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UPDATING THE EXECUTIVE,
OR, THE CHARACTER OF THE PARDONING
PRESIDENT

Bernadette Meyler*


I. ORIGINAL MEANING AND FOUNDING ERA POLITICAL THEORY

The profound interest in the executive branch that emerged following the Bush administration’s response to the events of September 11, 2001, has led to assessments of the president’s ability to take extraordinary actions during emergency, reexamination of the scope of the “executive Power” that Article II vests in the president, theories about the “unitary” nature of the executive, and arguments about the parameters of the writ of habeas corpus. While several of these accounts have relied on evaluation of the Constitution’s original meaning for insight into how to construe the relevant constitutional provisions, others have insisted that the history of postconstitutional executive branch practice should determine the extent of the president’s constitutionally authorized capacity.² Both Clement Fatovic’s *Outside the Law: Emergency and Executive Power*³ and Jeffrey Crouch’s *The Presidential Pardon Power*⁴ wrestle with the quandary of how to reconcile the founding era history of their subjects with the contemporary presidency.

Fatovic contends that seventeenth- and eighteenth-century political theory presented the elevated virtue and character of the king and, subsequently, the president, as the primary source of a constraint on the abuse of his authority in situations of

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1. U.S. Const. art. II, § 1, cl. 1.


emergency. From his rich analysis of these materials, he concludes that we might valuably revitalize virtue as a consideration in electing and evaluating modern presidents. Jeffrey Crouch’s book oscillates more between a reliance on founding era rationales for the presidential pardoning power and an account of the costs and benefits that today affect presidents’ decisions to pardon in disparate contexts. The two works nevertheless share a sense that it would be more productive for present purposes to resuscitate the values underlying the Constitution than to turn to the original meaning of constitutional text.

While this approach is provocative, it encounters certain obstacles when implemented, obstacles that impede the effort to derive a persuasive normative thesis for the present from past principles of executive power. The virtuosity and insightfulness of Fatovic’s analyses of Anglo-American political theory render such a quibble almost irrelevant to the reader of Outside the Law, but it poses more of a challenge to Crouch’s thesis, which focuses heavily on the current implications of his account. Together the books suggest that updating the theory of executive power may present a complicated task, one that will require a nuanced dialogue between, on the one hand, normative arguments that speak to the present situation and, on the other, the sometimes surprisingly resonant and sometimes outdated rationales of the past.

II. CHARACTER AND VIRTUE FROM BODIN TO BUSH

In Outside the Law, Fatovic addresses the problem of emergency power that has plagued scholars of U.S. constitutional law for nearly the past decade by looking historically to the roots of American attitudes within liberal theories of the state. Replete with fascinating readings of liberal theory, from John Locke, to David Hume, to William Blackstone, to the writings of members of the founding generation, the book largely treats discussions of emergency internal to these thinkers’ accounts. The conclusion, however, turns to the contemporary moment and contends that analyses of these sources may help to cabin what should be understood as an emergency in the first place. As Fatovic contends:

From Locke’s illustration of the burning house to Hamilton’s reference to “unexpected invasions” and Jefferson’s examples of a military siege and a “ship at sea in distress,” emergencies of the kind that justify extralegal action tend to raise existential questions beyond the ordinary competence of the law. [T]he kinds of emergencies liberal constitutionalists generally had in mind involved pressing matters of survival that require immediate attention.5

In service of restricting the number of situations that count as emergencies, Fatovic contrasts them with crises, glossing the former as “extreme events that arise suddenly and unexpectedly” and the latter as “chronic or ongoing problems,” including, for example, the financial downturn beginning in 2008.6 This vision of what constitutes an

6. Id.
emergency derives from Fatovic’s readings of the liberal sources; by attempting to define what an emergency is before the exercise of any prerogative to eliminate it, Fatovic’s account stands in opposition to antiliberal theorist Carl Schmitt’s notion that “[s]overeign is he who decides on the exception.” 7 Whereas for Schmitt, the decision on the exception also involves determining when an emergency has arisen, for Fatovic, the compass of what falls under that rubric is more narrowly delimited, and this delimitation precedes any particular instance of application. In light of the often-identified tendency of emergency to become pervasive, this attempt to discern a principled means of cabining the concept appears particularly significant.

Once a situation could legitimately be considered an emergency, Fatovic argues, liberal theories of the state, far from simply endorsing an abstract rule of law or insisting on the conformity of the executive’s actions with legal principles, instead saw the need for the exercise of executive prerogative—whether that of the king or of the president. As Fatovic elegantly demonstrates, it was not liberal theory—despite its insistence on law—that eschewed executive prerogative, but rather republican theory. 8 The continuity between liberal thought and older royalist perspectives on the prerogative remained, on this account, greater than that between the liberal and republican reformers. Elaborating on why liberals would have diverged from republicans in this respect, Fatovic explains that “[s]ince early liberals understood that law and morality were analytically distinct (albeit related), violating the law was not quite as problematic for them as it was for republicans, who were much more likely to revere law as the foremost expression of the ethical values of the community.” 9

Liberal theorists were willing to recognize that the laws might not cover every instance in which power should be exercised and that particular circumstances might require swift action most suited to the executive to undertake. They also viewed the executive as the entity most capable of implementing the interests of the people and considering the collective happiness of the polity rather than evaluating advantages accruing to particular individuals. 10 The character and virtue of the executive, according to Fatovic, more than particular structural controls placed upon the exercise of his power, prevented him from diserving the public interest. Just as the liberal understanding of the prerogative diverged from the republican, the two accounts of virtue also contrasted with each other. Whereas republicans insisted on developing the civic virtue of all participants in the political community, liberals were not convinced of the feasibility or even

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8. Hence, Fatovic concludes,
   Locke differed dramatically from the republicans not only because he considered prerogative indispensable and not inimical to the preservation of liberty but also because he accepted exercises of individual political judgment and discretion in a way that they fundamentally rejected.
   In some respects, Locke’s theory of prerogative bears a closer resemblance to the arguments of royalists than to those of republicans, with whom he shared many more political and ideological aims.
   Fatovic, supra n. 3, at 59.
9. Id. at 36-37.
10. Id. at 75.
desirability of this emphasis; instead, they focused on the virtue of the rulers.\textsuperscript{11} For these liberal theorists, character and virtue represented personally based constraints on the executive that would guarantee the appropriate exercise of prerogative and emergency powers.

While Fatovic’s account of the role of character and virtue within liberal political theory is extremely convincing, some obstacles arise in attempting to reach conclusions about contemporary constitutional quandaries from these early modern conceptions of character. First, the role of character altered within the seventeenth and eighteenth centuries as England moved towards a legislative conception of sovereignty. Whereas, in the early 1600s, the king’s reputation had to be carefully managed to ensure his continued authority, by the time of Blackstone, the law itself presumed the good character of the monarch. Although the king’s position might seem more secure under the latter model, the presumption of his good character corresponded to a diminution in his actual power. Addressing the American context requires the further attempt to conceive executive character within a separation of powers framework.

Second, character itself constituted a peculiarly eighteenth-century preoccupation. By the nineteenth century, at least according to one recent account,\textsuperscript{12} character no longer furnished a focal point of attention. This change raises the question of how the emphases of social and political theory at the time of the founding should be treated by present-day constitutional interpreters, given their inevitably historically contingent quality. Finally, a careful examination of the determinants of character within the seventeenth and eighteenth centuries reveals several aspects that might sit ill with the religious pluralism of contemporary American society. To the extent that certain aspects of an earlier vision of character no longer appear palatable criteria for contemporary political evaluation, the issue of how one might sort the valuable from the dispensable aspects of character becomes both pressing and vexed.

The shift from a king to an “executive branch” and away from monarchical sovereignty inevitably affected how the character of the national leader was conceived. The significance of these alterations is elided to some extent by Fatovic’s reliance on the notion that legislative authority was coextensive with sovereignty throughout the early modern period. As Fatovic argues:

The initial confusion over the nature of the executive was largely a result of the Framers’ uncertainty over the proper location of sovereignty. Beginning with Jean Bodin and leading through Thomas Hobbes to (moments in) William Blackstone, sovereignty was identified so closely with the supremacy of legislative authority that it became difficult to reconcile the idea of indivisible sovereignty with the emergent doctrine of the separation of powers. The confusions in Blackstone’s account of the British Constitution stem in large part from

\textsuperscript{11} Fatovic emphasizes this point in his discussion of Hume:

He developed a postrepublican conception of virtue that would appeal to leading nationalists in America, who were becoming increasingly disenchanted with the prospects of republicanism during the 1780s. Hume’s insistence on the importance of the personal qualities of a ruler, especially in times of national crisis, called into question some of the most cherished convictions of republicans, who considered national character decisive in determining the outcome of war, for instance. Hume’s position on leadership was an oblique critique of the republican stance on civic virtue.

\textit{Id.} at 104.

\textsuperscript{12} See infra nn. 24-26.
an analytical inability to disentangle the idea of sovereignty from the powers of the legislature.\textsuperscript{13}

Although Bodin and Hobbes do emphasize the importance of legislative capacity to determining sovereignty, the principal contribution of the former and, to a lesser extent, the latter was theorizing the sovereignty of the king. For Bodin, legislative power constituted the foremost mark of sovereignty, but he enumerates others, and much of Bodin’s advice pertains to the king’s efforts to establish his authority and maintain his reputation.\textsuperscript{14} Hobbes does insist strongly on the significance of legislative power, but he associates this ultimately with the king, who also, as he discusses in the posthumous \textit{Dialogue between a Philosopher and a Student of the Common Laws},\textsuperscript{15} must possess the ultimate interpretive, or judicial, authority.\textsuperscript{16} With Blackstone, the effects of the development of legislative supremacy become most clearly evident, and the American context demonstrates a partial reaction against this dominance.\textsuperscript{17} On the other side of legislative supremacy in America, the executive finds himself in a rather different position than he occupied before. This set of shifts helps to explain a rhetorical transformation that is partly in evidence in Fatovic’s book, but also appears more dramatically from examining additional early modern sources.

In the sixteenth and seventeenth centuries, from Bodin, to King James I (who read Bodin and other theorists), to his successors, the reputation of the king was an asset to be managed, both by displays of justice and mercy and by resisting all kinds of slander or \textit{scandalum magnatum}.\textsuperscript{18} For example, as James wrote to his son Henry, in \textit{Basilicon Doron}, one of the most unpardonable crimes would be “the false and [u]nre[v]erent writing or speaking of malicious men against your Parents and Predecessors”; James instructs Henry, “sen ye are the lawful magistrate, suffer not both your Princes and your Parents to be dishonoured by any; especially, sith the example also toucheth your

\begin{itemize}
\item \textsuperscript{13} \textit{Id.} at 180.
\item \textsuperscript{14} Legislative power does, indeed, furnish the first mark of sovereignty for Bodin, and at one point he claims that “[a]ll the other attributes and rights of sovereignty are included in this power of making and unmaking law, so that strictly speaking this is the unique attribute of sovereign power.” Jean Bodin, \textit{Six Books of the Commonwealth} 44 (M.J. Tooley trans., Basil Blackwell 1955). Bodin nevertheless continues to identify a number of other marks that we might not automatically view as comprehended within the capacity to legislate, including “the making of war and peace,” “the power to institute the great officers of state,” “that the prince should be the final resort of appeal from all other courts,” “the right of pardoning convicted persons,” “the right of coinage,” and “[t]he right of levying taxes and imposing dues.” \textit{Id.} at 44, 45, 46, 47, 47. For a longer discussion of Bodin’s treatment of the sovereign’s reputation, see Bernadette Meyler, \textit{Theaters of Pardoning: Tragicomedy and the Gunpowder Plot}, 25 Stud. L., Pol., & Soc’y. 37, 49-54 (2002).
\item \textsuperscript{16} \textit{Id.} at 70, 94-95.
\item \textsuperscript{18} \textit{Scandalum magnatum} constituted “[a]ctionable slander of powerful people; specif., defamatory comments regarding persons of high rank, such as peers, judges, or state officials.” \textit{Black’s Law Dictionary} 1345 (Bryan A. Garner ed., 7th ed., West 1999). For extensive treatments of the dynamics and consequences of slandering the sovereign in sixteenth- and early seventeenth-century England, see generally Ina Habermann, \textit{Staging Slander and Gender in Early Modern England} (Ashgate Publg. Ltd. 2003); M. Lindsay Kaplan, \textit{The Culture of Slander in Early Modern England} (Cambridge U. Press 1997).
The reputation of this “lawful magistrate” could be tarnished not only by insults to his political persona but also by the casting of personal aspersions; James’s own comments were generally thought to be addressing the shame he had inherited from his mother, Mary Stuart’s, putative murder of his father. King Charles I would later savagely punish the anti-theatrical writer William Prynne partly because of a perceived attack on the participation of Charles’s wife, Queen Henrietta Maria, in theatrical activities at court. The scandals of private life might thus detrimentally affect the public persona of the king.

By the time of Blackstone, however, the emphasis fell not on the king’s own efforts to maintain his reputation but rather on how the public should view the chief executive in light of his institutional position. The passages that Fatovic cites from Blackstone do not suggest that the latter necessarily believed the king in fact to be someone of “greater perfection” than the ordinary man; whatever the actuality of the matter, the king should simply be viewed as an individual of “greater perfection.” Hence, Blackstone writes that “the mass of men will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves,” and that “the law deems so highly of his [the king’s] wisdom and virtue, as not even to presume it possible for him to do any thing inconsistent with his station and dignity.” Here, the law creates the character of the king, rather than the character of the king determining the lawfulness of his actions. The significance of character changes with the altered place of the executive within the system of the state as a whole; whereas earlier, reputation had to be controlled in order to ensure the continuity of sovereign power, with Blackstone, law itself dictates respect for the executive because of his place within the system. Quite apart from transformations in the social meaning of character, the conception and significance of the executive’s character changes with the gradual reorientation of the political landscape.

Alterations in the role of character outside the specifically political arena may also, however, indicate the instability of its status inside that sphere. In Women, Crime, and Character, Nicola Lacey turns to eighteenth- and nineteenth-century British novels to investigate the rationale for changes in the English criminal justice system’s treatment of women. Lacey contends that, whereas in the eighteenth century, “attributions of responsibility were based . . . on judgments about the quality of character displayed in

conduct,\textsuperscript{25} by the end of the nineteenth century, the focus was placed not on character and reputation but instead on "engaged volitional and cognitive capacity."\textsuperscript{26} If Lacey is correct in positing that the importance of character diminished at least in the criminal justice context during the course of the period she considers, we might suppose that character correspondingly shrank in importance within the political theory of executive power. The material that Fatovic explores largely ends with the founding period and does not evaluate the effect that the nineteenth century's lesser reliance on character in general might have on comprehending the role of character or virtue in policing executive prerogative.

Finally, Fatovic's discussion of late seventeenth-century perceptions about the king's abuse of his prerogative demonstrates the possible intertwining of considerations of character and virtue with those of religion. As he writes:

Almost immediately after the Restoration, Charles II used his prerogative to grant an indulgence to religious dissenters by suspending penal laws against those who refused to adhere to the modes of worship prescribed in the Conventicle Act and other parliamentary enactments. When Charles II invoked his prerogative to issue a Declaration of Indulgence in 1672 without parliamentary approval, many of the king's eventual opponents... interpreted this as part of a larger conspiracy to restore "popery" to England. These politicians were aghast at the religious, social, and constitutional implications.\textsuperscript{27}

The outrage expressed in the seventeenth century against Charles II corresponds to a particular religious vantage point; we might wonder today how much assumptions about character and virtue in general partake of certain religious perspectives and how, even if we wished to do so, we would be able to generate a vision of virtue that would be acceptable to the various contemporary American religious and secular constituencies.

Not only changes in the place or conception of character may affect how the political theory Fatovic reconstructs could be updated for present purposes, but also shifts in the understanding of emergency. With the administrative state, emergency has correspondingly become more dispersed, so that the Schmittian decisions of a singular sovereign may matter less than the accumulation of determinations filling the gaps of what Adrian Vermeule has called "grey holes."\textsuperscript{28} As Michel Foucault describes the transformation in his seminar on Security, Territory, Population, the phase that follows the disciplinary society he earlier outlined is that of "governmentality" and "security."\textsuperscript{29} Within the system of governmentality which he posits arising in the later eighteenth century in conjunction with a notion that commerce is free - the population rather than the individual becomes the unit of analysis and disaster no longer strikes, but rather risks - including rates of mortality are calculated in advance. Part of the administrative apparatus in place within the United States today is similarly designed to restrict the

\textsuperscript{25} Id. at 23.
\textsuperscript{26} Id. at 24.
\textsuperscript{27} Fatovic, supra n. 3, at 44.
\textsuperscript{28} Adrian Vermeule, Our Schmittian Administrative Law, 122 Harv. L. Rev. 1095 (2009).
scope or effects of particular emergencies; one of the reasons we might agree with Fatovic that the 2008 financial crisis under President George W. Bush was not an emergency is that various administrative safety nets cushioned the blow of disaster for the vast majority of the population. Likewise, the mechanisms of security that have been in place for some time now are engineered to anticipate and prevent most instances of emergency. The question of what role presidential character might play within such dispersed systems of emergency response remains uncertain.

III. PERSONAL OR ADMINISTRATIVE PARDONING

In his provocative work on *The Presidential Pardon Power*, Jeffrey Crouch sets out to address what he describes as "two pardon paradoxes," the first consisting in the fact that "this nearly limitless constitutional power has been used less and less over time," and the second in the circumstance that, "despite presidents' usual concern for political safety, each of our last three chief executives has made at least one very controversial clemency decision involving his political party's executive branch officials or supporters." These pardons were rendered suspect for several reasons: "First, few of these clemency recipients had stood trial for their offenses . . . . Second, these presidents waited until late in their presidencies, when they were safe from direct electoral penalty, to grant politically risky pardons. Third and most important each president granted clemency for self-interested reasons." Attempting to resolve these paradoxes, Crouch claims to use a "framers' intent" model, while he also surveys more recent deployments of the pardon power, focusing his attention on President Gerald Ford's pardon of President Richard Nixon following Watergate and subsequent presidents' most notorious clemency decisions.

From examining these episodes, Crouch appears to conclude that the benefits of engaging in pardons that were self-interested or last minute or both outweighed the costs for President William Clinton and the two Presidents Bush (George H. and George W.). Rather than recommending any institutional alterations in the system to remedy this situation, Crouch suggests instead:

> When a president abuses the clemency power, we need to decide that his actions will trigger real sanctions. The judgment of history should be harshly critical of presidents who make self-interested clemency decisions. It is only by punishing presidents who exploit the clemency power that we can uphold the rule of law, and - ultimately - preserve and defend our Constitution.

Although he does not explicitly mention public assessment of character as a means of checking presidential overreaching in the exercise of the pardon power, Crouch's

31. Id.
32. Id. at 3.
33. Id.
34. Id. at 4.
35. Crouch, supra n. 4, at 149.
normative conclusion gestures towards something quite similar to what Fatovic is recommending. As Fatovic indicates in his conclusion, today “[t]he right question [about character] is not whether the president ‘feels our pain,’ as Bill Clinton intoned, or is a ‘hard-hearted person,’ as George W. Bush proposed, but whether the president places the interests of the public above competing interests of self, family, sect, or party.”36 If evaluations of presidential character depend on the extent of the chief executive’s ability to avoid acting out of self-interest, such appraisals would censure the kinds of pardons that Crouch critiques.

Like Fatovic, Crouch also concentrates his attention on the president, leading to similar blind spots. Just as Fatovic’s focus on the individual character of the executive tends to neglect the administrative dimensions of contemporary emergencies, Crouch’s emphasis on relatively sensational presidential pardons underestimates the significance of more routine exercises of the power. Crouch’s narrative, however, unlike Fatovic’s, fails to remain faithful to the historical tradition he invokes. In the seventeenth- and early eighteenth-century contexts, emergencies were arguably envisioned less as occurrences for the state to manage than exceptions over which the executive should take control. The history of pardoning, however, reveals a persistent duality between the regularized grant of mercy—whether to reduce the penalty for a particular category of crimes or to erase the memory of civil conflicts—and extraordinary acts of grace.

Crouch does discuss the administrative apparatus that arose around pardoning in the United States during the nineteenth century, insisting that several of the presidents he treats should have relied on the advice of the Office of the Pardon Attorney, but he does not explain how to reconcile the rationales for pardoning at the time of the founding with this newer development. As a result, The Presidential Pardon Power both disregards the multiple varieties of pardoning present in England and early America and overvalues the necessity of following an administrative vision of pardoning. By concentrating on visible and problematic pardons in which the potential political repercussions of pardoning have failed to deter presidents from acting, Crouch also understates the extent to which the political pressures against pardoning in the present impede gubernatorial and presidential exercises of pardoning in the crucial contexts of mitigating excessive punishment and vindicating innocence.

As Crouch describes his method, he “examine[s] the historical and legal background of the clemency power, with a particular focus on the framers’ intent.”37 In investigating the history of judicial interpretation of the pardon power, he uncovers two justifications for its deployment—an “act of grace” rationale, which he associates with Chief Justice John Marshall’s 1833 decision in United States v. Wilson,38 and a “public welfare” or “public interest” reasoning, which he identifies with Justice Oliver Wendell Holmes’ Biddle v. Perovich39 opinion.40 Both of these bases also hearken back to the founding era, under Crouch’s account. The former corresponds with an earlier English

36. Fatovic, supra n. 3, at 265.
37. Crouch, supra n. 4, at 4.
conception of the king’s power to pardon; as Crouch quotes Kathleen Moore, “the
pardoning power [in England] . . . was analogous in theory and practice to divine grace.
Like grace . . . a royal pardon was thought of as a personal gift. Therefore, it required no
justification and was not subject to criticism.”41 The latter accords with Alexander
Hamilton’s argument in Federalist 74 for granting the president the ability to pardon; as
Hamilton had claimed,

[T]he principal argument for reposing the power of pardoning in this case to the Chief
Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments,
when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of
the commonwealth; and which, if suffered to pass unimproved, it may never be possible
afterwards to recall. The dilatory process of convening the legislature, or one of its
branches, for the purpose of obtaining its sanction to the measure, would frequently be the
occasion of letting slip the golden opportunity.42

Between these two justifications within political theory for the pardon power, the
history of those pardons that served to modify the institutional dynamics of the English
legal system is elided. Pardons historically functioned not only as acts of royal grace, but
also as means of modifying legal doctrine or altering methods of punishment. In the
medieval period, for example, pardons were routinely granted for what were considered
excusable forms of killing despite the fact that those acts were prosecuted as murders.43
Likewise, during the later seventeenth and eighteenth centuries, conditional pardons
were widely used to promote the transportation of prisoners to the colonies in lieu of
imposition of the death penalty.44 These forms of pardoning provide more compelling
precedents for the ordinary uses of the pardon power today than the justifications within
political theory upon which Crouch relies.

Crouch also minimizes the distinction between pardon and amnesty, a
differentiation that in various historical contexts led to amnesty’s allocation to a
legislative, rather than executive, branch. According to his definition of the terms,

“Amnesty,” which comes from the Greek amnestia, or “forgiveness,” is typically granted
to a group rather than an individual, is often given pre-conviction, and usually rests on the
judgment that the public welfare is better served by ignoring a particular crime than by
punishing for it. Unlike a pardon, an amnesty does not excuse the crime; however, in the
eyes of the law, amnesty and pardon are treated about the same.45

41. Id. at 11-12 (quoting Kathleen Dean Moore, Pardon for Good and Sufficient Reasons, 27 U. Rich. L.
Rev. 281, 282 (1992)).
43. For a discussion of this phenomenon, see Naomi D. Humard, The King’s Pardon for Homicide before
44. See Cynthia Herrup, Punishing Pardon: Some Thoughts on the Origins of Penal Transportation, in
Penal Practice and Culture, 1500-1900: Punishing the English 121 (Simon Devereaux & Paul Griffiths eds.,
Palgrave Macmillan 2004); Simon Devereaux, Imposing the Royal Pardon: Execution, Transportation, and
45. Crouch, supra n. 4, at 20 (footnote omitted).
Amnesty is not, however, quite the same as forgiveness - its derivation instead connotes forgetting, or lack of memory. This origin is significant because amnesties - or acts of oblivion, as they were designated in the English context - attempt to prevent old animosities from being recalled through additional punishment or prosecutions. Amnesties may not excuse the crime but pardons do not necessarily either. Instead, amnesties insist that the determination of guilt or innocence no longer remains relevant. Partly because they are more general in scope than a normal pardon and partly because they serve to reintegrate a divided polity, amnesties have often been granted legislatively. Proposed by King Charles II, the 1660 Act of Oblivion following his restoration to the English throne was ultimately passed by Parliament;\textsuperscript{46} by the time of the Weimer Constitution of 1919, a distinction between pardon and amnesty was so clear in the international arena that Article 49 of that document read as follows: “The President exercises the right of pardon [das Begnadigungsrecht] for the Reich. Reich amnesties [Reichsamnestien] require a Reich statute.”\textsuperscript{47} The significance of the differentiation is important to understanding the debates about the proper location of the amnesty power following the Civil War and the question of whether it should reside in Congress or in Presidents Abraham Lincoln and Andrew Johnson.\textsuperscript{48} Although Crouch furnishes a fascinating and detailed account of the post-Civil War cases treating the extent of executive, as opposed to legislative, clemency power,\textsuperscript{49} the strength of the argument that Congress - ultimately unsuccessfully - put forth in support of its claim for control over amnesty is less evident than the broader history of the distinction between amnesty and pardon renders it.

An administrative aspect of pardoning does appear in The Presidential Pardon Power, introduced with the Office of the Pardon Attorney in the nineteenth century. On several occasions, Crouch laments presidents’ neglect of the Office’s recommendations or their failure to go through its bureaucratic process prior to pardoning. As he notes about the end of Clinton’s second term:

Observers were stunned by the number of pardons and commutations . . . . The pardon attorney did not have the time or the means to adequately deal with [the] enormous backlog: The office announced in October 2001 that new pardon applications could no


\textsuperscript{48} For an excellent account of the disputes between Congress and the president over the capacity to grant amnesty to members of the Confederacy, see generally Jonathan Truman Dorris, \textit{Pardon and Amnesty under Lincoln and Johnson: The Restoration of the Confederates to Their Rights and Privileges}, 1861-1898 (U.N.C. Press 1953). The question of whether Congress could legislatively provide amnesty was subsequently debated in the aftermath of the Vietnam War, when hearings were held on the subject of the appropriate treatment of those who had refused to be drafted or had otherwise avoided or left military service without authorization. See generally H.R. Subcomm. on Cts., Civ. Liberties, & Administration of Just. of the Comm. on Judi., \textit{H.R. 263, H.R. 674, H.R. 2167, H.R. 3100, H.R. 5195, H.R. 10979, H.R. 10980, H.R. 13001, H. Con. Res. 144, and H. Con. Res. 385 Relating to Amnesty}, 93d Cong. (Mar. 8, 11, 13, 1974).

\textsuperscript{49} Crouch, \textit{supra} n. 4, at 28-52.
longer be accepted and urged applicants to instead appeal to Clinton directly. 50

In summarizing the problems posed by certain pardons in recent administrations, he further asserts, “In each of these cases, the presidents involved bypassed or ignored the pardon attorney apparatus - thereby thumbing their noses at the public - and did what they wanted to do.” 51 It is not entirely clear from the book how to reconcile Crouch’s attempt to resuscitate the original rationales for pardoning with this emphasis on following administrative procedures put in place in the nineteenth century. The longer history of pardoning does, as discussed above, manifest forms that were more routine than exceptional, but they coexisted with other kinds of pardoning. To insist too much on the role of the Office of the Pardon Attorney would entail significantly altering the strands of justification for the pardon power available at the founding and limiting their variety.

Perhaps more troubling than a president’s grant of pardon without Office of the Pardon Attorney approval are chief executives’ failures to furnish pardons even when these are endorsed by the pardon bureaucracy. Recently, Governor Jan Brewer of Arizona rejected the Arizona Board of Executive Clemency’s recommendation of pardon for a man who had already spent thirty-five years in prison and whom the Board had concluded was innocent. 52 One of Crouch’s paradoxes invokes the diminution in instances of pardoning, and he briefly surveys some factors deterring presidents from pardoning ordinary individuals including “the fact that society has grown less tolerant of criminals” 53 and “changes in the application process [that] have generally forced pardon applicants to wait longer periods of time before they may apply for clemency.” 54 He does not, however, emphasize that even when all bureaucratic requirements have been fulfilled, the final decision makers may, and do, reject pardon applications for any reason, or no reason at all.

These executive branch refusals to pardon may just as much as an improvident grant of pardon - reflect self-interest. As Crouch himself observes, “[t]he current political environment rewards . . . a president who is sparing with the pardon power.” 55 The character of a president as law-abiding is affected by the perception that he is willing to grant too many pardons, and, hence, refraining from pardoning may serve the president’s own reputational aims. A thoroughgoing effort to hold the president to a standard of character involving acting in the public interest would necessitate addressing the instances in which he failed to pardon as well as those in which he seemed to pardon too liberally.

50. Id. at 112.
51. Id. at 128.
52. Adam Liptak, Governor Rebuffs Clemency Board in Murder Case, 159 N.Y. Times A20 (June 15, 2010). As governor of Texas, George W. Bush similarly rejected the recommendation of the Texas Board of Pardons and Paroles and refused to pardon a convicted rapist. See Sam Howe Verhovek, Gov. Bush Denies Pardon in Rape Case, Despite DNA, 146 N.Y. Times 23 (Sept. 14, 1997).
53. Crouch, supra n. 4, at 62.
54. Id. at 63. For a trenchant critique of how administrative law has affected perceptions of the exercise of mercy, including executive clemency, see Rachel E. Barkow, The Ascent of the Administrative State and the Demise of Mercy, 121 Harv. L. Rev. 1332 (2008).
55. Crouch, supra n. 4, at 5.
It is instructive, however, to examine the most concrete example Crouch provides of how to reconcile Biddle v. Perovich’s concern for the public welfare or public interest and Hamilton’s defense in Federalist 74 of pardoning in times of conflict with a relatively recent presidential exercise of the pardon power. According to Crouch, despite the unpopularity of Ford’s pardon of Nixon and the former’s incapacity to provide a persuasive justification for his action, this pardon did conform to “the framers’ understanding of the clemency power.”56 As he writes:

A brief look at Alexander Hamilton’s words from Federalist No. 74 . . . suggests that despite Ford’s mishandling of his public presentation of the Nixon pardon - the decision itself was consistent with the original rationales offered for the presidential pardon power. As Hamilton noted, “in seasons of insurrection or rebellion,” the president has the power to pardon to “restore the tranquility of the commonwealth.” Watergate was a constitutional crisis, and Ford was on solid historical, legal, and constitutional ground in granting the pardon.57

The comparison here between the insurrection or rebellion that Hamilton envisioned and the status of Nixon’s prosecution after he had left office seems somewhat stretched. An effort to delimit what counts as an emergency along the lines that Fatovic sketches would presumably exclude such an instance from its compass. The strained quality of Crouch’s attempt to fit Ford’s pardon of Nixon within Hamilton’s rationale further calls into question the extent to which founding-era political theory can furnish a useful benchmark for assessing pardoning in the present. Nevertheless, the invocation of Federalist 74 within the contemporary context suggests its potential relevance in another setting - that of emergency powers.

IV. PARDON AS EMERGENCY POWER

Juxtaposing Outside the Law with The Presidential Pardon Power not only reveals a shared reliance on the original political theory behind the Constitution rather than on its original meaning, but also highlights a significant omission in much of the recent scholarship on executive power. Although pardoning, both as Article II presents it and as it has been construed over the course of constitutional history, arguably constitutes the most absolute of presidential powers, it has been invoked surprisingly little by those debating the scope of executive power post-September 11. As a capacity for mercy rather than a source of punishment, it might seem irrelevant to debates about extraordinary rendition or the use of torture.

The longer, transnational history of pardoning, however, demonstrates its involvement in situations akin to those in place today. Within late-seventeenth-century England, prohibitions on certain kinds of pardons - whether of the king’s cronies who had been impeached or of anyone who attempted to transport subjects to the colonies without their consent - impeded the capacity of the king to immunize his allies acting in

56. Id. at 129.
ways that might infringe subjects’ rights. Under the U.S. Constitution, only the restriction on pardoning in cases of impeachment remains today; unlike in the earlier English context, pardons could therefore be deployed to conceal executive officers’ illegal activities by being issued before the commencement of any prosecution. Pardon and amnesty can also be used to avert rebellion or stop it in its tracks, as earlier American examples and those from other countries demonstrate. While it is possible that pardoning would be an ineffectual answer to the threat of terrorism, the conceivable employs of pardoning in such a context have not even been explored.

This division between the focus of post-September 11 work on executive power and studies of the president’s power to pardon recurs in Fatovic’s and Crouch’s books. Crouch suggestively refers to and relies on Alexander Hamilton’s endorsement of an expansive presidential pardon, even in cases of treason, and his support, in Federalist 74, for the use of pardon “in seasons of insurrection or rebellion.” Despite the overtones that the language of Federalist 74 shares with the temporal rationales for expanding presidential powers in cases of emergency, including during the War on Terror, Crouch refrains from drawing the connection to the contemporary context. Likewise, although Fatovic refers to pardoning on a few occasions in his own work, the power seems less than central to his argument. It is, however, perhaps precisely in emergency situations that the character of the president might convince us of the virtues of his pardons.

In sum, Fatovic’s book furnishes an extremely rigorous and insightful account of how liberal theory envisioned virtue and character as possible constraints on the employment of emergency powers, although it largely leaves to others the task of answering the question of how or whether such theory might be updated to fit the context of the contemporary executive. Crouch also provides a number of compelling observations about the exercise of the pardon power, but his normative suggestions about its present employment remain difficult to reconcile with his account of the original political theory behind pardoning, and this account itself appears rather partial in light of pardoning’s longer history. Nevertheless, for anyone who reads them, both Outside the Law and The Presidential Pardon Power will produce fruitful insights on matters of pressing concern.

58. Crouch helpfully discusses this English context, focusing on the controversy over Parliament’s attempt to impeach Thomas Osborne, King Charles II’s Lord High Treasurer, in 1678, an effort that was thwarted by the intervention of the King’s pardon. See id. at 12. During the same period, the Habeas Corpus Act of 1679 provided an action for treble damages against anyone transporting a subject outside the realm without his or her consent and specified that such a person would be stripped of his office, subject to forfeitures, and “be incapable of any pardon from the King, his heirs or successors, of the said forfeitures, losses or disabilities or any of them.” Habeas Corpus Act 1679 (31 Car 2 c 2).

59. See Crouch, supra n. 4, at 12-19. See also U.S. Const. art. II, § 2, cl. 1.

60. Crouch treats this feature of pardoning, both as Alexander Hamilton anticipated its usefulness in the Federalist Papers and as President George Washington employed it in responding to the Whiskey Rebellion. See Crouch, supra n. 4, at 18-19, 55-56. For an example of a similar approach in a radically different context, that of Imperial China, see Jonathan D. Spence, Asking for Forgiveness - At What Price? 150 N.Y. Times A23 (Mar. 27, 2001).

61. Hamilton, supra n. 41, at 475.