

# The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency

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## I. INTRODUCTION

Shortly after 9:30 a.m. on January 15, 2009, Senator Patrick Leahy gav-  
eled the Senate Judiciary Committee to order.<sup>1</sup> Seated before the Committee  
was Eric Holder, then President-elect Barack Obama's nominee to become  
the eighty-second Attorney General of the United States. As Senator Leahy  
used his opening statement to sing the nominee's praises, the senator seated  
to Leahy's right—ranking member Senator Arlen Specter—had only one  
name on his mind: Marc Rich. Senator Specter's initial round of questioning  
focused entirely on Holder's role in the controversial, last-minute pardon  
President Clinton granted to the wealthy financier and Democratic fundraiser  
during his final hours in office.<sup>2</sup> Undoubtedly, Specter was not the only one  
with questions, as many Americans questioned whether Holder truly repre-  
sented the change for which the nation had voted. The reemergence of the  
Marc Rich story during the Holder confirmation hearings once again cast the  
limelight on the current presidential pardoning structure's vulnerability to  
abuse. This article seeks to explore the pardoning process and—consistent  
with the Obama Administration's focus on making government more trans-  
parent—to propose a solution by which the unchecked power of the Presi-  
dent to pardon might be reformed.

Article II, Section 2, Clause 1 of the Constitution grants the President  
of the United States the "Power to Grant Reprieves and Pardons for Of-  
fenses against the United States, except in Cases of Impeachment."<sup>3</sup> The  
Framers' vesting of this broad authority, coupled with Supreme Court deci-  
sions affirming the near-limitless nature of this power,<sup>4</sup> has imbued the Of-  
fice of the President with tremendous discretion to grant federal offenders  
pardons, conditional pardons, commutations of sentence, remissions of fines,

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<sup>1</sup> See *Attorney General Nomination Hearings Before the S. Judiciary Comm.*, 111 Cong. (2009) (statement of Sen. Patrick Leahy, Chairman, S. Judiciary Comm.), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3610&wit\\_id=2629](http://judiciary.senate.gov/hearings/testimony.cfm?id=3610&wit_id=2629) (on file with the Harvard Law School library).

<sup>2</sup> See Eric Lichtblau & David Johnston, *Pardon Is Back in Focus for the Justice Nominee*, N.Y. TIMES, Dec. 1, 2008, at A1; see also Eric Lichtblau, *Nominee Wants Some Detainees Tried in the U.S.*, N.Y. TIMES, Jan. 16, 2009, at A1.

<sup>3</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>4</sup> See *infra* text accompanying notes 22–31.

reprieves, and amnesties.<sup>5</sup> While clemency power is by no means unique to the American system of government,<sup>6</sup> the seemingly unchecked nature of this power establishes executive clemency as somewhat of a constitutional anomaly outside the system of checks and balances.<sup>7</sup>

Eric Holder's confirmation hearings revived the public's memory of President Clinton's notorious Marc Rich pardon. Other recent controversial pardons include President George H.W. Bush's pardon of six White House officials involved in the Iran-Contra scandal<sup>8</sup> and the commutation of I. Lewis "Scooter" Libby's sentence by President George W. Bush.<sup>9</sup> Additional criticism of executive clemency has highlighted the declining use of the presidential pardon, despite the Framers' intent for clemency to serve a vital role in the criminal justice system.<sup>10</sup>

In an effort to address the problems of the current executive clemency structure, this paper probes the various state pardoning models for solutions. Drawing on the structure common to many state reform systems while recognizing the unique attributes of federal clemency, this paper proposes the creation of a small, partisan Presidential Clemency Board to review and approve all presidential pardons. The hope is that the creation of such a Board would establish a system that is agile enough to respond to those situations where the public interest demands a pardon, responsive enough to allow deserving offenders the opportunity to receive clemency, and accountable enough to the electorate to deter corruption.

To illustrate the necessity and potential benefits of a Presidential Clemency Board, this paper tracks the following path. The next section provides

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<sup>5</sup> See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575–78 (1991). The terms "pardon" and "clemency" are sometimes used to describe different things, with "pardon provid[ing] the most sweeping remission of the consequences that normally attend violation of the law" and "clemency" being the broader umbrella term capturing pardons, commutations, remissions of fines, reprieves, and amnesties. For the purposes of this paper, the term "pardon" is used interchangeably with "clemency" to refer to what Kobil describes as the "general power to remit punishment." *Id.* at 576.

<sup>6</sup> *Id.* at 575 ("The clemency power is something of a living fossil, a relic from the days when an all-powerful monarch possessed the power to punish and remit punishment as an act of mercy. It is the oldest form of release procedure, and survives in some form in every state in the union and in every country of the world except China.").

<sup>7</sup> James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 353 (1993) ("Although the delegates recognized the potential breadth of the clemency power, all of the proposed limitations on the exercise of that power were ultimately defeated at the Convention. Thus, the executive's clemency power, a privilege uncharacteristic of the constitutional framework of checks and balances and limited democracy, was incorporated into the Constitution.").

<sup>8</sup> *Id.* at 362–68.

<sup>9</sup> Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 FED. SENT'G REP. 5, 5 (2007).

<sup>10</sup> See, e.g., Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 582–83 (2001); Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1508 (2000); Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1491 (2000); Kobil, *supra* note 5, at 602.

a brief constitutional history of executive clemency and Supreme Court decisions that have expansively interpreted this presidential power. Following that, the paper presents both the strengths and faults of the current regime, noting situations of national emergency in which the President's ability to pardon swiftly has served the public interest, but also highlighting faults of the current system, including the declining use of the pardon and the potential for corruption. The subsequent section provides a discussion of state pardoning procedures, noting how states have deviated from the federal model by promoting executive accountability and distributing at least part of the pardoning power to an external clemency board. The argument then culminates in a plan for reforming federal clemency, considering the states' approaches and the unique attributes of the federal clemency system. The proposed creation of a small, partisan Presidential Clemency Board maintains the current clemency model's ability to respond swiftly during moments of national crisis, while simultaneously improving the pardoning process by increasing the availability of clemency to deserving offenders and decreasing the potential for corruption.

## II. CONSTITUTIONAL HISTORY OF PARDONING POWER AND THE SUPREME COURT'S INTERPRETATION

Executive clemency in the United States has its roots in the pardoning power of the British monarchs in the seventeenth and eighteenth centuries.<sup>11</sup> Rather than perceive it as a failsafe in the criminal justice system, the British viewed executive clemency as a power vested in the monarch in accordance with his divine right to rule. Pardons were thought of as personal gifts from the monarch that required no justification and were not subject to criticism.<sup>12</sup> Naturally, monarchs began to abuse the pardon, employing this power for monetary and political gain.<sup>13</sup>

Upon colonizing the New World, the British Crown delegated clemency power to the colonies' royal governors. The American Revolution toppled this existing order, and, in accordance with the Revolution's spirit of distrust in executive authority, the states placed clemency power in the hands "of the legislature and governor jointly or in the legislature alone."<sup>14</sup> This trend toward empowering the legislature shifted in 1787 when the Framers, despite their wariness of concentrating power in the executive and their full

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<sup>11</sup> Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 282 (1993).

<sup>12</sup> *Id.*; see also Jorgensen, *supra* note 7, at 350.

<sup>13</sup> P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development, and Analysis (1900-1993)*, 27 PRESIDENTIAL STUD. Q. 251, 252 (1997) (citing the work of David Gary Adler and his discussion of the pardoning power's history).

<sup>14</sup> Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 EMORY L.J. 959, 965 (1997); W. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 13-14 (1941).

knowledge of the abuse of the royal pardoning power,<sup>15</sup> decided to imbue the newly created office of President of the United States with the supreme authority to grant clemency.

At the Constitutional Convention in 1787, the Framers paid scant attention to the President's power to pardon. While neither the Virginia nor the New Jersey plans initially contained any clemency provision, the power to pardon was vested in the President at the urging of Alexander Hamilton, Charles Pinckney, and John Rutledge.<sup>16</sup> While a few delegates presented proposals to limit the President's power to pardon, the only modification adopted came from George Mason, who sought to ensure that the President could not issue a pardon "in cases of impeachment."<sup>17</sup> In explaining the Convention's logic in vesting the President with the power to pardon, Alexander Hamilton wrote:

As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his *sole fiat* would naturally inspire scrupulousness and caution . . . .<sup>18</sup>

Additional justifications offered at the Convention included "that a legislative pardon would be too cumbersome and slow" and "the President would be more conscientious and less biased than the Congress."<sup>19</sup> Accordingly, the Constitutional Convention decided that the President could be entrusted to exercise this unchecked power judiciously.

Subsequent Supreme Court rulings have affirmed the President's near-limitless authority to pardon federal offenders. The first Supreme Court decision addressing presidential pardon power was *United States v. Wilson*<sup>20</sup> in 1833. Writing for the Court, Chief Justice Marshall emphasized the similarities between the British and American systems of clemency, concluding that the presidential pardon is "an act of grace," similar to the pardon of the British monarch.<sup>21</sup> Ninety-four years later, in *Biddle v. Perovich*,<sup>22</sup> the Supreme Court shifted from this perspective on the presidential pardon:

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<sup>15</sup> See Moore, *supra* note 11, at 282; see also David Gray Adler, *The President's Pardon Power*, in *INVENTING THE AMERICAN PRESIDENCY* 209, 209 (Thomas E. Cronin ed., 1989).

<sup>16</sup> Adler, *supra* note 15, at 215; see also Humbert, *supra* note 14, at 15.

<sup>17</sup> Ruckman, *supra* note 13, at 253.

<sup>18</sup> THE FEDERALIST NO. 74, at 415-16 (Alexander Hamilton) (Clinton Rossiter ed., Mentor Books 1999) (1961).

<sup>19</sup> Leonard B. Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 U. COLO. L. REV. 1, 13-14 (1976).

<sup>20</sup> 32 U.S. (7 Pet.) 150 (1833).

<sup>21</sup> *Id.* at 160.

<sup>22</sup> 274 U.S. 480 (1927).

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.<sup>23</sup>

Despite this modernized conception of executive clemency, Supreme Court jurisprudence suggests that neither Congress nor the courts has the ability to infringe on the President's power to pardon, instead holding that "the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself."<sup>24</sup>

With regard to the legislative branch, the Supreme Court has consistently held that Congress is powerless to infringe upon the executive's prerogative when it comes to clemency. In *Ex parte Garland*, Justice Field delivered the opinion of the Court: "This [pardon] 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."<sup>25</sup> Similarly, in *United States v. Klein*, the Court noted "that the legislature cannot change the effect of such a pardon any more than the executive can change a law."<sup>26</sup>

The presidential pardon is similarly sacrosanct when it comes to the judiciary. In *Ex parte Grossman*,<sup>27</sup> the Supreme Court rejected the argument that the President cannot pardon offenders convicted of criminal contempt of court on the grounds that allowing the President to do so would infringe on the powers of the judiciary. Instead, Chief Justice Taft adopted an expansive view of the President's clemency power, noting that "[o]ur Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."<sup>28</sup>

This view of the courts' inability to restrict pardoning authority was reiterated as recently as 1998 in *Ohio Adult Parole Authority v. Woodard*, in which the Supreme Court noted: "[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review."<sup>29</sup> Although the Supreme Court has established some minor restrictions on the President's pardoning authority,<sup>30</sup> the general tenor of the Court's opinions suggests that neither Congress nor the courts can interfere with executive clemency.

<sup>23</sup> *Id.* at 486.

<sup>24</sup> *Schick v. Reed*, 419 U.S. 256, 267 (1974).

<sup>25</sup> 71 U.S. (4 Wall.) 333, 380 (1866).

<sup>26</sup> 80 U.S. (13 Wall.) 128, 148 (1872).

<sup>27</sup> 267 U.S. 87 (1925).

<sup>28</sup> *Id.* at 121.

<sup>29</sup> 523 U.S. 272, 280 (1998) (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)).

<sup>30</sup> See Hoffstadt, *supra* note 10, at 594; *Knote v. United States*, 95 U.S. 149, 154 (1877); *Ex parte Garland*, 71 U.S. at 381; *Ex parte Wells*, 59 U.S. (18 How.) 307, 312 (1855); *Hart v. United States*, 118 U.S. 62, 67 (1886) (explaining that a pardon cannot require the payment of funds from the Treasury in violation of the Spending Clause); *Schick v. Reed*, 419 U.S. 256, 267 (1974) (holding that a pardon cannot require a prisoner to forfeit his constitutional rights unreasonably although the President may attach conditions); *Ohio Adult Parole Auth.*, 523

The nearly unfettered nature of the President's power to pardon, coupled with the Supreme Court's rulings that neither Congress nor the courts can check the executive's authority, has created a presidential pardoning system with few restrictions. Except for the dramatic step of impeachment, the only constraints on the President's pardoning power are the possibility of being voted out of office or, as Justice Iredell stated, "the damnation of his fame to all future ages."<sup>31</sup>

### III. STRENGTHS AND FAULTS IN THE CURRENT FEDERAL PARDONING SCHEME

In developing a comprehensive mechanism for reforming federal clemency, it is necessary to consider both the advantages and disadvantages of the present structure. A historical survey of presidential pardons reveals the strengths and faults of the current regime. While the current regime permits the President to act nimbly during periods of national crisis—thus suggesting that the President's near-limitless authority to pardon serves the public interest—critics have charged that the current system grants an insufficient number of pardons to deserving federal offenders and that corruption has the potential to taint the pardoning process.

At several moments in American history, the President's ability to pardon federal offenders swiftly has helped to heal the nation and serve the public interest. George Washington used the first presidential pardon in 1795 when he granted amnesty to participants in the Whiskey Rebellion.<sup>32</sup> Similarly, John Adams tried to serve the "the public good" by pardoning the members of a rebellion in Pennsylvania.<sup>33</sup> Thomas Jefferson employed the pardoning power to nullify all convictions under the controversial Alien and Sedition Acts, which had been used by Federalists to stifle political opposition.<sup>34</sup> Perhaps the best known examples of the presidential pardon being employed to restore tranquility to the nation arose during and after the Civil War. In 1863, President Lincoln issued a proclamation of general amnesty to those who rebelled against the Union; President Andrew Johnson, on Christmas Day 1868, pardoned Jefferson Davis and other confederate soldiers in what one scholar has called "the most salient exercise of executive clemency to date."<sup>35</sup>

In more recent times, President Gerald R. Ford's pardon of Richard Nixon on September 8, 1974, closed a bleak chapter in American history.

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U.S. at 289 (explaining that the procedures by which a pardon is granted must comply with the Fifth Amendment's Due Process Clause). It is also important to note that Congress holds the power to pardon concurrently. *See also* Hoffstadt, *supra* note 10, at 632 ("It is a long-accepted fact that Congress possesses a concurrent power to grant clemency.")

<sup>31</sup> Love, *supra* note 9, at 6 (quoting Justice Iredell).

<sup>32</sup> Kobil, *supra* note 5, at 592; Ruckman, *supra* note 13, at 6.

<sup>33</sup> Kobil, *supra* note 5, at 592.

<sup>34</sup> *Id.* at 592-93; Steiner, *supra* note 14, at 959.

<sup>35</sup> Ruckman, *supra* note 13, at 254.

Although the pardon was challenged on grounds that the President could not pardon a person who had not yet been convicted of a crime, the U.S. District Court upheld Ford's clemency grant, noting that, in the words of Alexander Hamilton, Ford had the authority to grant this pardon to "restore the tranquility of the commonwealth."<sup>36</sup> Similarly, on his first full day in office, Jimmy Carter pardoned those who had evaded the draft during the Vietnam War in an effort to "bind the wounds that an unpopular war had inflicted on society and on its young people, so that healing could begin."<sup>37</sup> These examples demonstrate instances in which the President's ability to act nimbly and decisively has served the nation's best interests.

Despite these examples, the current federal clemency regime is far from perfect. One major criticism of the current federal clemency system is that an insufficient number of presidential pardons are granted to deserving offenders. Several scholars, including Carol S. Steiker<sup>38</sup> and Daniel T. Kobil,<sup>39</sup> have called for an increase in the use of the clemency power in light of the harsher sentencing standards that have dramatically increased America's prison population. The number of inmates has increased from approximately 330,000 in 1960 to nearly 2.3 million today; many of these additional inmates are federal drug offenders.<sup>40</sup>

Despite this increase in the federal prison population, presidential use of the pardon power has declined precipitously.<sup>41</sup> Almost every year between 1932 and 1980, the President pardoned at least one hundred sentenced individuals, with some years boasting over three hundred.<sup>42</sup> While President Kennedy issued pardons to over one hundred drug offenders serving long mandatory sentences,<sup>43</sup> President George W. Bush granted only twenty-one pardons during his first term in office.<sup>44</sup> Critics attribute the decline in the pardon's use to the politics of crime control, with Republicans and Democrats competing in a "race to incarcerate" since the early 1980s.<sup>45</sup> Similarly, others point to the "shift in the last quarter of the twentieth century from the predominance of redemptive rhetoric and justifications for the use of power to the rhetorical predominance of retributivism."<sup>46</sup> In a political climate

<sup>36</sup> *Murphy v. Ford*, 390 F. Supp. 1372, 1374 (W.D. Mich. 1975).

<sup>37</sup> Moore, *infra* note 41, at 81-82.

<sup>38</sup> See Carol S. Steiker, *Passing the Buck on Mercy*, WASH. POST, Sept. 7, 2008, at B7.

<sup>39</sup> See Kobil, *supra* note 5, at 574-75 (citing prison overcrowding and an increase in the number of prisoners with AIDS as a reason why clemency needs to be reformed).

<sup>40</sup> Steiker, *supra* note 38, at B7.

<sup>41</sup> For a more in depth discussion of retributivist theory and various justifications for executive clemency, see KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 34-130 (1989).

<sup>42</sup> Love, *supra* note 10, at 1491-92.

<sup>43</sup> Rapaport, *supra* note 10, at 1508-09.

<sup>44</sup> Dep't of Justice, *Presidential Clemency Actions by Administration 1945-Present*, available at [http://www.usdoj.gov/pardon/actions\\_administration.htm](http://www.usdoj.gov/pardon/actions_administration.htm) (last visited Mar. 19, 2009) (on file with the Harvard Law School Library).

<sup>45</sup> Love, *supra* note 10, at 1495 (citation omitted).

<sup>46</sup> Rapaport, *supra* note 10, at 1506.

where a reputation for being “soft on crime” amounts to a death sentence at the polls, chief executives who hold the power to exercise clemency have been reluctant to do so. Accordingly, a criticism of the current pardoning regime is that Presidents exercise the power too infrequently, forcing a large number of federal offenders to serve out unjustly long prison sentences.

In addition to the declining number of pardons granted, some argue that the federal clemency process as it currently stands opened the door to corruption. Perhaps the most egregious examples of abuse can be seen in pardons granted by the last three American presidents. Following his loss in the 1992 election, President George H.W. Bush issued pardons to six Reagan Administration officials—Casper Weinberger, Elliott Abrams, Duane Clarridge, Alan Fiers, Clair George, and Robert McFarlane—who had been accused or convicted of misconduct in connection with the Iran-Contra scandal.<sup>47</sup> Because President Bush acted after the 1992 presidential election, these pardons were issued without any democratic check on the executive’s authority. Furthermore, some have speculated that these pardons “may have been motivated by the self-interest of a President who halted criminal proceedings in order to suppress information concerning his own conduct.”<sup>48</sup>

In the summer of 1999, President Clinton—in a move criticized as an attempt to curry favor with Hispanic voters for his wife’s Senate candidacy—granted clemency to sixteen incarcerated members of the Puerto Rican nationalist group FALN who had been convicted of terrorist offenses.<sup>49</sup> Additionally, on January 20, 2001, with only hours remaining in his presidency, Clinton granted 140 pardons and thirty-six commutations of sentence, including a pardon to Marc Rich, whose wife, Denise, had made substantial donations to the Clinton Library and to Mrs. Clinton’s Senate campaign.<sup>50</sup> The most recent controversial presidential pardon came on July 2, 2007, when President George W. Bush commuted the prison sentence of I. Lewis “Scooter” Libby, Vice President Cheney’s former chief of staff, who had been sentenced to thirty months in prison for perjury and obstruction of justice in connection with the Valerie Plame Wilson scandal.<sup>51</sup>

All of these pardons occurred at times when the President would never again face the voters, thereby highlighting the troubling fact that presidents in the final days of their tenure in office or—with the adoption of the Twenty-Second Amendment—at any time during their second term are free from electoral accountability. This phenomenon is not limited to the most

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<sup>47</sup> Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL’Y REV. 361, 364–67 (1993); 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, 442 (1999).

<sup>48</sup> Jorgensen, *supra* note 7, at 346.

<sup>49</sup> Love, *supra* note 10, at 1484.

<sup>50</sup> Jonathan Peterson & Lisa Getter, *Clinton Pardons Raise Questions of Timing, Motive*, L.A. TIMES, Jan. 28, 2001, at A1.

<sup>51</sup> Love, *supra* note 9, at 5.



recent presidential administrations. George Washington “granted almost as many pardons on his last day in office as he had during his previous seven years as President.”<sup>52</sup> Presidents Grant, Hayes, Wilson, Coolidge, and Johnson also pardoned a high number of individuals in their final days before departing office.<sup>53</sup> These examples illustrate the potential for corruption, as well as a lack of accountability, in the federal clemency process.

A historical review of the President’s use of the pardon power reveals both strengths and weaknesses in the current federal clemency apparatus. In reforming federal clemency, a system must be devised that preserves the strengths while eliminating, or at least mitigating, the deficiencies. Thus, a proposal for reform must meet three goals: first, federal clemency must be sufficiently agile to respond in those situations where the public interest demands a pardon; second, the system must be sufficiently responsive to deserving federal offenders; and, finally, the presidential pardon must provide a sufficient level of accountability to the leaders who wield it, thereby increasing its democratic legitimacy while mitigating corruption. State clemency procedures are a natural starting point in exploring what reforms would be most effective.

#### IV. VARIATIONS AMONG STATE-LEVEL PARDONING PROCEDURES

The methods states have adopted in reforming their executive clemency models provide a basis for developing a new federal system. Historically, state and federal clemency models have been quite similar. While some state constitutions grant the legislature a role in the pardoning process, nearly all state constitutions vest final discretion in the governor.<sup>54</sup> States’ pardoning processes are also plagued by corruption. Just like American Presidents, state governors have shown a penchant for granting pardons to the wealthy and well-connected, as well as to those offenders who could provide some kind of political advantage.<sup>55</sup> The similarities between state and federal clemency systems, both in terms of the division of responsibility and the common problem of corruption, suggest that a brief review of how states have addressed pardoning is warranted.

A wide variety of state clemency structures have emerged as various states have sought to reform their pardoning systems. In *The Pardon Power and the American State Constitutional Tradition*, John Dinan reviews the 230 state constitutional conventions that took place in the nineteenth and

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<sup>52</sup> P.S. Ruckman, “Last-Minute” Pardon Scandals: Fact and Fiction 4–5 (paper prepared for delivery at the Annual Meeting of the Midwest Political Science Association April 15–18, 2004, in Chicago, IL), available at <http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf> (on file with the Harvard Law School library).

<sup>53</sup> *Id.*

<sup>54</sup> Dorne, *supra* note 37, at 426.

<sup>55</sup> John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 POLITY 389, 396–97 (2003).

twentieth centuries to identify how various states have addressed the issue of executive clemency.<sup>56</sup> Christen Jensen, in his 1922 book *The Pardoning Power in the American States*, conducts a similar analysis.<sup>57</sup> These two scholars note how many states, in their efforts to reform their individual pardoning systems, sought to develop systems of shared responsibility, establishing pardoning boards to limit the number of improper pardons granted.<sup>58</sup> At the turn of the twenty-first century, nine states required a governor to solicit non-binding advice prior to a pardon. In eleven other states, a governor could only grant clemency after securing approval from a board or legislative body. Another nine states gave a pardoning board complete control of clemency.<sup>59</sup> Drawing upon these state measures, the creation of a pardoning board mediating executive control could represent a viable approach to reforming the federal clemency process.

While corruption is common to both state and federal pardoning procedures, the federal system is also plagued by a hesitancy to grant pardons to deserving offenders. Moreover, its role in national reconciliation requires that it be flexible enough to respond swiftly in a crisis. In considering these two issues, the states may not represent an appropriate model. States' discussions of clemency reform largely centered on decreasing, rather than increasing, the number of pardons granted.<sup>60</sup> Additionally, states do not have to consider larger national needs when granting individual pardons. Dinan describes this federal factor as the "greater need to grant pardons for reasons of state than of justice . . . in order to quell insurrections, reward individuals who have fought for their country . . . and restore tranquility during riots and rebellions."<sup>61</sup> However, the pervasive and continued presence of clemency boards in state reform efforts suggests this may be a viable method of addressing some of the problems associated with executive clemency.

#### V. REFORMING FEDERAL PARDONING VIA THE CREATION OF A PRESIDENTIAL CLEMENCY BOARD

A review of the strengths and faults of the current federal clemency scheme reveals that a proposal for reforming the system should have three

<sup>56</sup> *Id.* at 392–94.

<sup>57</sup> CHRISTEN JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* 23–33 (1922).

<sup>58</sup> *See id.* at 23 (noting how the "laxness" of executives in dispensing pardons prompted reform); *see also id.* at 11–15 (detailing how many states' reform efforts have employed a pardoning board); Dinan, *supra* note 55, at 398; Dorne, *supra* note 4737, at 427–28.

<sup>59</sup> *See* Dinan, *supra* note 55, at 403–04.

<sup>60</sup> *Id.* at 398–99 (noting how delegates to state conventions supported the creation of a pardoning board out of "an awareness of the frailty of human nature," as governors were often powerless to prevent their own issuing of a pardon in the face of an elderly or attractive woman's pleas on behalf of a son or husband); *see also* Jensen, *supra* note 57, at 23 (citing the California Constitutional Convention of 1878–79 to note that "governors had often been influenced by sentiment and emotion.").

<sup>61</sup> Dinan, *supra* note 55, at 414–15.

main goals. First, a reformed federal clemency procedure must be sufficiently agile to respond to the public interest. Second, the reforms must reinvigorate the pardoning process so as to make the system more responsive to those federal offenders deserving of clemency. Third, a proposal for reform must take action to prevent any presidential abuse of the pardoning authority. This paper argues that the creation of a small, partisan Presidential Clemency Board could achieve these three goals.

Before delving into the structure and composition of the proposed Presidential Clemency Board, it is important to discuss the procedural mechanics of how reform might be achieved. As discussed above, the constitutional history of the President's pardoning power and the subsequent Supreme Court case law interpreting this authority suggest that granting clemency is almost exclusively within the executive's prerogative. Accordingly, it appears that only two mechanisms exist to reform the federal clemency system: the first involves amending the United States Constitution, and the second requires the President to impose limitations on his own authority.

The prospect of a constitutional amendment being used to limit the President's pardoning power is unlikely. Perhaps in the aftermath of a President engaging in dramatic abuse of the pardoning authority, a movement of sufficient strength could arise to carry a constitutional amendment through three-quarters of the state legislatures. History, however, suggests this turn of events would be improbable. In the period following President Ford's pardon of Richard Nixon—a time when negative public opinion regarding the presidential pardon was arguably at its highest—Senator Walter Mondale proposed a constitutional amendment that would allow Congress to overrule a presidential pardon with a two-thirds majority.<sup>62</sup> Despite fresh public resentment of the Nixon pardon, Mondale's amendment failed. Historically, there have not been many pardons that have sparked the degree of controversy necessary to propel a constitutional amendment.<sup>63</sup> It therefore appears that limitations on executive clemency must originate with the President himself.<sup>64</sup>

The prospect of a President imposing limitations on his own pardoning authority is not as far-fetched as it may seem. One could imagine this occurring in the aftermath of several questionable pardons by an outgoing President. An incoming administration might choose to address the issue directly, drafting an executive order to limit the President's clemency-granting authority. Furthermore, this notion of the President imposing restrictions on his authority is not without precedent. In 1976, President Gerald R. Ford imposed restrictions on the President's power to give orders to the United

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<sup>62</sup> *Id.* at 390; Adler, *supra* note 15, at 230; Moore, *supra* note 41, at 217.

<sup>63</sup> Ruckman, *supra* note 13, at 256.

<sup>64</sup> Kobil, *supra* note 5, at 601 (“As a practical matter, then, the exercise of the clemency power has been subject only to the constraints that each chief executive has chosen to impose upon himself.”).

States military and intelligence personnel, issuing Executive Order 11905.<sup>65</sup> In a section entitled “Restrictions on Intelligence Activities,” Ford banned the military and intelligence agencies from engaging in political assassination: “5(g) *Prohibition on Assassination*. No employee of the United States Government shall engage in, or conspire to engage in, political assassination.”<sup>66</sup> Both Jimmy Carter and Ronald Reagan reiterated the prohibition, adopting slightly different language. Because no subsequent executive order or piece of legislation has repealed the prohibition on political assassination, it remains in effect today. As Executive Order 11905 demonstrates, it is not unprecedented for Presidents to limit the scope of their own power. Accordingly, the most viable mechanism for enacting clemency reforms is via executive order.

The establishment of a small, partisan Presidential Clemency Board would maintain the agility of the current clemency system, while increasing the availability of pardons to deserving federal offenders and limiting corruption. The Presidential Clemency Board would be comprised of five members: the President and four members of Congress. All five members would be of the same political party, with the four congressional members being either the chair or ranking member (depending on the partisan control of the two chambers of Congress) of the following congressional committees: the House Judiciary Committee, the Senate Judiciary Committee, the House Standards of Official Conduct Committee, and the Senate Ethics Committee. The leaders of these committees are selected deliberately, as these Members of Congress are the most likely to have legal backgrounds, institutional knowledge of the Department of Justice, or a heightened awareness of what constitutes unethical or otherwise improper conduct. Under this proposal, the President would issue an executive order establishing the creation of the Presidential Clemency Board and would require the consent of at least three members of the Board to a presidential pardon before the pardon could be issued.<sup>67</sup>

The establishment of the Presidential Clemency Board would accomplish all three of the goals suggested. First, because the Board would be small, the federal clemency system would remain sufficiently agile to respond swiftly during times of national crisis. While it is undeniable that a President acting alone may act more quickly than the proposed Presidential Clemency Board, the intimate size would still enable swift action. Moreover, because only three out of four members must consent, the unavailability

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<sup>65</sup> Exec. Order No. 11,905, 41 Fed. Reg. 7703 (Feb. 18, 1976).

<sup>66</sup> *Id.*

<sup>67</sup> Empowering Members of Congress to consent to or decline a president’s pardon may raise constitutional concerns regarding the separation of powers and the unconstitutional delegation of executive authority. In addressing this policy proposal’s constitutionality, it is important to note that Board members are not granted authority to pardon; this power is retained with the president. Thus, it is unlikely that this proposal constitutes an unconstitutional delegation of executive authority or a betrayal of the separation of powers. However, additional research on the constitutional questions surrounding this proposal is warranted.

of a member would not unduly hinder a grant of clemency. Furthermore, no one member of the Board would be able to abuse his position and single-handedly derail the clemency process in order to burnish his “tough on crime” credentials.

Second, a Presidential Clemency Board could also increase the number of pardons granted to deserving individuals. Scholars have noted how the President’s detachment from those requesting clemency has helped to contribute to the presidential pardon’s decline.<sup>68</sup> Unlike the President, members of Congress remain in close contact with their constituents and are more responsive to their demands. While it is true that constituents and family members are currently able to lobby their representatives in pursuit of a pardon, the present structure affords members of Congress no formal role, instead relying on the unelected Office of the Pardon Attorney (OPA) within the Department of Justice (DOJ) to decide which cases merit executive clemency. A concerned citizen’s access is obstructed, as she must first lobby her representative, who then must exert influence with DOJ or OPA officials. By contrast, a Presidential Clemency Board would afford the legislative branch a direct role, and individual representatives and senators would be afforded easy access to lobby a congressional Board member on behalf of a deserving constituent. Because members of Congress are more accessible to citizens, increasing their formal role in the pardoning process would grant an individual with a sympathetic case a greater opportunity to be heard.

Finally, the establishment of the Presidential Clemency Board would imbue the system with a greater degree of accountability. Presidents, instead of being able to grant clemency by fiat, would have to provide the four other Board members with a justification for granting a pardon. Such a system would likely prevent pardoning motivated by cronyism or corruption. Furthermore, the Presidential Clemency Board would introduce electoral accountability into the pardoning structure. The fact that all members of the Board would be members of the President’s political party ensures that each pardon would be identified not just with a President, but also with that President’s party. Such a scheme would promote judicious use of the pardon by affording voters an opportunity for future electoral retaliation against a political party affiliated with corrupt pardoning. Additionally, the congressional members of the Board would have a strong incentive to thwart an inappropriate pardon, as those individual representatives and senators might face an electoral backlash in their respective districts or states.

Admittedly, it is possible that increased accountability might result in fewer pardons being granted, thereby detracting from the second objective of increasing the number of pardons available to deserving offenders. Political history, however, suggests that the aims are not mutually exclusive. Whenever pardoning is cause for criticizing a politician, the political attack is usually couched in a specific example linking a politician to a questionable

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<sup>68</sup> Dinan, *supra* note 55, at 412; Humbert, *supra* note 14, at 5.

pardon. Examples of a politician's pardoning record being criticized because of a specific questionable grant of clemency include the aforementioned examples of George H.W. Bush and the Iran Contra officials, as well as Bill Clinton and March Rich. The Presidential Clemency Board, by decreasing the likelihood of a scandalous pardon, actually helps sideline clemency as a political issue, affording Presidents the ability to pardon deserving citizens with a diminished fear of political attack. In conclusion, the establishment of this small, partisan Presidential Clemency Board to reform the federal pardoning system meets all three identified goals.

## VI. CONCLUSION

The United States Constitution and subsequent Supreme Court opinions have afforded the chief executive near-limitless authority in granting federal clemency. Recent instances of controversial pardoning have highlighted the need to reform the current mechanism by which federal clemency is granted. An investigation delving into the merits of the federal clemency system reveals both its strengths and faults. Although the President is able to respond swiftly with a pardon and restore tranquility during times of national crisis, the number of federal pardons granted to deserving offenders is too low, while the number of federal pardons of questionable integrity is too high.

An exploration of the various state models for granting clemency suggests that the formation of clemency boards presents a viable solution for reform, and yet the challenges unique to federal clemency preclude the adoption of any of the state reforms whole-cloth. One reform that could be successful on a federal level is the creation of a small, partisan Presidential Clemency Board via executive order. First, the Board's small size would permit federal clemency to be granted quickly during times of national crisis. Second, the inclusion of four members of Congress in the clemency process could increase the number of appropriate pardons, as deserving offenders and their families would have a greater opportunity to be heard. Finally, forcing the President to justify his pardons to a partisan Board would stymie corruption because each pardon would be associated with a specific political party and Members of Congress who could be held accountable in the next election. While the Presidential Clemency Board does not promise a flawless pardoning procedure, it does offer the potential for significant improvement upon the current system.