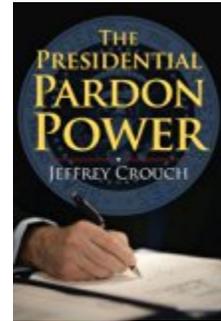


Jeffrey Crouch. *The Presidential Pardon Power*. Lawrence: University Press of Kansas, 2009. viii + 208 pp. \$34.95 (cloth), ISBN 978-0-7006-1646-6.

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## The Presidential Pardon—Now a Dangerous Power?

When President George W. Bush commuted I. Lewis “Scooter” Libby’s prison sentence after his conviction in the Valerie Plame spy exposure scandal in 2007, many Americans complained that the president had abused his Article II, Section 2.1 constitutional power “to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” Earlier, Americans felt similar outrage when Bill Clinton granted clemency to Puerto Rican nationalists and fugitive financier Marc Rich, when George H. W. Bush pardoned Caspar Weinberger for his involvement in the Iran-Contra affair, and when Gerald Ford pardoned Richard Nixon for possible crimes in the Watergate scandal. In *The Presidential Pardon Power*, political scientist Jeffrey Crouch contends that Americans are rightfully concerned about these recent presidential decisions, because they signal misuse and sharp divergence from the original constitutional intent and historical practice of granting presidential clemency.

An up-to-date scholarly synthesis, Crouch’s book provides the fullest historical account and legal analysis of the presidential pardon power published in two decades. He begins by explaining that the clemency power began in ancient Babylonian, Greek, and Roman societies and became a favorite instrument of English kings, but stirred up controversy at the American constitutional convention of 1787 as to whether such a “kingly” power belonged in republican government. Only after some debate did the Framers decide to vest unlimited authority to grant clemency in the executive branch alone—

without senatorial consent, before or after criminal convictions, even for treason, though not for impeachment. Crouch acknowledges Anti-Federalist Luther Martin’s prescient warning in the ratification debate that presidents might abuse clemency authority to cover up treason in the executive branch, but he asserts that the pardoning power otherwise evoked little discussion. He consequently accepts Alexander Hamilton’s Federalist Nos. 69 and 74 as the definitive statement of the clemency clause’s original meaning: presidents need broad pardoning power to serve “humanity and good policy” (p. 18), and can be checked by impeachment if they misuse that authority.

Crouch usefully delineates the legal components of the clemency power. The phrase “reprieves and pardons,” he says, allows the president to select one of five gradations of clemency—full pardons, commutations of sentences, remissions of fines and forfeitures, reprieves or postponements of punishment, and amnesty or general pardons. Congress institutionalized the pardoning process in 1865 by creating the Office of Pardon Clerk (Pardon Attorney as of 1891), and federal courts clarified the character and scope of the president’s pardoning power over the years. Chief Justice John Marshall in *U.S. v. Wilson* (1833) affirmed that presidential pardons were “acts of grace” valid only upon recipients’ acceptance, but *Biddle v. Perovich* (1927) determined (without overruling *Wilson*) that that they mainly served the public welfare. Other decisions ruled that pardons could be given at any time after the commission of a crime, could be partial

or conditional in the benefits that they bestowed, but did not restore pardoned parties to status as “new men” expunged of criminal records. Several Civil War cases raised the possibility of concurrent congressional authority to grant or withhold clemency, but Crouch finds that courts consistently construed the power to pardon just as an executive function.

*The Presidential Pardon Power* maintains that the pardoning process operated mainly out of the public spotlight from the presidency of George Washington to Watergate. Most pardons involved unknown people, but Crouch observes that some concerned notables, from Whiskey and Fries rebels to Eugene Debs, Marcus Garvey, and Jimmy Hoffa. In most cases, Crouch explains, presidents followed George Washington’s practice of granting clemency as an “act of grace” or to serve the public welfare. Rarely did they deploy the clemency authority politically—as when Thomas Jefferson proffered it to secure testimony against alleged traitor Aaron Burr, or when Ulysses Grant refused to offer immunity for witnesses aligned against his personal secretary Orville Babcock in the Whiskey Ring scandal. Most of the time, Crouch says, presidents refrained from using the pardon power to disrupt executive branch investigations, whether Theodore Roosevelt in the Oregon Land Fraud case, Calvin Coolidge and Herbert Hoover in the Teapot Dome scandal, or Harry Truman in a tax-fixing offense at the Bureau of Internal Revenue.

Crouch only partially explores the political ramifications of Civil War-era pardons. He recognizes the constitutional tug-of-war between “pro-amnesty presidents” Abraham Lincoln and Andrew Johnson and the “anti-amnesty” Radical Republican Congress, the latter of which registered the most significant legislative challenge to the presidential pardon power in U.S. history (p. 40). He stops short, however, of discussing the clemency power’s entanglement in Civil War and Reconstruction policy. He might have observed, for instance, that Johnson’s thousands of pardons to ex-Confederate officials were not just gestures of leniency to restore domestic tranquility, but political acts that undermined a congressional land redistribution scheme, preserved white supremacy in the South, and courted a southern political following for Johnson’s potential 1868 reelection bid.[1] *The Presidential Pardon Power*, however, remains more focused on the narrow legalities of presidential misuse of and congressional encroachment on clemency authority, than on its role in larger political battles.

Crouch sees President Gerald Ford’s pardon of for-

mer president Richard Nixon as the crucial turning point in the presidential pardon power’s history. According to Crouch, twentieth-century immunity and parole statutes had likely diminished the need for presidential pardons in ordinary criminal cases, but Ford’s Nixon pardon set the stage for a new era of self-interested political clemency decisions. As for Ford himself, Crouch strongly sympathizes with his “very difficult circumstances” (p. 91) and concludes that his pardon of Nixon probably did not result from any deal, but rested properly on the public welfare theory of “heal[ing] the wounds throughout the United States” (p. 67). Nonetheless, Crouch argues that the timing of Ford’s Nixon pardon before any indictments was understandably very controversial, despite precedents like *Ex Parte Garland* (1862), and that Ford himself badly bungled the public explanation of his decision, a failure that contributed to his 1976 presidential election defeat.

*The Presidential Pardon Power*’s most original contention is that the 1978 post-Watergate Independent Counsel Act encouraged abuse of the clemency power. Passed in reaction to Richard Nixon’s infamous dismissal of a special prosecutor in the October 1973 “Saturday Night Massacre,” the counsel law attempted to create an independent process for investigating executive branch wrongdoing. In a chapter devoted wholly to the measure’s origins and impact, however, Crouch contends that the statute had the unexpected effect of giving presidents “political cover” to use the pardoning power “to exercise aides or supporters caught up in an investigation as victims worthy of presidential clemency” (p. 94). Presidents strategically pardoned executive branch officials to thwart independent counsel investigations on grounds that such prosecutions were politically motivated.

The result, Crouch maintains, was a series of reprehensible political pardons that bypassed normal procedures, mocked the traditional reasons for granting clemency, and usually came at the very end of presidential terms when chief executives were no longer accountable to the voters. His detailed account of the political maneuvering behind these acts of clemency is one of the most illuminating parts of the book. These pardons, he contends, served mainly to “protect [presidents’] personal interests” (p. 95). The pardon of defense secretary Caspar Weinberger, for example, relieved George H. W. Bush of the embarrassing possibility of having to testify in Weinberger’s trial about his own conduct in the Iran-Contra affair. Clinton’s grant of conditional clemency to convicted members of FALN, a Puerto Rican nationalist group, were likely intended to help his wife Hillary’s U.S.

senatorial bid and Vice President Al Gore's presidential race, while his last-minute pardon of Marc Rich likely aimed to reward the latter's ex-wife for a half-million-dollar contribution to the Clinton presidential library. George W. Bush's commutation of Scooter Libby's jail time protected a member of the president's inner circle.

Crouch convincingly maintains that these recent presidential pardons marked an ominous turn toward self-interested political use of the presidential clemency power, but whether he can attribute that shift mostly to the effects of the Independent Counsel Act is debatable. Arguably, the counsel statute did provide "political cover" for the two President Bushes to protect allies (and themselves) by pardoning accessories to the Iran-Contra and Valerie Plame episodes, but the statute seemingly had little to do with President Clinton's stunning batch of last-minute pardons. Here again, the book might look to additional historical circumstances that may have contributed to the recent explosion of political pardons. One was the ratification of the Twenty-Second Amendment in 1951, giving modern two-term presidents an automatic "lame duck" second term free from electoral repercussions, something that benefited Presidents Clinton and George W. Bush, as Crouch's account shows. Second was the unusually vindictive partisan political environment surrounding the Clinton presidency, not to mention the forty-second president's own proclivity for improvisational last-minute decision making.[2] Perhaps, both encouraged Clinton to act in an independent and self-interested fashion. Most important, finally, was the continued growth of the post-World War II "imperial presidency" that vastly expanded presidents' control over foreign policy, especially in covert operations. Isn't it notable that two of the most dubious recent grants of presidential clemency—George H. W. Bush's pardon of Weinberger in the Iran-Contra affair and George W. Bush's commutation of Libby's sentence in the Iraq War-related Plame expose—both involved notorious excesses in chief

executives' foreign policy conduct? [3]

The problem, then, might be bigger than Crouch lets on, and his proposed remedy too mild. He admits that vesting unlimited clemency power in a single executive alone, with only the impeachment power to check it, "may indeed reveal a weakness in the framers' design" of the checks-and-balances system. Yet, he contends that this "flaw" is not "fatal," and needs not to be addressed through the pursuit of a "better system" (i.e., through constitutional amendment), but can be corrected by more vigorous use of the constitutional mechanisms at hand—congressional hearings, congressional termination of funds for executive programs, or "in extreme cases," impeachment (pp. 52, 149). Readers might question how much of a deterrent that such proceedings would actually present in the waning days—or hours—of a lame-duck presidency. Perhaps, the greatest sanction may come from negative public opinion, but even that seems to have had little effect on the two Bushes and Clinton in their lame-duck situations. *The Presidential Pardon Power* grandly brings to light the danger of "last-minute clemency abuses" (p. 149), but it may leave readers still wondering whether there is a viable remedy for them within the existing political and constitutional system.

#### Notes

[1]. Michael Les Benedict, *The Impeachment Trial of Andrew Johnson*, (New York: W. W. Norton & Company, Inc., 1973), 40, 42; Eric Foner, *Reconstruction: America's Unfinished Revolution*, (New York: Harper & Row, 1988), 191.

[2]. Lewis Gould, *The Modern American Presidency*, (Lawrence: University Press of Kansas, 2003), 222, 226-227, 232.

[3]. Gould, *Modern American Presidency*, 202; Louis Fisher, *Presidential War Power*, 2nd ed. (Lawrence: University Press of Kansas, 2004), 237-239, 252-257, 261.

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