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"When a power is acknowledged to be necessary, it is a very dangerous thing to prescribe limits to it, for men must have a greater confidence in their own wisdom than I think any men are entitled to, who imagine they can form such exact ideas of all possible contingencies as to be sure that the restriction they propose will not do more harm than good."[1]

I. INTRODUCTION

The United States Constitution grants the president "the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[2] Due to the fact that the clemency power authorizes the president to free and absolve known and/or convicted criminals, the power has great potential to stir controversy when exercised. In the wake of the Clinton presidency, the existence and future of the clemency power has never experienced more intense question and scrutiny. After Clinton's pardon of fugitive financier Marc Rich, along with other unpopular grants of clemency on the day he left office, many have called for reforms of the sweeping clemency power retained by the president.[3] Some of those proposed reforms are minor, calling for statutory procedural requirements and/or increased public disclosure, and others go as far as implementing a Constitutional amendment requiring Senate approval of all clemency actions.[4]

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1. JAMES IREDELL, ANSWER TO MASON'S OBJECTIONS (1787), REPRINTED IN PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 350, 351-52 (Paul Leicester Ford ed., Lawbook Exchange, Ltd. 2000).

2. U.S. CONST. art. II, § 2.

3. After an eight year Presidency already shrouded in controversy, the Clinton pardons caused an uproar that prompted many outraged journalists, political commentators, and legal and political scholars to call for reforms of the clemency power that are too numerous to list here, but many of which will be explored throughout this Note.

4. *See generally* Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561 (2001).

However, this Note opposes tampering with a system that has worked as intended for as long as this government has existed. The explicit intent of the Framers of the Constitution, a long line of U.S. Supreme Court decisions, the separation of powers doctrine, and the danger of doing greater damage to the public welfare by reforming the clemency power all support this proposition. It would be imprudent and unwise to ignore the strong precedent mentioned briefly above in favor of a superficial reflex toward reform every time the media publicizes the one or two questionable pardons among the literally thousands of deserving grants of clemency that have been issued in the past.[5]

Section II of this Note defines clemency and illustrates its five different forms. Section II also describes the origins of the clemency power in Western civilization, how it developed in England and in the United States, and how the power has been used and interpreted throughout American history.

Section III then discusses the Clinton pardons that have intensified the debate to such a high level as well as some noteworthy reforms of the clemency power that have been proposed.

Section IV discusses this Note's argument that despite the great unrest in the wake of the Clinton Presidency regarding the clemency power, any action toward reform will likely be more harmful than inaction. Therefore, the answer as to what should Constitutionally be done in the wake of the Clinton Presidency is quite simple: absolutely nothing.

II. THE HISTORICAL EVOLUTION OF CLEMENCY

Clemency Defined

This Note focuses on the federal executive clemency power granted by the U.S. Constitution.[6] The executive clemency power found in Article II, § 2 of the U.S. Constitution in all its forms is commonly referred to as the pardon power. However, as demonstrated below, pardoning is only one of the five forms of clemency.

5. In the twentieth century alone, there have been well over 20,000 grants of federal executive clemency. *See* Robert Nida & Rebecca L. Spiro, *The President As His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 211 (1997).

6. U.S. CONST. art. II, § 2.

Therefore, for purposes of uniformity and clarity, this Note will hereinafter refer to any act of clemency, pursuant to the power granted to the president in Article II, § 2, simply as "clemency" or "the clemency power."

Clemency is an official act by the president[7] that removes all or some of the consequences that result from a criminal conviction, or may result in the future.[8] The exercise of clemency can take a number of forms: pardons, amnesty, reprieves, commutations, and remission of fines and forfeitures. Pardon is the broadest form of clemency. A full pardon exempts the grantee from punishment and removes any guilt, so that the offender becomes as innocent as if the offense was never committed.[9] A pardon can also be partial where an offender is not completely released from all consequences of the offense, but only those specified at the time the pardon is granted.[10] It can be absolute or conditional, contingent on the future acts or omissions of the offender stipulated by the president.[11] It can be granted following trial, conviction, sentencing, or before charges or accusations are even made.[12] Pardons are often granted to restore the reputation and civil rights of offenders who have served their sentences and/or have lived admirable lives after committing the crimes.[13]

Amnesties can be distinguished from pardons because they are usually granted to groups or classes of people, and usually before conviction.[14] Amnesty, unlike a pardon, does not restore the of-

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7. Although clemency is usually granted by a government's chief executive, and for the purpose of this Note, the President of the United States, it can also be granted by state legislatures and by the United States Congress. *See* 59 AM. JUR. 2D *Pardon and Parole* § 10 (2001).

8. *See id.*

9. *See* Ex parte Garland, 71 U.S. 333, 380 (1866).

10. *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 5 (1989).

11. *Id.*

12. *Id.* For example, President Ford granted a pardon to former President Nixon before Nixon was charged with any crimes as a civilian. *See id.*

13. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power From the King*, 69 TEX. L. REV. 569, 576 (1991).

14. *See* Burdick v. United States, 236 U.S. 79, 95 (1915). *See also* MOORE, *supra* note 10, at 5. For example, President Carter's grant of amnesty to Vietnam War draft evaders. *See id.* at 81-82.

fender's reputation or civil rights.[15] Amnesty forgets but does not forgive crimes.[16] However, the distinction between amnesty and pardon is far more academic than practical.[17] The effects of the two are in practical terms identical, and the Supreme Court recognizes little distinction between them.[18]

A third form of clemency is the reprieve. Reprieves are the most limited form of clemency because they do not remove guilt or sentences but only temporarily postpone punishment.[19] Reprieves typically postpone executions until death-row inmates can give birth, recover from illness, or be heard on a final appeal.[20]

A commutation is a form of clemency where a lesser punishment is substituted for the sentence imposed by a court.[21] Commutations are distinguished from pardons in that they do not release the offender from the consequences or guilt of an offense; they simply reduce punishment.[22] Commutations are commonly used to reduce sentences to time already served or to reduce death sentences to life sentences.[23]

Finally, the clemency power has been held to extend to include the ability of the president to release offenders from fines and forfeitures levied by the United States.[24]

The Origins of Clemency

The earliest traces of clemency can be found in the Code of Hammurabi from the eighteenth century B.C., even though the Code is famous for its harshness.[25] The Old Testament, while also portraying harsh punishments and a vengeful God, is full of stories of mercy and reduced punishments.[26] In the governments of an-

15. Kobil, *supra* note 13, at 577.
16. *See* MOORE, *supra* note 10, at 81-82.
17. *See* Knote v. United States, 95 U.S. 149, 152-53 (1877).
18. *See id.*
19. *See* Ex parte United States, 242 U.S. 27, 43-44 (1916).
20. *See* MOORE, *supra* note 10, at 5.
21. *See* Schick v. Reed, 419 U.S. 256, 273 n.8 (1974) (Marshall, J., dissenting).
22. *See id.*
23. MOORE, *supra* note 10, at 5.
24. *See* Osborn v. United States, 91 U.S. 474, 479 (1875).
25. *See* MOORE, supra note 10, at 15.
26. For an example, see id. at 16 where Moore gives the example of God commuting the sentence of Cain by allowing him to live in the land of Nod after he committed the oldest crime in history, the murder of his brother. *See Genesis* 4:12, 16.

cient Greece and Rome, clemency was often granted for non-judicial reasons, as these societies saw the law as originating from infallible gods.[27] As evidenced by the clemency power exercised when Pontius Pilate exonerated Barrabus during the crucifixions of he and Jesus Christ, the Jews and the Romans had customs of pardoning criminals, especially on holidays.[28] In fact, the Romans often used clemency as a political tool to quiet discontent throughout the vast Roman Empire, thereby reinforcing its power.[29]

The Development of Clemency in England

Originally, many of those who held power in England – the king, clergy, and courts – fought for the right to punish and to pardon.[30] In 1535, the clemency power was formally granted to the king under Henry VIII by an act of Parliament: "no other person has the power to pardon or remit any treason or felonies whatsoever; but that the king has the whole and sole power thereof, united and knit to the imperial crown of his realm."[31] Clemency was also used as a political tool in England, not unlike its use in the Roman Empire.[32] Blackstone stated that the king's acts of clemency endeared him to his subjects and strengthened their loyalty to him.[33]

Although the clemency power in England was often successful in protecting against a harsh and rigid judicial system, abuses of the royal clemency power did exist, and later advocates of a clemency power in America were well aware of this.[34] For example, the open and notorious sale of clemency was commonplace, prompting widespread criticism.[35] The clemency power was not only used to further the interests of the king, but of the state as well. Criminals

27. *See* Kobil, *supra* note 13, at 583-86.

28. *See* MOORE, *supra* note 10, at 16-17.

29. *See id.*

30. *See* Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51, 55 (1963).

31. 4 WILLIAM BLACKSTONE, COMMENTARIES 315 (Wayne Morrison ed., 2001).

32. *See id.* at 316. *See also,* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 233 (4th ed. 1669).

33. *See* BLACKSTONE, *supra* note 31, at 316.

34. *See* Kobil, *supra* note 13, at 588-89.

35. *See id.* at 589; *see* Grupp, *supra* note 30, at 59 ("the purchase of a pardon was once a common practice and seems to have been generally associated with the procurement of a pardon in early times").

were granted clemency on the condition that they travel to the colonies in America and work on the plantations.[36] Clemency was also granted on the condition that the criminals join the Royal Navy, or even to secure testimony by the criminals that would incriminate their accomplices.[37]

Clemency in the British Colonies in America

The British clemency power followed the colonists to America.[38] The power was delegated by the king to executive authorities of each colony, usually the royal governor.[39] The colonial charters of Virginia, Massachusetts Bay, Maryland, Maine, the Carolinas, New Jersey, Pennsylvania, and Georgia explicitly granted the clemency power to the respective governors.[40] However, after the Revolution and before the Constitution, the common fear of a strong central government caused a sharp decline in the general power of executives and the clemency power was no exception.[41] By 1787, most states had granted the clemency power to their governors and legislative councils jointly or to the legislature alone,[42] and there was no national clemency power under the Articles of Confederation.[43] However, with the increasing calls for a stronger central government and a stronger chief executive after the failure of the Articles, support mounted for a strong federal clemency power much like that of England.[44] This was evidenced by the fact that the governors of New York, Delaware, Maryland, North Carolina, and South Carolina possessed unilateral clemency powers at this point.[45]

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36. Kobil, *supra* note 13, at 589.

37. *Id.*

38. For a more detailed discussion of the clemency power in the colonies, *see* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 497-501 (1977).

39. *Id.*

40. *See id.* at 497. For example, the Virginia charter of 1609 granted the governor "full and absolute Power and Authority to correct, punish, pardon, govern, and rule all such Subjects of Us, our Heires, and Successors as shall from Time to Time adventure themselves." *See id.* The other colonies used similar language. *See id.*

41. *See* Kobil, *supra* note 13, at 590.

42. *Id.*

43. Duker, *supra* note 38, at 500.

44. *See generally id.*

45. *See* Kobil, *supra* note 13, at 590.

Presidential Uses of the Clemency Power

Among the first exercises of the clemency power granted under Article II of the Constitution was President George Washington's pardons of the leaders of the Whiskey Rebellion in 1795 after their attempt to prevent collection of a federal tax on whiskey.[46] Similarly, President John Adams pardoned members of an insurrection in Pennsylvania.[47] President Thomas Jefferson granted clemency to his political allies after they were convicted under the Sedition Act of publishing Anti-Federalist material.[48]

This use of the clemency power, not just in instances deserving of mercy, but also for the purpose of promoting unity and tranquility, gained much significance in the years preceding, during, and after the Civil War.[49] For the first time, large numbers of Americans were being conscripted.[50] This, coupled with the nature of the War, which pitted Americans against each other, led to a great deal of desertion and draft evasion.[51] President Abraham Lincoln granted clemency to these deserters and evaders on the condition that they return and fight, and many did.[52] After the Civil War, Presidents Lincoln, Andrew Johnson, and Ulysses S. Grant all granted clemency to leaders and supporters of the Confederacy.[53]

Controversy over the clemency power was relatively quiet again until the later part of the twentieth century. In perhaps the most famous pardon in American history, President Gerald Ford granted a pardon to former President Richard Nixon after Nixon resigned the Presidency during the Watergate scandal.[54] Ford granted the pardon "for all offenses against the United States" for the purposes of restoring tranquility and giving closure after a tumultuous and disgraceful period in American politics.[55] This pardon greatly contributed to Ford's loss of the next presidential election.[56]

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46. *See* Nida & Spiro, *supra* note 5, at 211.
47. *Id.*
48. *Id.*
49. *See* MOORE *supra* note 10, at 51.
50. *See id.*
51. *See id.*
52. *See id.*
53. *See id.*
54. *See* MOORE, *supra* note 10, at 80.
55. *Id.* at 81.
56. *See id.*

More controversy came in 1977 when President Jimmy Carter granted amnesty to all Vietnam draft evaders.[57] This grant of clemency has taken place after every major American war but emotions ran especially high during and after Vietnam. Therefore, Carter's grant of amnesty to this entire class of people created much tumult, regardless of its historical support.[58]

As the clemency power has become more visible in the press and widely known and discussed, the number of acts of clemency granted have consistently declined in the last half of the twentieth century.[59] Federal Regulations advise that the clemency application process go through the Office of the Pardon Attorney and only be accepted after a five year waiting period commencing with release from confinement or conviction.[60] However, these regulations are only advisory.[61] The president retains the authority to consider applications from individuals who are ineligible, and to grant clemency *sua sponte* without receiving an application.[62]

President Ronald Reagan granted only nine percent of clemency applications, the lowest rate in history.[63] The most controversial of these was to New York Yankees owner George Steinbrenner for illegal campaign contributions during the 1970s.[64] In the last days of his Presidency, George H.W. Bush granted pardons to six alleged players in the Iran-Contra scandal in which Bush himself had been implicated.[65] It has been argued that the pardons were used as a tool to prevent Bush and the other members of the scandal from testifying against one another.[66] After Bush had granted clemency in only 74 cases over four years, Clinton also granted rel-

57. *See* MOORE, *supra* note 10, at 80.

58. *See id.*

59. *See* Kurt Eichenwald & Michael Moss, *Rising Numbers Sought Pardons In Last 2 Years*, N.Y. TIMES, Jan. 29, 2001, at A1. President Truman granted 1,913, Eisenhower 1,110, Kennedy 472, Johnson 960, Nixon 863, Ford 382, Carter 534, Reagan 393, Bush 74, and Clinton 395. *Id.*

60. *See* 28 C.F.R.§§ 1.1-1.2, 1.6 (2001).

61. *See id.* at § 1.11.

62. *See* U.S. Dept. of Justice, *Testimony of Pardon Attorney Roger C. Adams Before the Committee on the Judiciary, U.S. Senate, February 14, 2001 available at* http://www.usdoj.gov/pardon/testimony/adams1.html.

63. *See* MOORE, *supra* note 10, at 82.

64. *See* Nida & Spiro, *supra* note 5, at 212.

65. *Id.*

66. *Id.*

atively few pardons until the last moments of his eight year Presidency.[67]

Clemency and the U.S. Supreme Court

In *Marbury v. Madison*,[68] Chief Justice John Marshall wrote for the majority:

> By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . .whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. . .the decision of the executive is conclusive.[69]

The Supreme Court has clearly and consistently defended unilateral and unqualified executive clemency. The first case to involve the executive clemency power was *United States v. Wilson* in 1833.[70] In *Wilson*, Chief Justice John Marshall recognized English common law as the source of the American clemency power and how it should operate in America.[71] Marshall described the American clemency power as an act that need not be justified to the judiciary.[72] Consequently, Marshall warned of the dangers of viewing pardons from non-judicial, political eyes and overturning "those rules which have been settled by the wisdom of ages."[73] Implicit in Marshall's definition of American clemency is the concept that the president can exercise the power in any form, at any time, and for any reason, except in cases of impeachment.[74]

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67. In Clinton's first seven years as President, he granted clemency only 219 times, but in his final year, he granted 176. *See* Eichenwald & Moss, *supra* note 59.

68. Marbury v. Madison, 5 U.S. 137 (1803).

69. *Id.* at 165-66

70. United States v. Wilson, 32 U.S. 150 (1833).

71. Wilson, 32 U.S. at 160.

72. *Id.* at 160-61.

73. *See id.* at 161.

74. *See* Kobil, *supra* note 13, at 593.

In *Ex parte Wells*,[75] the Court interpreted the clemency power very broadly, holding that the Constitution gives the president the power to grant clemency in any form known in the law, and may also condition the clemency on virtually any terms.[76]

After a ruling that an act of clemency could be refused by the grantee,[77] the Court further expanded the clemency power in *Biddle v. Perovich*,[78] recognizing the clemency power as an essential part of our Constitutional system in promoting the public welfare.[79] Justice Holmes stated that an act of clemency, "when granted. . .is the determination of the ultimate authority that the public welfare will be better served. . ."[80]

In *Ex parte Grossman*,[81] the Court interpreted the clemency power broadly at the expense of the judiciary. The Court held that the president must have full discretion in exercising the clemency power and that it extends to criminal contempt of court.[82]

In *Ex parte Garland*,[83] the Court gave its most expansive interpretation of the executive clemency power:

> The [clemency] power thus conferred is unlimited, [except in cases of impeachment]. It extends to every offense known to the law, and may be exercised at any time. . .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 power] cannot be fettered by any legislative restrictions.[84]

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75. Ex parte Wells, 59 U.S. 307 (1855).

76. *See id.* at 310-15; *See also* Kobil, *supra* note 13, at 595-96; Armstrong v. United States, 80 U.S. 154 (1872) (upholding President Johnson's grant of amnesty); Osborn v. United States, 91 U.S. 474 (1875) (upholding the President's power to use clemency in remitting fines and forfeitures); United States v. Klein, 80 U.S. 128 (1871) (upholding the power of the President to attach to a grant of clemency any conditions or qualifications he should see fit).

77. *See* Burdick v. United States, 236 U.S. 79 (1915); *See also* Kobil, *supra* note 13, at 595.

78. Biddle v. Perovich, 274 U.S. 480 (1927).

79. *Id.* at 486.

80. *Id.*

81. Ex parte Grossman, 267 U.S. 87 (1925).

82. *See id.* at 121-22.

83. Ex parte Garland, 71 U.S. 333 (1866).

84. *Id.* at 370-71.

In a more recent case, *Schick v. Reed*,[85] the Court reaffirmed the view of *Grossman*. In the majority decision, Chief Justice Burger spoke of the draftsmen of Article II of the Constitution who secured the prerogative of the president to grant clemency without being "fettered or embarrassed."[86] Chief Justice Burger added that the clemency power "flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."[87]

This support for a unilateral and unqualified clemency power comes without any pertinent dissents.[88] Any limitations that would be imposed on the clemency power would have to be found in the Constitution itself.[89] The Supreme Court has made it invariably clear that the clemency power was vested in the president alone for good reason and that any changes or limitations whatsoever would have to come in the form of a Constitutional amendment.

III. THE CLINTON PARDONS AND CALLS FOR REFORM OF THE EXECUTIVE CLEMENCY POWER

The Clinton Pardons

On January 20, 2001, the Clinton administration left power and gave way to the administration of President George W. Bush. The inauguration, however, was not the only big news to come out of Washington that day. In the last hours of his Presidency, Clinton exercised the executive clemency power for 176 individuals; a sharp increase in the number of pardons granted both in the modern trend as well as within the Clinton Presidency.[90] A few of these pardons gave rise to the outrage and debate regarding the executive clemency power and its potential for abuse. Normally, this com-

85. Schick v. Reed, 419 U.S. 256 (1974).

86. *Id.* at 384 (quoting THE FEDERALIST NO. 74, at 447-49 (Alexander Hamilton)(Clinton Rossiter ed., 1961)).

87. *Schick*, 419 U.S. at 385.

88. *Wilson*, *Grossman*, and *Biddle* are unanimous opinions. The dissenting opinions in *Wells*, *Garland*, *Klein*, and *Schick* do not challenge any language in the majority opinions regarding the unilateral and unqualified nature of the clemency power.

89. *See id.*

90. *See* Marc Lacey, *The Inauguration: The Presidential Pardons*, N.Y. TIMES, Jan. 21, 2001, at A1. Of these, 140 were classified as pardons and 36 as commutations of sentence. *Id.*

mon exercise of presidential clemency at the end of a term would not have been so vigorously debated for so long. However, Clinton had already made the headlines with his grant of clemency to 16 Puerto Rican terrorists in August 1999, which was seen by many as serving the purpose of aiding the image of Hillary Clinton in her U.S. Senate campaign.[91] To make matters worse, Clinton's last minute grants of clemency were surrounded by the controversies of one pardon being granted to the President's half brother who served time for dealing drugs, of Hillary Clinton's brother receiving $400,000 in return for pardons,[92] and most of all, of the pardons of Marc Rich and Pincus Green.

Rich and Green were indicted in the largest tax evasion case in U.S. history.[93] Once among the world's leading commodity traders, the companies owned by Rich and Green pleaded guilty in 1984 to tax evasion for hiding millions of dollars of profits made on crude oil trading.[94] The pair often refused to cooperate with prosecutors' requests to produce documents.[95] They fled to Switzerland, which refused to extradite them, to escape prosecution for the tax evasion, racketeering, and mail and wire fraud.[96] They never appeared in any U.S. court and they have renounced their U.S. citizenship.[97]

At the time of the pardon, it surfaced that Rich's ex-wife, Denise Rich, pledged $450,000 to the Clinton presidential library before the pardons were issued.[98] This was later confirmed by one of her lawyers during the Congressional hearings on the matter.[99] An anonymous Democratic fundraiser also claimed that Ms. Rich had pledged nearly $1 million in four installments over two years.[100]

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91. *See generally* Eichenwald & Moss, *supra* note 59.

92. *See* David Johnston & Don Van Natta, Jr., *The Clinton Pardons: The Lobbying*, N.Y. TIMES, Feb. 23, 2001, at A1.

93. Lacey, *supra* note 90.

94. *Id.*

95. *See id.*

96. Lacey, *supra* note 90.

97. *See id.*

98. *Id.*

99. *Id.*

100. Alison Leigh Cowan, *Ex-Wife of Pardoned Financier Pledged Money to Clinton Library*, N.Y. TIMES, Feb. 9, 2001, at A1.

In addition, questions were raised as to whether Eric Holder, Jr., a Clinton deputy attorney general, had attempted to engage in any *quid pro quo* with Jack Quinn, Marc Rich's lawyer and a close adviser to former Vice President Al Gore.[101] Holder was believed to have offered his assistance in securing the pardons in exchange for Quinn's help in getting Holder appointed attorney general in a possible Gore administration.[102] All sides denied any wrongdoing, and Denise Rich never testified at any hearing, invoking her Constitutional right against self-incrimination.[103]

In an unusual action, former President Clinton defended his acts of clemency, especially those granted to Rich and Green, in an Op-Ed piece in the New York Times.[104] Clinton gave a number of justifications for the pardons that he believed made Rich and Green worthy of clemency.[105] These justifications include, but are not limited to, unfair prosecution against Rich and Green, evidence that there was technically no wrongdoing, their past payment of $200 million in fines and taxes, and the urging by Jewish leaders to pardon Rich for his great services to Israeli charities.[106] Clinton also explained that, as a condition to the pardons, he required Rich and Green to waive all defenses, including any statutes of limitation, thus allowing the government to pursue any Energy Department, civil tax, or other charge that might be warranted in the future.[107]

Calls For Reform

Many citizens and politicians were enraged over this seemingly blatant and defiant controversy at the end of a second term already surrounded by scandal. So much so, that many journalists, citizens, and even members of Congress were calling for a reform of the

101. Alison Leigh Cowan, *Ex-Wife of Pardoned Financier Pledged Money to Clinton Library*, N.Y. TIMES, Feb. 9, 2001, at A1.

102. *See id.*

103. *Id.*

104. William Jefferson Clinton, *My Reasons for the Pardons*, N.Y. TIMES, Feb. 18, 2001, § 4 at Page 13.

105. *See id.* These reasons are discussed a bit more in depth by the former President in the article.

106. *See id.*

107. *See* Clinton, *supra* note 104.

executive clemency power that would prevent such an inappropriate exercise in the future.[108]

It seems as though after the highly publicized and controversial pardons granted by Ford, Carter, and Bush, coupled with the already strong disapproval of the Clinton scandals, the American body politic had had enough. Add the common perception that Clinton granted the pardons in defiance of a public that chastised him for his scandals and of the Congress which had recently impeached him, and the result is the most intense rhetoric and possible imminent reform of the executive clemency power since the debates at the Constitutional Convention. This warrants a look at some of the more noteworthy reforms that have been proposed before the Clinton scandal which are gaining momentum in its wake.

One such proposed reform is that a post conviction limitation be imposed on the executive clemency power.[109] Under this proposal, the president would be unable to exercise the clemency power until the grantee has been formally convicted.[110] The reasoning behind the post conviction limitation centers around the controversy of the Bush pardons of the Iran-Contra defendants.[111] As mentioned previously, many felt that the motivation for the pardons was to prevent misconduct from surfacing in further investigations or trials.[112]

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108. Countless articles appeared in major newspapers chastising Clinton for the acts of clemency in the two months following Jan. 20, 2001, some even proposing actual reforms. Also, there were a number of Congressional hearings that took place in February and March 2001 regarding the clemency process, the Clinton pardon of Marc Rich in particular, and most importantly, the prospects of reforming the clemency power with or without a Constitutional amendment. *See, e.g., Hearing On President Clinton's Pardons Before the House Comm. on Gov't Reform,* 107th Cong. (2001); *Hearing on Marc Rich Pardon Before the Senate Judiciary Comm.*, 107th Cong. (2001); *Hearing on Pardons Before the House Comm. on the Judiciary,* 107th Cong. (2001) ("Many here in Congress and across the country have suggested constitutional or legislative changes that would restrict the president's ability to issue pardons"); *Id.*

109. *See* James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative To Escape Accountability,* 27 U. RICH. L. REV. 345 (1993); *See* Scott P. Johnson & Christopher E. Smith, *White House Scandals and the Presidential Pardon Power: Persistent Risks and Prospects For Reform,* 33 NEW ENG. L. REV. 907 (1999). Both articles offer a proposal of a post conviction limitation.

110. *See id.*

111. *See* Jorgensen, *supra* note 109, at 369.

112. *See supra* note 108.

Proponents of this limitation argue that it would prevent a president from concealing misconduct as the prosecution and defense of the trial could investigate and publicize relevant information, thus increasing the accountability of all parties involved in the wrongdoing.[113] The post conviction proponents recognize the possibility that defendants could simply enter a guilty plea to satisfy the conviction requirement in expectation of a pardon.[114] However, their answer is if there are doubts about a defendant's sincerity in these situations, the trial judge can simply reject the plea, thereby forcing trial or more forthcoming answers from the defendant.[115]

Another noteworthy reform proposal is a requirement that clemency only be granted for specific charges.[116] The specification-of-charges-proponents argue that because a grant of clemency prevents pursuit or investigation through the criminal justice system, the requirement would enable the investigations of the news media and Congress on the specific misdeeds involved.[117] Additionally, proponents point out that prosecutors would be free to pursue all other charges not specified in the grant of clemency.[118] This proposal would serve the purpose of preventing presidents from hiding crimes and misdeeds committed by themselves and others because they would not be able to issue sweeping grants of clemency.[119]

A third proposal incorporates a set of proposals all in favor of passing a Constitutional amendment restricting how and when a president may exercise the clemency power. One such proposal is the same made at the Constitutional Convention, that all acts of clemency be subject to the consent of the Senate, much like many other executive actions.[120] A twist on this proposal is an amendment subjecting all grants of clemency to an override by a two-thirds vote of both Houses of Congress.[121] Another of these pro-

113. *See* Johnson & Smith, *supra* note 109, at 923-4.

114. *See id; See also* Jorgensen, *supra* note 109, at 369.

115. *See* Johnson & Smith, *supra* note 109, at 923-4; *See also* Jorgensen, *supra* note 109, at 369.

116. *See* Johnson and Smith, *supra* note 109, at 925.

117. *See id.*

118. *Id.*

119. *See* Jorgensen, *supra* note 109, at 370.

120. *See* 2 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1966).

121. *See Hearing on Pardons, supra* note 108, at 6. This proposal was suggested by U.S. Senator Arlen Specter.

posals is an amendment that no grants of clemency may be issued between October 1 of a presidential election year and January 21 of the following year.[122] Clearly, this amendment would prevent lame duck presidents from issuing clemency before they leave office, but essentially after they can be held responsible for unpopular grants.

A final and quite innovative proposal for reform is a bifurcation of the clemency power.[123] This proposal entails the appointment of a politically independent clemency commission comprised of "professional men."[124] The commission would be appointed in a manner similar to that of the federal judiciary: by the president and for life during good behavior.[125] This proposal would allow the president to continue granting clemency in those cases which are deemed by the commission to be unrelated to principles of justice and to leave those decisions which would presumably enhance justice to the commission.[126] Whichever body makes the decision, the proposal calls for the president to report all acts of clemency to the Congress immediately, which would be permitted to override the act of clemency by a super-majority vote.[127] Because of the broad and unilateral nature of the clemency power that has been granted by the Constitution to the president alone, the proposal concedes that the most logical choice to institute this reform is by executive order.[128]

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122. *See id.* at 7. This amendment was proposed by U.S. Representative Barney Frank.

123. *See generally* Kobil, *supra* note 13. Professor Kobil spends the majority of his article describing his proposal for bifurcation.

124. *See id.* at 622-23. Professor Kobil suggests a commission "composed entirely of men: a psychiatrist, a jurist, a physician, a sociologist, an educator, perhaps a barrister, and a criminologist." *Id.* at 623.

125. *Id.* There is no mention as to whether the appointments would require Senate confirmation.

126. *See id.* Professor Kobil distinguishes clemency decisions that are "justice-enhancing" such as those acts that would commute a blatantly discriminatory sentence, and "justice-neutral" such as those that might restore order or unity. *See id.*

127. Kobil, *supra* note 13, at 638.

128. *Id.* at 622.

IV. WHAT TO DO ABOUT THE EXECUTIVE CLEMENCY POWER IN THE WAKE OF THE CLINTON PRESIDENCY: ABSOLUTELY NOTHING.

Appropriate and Inappropriate Uses of Clemency

The unilateral and discretionary nature of the clemency power, coupled with the fact that the power was designed to protect the president from passionate judgments from the public, Congress, and the judiciary, make it very unclear what constitutes appropriate and inappropriate uses of the power. U.S. Supreme Court Justice Oliver Wendell Holmes gave some guidance in *Biddle v. Perovich.*[129] Holmes recognized the unilateral and unqualified nature of the clemency power but at the same time distinguished it from a divine prerogative: "[Clemency] is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme. . .it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[130] An appropriate use of the clemency power is simply one where the president uses it to prevent or correct an injustice.[131] Considering the fact that presidents need not justify their pardons, this broad and deferential standard almost creates a presumption that a grant of clemency is appropriate unless shown otherwise. Therefore, it is much clearer to analyze what would constitute an inappropriate use of clemency.

According to the standard in *Biddle*, an inappropriate grant of clemency is one that solely advances the interests of the president, his family, friends, or party.[132] Consequently, when a president refuses a grant of clemency due to the expectation of negative political implications, this is also inappropriate.[133]

Any evidence of *quid pro quo* might not be enough to constitute an inappropriate use on its own. For example, Clinton's pardon of his brother was inappropriate because the only reason Roger Clinton received it was because his brother was the president. There is

129. Biddle v. Perovich, 274 U.S. 480 (1927).

130. *See id.* at 486.

131. *See* Kathleen Dean Moore, *Pardon For Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 285 (1993).

132. *See* Moore, *supra* note 131, for further discussion of this assertion.

133. *See id.*

no justice or public interest that is served. On the other hand, a very strong argument could be made that Ford's pardon of Nixon was appropriate because while Ford was making the grant to a political ally and Nixon was receiving special treatment as a former president, Ford successfully spared the nation of putting a former president on trial and keeping the saga going. So Ford furthered the public welfare, and if anything, the pardon was actually detrimental to his own interests.[134]

In sum, perhaps the best way to describe an inappropriate grant of clemency is one in which the personal interests of the president are served in a greater proportion to the interests of justice and of the public welfare.

Constitutionally Amending the Clemency Power

It is widely agreed that any meaningful change in the executive clemency power would have to come in the form of a Constitutional amendment.[135] The Code of Federal Regulations[136] provides clemency guidelines, but they are only advisory in nature and need not be followed.[137] The changes called for in the bifurcation proposal would have to be adopted by an executive order by one president and followed without being modified or abrogated by the executive order of future presidents. In short, this proposal amounts to merely requesting that presidents act properly in the dispatch of the clemency power, as there is no way to enforce the proposal. Because amending the Constitution is required to enforce any significant reform, the question shifts to the need for and viability of an amendment.

The Intent of the Framers

The Framers of the Constitution understood the executive clemency power that they included "not as a personal privilege but

134. *See* MOORE, *supra* note 10, at 4.

135. *See Hearing on Pardons, supra* note 108, at 30-31 where Constitutional Law Professors Daniel Kobil, Allan J. Lichtman, and Ken Gormley all testify before Congress that nothing short of a Constitutional amendment would be necessary to require any action or inaction of the President regarding the clemency power.

136. *See* 28 C.F.R. §§ 1.1-1.11 (2001).

137. *See Hearing on Pardons, supra* note 108, at 43.

as an obligation of office."[138] John Locke, whose influence on the founding generation was immeasurably important, said:

> Many things there are, which the law can by no means provide for, and those must necessarily be left to the discretion of him, that has the executive power. . .'tis fit, the ruler should have a power, in many cases to mitigate the severity of the law and pardon some offenders. This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called *prerogative:* for since in some governments the lawmaking power. . .is usually too numerous, and so too slow, for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities. . .or to make such laws as will do no harm, if they are executed with an inflexible rigour, therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe.[139]

The executive clemency power did not make it into the draft of the Constitution without debate, and much can be learned about the intent of the Framers from the discourse that occurred during the time of the Constitutional Convention. There was a motion introduced by Roger Sherman to only allow the president to grant reprieves until the next session of the Senate, at which time the Senate would either give its consent to the pardon or refuse clemency.[140] This motion was voted down by a margin of eight to one.[141] Luther Martin moved to require the clemency power be granted only after conviction.[142] After an objection and after a brief discussion, the motion was withdrawn.[143]

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138. Margaret Colgate Love, *The Quality of the President's Mercy*, N.Y. TIMES, Dec. 19, 2002, at A39.

139. JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 384-86 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

140. *See* THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, REPORTED BY JAMES MADISON 471 (Gaillard Hunt & James Brown Scott eds., 1999).

141. *Id.*

142. *See* THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 120, at 422.

143. *See id.* at 426.

In a pamphlet, future Supreme Court Justice James Iredell answered concerns about the unilateral and unqualified clemency power giving the president the ability to shield himself and/or accomplices from their misdeeds.[144] Iredell recognized this threat, but at the same time recognized the threat of imposing a change on the power as it stood.[145] It would be impossible to foresee the negative implications of the change.[146] Iredell saw the broad, unilateral and unqualified nature of the clemency power as being a great advantage since the president could act with a "great degree of secrecy and dispatch on critical occasions."[147] Iredell gave an example of persons that could provide useful information and services to the nation but might otherwise be criminals or spies.[148] These persons and their contributions are not known to the public and the president should have the ability to negotiate and grant clemency to them, for they could save this nation with timely information.[149]

Perhaps in the pre-9/11 world, this would have been seen as an outdated Revolutionary idea. It is no longer so. Many arguments are made to involve Congress or commissions in clemency decisions, to open up the process to the public. But these changes, as well as those calling for convictions or specification of charges before clemency, would render the president unable to pardon a captured "unlawful combatant." A deal could have been negotiated with the detainee to provide very useful information that might otherwise prevent terrorist attacks or aid intelligence agencies in finding other dangerous terrorists. These kinds of maneuvers are useless if publicized or forced to endure bureaucratic debate and delay.

Another example provided by Iredell is the case of innocent people who are convicted because popular opinion is so strongly against them that no judge or jury could be completely impartial.[150] Again, current affairs have made this example quite plausible. Can Arab men accused of being terrorists in this political climate receive

144. *See* IREDELL, *supra* note 1, at 350.
145. *Id.* at 352.
146. *See id.*
147. *Id.*
148. *See id.* at 352-53.
149. *See id.*
150. *See* IREDELL, *supra* note 1, at 353.

a fair trial, guilty or innocent?[151] How about the American, John Walker, that had been fighting for the Afghan Taliban? Simply put, Iredell chose to take the chance of a president acting inappropriately rather than blindly making changes that might result in far more damage in the future.[152]

These concerns are echoed in *The Federalist Papers No. 74* by Alexander Hamilton, one of the greatest early proponents of a unilateral and discretionary clemency power.[153] Hamilton believed that the clemency power should be left to "one man. . .as little as possible fettered" because people derive confidence in their numbers and could encourage each other in their passions or vengeance.[154] Hamilton explicitly rejected the idea of including either House of Congress or any other body in clemency decisions and warned that the more persons involved in the process, the more difficult and timely it becomes.[155] This, Hamilton feared, could create bureaucratic gridlock in times of crisis where "the loss of a week, a day, an hour, may sometimes be fatal."[156]

The dangers that the proponents of clemency limitations both in 1787 and today fear were all considered by the Framers. The Framers were fully aware of the history of abuse of the royal pardoning power,[157] and they were not naive about human nature. Their own lives provided them with plenty of experience regarding the links between absolute power and corruption.[158] Despite this, they chose with almost total agreement and over noted objections to leave the clemency power in the Constitution absolutely unilateral and unqualified. Except, of course, for the bar in cases of impeachment, where the Framers clearly believed the president would be given too much power to shield someone or even himself from the ultimate check that Congress possesses on the executive and judi-

151. *See* Ex parte Grossman, 267 U.S. 87, 120-21 (1925) where Chief Justice Taft himself stated, "the administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt". *See id.*

152. *See* IREDELL, *supra* note 1, at 352.

153. *See* THE FEDERALIST No. 74, at 447-49 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

154. *Id.* at 447-48.

155. *See id.* at 448-49.

156. *See id.* at 449.

157. *See* Moore, *supra* note 131, at 282.

158. *See Hearing on Pardons, supra* note 108, at 17.

cial branches. The important part here is that lines of limitation were considered and drawn where the Framers deemed appropriate: almost nowhere.

If the Framers intended further limitations, they would not have expressly rejected them. They could have made the clemency power like many other executive powers, checked by legislative consent or oversight. Yet they did not, they chose to leave it in the hands of one person. The arguments recorded by James Madison at the Constitutional Convention and the arguments employed by Hamilton in defense of Article II "reinforce the image of pragmatic men determined to guarantee an effective government even at the cost of compromising democratic principles."[159] Simply stated, the Framers sought to make a government that works, not to philosophize about granting a unilateral power to a president of a democracy.[160]

The debates show that the Framers thought the legislature too powerful and/or too prone to political passions to be entrusted with the clemency power.[161] Recent history regarding the course of events during judicial and cabinet confirmations shows once again the foresight and wisdom of the Framers. Perhaps their judgment should not be so readily questioned.[162]

Over the 215 years since the Framers have devised "the most durable charter known to humankind,"[163] questionable grants of clemency have been relatively quite unusual[164] and this hardly warrants a Constitutional amendment.[165] History has shown that the wisdom of controversial pardons cannot be judged without hindsight.[166] All of the reforms attempt to insert other bodies into the

159. *See* MOORE, *supra* note 10, at 26.

160. *See id.* at 27.

161. *See Hearing on Improving the Pardon Process Before the House Subcommittee on the Constitution, Comm. on the Judiciary,* 107th Cong. (2001) (testimony of Daniel T. Kobil, Professor of Law at Capital University Law School).

162. *Id.* at 13.

163. *Hearing Concerning Possible Constitutional Amendments to the President's Pardon Power Before the Senate Comm. on the Judiciary,* 107th Cong. 10 (2001) (statement of Professor Ken Gormley, Professor of Law at Duquesne University).

164. *See* Moore, *supra* note 131, at 284.

165. *See Hearing Concerning Possible Constitutional Amendments, supra* note 162, at 10. Professor Gormley testified that amendments should be disfavored unless absolutely necessary, he would prefer to err on the side of leaving the Constitution undisturbed.

166. *See id.* at 12.

clemency decision, whether it be Congress, the media, a professional commission, the judiciary, or a combination thereof. In any case, all without hindsight. This would allow other bodies in the decision making process to judge a president's grant of clemency by inappropriate gauges such as passions of the moment, before the merits of a particular grant can be realized.

The proponents of change ignore the explicit intentions of the Framers to leave the clemency power as it is in the Constitution. The proponents substitute their own judgment for that of the Framers, which of course has been done from time to time with Constitutional amendments but only with clear and compelling necessity, which simply does not exist with the current state of the clemency power. Amending the clemency power in any substantial way would, as Hamilton feared, possibly strip the president of the power in the time when it is needed most. This would all be done at the expense of a nation and only in the name of rooting out the occasional controversial pardon, a monumental price to pay.

The Role of Clemency in the Separation of Powers

When the Framers diffused the power of the federal government into three distinct branches, they sought to create a framework where each branch could exercise checks on the others. This would ensure that the power would remain balanced, preventing any one branch from becoming oppressive. A common argument against the present state of the executive clemency power is that it violates the doctrine of separation of powers because the executive is permitted to exercise the power with few checks on it.[167] However, the Framers recognized the unique unilateral nature of the clemency power and put the checks in place that would not only keep the balance of power, but more importantly, would preserve the essential power and prerogative of executive clemency.

Generally in the federal system, Congress defines crimes and their punishments and the judiciary interprets and applies those laws and punishments.[168] The clemency power is itself an executive

167. *See, e.g.*, Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations From a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 418 (1999).

168. Hoffstadt, *supra* note 4, at 593.

check on Congress and the judiciary.[169] The Framers also cautiously added a check with the impeachment exception.[170] If the president could pardon in cases of impeachment, the check that Congress has on the executive and judicial branches would be virtually moot. Along the same lines, if a reform forces the president to share the clemency power with the legislative and/or judicial branches, this executive check on the branches that make, apply, and interpret the laws would also become moot.

During the debates at the Constitutional Convention, when Edmund Randolph moved to except cases of treason as well, Gouverneur Morris suggested that this particular aspect of clemency be vested in the legislature.[171] James Wilson thought the impeachment power of Congress sufficient to keep the executive in check when granting clemency for treason.[172] Rufus King saw the proposal as a violation of the separation of powers, to which James Madison agreed, but suggested involving the Senate alone, albeit only in an advisory nature.[173] In response, George Mason argued that the Senate already had too much power and Randolph, who made the motion, stated that "a great danger to liberty lay in a combination between the president and [the Senate]."[174] After the debate, the motion was voted down eight to two, with one abstention.[175]

There are substantial checks on the president in the exercise of the clemency power.[176] Congress has the power to impeach and remove a president for any misuse of the power. Although the Supreme Court will not review the merits of a grant of clemency, the Court will review it to ensure it does not infringe another Constitutional right of the grantee or a third party.[177] Finally, an often overlooked check is that of the electorate and public opinion. The electorate can simply choose not to re-elect a president who abuses the clemency power.

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169. Hoffstadt, *supra* note 4, at 594.
170. *See supra*, Section IV, subtitled *The Intent of the Framers.*
171. *See* THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 120, at 626.
172. *See id.*
173. *See id.* at 626-27.
174. *Id.* at 627.
175. THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 120, at 627.
176. *See* Hoffstadt, *supra* note 4, at 595.
177. *See id.*

The force of this check can be seen by the very fact that the most controversial pardons are withheld until the last weeks of a term, where this check has no impact on a lame duck president. It can also be seen in the case of Ford's pardon of Nixon, which many believe led to Ford's loss in the next presidential election.[178]

Perhaps the most telling example of the American body politic's check is the atrophy of the clemency power that has taken place in the later half of the twentieth century.[179] With the increasing role of the media in American politics and everyday life, the discontent with the clemency power has risen proportionately. So much disgust has been expressed at pardons such as those granted to Nixon, to the Iran-Contra defendants, and to Rich, that presidents must think twice before exercising the power and having to face the storm.[180]

Any reform of the executive clemency power that proposes to take any of the president's power and shift it to another branch, including setting mandatory rules or standards, and an increased role of judicial review, undermines the separation of powers doctrine and disturbs the balance of powers already in place. The argument that the clemency power must be checked cannot stand because the clemency power itself is a broad, final check on the entire legal and judicial system. If Congress and/or the judiciary are given another check on the clemency power which already is an essential executive check on those two branches, then that executive check is greatly diminished, if not abolished. Any reform that blurs the roles between the branches in the name of preventing clemency abuse, undermines the need for a unilateral and unqualified clemency power, and may effectively remove it from the Constitution.[181]

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178. MOORE *supra* note 10, at 7.

179. *See id.* at 82-86.

180. *See* Kobil, *supra* note 13, at 602-03, 640-41. This can be implied from the consistent decline in the number of grants of clemency discussed *supra* notes 58-59 and accompanying text. Indeed, the drop continued with Clinton until he granted clemency 176 times in his last year, and 219 in the previous eight. *See id.* Perhaps as the Clinton Presidency wound down, the goal was to grant the pardons he saw fit, regardless of approval ratings that were already quite low due to previous scandal.

181. *Hearing on Pardons*, *supra* note 108, at 19.

The Continuing Need For Clemency

In a time when the executive clemency power has come under so much fire, it is important to remember how clemency advances the general welfare, and makes such a dramatic difference in the thousands of lives it affects, the stories that never make the headlines.

Clemency in the American system operates as a fail-safe, allowing the president, one person, to stand between a defendant and the entire legislative and judicial system of laws and enforcement. Our judicial system is a complex one in which general laws are applied to specific cases.[182] These applications are marked by uncertainty and human passion, and therefore are particularly vulnerable to error.[183] The clemency power is a backup system that works outside of the rules so it can alleviate the effect of some of these errors.[184] If the same framework of rules of the main system were applied to the backup system, the same errors and fundamental flaws are present, effectively nullifying the backup.

In the *Odyssey*, Odysseus plugged the ears of the men on his ship and ordered them to tie him to the mast and ignore his subsequent orders so that they were not drawn to destruction by the Sirens.[185] In what was arguably the birth of constitutionalism, it was recognized that unchecked emotion will lead to destruction, that a structure must be put into place to allow earlier reason to trump later passion.[186] Similarly, the U.S. Constitution needs the clemency power to remain unaltered as one of its own structures to allow reason to trump passion. This generation must recognize that we must allow ourselves to be bound by the structures put in place by the founding generation, rather than letting discontent with the Clinton grants of clemency, which will seem relatively insignificant in history's judgment, to get the best of us. We have inherited our constitutional plan, but it does not belong exclusively to this generation. We are a bridge between those that have come before and

182. *See* Moore, *supra* note 131, at 284.

183. *Id.*

184. *Id.*

185. *See* Robert Blecker, Constitutional Supremacy And Nullification In Ancient Greece (in progress) (unpublished manuscript, on file with author).

186. *See* Blecker, *supra* note 185.

those that will come in the future. We are bound to allow both reason and restraint to triumph over passion.

Clemency promotes public confidence.[187] The public often loses confidence in an intricate American legal system that must be rigid by nature, but nonetheless sometimes results in what appears to be arbitrary justice or disparate sentencing.[188] Clemency will always be needed to ensure the American public that our government is dynamic enough to allow itself to alleviate its inevitable rigidities.[189]

Clemency does not go so far as to reduce pressure to reform these rigidities, it merely acts in securing the president's ability to stimulate or participate in a dialogue regarding the wisdom, constitutionality, or effectiveness of the laws, beyond ordinary methods.[190] For example, Clinton made a statement with grants of clemency to first time drug offenders who were sentenced under what many believe are overly harsh mandatory federal sentencing guidelines.[191] This recent example illustrates how important this aspect of clemency remains. The mandatory sentences were instituted by Congress and meted out by the judiciary, but stopped in the last line of defense with the unilateral executive clemency power.

Clemency also acts as a means of instituting mercy into our justice system.[192] As Hamilton so eloquently stated in reference to criminal codes, "without an easy access to exceptions of unfortunate guilt, justice would wear a countenance too sanguinary and cruel" and clemency is "a mitigation of the rigor of the law."[193]

The Atrophy of the Clemency Power

Perhaps the greatest danger concerning the clemency power today is not that the power will be exercised in increasingly inappropriate manners in the future, as many have suggested in the

187. *See Hearing on Improving the Pardon Process, supra* note 160, at 10-11.
188. *See id.*
189. *See Hearing on Pardons, supra* note 108, at 19.
190. *See Hearing on Improving the Pardon Process, supra* note 160, at 11.
191. *Id.*
192. *See Hearings on Improving the Pardon Process, supra* note 160, at 11.
193. THE FEDERALIST No. 74, *supra* note 153, at 447-48.

wake of the Clinton Presidency.[194] Instead, the real danger is that the historical controversies over Nixon, Iran-Contra, etc., and the Clinton controversy will create an atrophy of the pardon power to the point that its inherent benefits to the general welfare will be lost even absent any reform.[195] In practical terms, it is easy to imagine how every president following Clinton in the near future would be extremely hesitant in granting clemency because of the obvious political fallout, whether it be attacks in the media, before Congress, in the next election, or on the president's legacy.[196]

Indeed, Clinton's immediate successor did not exercise his clemency power once in his first 23 months in office.[197] Once President Bush did grant clemency, he chose to pardon seven unknown individuals who had committed small crimes and paid the price long ago.[198] These are among thousands of applications that the administration has denied.[199] The choices were clearly safe choices that had little chance of backfiring as opposed to commuting sentences of notorious individuals. The clemency power stirs much less controversy when used to restore the rights of petty thieves who have been punished and rehabilitated than when it is used to prevent those found guilty from receiving their full punishments. With Bush granting clemency only seven times in two years, the damage that has been done is painfully obvious.

Undoubtedly, in this political climate, at least one person, but probably many more, who deserve clemency will be passed up because his or her case may be too controversial and likely to make the headlines. The clemency power was entrusted to the single highest authority in the United States alone to guard against this very situation.

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194. *See Hearing on Improving the Pardon Process*, *supra* note 160, at 12.

195. *See id.* This notion is shared by many professors, attorneys, and students who have studied the clemency power even before the controversy over the Clinton pardons including, but certainly not limited to, Margaret Love, former U.S. Pardon Attorney, Kathleen Dean Moore, and Professor Daniel T. Kobil. *See id.*

196. *See id* at 13.

197. *See* Associated Press, *Bush Pardons $11 Thief and a Moonshine Seller*, N.Y. TIMES, Dec. 24, 2002, at A20.

198. *See id.*

199. *See* Alison Leigh Cowan, *Begging Pardon*, N.Y. TIMES, November 25, 2001, Section 4 at Page 2.

The question narrows to a balancing test which comes down to whether one would favor stopping all abuse at the expense of those that honestly deserve clemency, or permitting relatively minor abuse and ensuring deserving acts of clemency are granted. If given the choice of letting ten Marc Riches go free to save one unnamed innocent, the choice, one would hope, is clear.

V. CONCLUSION

Calling for reform of the executive clemency power makes for great academic and legal debate but falls far short in the practical world. As this Note illustrates, the calls for reform should go unanswered. The Framers of the U.S. Constitution knowingly adopted the clemency power that was abused in England. The problems we face today as well the reforms currently proposed were considered by them and the Framers explicitly and intentionally created a unilateral and unqualified executive clemency power nonetheless, which the Supreme Court has recognized and unwaveringly upheld.

Most, if not all reforms involve some type of increase in the power of Congress and/or the judiciary in matters of clemency, especially in the form of some type of oversight. This would invariably violate the separation of powers doctrine which the clemency power was designed to preserve, and of which the clemency power is itself a vital part. Finally, clemency plays the very important role in our society of providing a last chance of mercy for criminals and innocents alike, in a justice system that is far from perfect, and at times unreasonably rigid. It is a means of promoting public confidence and of forcing a closer look at unfair laws and sentences.

As the opening quote suggests, proponents of changing this power propose to substitute their system for one that, while once every four to eight years is complained about because of one or two anomalies, works well in preserving freedom and maintaining faith in the judicial system. These substitutions are a very dangerous undertaking with unintended and unforeseeable consequences that far outweigh the dangers of the inappropriate use we have seen. In its simplest form, this Note stands for the proposition that the gravity of the harm done by the executive clemency power as it stands today and has stood for centuries does not justify the risk of the

much greater harm of succumbing to the reflex of imposing change. "'If a thing has been practiced for two hundred years by common consent, it will need a strong case' to overturn it."[200] That case, critical and strong enough to warrant amending the Constitution of the United States, has yet to be made.

200. Schick v. Reed, 419 U.S. 256 (1974) (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922)).