FEW 61 (5th ed. 1988).

B. *Judicial Branch*

Although the judiciary possesses the ability to restrict the president's pardoning power through its authority to interpret the Constitution,[112] historically, the federal courts have been reluctant to limit executive clemency powers.[113] This deferential approach is due to the tension between the premise that the executive's authority to grant clemency should be unfettered[114] and the judiciary's responsibility to review the constitutionality of executive actions.[115]

The monumental decision of *Ex parte Grossman*[116] effectively enabled the president to shield subordinate executive branch personnel from both judicial inquiry and congressional investigation.[117] On behalf of the trial court, special assistants to the Attorney General argued that if the president were allowed to pardon offenders for contempt of court, the very existence of the judiciary would be undermined and the president himself would be the source of judicial authority.[118] This argument was rejected by the Court which held that the power to pardon for contempt of court is inherent in the executive pardoning power.[119] As a result, the president now clearly possesses authority to frustrate the power of a court to protect itself, a power "essential to the operation of the judiciary."[120] The *Grossman* Court's expansive interpretation of the executive clemency powers not only empowered the president to invade the provinces of coordinate branches of government, but also prevented the judiciary from regulating these powers.

Although *Grossman* and other Supreme Court decisions grant the president broad clemency powers, the Court also has recognized specific limitations on the president's use of the pardoning powers.[121] The province of

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112. Powell v. McCormack, 395 U.S. 486, 521 (1969) (reaffirming the responsibility of the Court to determine whether the action of a coordinate branch of government exceeds the authority vested in that branch by the Constitution).

113. *See supra* note 66 and accompanying text.

114. Schick v. Reed, 419 U.S. 256, 263 n.6 (1974). The draftsmen of the Constitution stated that the pardoning power should not be "fettered or embarrassed." *Id.* (quoting THE FEDERALIST No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

115. Kobil, *supra* note 17, at 597. Kobil states, "[a] more difficult issue . . . concerns the authority of the judiciary to limit the president's clemency power, an issue which pits the notion that the presidential clemency power should be unfettered against the principle that the judiciary is responsible for reviewing the constitutionality of executive actions." *Id.*

116. 267 U.S. 87 (1925).

117. *See* Duker, *supra* note 6, at 526-30. In his historical analysis of the federal pardoning power, Duker notes the *Grossman* decision permits the president to pardon contempts of court as well as contempts of Congress. *Id.* at 528-29.

118. *Grossman*, 267 U.S. at 98.

119. *Id.* at 121.

120. Duker, *supra* note 6, at 528.

121. *See supra* notes 83-99 and accompanying text.

the judiciary is to determine the law. Therefore, it is incumbent upon the courts to review the president's exercise of clemency power in order to ensure that it is in compliance with the Constitution. For example, in light of the Court's holdings that the judiciary can refuse to give effect to a presidential pardon that attaches an unconstitutional condition[122] or that affects the vested rights of third parties,[123] the Court could invalidate pardons that expressly violate the Constitution or conflict with public policy.

IV. PRESIDENT BUSH'S USE OF THE PARDONING POWER: AN ACT OF MERCY OR AN UNPARDONABLE PARDON OF HIMSELF?

President Bush's controversial decision to pardon Caspar Weinberger and five other former Reagan Administration officials has polarized both legal and political communities.[124] Defenders of President Bush applaud the President's courage and fortitude in deciding to extend the pardons. Bush and his supporters believe that Special Prosecutor Lawrence Walsh was overreaching in indicting the ailing seventy-five-year-old Weinberger. However, Walsh has argued that the pardons do nothing more than complete the Iran-Contra cover up. Moreover, Walsh has asserted that the pardons were extended by Bush to conceal his own misconduct in the Iran-Contra scandal.[125]

A. *The Iran-Contra Affair*

The Iran-Contra scandal erupted with the November 1986 disclosure[126] that the Reagan administration, in violation of the President's stated policies,[127] secretly sold arms to Iran via Israel[128] in hopes of gaining the

122. Schick v. Reed, 419 U.S. 256, 266 (1974); *see also* Burdick v. United States, 236 U.S. 79 (1915) (holding that clemency could not be extended to deprive a witness of his Fifth Amendment rights).

123. Knote v. United States, 95 U.S. 149, 154 (1877).

124. *See supra* note 12.

125. A mere fifteen percent of those polled in a CNN-USA TODAY Gallup poll thought Bush pardoned Weinberger and the others to "protect people he felt acted honorably and patriotically from unfair prosecution." Fifty percent of the public thought Bush's real motive was "to protect himself from legal difficulties or embarrassment resulting from his own role in Iran-Contra." William Schneider, *Bush's Pardons Break All the Rules*, L.A. TIMES, Jan. 3, 1993, at M2.

126. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. No. 433, S. REP. No. 216, 100th Cong., 1st Sess. 9 (1987). [hereinafter COMMITTEE REPORT]. On November 3, 1986, a Beirut weekly, *Al-Shiraa*, reported that the United States secretly had sold weapons to Iran. William C. Banks, *While Congress Slept: The Iran-Contra Affair and Institutional Responsibility for Covert Operations*, 14 SYRACUSE J. INT'L L. & COM. 291, 291 (1988).

127. *See* N.Y. TIMES, July 1, 1985, at A10 (quoting President Reagan's statement on June 30, 1985, "[t]he United States gives terrorists no rewards and no guarantees. We make no concessions. We make no deals." *Id.*).

freedom of United States hostages held captive in Lebanon.[129] The Reagan administration procured these arms sales in violation of the Boland Amendments,[130] which were promulgated by Congress with the express purpose of halting the President's support to the Contras in Nicaragua.[131] The sales were accomplished by soliciting foreign countries and private donors to aid in the transfer of arms to Iran.[132] These covert funding operations continued until November 1986, when the Iran-Contra scandal surfaced.

Shortly after the scandal became public, the President and Attorney General initiated separate investigations into the allegations. The President appointed the Tower Commission[133] and the Attorney General ap-

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128. *Cf.* Tom Morganthau & Robert Parry, *Hot on the Iran Money Trail*, NEWSWEEK, May 4, 1987, at 24 (stating that various businessmen and officials profited as middlemen between the United States and Iran in the arms sales).

129. *See* Brian Duffy & Melissa Healy, *A Troubling Midsummer Mystery*, U.S. NEWS & WORLD REP., Aug. 10, 1987, at 14 (explaining that weapons sales profits were diverted to the Contras); Russell Watson & John Barry, *A Stunning Indictment*, NEWSWEEK, Mar. 9, 1987, at 26 (explaining that the Iran initiative evolved into an arms for hostages deal).

130. *See The Five Amendments*, WALL ST. J., June 4, 1987, at 30. In 1982, Congress enacted legislation known as the Boland Amendments, which were designed to control the level of funding available to the Contras fighting in Nicaragua. *Id.* The third and fourth amendments, which were in effect during the period in question, banned all funds available to specified government agencies and all other intelligence entities from being used either directly or indirectly, to support the Contras. *Id.* (Boland Amendment 3 was in effect from Oct. 3, 1984 to Sept. 30, 1985. Boland Amendment 4 was in effect from Aug. 8, 1985 to March 31, 1986). *See generally Who Knew What*, TIME, July 20, 1987, at 24 (stating that the diversion and solicitation of funds may have been a violation of Boland Amendment as well as a conspiracy to defraud government). Boland Amendment 3 provided in pertinent part that during fiscal year 1985 no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities "may be obligated or expended for the purpose of which would have the effect of supporting directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual." Intelligence Authorization Act of 1985, Pub. L. No. 98-618, § 801, 98 Stat. 3298, 3304 (1984).

131. COMMITTEE REPORT, *supra* note 126, at 31.

132. *See It Ain't Over Till It's Over*, TIME, July 27, 1987, at 19 (reporting that Oliver North, the central figure in the Iran weapons sales, spent nearly three years coordinating the operation of arms purchases and Contra funding); George I. Church, *Ollie's Turn*, TIME, July 13, 1987, at 22-23 (noting that North worked closely with former National Security Advisor Robert McFarlane and CIA Director William Casey). *See generally Who Knew What*, TIME, July 20, 1987, at 24 (reporting that raising private and foreign funds for the Contras and using Iran weapons sales profits to support the Contras were activities included in the covert operations).

133. On November 26, 1986, President Reagan named former Texas Senator John G. Tower, former National Security Advisor Brent Skowcroft, and former Secretary of State Edmund S. Muskie as the special panel to investigate the National Security Council. COUNCIL ON FOREIGN RELATIONS, INC., AMERICA AND THE WORLD 653 (1986) [hereinafter AMERICA AND THE WORLD]. The results of the Tower Commission's investigation are contained in JOHN TOWER, EDMOND MUSKIE, & BRENT SKOWCROFT, REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD (Feb. 26, 1987) [hereinafter TOWER REPORT]. The Tower Report may have

pointed a special prosecutor to investigate possible criminal conduct by high-ranking members of the Reagan administration.[134] The special prosecutor, Iran-Contra independent counsel Lawrence Walsh,[135] brought fourteen indictments and obtained eleven convictions[136] during a thirty-five million dollar six-year investigation into the involvement of the CIA and the White House.[137]

On December 24, 1992, six years after the commencement of the independent counsel investigations,[138] President Bush extended pardons to former Secretary of Defense Caspar Weinberger and to five other figures involved in the Iran-Contra scandal.[139]

B. *President Bush's Rationale for Granting the Pardons*

In granting clemency to six former Reagan administration officials, President Bush offered several justifications for the pardons. First, Bush

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understated President Reagan's personal responsibility for the scandal. The Tower Report substantially contradicted the White House's story that Lt. Col. Oliver North ran this operation without the knowledge or authorization of his superiors. *See id.*, Appendices B, C, D; *see also* Banks, *supra* note 127, at 292.

134. Such an appointment is authorized by the Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601(a), 92 Stat. 1867 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1988). Lawrence Walsh was appointed by the Attorney General as independent counsel to investigate and, if necessary, prosecute those officials who were involved in the Iran-Contra Affair. *See* Morrison v. Olson, 487 U.S. 654 (1987) (holding that the independent counsel law is valid because it limited the roles of Congress and the judiciary in the functioning of the independent counsel, in addition to maintaining adequate executive branch authority over the prosecutorial function).

135. Walsh, former president of the American Bar Association and former Manhattan federal judge, was appointed counsel in charge of the Iran-Contra investigation on December 19, 1986. AMERICA AND THE WORLD, *supra* note 133, at 653.

136. Robert L. Jackson and Ronald J. Ostrow, *Bush Pardons Weinberger, 5 Others in Iran-Contra*, L.A. TIMES, Dec. 25, 1992, at A1. Caspar Weinberger, former Secretary of Defense and Duane R. "Dewey" Clarridge, former CIA agent and former head of CIA covert operations in Latin America, received pardons while awaiting trial. Clair E. George, former CIA official, Robert C. McFarlane, former National Security Advisor, Elliot Abrams, former Assistant Secretary of State, and Alan D. Fiers, Jr., head of the CIA's Central American Task Force, all were found guilty and subsequently pardoned. Carl R. "Spitz" Channell, a fund raiser for conservative causes, Richard R. Miller, a conservative publicist, Albert A. Hakim, the financial organizer of the scheme, Richard V. Secord, a retired Air Force general, and Thomas G. Clines, a partner of Hakim and Secord, were found guilty but were not pardoned. John M. Poindexter, former National Security Advisor, Joseph M. Fernandez, former CIA station chief in Costa Rica, and Oliver L. North, a central figure in the scheme, all had their cases dismissed. Evan Thomas, *Pardon Me*, NEWSWEEK, Jan. 4, 1993, at 14.

137. Bob Cohn & Ann McDaniel, *Anatomy of a Pardon: Why Weinberger Walked*, NEWSWEEK, Jan. 11, 1993, at 22.

138. *See* AMERICA AND THE WORLD, *supra* note 133, at 653. Lawrence E. Walsh was appointed independent counsel in charge of the Iran arms sales and diversion investigation on December 19, 1986. *Id.*

139. President Bush pardoned Caspar Weinberger, Robert McFarlane, Elliott Abrams, Duane Clarridge, Alan Fiers, and Clair George. *See supra* note 136 and accompanying text.

pardoned Weinberger on grounds of compassion. The President maintained that Weinberger and the others were driven by "honor, decency and fairness,"[140] noting that both Weinberger and his wife now suffer from "debilitating illness."[141]

Second, Bush justified the pardon on grounds of prior service, maintaining that he was "pardoning [Weinberger] not just out of compassion or to spare a 75-year-old patriot the torment of lengthy and costly legal proceedings, but to make it possible for him to receive the honor he deserves for his extraordinary service to our country."[142] Moreover, Bush described Weinberger as "a true American patriot" who had served his country "with great distinction."[143]

Third, Bush employed a "politics argument" to explain the pardons. The President claimed that the defendants were being required to pay criminal penalties for "policy differences"[144] within the Reagan administration and that such policy differences should be contested in the "political arena."[145]

Fourth, President Bush pointed out that "[the former Reagan administration officials] did not profit or seek to profit from their conduct."[146] Bush declined to pardon defendants whose conduct demonstrated any element of self-aggrandizement, such as Richard Secord or Albert Hakim.[147]

C. *Independent Counsel's Reaction to the Pardons*

Lawrence Walsh reacted to the announcement that President Bush had pardoned Weinberger and five other former Reagan administration offi-

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140. Fred Bruning, *The Time Bomb that Ticks for George Bush*, MACLEAN'S, Jan. 18, 1993, at 11.

141. *Bush Grants 6 Pardons in Iran-Contra; Angry Prosecutor Says He's Investigating the President*, THE HOUS. CHRON., Dec. 25, 1992, at A1.

142. *Id.*

143. *Id.*

144. Senator George Mitchell of Maine labeled the Bush pardons of Weinberger and the others a mistake. "It is not as the President stated today a matter of criminalizing policy differences. If members of the executive branch lie to the Congress, obstruct justice and otherwise break the law, how can policy differences be fairly and legally resolved in a democracy." David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails "Cover-Up,"* N.Y. TIMES, Dec. 25, 1992, at A1.

145. *Id.* President Bush stated that, "[t]hese differences should have been addressed in the political arena without the Damocles sword of criminality hanging over the heads of some of the combatants. The proper target is the President, not his subordinates; the proper forum is the voting booth, not the courtroom." *Id.*

146. Timothy J. McNulty, *Democrats Rap Bush's Pardons in Iran-Contra*, CHI. TRI., Dec. 25, 1992, at N1.

147. Bruce Fein, *Bush's Finest Hour: The Courageous Pardons of Iran-Contra*, THE RECORDER, Jan. 7, 1993, at 7.

cials by proclaiming that "[t]he Iran-Contra coverup . . . has now been completed with the pardon of Caspar Weinberger."[148] Walsh claimed that by pardoning these officials, Bush was merely protecting himself.[149] Weinberger was scheduled for trial on January 5, 1993, and might have called the President as a witness. Walsh believed there was a "conspiracy among the highest-ranking Reagan administration officials to lie to Congress and the American people."[150] According to the attorney, the pardon "was part of a disturbing pattern of deception and obstruction that permeated the highest levels of the Reagan and Bush administrations."[151]

Walsh further asserted that "I think the pardon has a devastating effect on the development of further facets of the inquiry, such as we would have expected in the Weinberger trial."[152] Moreover, he added that the President is "the subject now of our investigation."[153]

D. *The Iran-Contra Pardons: Impetus to Reform Presidential Pardoning Powers*

An examination of the pardons extended by President Bush to the six former Reagan administration officials reveals the harm that can result from the exercise of unfettered presidential clemency power. Because President Bush extended the pardons as a lame duck president, he did not face the electorate.[154] The direct consequence of these pardons may be the suppression of vital information concerning the possible misconduct of President Bush and other top executive branch officials.

The pretrial pardons have effectively suppressed information that might have been revealed during the Weinberger trial. In turn, this information might have implicated both Presidents Bush and Reagan. Furthermore, the pardons insulated other executive officials from further investigation. Due to these pardons, the public has been left with the incomplete conclusions reached by the Tower Commission[155] and congres-

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148. Jonathan Schell, *There's No Pardon in the People's Court*, NEWSDAY, (Nassau) Dec. 31, 1992, at 95.

149. Patrick Brogan, *Bush's Iran-Contra Pardons Stymie Prosecutor; Walsh Accuses President of Protecting Himself but Can Only Write His Report*, THE GAZETTE, (Montreal) Dec. 30, 1992, at A8.

150. *Id.*

151. *Id.*

152. Patrick Cockburn, *Iran-Contra Inquiry Targets President*, THE INDEPENDENT, Dec. 27, 1992, at 1.

153. Robert L. Jackson and Ronald J. Ostrow, *Bush Pardons Weinberger, 5 Others in Iran-Contra; Act Called Cover-Up*, THE L.A. TIMES, Dec. 25, 1992, at A1.

154. *Silent Pardoner*, THE NEW REPUBLIC, Jan. 18, 1993, at 8.

155. Concerning Vice President Bush, the Tower Commission report stated:

> There is no evidence that the Vice President was aware of the diversion. The Vice President attended several meetings on the Iran initiative, but none of the participants could recall his views.

sional investigations.[156] Although the pardons have generated intense short-term scrutiny from the media and Congress, the plethora of policy issues competing for the public's attention eventually will cause the controversy to recede into the background.

Since there are limited mechanisms for maintaining accountability and control over the executive branch,[157] the president should not be permitted to unilaterally preempt the discovery of damaging information by pardoning executive staff members. The broad scope of the pardon power creates grave risks that the democratic process can be subverted through the discretionary and potentially self-serving actions of the president.

The pardons of Weinberger and the other Reagan administration officials illustrate two harms in permitting unfettered presidential discretion. First, by depriving the public of information, the president eliminates a prerequisite for the functioning of an accountable democratic government. The use of the presidential pardon deprives the public and other branches of government of the opportunity to hold their government accountable.

Second, discretionary use of the pardon prevents reform of the governing system. One strength of the American democratic system of government is its flexibility. However, presidential pardons prevent identification of problems, thus hindering the improvement of government policies and structures.

V. An Attempt to Eliminate Abuse of the Presidential Pardoning Powers: Recommended Procedural Mechanisms

As illustrated by George Bush's Christmas Eve pardons and his resulting escape from accountability for possible misconduct in the Iran-Contra scandal, authority already vested in Congress[158] and the federal judici-

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> The Vice President said he did not know of the Contra resupply operation. His National Security Advisor, Donald Gregg, was told in early August 1986 by a former colleague that North was running the Contra resupply operation, and that ex-associates of Edwin Wilson — a well known ex-CIA official convicted of selling arms to Libya and plotting the murder of his prosecutors — were involved in the operation. Gregg testified that he did not consider these facts worthy of the Vice President's attention and did not report them to him, even after the Hasenfus airplane was shot down and the Administration had denied any connection with it.

Committee Report, *supra* note 126, at 21.

156. Michigan Democrat Senator Carl Levin said that "the right place to present this material is in court. That's where it should have been presented — not in the media, not in a congressional hearing, ideally, but in court." Walter Pincus, *Senate Panel May Question Weinberger; Lawbreaker Wants to Examine Iran-Contra Case, Pardons*, The Hous. Chron., Dec. 28, 1992, at A1.

157. These mechanisms are found in the legislative and judicial branches. *See supra* notes 100-23 and accompanying text.

158. *See supra* notes 102-11 and accompanying text.

ary[159] has not adequately checked the exercise of executive clemency power. Therefore, other mechanisms must be implemented to ensure presidential accountability. The adoption of the following two mechanisms would restrict the executive clemency powers and result in increased presidential accountability: first, withholding pardons until after trial, conviction, and sentencing;[160] and second, granting pardons only for specified offenses.

A. *Pardons Only After Trial, Sentencing, and Conviction*

The first option is to withhold pardons until after a criminal trial, conviction, and sentencing.[161] The idea of withholding a pardon until after conviction is not new. Luther Martin, a Maryland delegate at the federal Constitutional Convention of 1787,[162] proposed such an idea at the Convention, but withdrew the suggestion after an objection was made.[163]

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159. *See supra* notes 112-23 and accompanying text.

160. However, some language found in Supreme Court cases approves the practice of granting preconviction pardons. "The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial, or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress." *Ex parte* Grossman, 267 U.S. 87, 120 (1925).

161. Limiting the exercise of the pardoning power until after conviction, trial, and sentencing would not result in a dramatic change in general pardoning practices. In fact, *The Congressional Quarterly* reported that, "of the 2,314 pardons granted by Presidents Kennedy, Johnson, and Nixon, it appears that only three preceded conviction." 32 THE CONGRESSIONAL QUARTERLY WEEKLY REPORT 2458 (no. 37, September 14, 1974). Although the impact of restricting the issuance of pardoning power to postconviction would be minimal in ordinary pardons, its effect on pardons for executive branch personnel or pardons in which the president has a self-interest would be great. *See infra* notes 164-65 and accompanying text.

162. S. Doc. No. 34, 100th Cong., 2d Sess., 1431 (1989). Luther Martin, former Attorney General of Maryland, was elected to the Continental Congress in 1774 but did not attend. Martin represented Maryland as a member of the Federal Constitutional Convention in 1787. *Id.*

163. U.S. PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT 350-51 (1975). According to a journal kept by James Madison at the federal Convention, the proposal and its withdrawal by Martin occurred as follows:

> Two days later, on August 27, 1787, a suggestion was made that the President should have the authority to grant a pardon only after the offender had been convicted. That suggestion was quickly withdrawn, however, after an objection was made to it:

Monday, August 27th, 1787

In Convention, . . . Article 10, Section 2, being resumed, . . .

Mr. L. Martin moved to insert the words, "after conviction," after the words, "reprieves and pardons."

Mr. Wilson objected, that pardon before conviction might be necessary, in order to obtain the testimony of accomplices. He stated the case of forgeries, in which this might particularly happen.

Mr. L. Martin withdrew his motion.

If the post-trial pardoning recommendation had been implemented before the Bush pardons of Weinberger and the other Iran-Contra defendants, it would have enabled the prosecution and defense to investigate and publicize any information relevant to allegations of executive misconduct. Because Bush pardoned Weinberger and the other Iran-Contra defendants before trial, important information concerning President Bush's possible misconduct in the Iran-Contra scandal will never surface in a court of law. The operation of the criminal judicial process would place the courts in a stronger position to order the president and his subordinates to reveal relevant information[164] and thus increase executive accountability.

The president might still attempt to subvert the process and avoid revealing damaging information by ordering a subordinate to plead guilty before receiving a pardon. However, certain factors would make even this situation more desirable than the current opportunities for preemptive pardons. First, the defendant might resist pleading guilty in order to avoid the public stigma that results from admitting criminal misconduct.[165] In addition, although the acceptance of a pardon arguably implies an admission of guilt, mere confession of culpability will not adequately advance executive accountability. Judges, before accepting a guilty plea, must ensure that the defendant understands and acknowledges the criminal acts committed. Therefore, before accepting pleas, the judge asks questions of the defendant in open court to elicit information concerning the crimes at issue and guard against collusion. If there are doubts about the veracity of the defendant's testimony, the judge need not accept the plea of guilty, which would prevent the application of the pardon and force the defendant either to be more forthcoming in responding to questions or else face a complete trial. The end result provides the public with greater access to information about executive branch misconduct. The president's ability to hide wrongdoing also would be greatly reduced.

B. *Pardons Only for Specified Crimes*

A second method of rendering the president more accountable for his exercise of the pardoning power would be the implementation of a re-

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Id. (citing DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, at 621 (Tansill ed., 1927).

164. In United States v. Nixon, 418 U.S. 683, 707 (1974), the Supreme Court observed that "the legitimate needs of the judicial process may outweigh [assertions of] Presidential privilege." *Id.*

165. *See supra* notes 68-70 and accompanying text. One commentator has noted that "[c]ontrary to popular belief, a pardon does not obliterate the record or stigma of a conviction, nor does it establish the innocence of the person. It merely forgives the offense." Christopher C. Joyner, *Rethinking the President's Power of Executive Pardon*, 43 FED. PROBATION 16, 20 (1979).

quirement that the president specify charges when granting clemency. The primary benefit of such a requirement would be that the specific misdeeds cited in the pardon would be subject to the close investigative scrutiny of the media and Congress. This is especially important in view of the inability to examine the specified misdeeds through the criminal justice process. Moreover, unspecified charges would remain fair targets for prosecution. Thus, the president would risk subsequent damaging revelations by an attempt to hide crimes with statements omitting specific references within the pardon proclamation. Although the public would not necessarily receive complete or accurate information, executive accountability would be enhanced because the president would be required to describe the misconduct specifically when issuing a pardon to executive branch personnel.

VI. Conclusion

The present construction of presidential clemency powers presents a significant risk that a president may employ the power to conceal criminal activity within the executive branch. Indeed, President Bush has been able to escape accountability for his actions in the Iran-Contra scandal because of the pardoning power. Current accountability mechanisms in the federal system have not sufficiently monitored the president's use of this important power. Therefore, formal congressional or judicial limitations upon this clemency power would benefit the governing system by facilitating public access to information concerning possible misdeeds by the president and executive branch subordinates. Although any attempt to limit presidential power will generate considerable political opposition, the Iran-Contra scandal has illustrated the serious threat of a presidential pardon which could thwart full disclosure of wrongdoing within the executive branch. Lest the lessons of the Reagan and Bush administrations repeat themselves in another presidential administration, perhaps with even more damaging effects, the clemency powers of the president should be limited in regard to executive branch officials in order to ensure executive accountability to the electorate.

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