

PERSPECTIVE

CONTRAGATE AND THE INVALIDITY OF PARDONS FOR VIOLATIONS OF INTERNATIONAL LAW

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Recently it has been suggested by close advisers to President Reagan that John Poindexter, Oliver North, Robert McFarlane and others involved in illegalities stemming from the Contragate scandal should be pardoned.¹ The President, it has been reported, is not considering pardons at this time;² but it is possible that despite any moral impropriety and an abnegative judgment of history, he will attempt to pardon those involved in Contragate before he leaves office.

Since some of the alleged improprieties involve violations of international law,³ the question arises: would such pardons be legally permissible? More specifically, could a President lawfully pardon subordinates who were carrying out the plan of the pardoning President?⁴ Furthermore, could a President lawfully pardon or grant any sort of immunity with respect to criminally sanctionable violations of international law?

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1. See, e.g., *Reagan Makes Frequent Use of 'Sweeping' Power to Pardon*, Houston Post, Nov. 27, 1987, at 24A, col. 1.

As used herein, "Contragate" connotes the scandal which gave rise to protracted Congressional hearings during the summer of 1987. The somewhat complicated transactions involved the sale of arms to Iran in exchange for hostages, the profits from which were allegedly funneled to the "Contras," who were essentially the "rebels" fighting to overthrow the government of Nicaragua.

2. See, e.g., *Kirk Seeks Assurance From Reagan*, Houston Post, Nov. 30, 1987, at 4A, col. 1.

3. Relevant international law involves both treaty-based and customary law proscribing violations of neutrality. See, e.g., Paust, *The Link Between Human Rights and Terrorism and Its Implications Concerning the Law of State Responsibility*, 11 HASTINGS INT'L & COMP. L. REV. — (1987); Note, *The Iran-Contra Affair, the Neutrality Act, and the Statutory Definition of "At Peace,"* 27 VA. J. INT'L L. 343 (1987); C. Stone, "Original Intent" and Following Orders—A Framers of Constitution Set Issue Straight for Early-Day Ollie, L.A. Times, Jul. 22, 1987, pt. II, at 5. See also, Note, *Nonenforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution*, 95 HARV. L. REV. 1955 (1982).

4. It might be argued that such a shield for illegality set up by the very President involved would amount to an impermissible abuse of discretion that should not be legally operative and can be questioned by others who must also faithfully execute the law. Early in our history it was recognized that a pardon is "an act of grace, proceeding from the power entrusted with the execution of the laws. . . ." *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J., writing for the majority). Thus, it could not have been that a scheme to

The Constitution does not speak to pardons with respect to violations of international law. Under Article II, Section 2, clause 1 of the U.S. Constitution, the President's power "to grant Reprieves and Pardons" is expressly limited to "Offenses against the United States." Although references appear elsewhere in the Constitution to "Offenses against the Law of Nations"⁵ and to "all Treaties" being "the supreme Law of the Land,"⁶ the pardoning power is related to none of these. Additionally, the express limitation of the pardoning power to "Offenses against the United States" stands in sharp contrast to the broad duty of the President to "take Care that the Laws be faithfully executed,"⁷ especially in view of the fact that the word "Law" is expressed in several articles of the Constitution in connection with the "Law of Nations" and treaties.⁸ Thus, it is evident from the text of the Constitution that the

violate the law was thought to be protectable through a final breach of that trust. *See also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 193, n.10 (1978), and references cited therein. *But see* Founder and later Supreme Court Justice James Wilson's remarks in J. MADISON, *NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787* 646 (1893) ("If he be himself a party to the guilt he can be impeached and prosecuted.").

Also early in our history, James Kent recognized that the impeachment limitation was designed to check a President "from screening public officers, with whom he might possibly have formed a dangerous or corrupt coalition, or who might be his particular favorites and dependents." J. KENT, *I COMMENTARIES ON AMERICAN LAW* 284 (1826). On such a danger, *see also* L. Martin's remarks before the Maryland legislature on Nov. 29, 1787, in 3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 218 (1966) (the danger of a President securing "from punishment the creatures of his ambition, the associates and abettors of his treasonable practices, by granting them pardons" is a subversion of the Constitution and it is not remedied by the assumption that a President would not himself be involved in illegality). The same check should apply, then, if such public officers merely resign before impeachment.

Indeed, no power should be absolute so as to allow a breach of the trust in which it was delegated. The very essence of a scheme of law and justice which lies at the base of all our civil and political institutions would be compromised by blind deference to an absolute power to pardon. As Justice Paterson recognized in another context, to "render the execution of the laws dependent on" the President's "will and pleasure . . . is a doctrine that has not been set up, and will not meet with any supporters in our government." *United States v. Smith*, 27 F. Cas. 1192, 1229-30 (C.C.D.N.Y. 1806) (No. 16,342). *See also* James Madison's remarks in Virginia in 1788 on a limitation of another seemingly absolute power: "The exercise of the power must be consistent with the object of the delegation." *III THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 514 (J. Elliot ed. 1901). On other limitations of the King's power to pardon under English law, *see Ex parte Wells*, 59 U.S. (18 How.) 307, 312 (1856) (pardon regarding things "against the law of nature, or so far against the public good as to be indictable at common law" would be "void," including, presumably, offenses against the law of nations indictable at common law).

5. U.S. CONST., art. I, § 8, cl. 10.

6. *Id.*, art. VI, cl. 2.

7. *Id.*, art. II, § 3.

8. *See id.*, art. I, § 8, cl. 10; art. III, § 2, cl. 1; art. VI, cl. 2. On the interrelated and broad duty of the President to faithfully execute international law, *see, e.g.*, Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987); *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS CONST. L. Q. 719 (1982).

Importantly, the pardon power is not related to "Offenses against the Law of Nations," to "Offenses against Treaties," or to "Offenses against the Laws of the United States," but to "Offenses against the United States" as such.

President's power to pardon does not reach violations of international law and is limited to "Offenses against the United States."⁹

9. See also *United States v. Grossman*, 1 F.2d 941, 950 (N.D. Ill. 1924) recognizing:

There are no offenses against the United States, save those declared to be such by Congress. . . . The word "offense" in article 2, section 2, referring to the pardoning power of the President embraces only those offenses declared to be such by the solemn action of the legislative body.

Id.; 10 Op. Att'y Gen. 452, 453 (1863) (power is "limited to offenses, to crimes and misdemeanors, against the United States" and does not cover breach of blockade). *But see* the broad dictum in *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867) ("extends to every offence known to the law"). Such overly broad dictum, written more than seventy-eight years after the Constitution, is inconsistent with both the text of the Constitution and sound reason.

Clearly the President has no power to pardon offenses against the laws of other sovereign entities, foreign or domestic (including the states), just as a Governor has no power to pardon offenses against the United States. See, e.g., *Ex parte Commonwealth of Virginia*, 100 U.S. 313, 338 (1880) (Field, J., concurring); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 71-73 (1820) (Story, J., dissenting). Regarding the "state offence," the dissent in *Houston* argued: "it is not perceived how the right of the President to pardon the offence can be effectively exerted . . . the pardoning power of the State can alone purge away such an offence. The President has no authority to interfere in such a case." *Id.* Additional authority recognizing an absence of power to pardon offenses against other sovereign entities include: *United States v. Barnhart*, 22 F. 285, 292 (C.C.D. Ore. 1884); *In re Bocchario*, 49 F. Supp. 37, 38 (W.D.N.Y. 1943); E. CORWIN, J. PELTASON, UNDERSTANDING THE CONSTITUTION 78 (4th ed. 1967) ("extends only to offenses against the United States, not those against the laws of states"); E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 106 (1963) ("not State laws"); 7 Op. Att'y Gen. 760, 760-61 (1856) ("altogether beyond the reach of the President of the United States"). See also *Carlesi v. New York*, 233 U.S. 51 (1914); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 420, 430 (1847) (arguments of counsel); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161-62, 163 n.4 (1820), stating:

[B]y piracy at the common law, something was meant peculiar to that law, and not piracy by the civil law, or the law of nations . . . it is perfectly well settled, that piracy is no felony at common law . . . [English statute] does not . . . alter the nature of the offence in this respect; and, therefore, a pardon of all felonies generally, does not extend to it.

Id.

Similarly, the President's power does not extend to nonresident aliens who, "in the eye of the law," had been guilty of no offense against the United States. See *Young v. United States*, 97 U.S. 39, 66-68 (1878). The *Young* Court added: "if there is no offence against the laws of the United States, there can be no pardon by the President." *Id.* at 66. However, the court also recognized, albeit in dictum, that the alien "had committed no crime against the laws of the United States or the laws of nations and, consequently, he was not and could not be included in the pardon granted by the President." *Id.*

Thus, contrary to *Garland's* dictum, the President's power does not extend "to every offence known to the law." *Ex parte Garland*, 71 U.S. at 380 (1867). Moreover, *Garland*, as every previous case, did not address violations of international law.

Importantly also, the Neutrality Act, 18 U.S.C. § 960, (originally § 25) (1794), was enacted to implement the law of nations. See, e.g., *The Three Friends*, 166 U.S. 1, 51-53 (1897); *United States v. Arjona*, 120 U.S. 479, 488 (1887). The Act was enacted under Congressional power based in article I, Section 8, clause 10 of the U.S. Constitution. See also *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 156 (1795) (Paterson, J.) ("These acts were direct and daring violations of the principles of neutrality, and highly criminal by the law of nations"); 1 Op. Att'y Gen. 68, 69 (1797) ("The constitution gives to Congress, in express words, the power of passing a law for punishing a violation of territorial rights, it being an offence against the law of nations, and of a nature very serious. . . ."). Thus, the Neutrality Act addresses not a mere "Offense against the United States," "declared to be such by Congress." *Grossman*, 1 F.2d at 950. Rather, it addresses an offense against the law of nations sanctionable in part through an exercise of the power of Congress to "define and punish . . . Offenses against the Law of Nations." Art. I, § 8, cl. 10. On the nature of such offenses and the exercise by Congress of

Inapplicability of the pardoning power when international law is at stake makes sense. It is well recognized that no nation-state can lawfully grant any sort of immunity for violations of international law.¹⁰ More specifically, it has been recognized that a domestic pardon or grant of amnesty for war crimes is legally inoperative,¹¹ as is any domestic effort to "exonerate" war criminals.¹² Since no such power exists for any nation-state, it follows that no such power was intended for the President of the United States and that the text of the Constitution should be interpreted literally: to include the power to pardon only "Offenses against the United States."

Furthermore, the United States has a general obligation under international law to prosecute or extradite those reasonably accused of having committed criminally sanctionable violations of international law, or perhaps alternatively, to allow reparations to be made by the violators.¹³ It

such a power, *see also* *Ex Parte Quirin*, 317 U.S. 1, 27-30 (1942); 11 Op. Att'y Gen. 297, 299-300 (1865).

10. *See, e.g.*, *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (regarding "an offence against the universal law of society . . . no nation can rightfully permit its subjects to carry it on, or exempt them. . ."); Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE WEST. RES. J. INT'L L. 283, 284-85 (1986), and references cited therein; Paust, *Correspondence*, 71 AM. J. INT'L L. 505, 508, 509-11 (1977). Thus violations of international law are not merely offenses against a sovereign, and a sovereign cannot absolve them. *See also* Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 225-29 (1983) [hereinafter Paust, *Federal Jurisdiction*]; 9 Op. Att'y Gen. 356, 362-63 (1859) ("A sovereign who tramples upon the public law of the world cannot excuse himself. . ."). In this regard, it makes some sense that a treaty among relevant nations can grant a pardon. *See United States v. Ragsdale*, 27 F. Cas. 684, 686 (C.C.D. Ark. 1847) (No. 16,113) (treaty granting a pardon for murder).

Furthermore, there have been examples of treaties granting amnesty after a war. *See, e.g.*, Gross, *The Punishment of War Criminals*, 11 NETHERLANDS INT'L L. REV. 356 (1955). Yet, a bilateral treaty granting a pardon or amnesty for war crimes or acts of genocide should be no more valid than a bilateral treaty agreeing that signators can commit war crimes or acts of genocide which are offenses not against a single nation-state but against humankind. The same follows at least with respect to all criminally sanctionable violations of customary international law (*obligatio erga omnes*). *See also* Case Concerning the Barcelona Traction Light and Power Co. (Belgium v. Spain), [1970] I.C.J. 4, paras. 33-34; Paust, *Federal Jurisdiction*, 23 VA. J. INT'L L. at 225.

11. *See, e.g.*, Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 121 (1972) [hereinafter Paust, *My Lai and Vietnam*], citing Article 11.5 of Allied Control Council Law No. 10 (Jan. 31, 1946), in 15 TRIALS OF THE WAR CRIMINALS 25 (1949).

12. *See* Paust, *My Lai and Vietnam*, *supra* note 11, at 122 n.90, citing III MANUAL OF MILITARY LAW, THE LAW OF WAR ON LAND, 95 n.2 (British War Office 1958). *See also* 1 Op. Att'y Gen. 509, 513 (1821) (not to "obstruct" punishment of "crimes against mankind"); Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37, 65 (1950) (need exists for the U.N. Security Council or some other designated organ to approve measures of "clemency").

13. *See, e.g.*, Paust, *The Link Between Human Rights and Terrorism*, 11 HASTINGS INT'L & COMP. L. REV. at —; Paust, *Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANS. L. 235, 237-40 (1987); *Henfield's Case*, 11 F. Cas. 1099, 1108 (C.C.D. Pa. 1793) (No. 6,360). A pardon could not

would not be policy-serving to interpret the Constitution in such a manner as would allow the President to pardon such individuals and place the United States in violation of international law.¹⁴

In international proceedings, it has already been recognized that the pardon of a wrongdoer can implicate a state's responsibility under international law for a "denial of justice."¹⁵ Since "denials of justice" were of notable concern at the time of the formation of the Constitution,¹⁶ and since pardoning certain wrongdoers would place the United States in violation of international law, the pardoning power should not be interpreted to allow action constituting a "denial of justice" within the meaning of international law. Here again, the Constitution should be interpreted as it reads: the pardoning power is not applicable to anything more than mere "Offenses against the United States."

It is also probative that there is no known U.S. judicial ruling on an attempted pardon for a crime under international law.¹⁷ In both

reach civil claims against Contragate wrongdoers (which might arise, for example, under the Alien Tort Statute, 28 U.S.C. § 1350). *See* *Angle v. Chicago, St. P.M. & O. Ry.*, 151 U.S. 1, 19 (1894) ("neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability"); *Knote v. United States*, 95 U.S. 149, 153-54 (1877); 6 Op. Att'y Gen. 393, 403 (1854).

14. Whenever possible, the Constitution should be interpreted consistently with international law. By analogy, *see also* *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804) (statutes are to be interpreted so as to be consistent with international law); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); 1 Op. Att'y Gen. 26, 27 (1792). This is especially so since international law is a part of supreme federal law and is binding on the President. *See supra* note 8. Furthermore, international law has been utilized to enhance constitutionally based powers. *See, e.g.*, *Missouri v. Holland*, 252 U.S. 416 (1920); 1 Op. Att'y Gen. 52, 53 (1794) ("the municipal law is strengthened by the law of nations"). International law has also been recognized as limiting constitutionally based powers. *See, e.g., supra* note 8. Note also that the Neutrality Act of 1794 (18 U.S.C. § 960) was enacted to assure U.S. compliance with the law of nations. *See* *United States v. The Three Friends*, 166 U.S. 1, 51-53 (1897).

15. *See, e.g.*, *In re Janes*, 4 R. INT'L ARB. AWARDS 82, 87 ("especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty"). The arbitrators in *Janes* also recognized the "well-established principle . . . that, by pardoning a criminal, a nation assumes the responsibility for his past acts." *Id.* at 90, 96, *quoting* *In re Cotesworth & Powell* (*Great Britain v. Columbia*), J. MOORE, 2 INTERNATIONAL ARBITRATIONS 2050, 2082, 2085 (1898) (1925). *See also* 1 RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 711, Reporters' Note 2B (Tent. Draft No. 6, 1985), *citing* *In re West*, [1926-27] Opinions of the Commissioners 404 (Mexican-American Claims Commission) (pardon or amnesty).

16. *See, e.g.*, *The Federalist* No. 80 (Hamilton: "denial or perversion of justice"); Paust, *The Link Between Human Rights and Terrorism*, 11 HASTINGS INT'L & COMP. L. REV. at —. *See also* *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607) ("failure of justice"); 1 Op. Att'y Gen. 30, 32 (1793) (Randolph, Att'y Gen., *quoting* British: "The laws of nations . . . do not allow reprisals, except in case of . . . justice absolutely denied, in re minime dubia, by all the tribunals, and afterwards by the prince").

17. A statement in 1881 that a pardon remits forfeitures whether or not a "forfeiture arises under a merely municipal law or the law of nations" was mere dictum and without support. *See* *Kirk v. Lewis*, 9 F. 645, 646 (C.C.E.D. La. 1881). Furthermore, it did not address an international crime as such. In contrast to such dictum, Justice Miller, on circuit, had noted earlier that a forfeiture of property as a "lawful prize of war" is a disadvantage imposed "by the law of nations, and not by our local, or national legislation," adding: "And as no proclamation of the president can change or modify this law, I doubt very much whether it can

*Henfield's Case*¹⁸ and *United States v. Smith*,¹⁹ efforts to convict alleged violators of neutrality laws ended with sympathetic grand jury or jury acquittals, an outcome far more favorable to an accused than a mere pardon.²⁰

In view of the express limitation of the pardoning power to "Offenses against the United States," the relevant domestic and international legal policies at stake, the precedential prohibitions under international law, and the lack of approval in judicial opinions of a pardon of international crime, one must conclude that the President's power to pardon is limited to domestic U.S. offenses and does not and should not reach criminally sanctionable violations of international law.

relieve any party from the disabilities which it imposes. . . . The right of the president to pardon for all offenses against the laws of congress [however,] . . . is not questioned." See *Elgee's Adm'r v. Lovell*, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (Miller, J., on circuit). See also *supra* note 9. Although Justice Clifford stated per dictum in another case that confederate soldiers would be "mere pirates and insurgents" if they had not been belligerents and "liable to indictment . . . for the crime of murder, subject of course to the right to plead amnesty or pardon, if they can make good that defense," the dictum is ambiguous as to whether a pardon would be a proper defense and the reference to "pirates" could not have related to piracy under the law of nations since the political purpose of even insurgent perpetrators takes relevant conduct outside the latter sort of piracy. See *Ford v. Surget*, 97 U.S. 594, 623 (1878) (Clifford, J., concurring). On piracy under the law of nations, see, e.g., Paust, *Extradition and United States Prosecution of the Achille Lauro Hostage-Takers*, 20 VAND. J. TRANS. L. at 255-56. See also *supra* note 9. Thus, Justice Clifford's dictum is not even relevant to piracy under the law of nations.

18. *Henfield's Case*, 11 F. Cas. 1099, 1108 (C.C.D. Pa. 1793) (No. 6,360). See also *supra* note 13.

19. *United States v. Smith*, 27 F. Cas. 1192, 1229-30 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J.). See also *supra* note 4. For general background, see C. Stone, "Original Intent" and Following Orders—A Framers of Constitution Set Issue Straight for Early-Day Ollie, L.A. Times, Jul. 22, 1987, pt. II, at 5.

20. See *Burdick v. United States*, 236 U.S. 79, 90-91 (1915) ("Far from wiping out guilt, the acceptance of an executive pardon may imply a confession of guilt . . . confession of guilt implied in the acceptance of a pardon. . . .").