

Exclusive Discretion: Presidential Purposes for Issuing Pardons

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The President of the United States' prerogative to grant clemency to any individual for any crime (save for impeachment) serves as his only unchecked power. My paper seeks to gain a deeper understanding of the influences and motivations behind many prominent presidential pardon decisions throughout history. I propose a classification system for these motivations and correlate them to the intentions of our Founding Fathers. In doing so, I explain that the presidential pardon has both justified their hopes for the highest displays of mercy and justice and has also represented their fears of the lowest levels of selfishness and privilege. I also predict that the issuance of presidential pardons (save for those issued by lame duck presidents) will continue to decrease due to changes in modern politics and society that have resulted in increased presidential scrutiny.

The United States' democratic republic was founded upon principles of liberty and justice, equality and egalitarianism. It was founded in the face of tyranny and designed to oppose all sorts of political and personal oppression. Endowed with liberties to protect speech, home, and faith, the new government was also designed to be sustainable. Three independent branches of government were created, each to be held in check by the others. This design stood starkly against the paternalist, monarchical ideologies that our nation's Founding Fathers had previously been forced to embrace. Gone was absolute power from progeniture; individuals—landowning white males, at least—were now free to ascend to positions of authority, or, at the very least, to at least choose those who would govern them. The modern *demokratia*, the contemporary rule of the people, commenced.

For all of its checks and balances, however, the framers of the Constitution did ascribe one absolute power that was to be virtually unquestioned and limitless. This power was not to be held by an elected assembly or even by a small group of wise individuals. Rather, the only absolute power given by the authors of the Constitution was to be in the hands of one individual. Enter the pardon:

and he [the President] shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Without even a complete sentence, the pardon was born. Just as the United States' republic democracy has evolved into something today that is, in some respects, much different from our Founding Fathers' farthest reaching conjectures (to be sure, the Framers would not have imagined an America where the leading presidential contenders are black and female), the pardon power has also undergone

various translations and permutations over the past two centuries. As America has developed and changed, so too has the pardon. Likewise, as America has remained the same, the use of the pardon has also remained the same in many important ways. This paper will examine those trends.

Beginning with a brief historical and philosophical inquest into the roots of the pardon, this paper will seek to understand why the Founding Fathers endowed the President of the United States solely with the absolute pardon power rather than delegate the power to the Congress or to another governing body. In doing so, an understanding of the founders' intentions for the pardon will be gained. With this important historical context established, this paper will then seek to explain the current state of the pardon process. As much attention will be paid to the modern evolution of the pardon process, it is important to understand the procedures behind the issuance of presidential pardons. After some context has been achieved through history and procedure, I will examine pertinent scholarly literature on the pardoning process. Interestingly, the unlimited power of the pardon has not been subject to as intense scrutiny or research as, for example, the veto, a presidential power that is held in balance by the Senate.

After coming to an understanding of the current state of research on the pardon process and after placing the pardon in both historical and procedural context, this paper will examine pardons categorically. In particular, space will be allotted to categorize the different motivations of pardon decisions. In doing so, this paper will attempt to take a broad look at pardons spanning across the history of the United States and reach some conclusions as to what sorts of presidential motivations generally lead to pardons. Furthermore, this paper will examine how the motivations correlate to the intentions of the Founding Fathers. This paper will also attempt to explain, on a smaller scale, how recent trends in presidential pardon determinations also reflect recent changes in society and in politics. Finally, this paper will conclude by making predictions on the use of the presidential pardon in the future.

Unlike much of recent scholarship on the pardon, this paper does not seek to make recommendations for changes to the pardon process. To be sure, much of the recent literature on the pardon does make strong recommendations for revisions to executive clemency. Much of this literature is indeed a reaction to suspected misuses of the power, responding to the controversial pardons and commutations by former President Clinton and current President Bush. And, while this literature is indeed timely and in many cases a necessary response from academia, this paper does not seek to suggest sweeping changes to the pardon process. My reasoning for not advocating changes in this paper is two-fold. First, I do not have the background to do so. Many of the recent suggestions on modifications to the pardons process are from legal and presidential scholars or even from a former US Pardons attorney. This is not to say that I am incapable of providing suggestions for changing what many believe to be a flawed process, but moreover that any suggestions that I might make would likely be subordinate in quality and in context as compared to those far more experienced than me. Secondly, given the proclivity

of government to remain the same rather than to change, I do not view changes in the absolute nature of the pardon as being likely or even as particularly feasible. To do so would be to require a constitutional amendment, something not easily achieved in today's politically charged, partisan environment. Again, this is not to say that I would not potentially support changes in the pardoning process, but moreover that I feel my paper will be more useful in making predictions of future pardon trends based upon the current, 220 year-old system.

HISTORICAL AND PHILOSOPHICAL ROOTS OF PARDONS

The pardon's development in a historical context closely follows the development of formal political structures throughout world civilization. The Greeks were among the first to both create a governmental structure and formalize a process for pardoning offenders convicted of crimes. The procedure was relatively simple to understand, yet wholly difficult to execute. A pardon seeker needed to receive the signatures of some 6,000 citizens. In Rome, various systems for amnesty existed that included pardons by the legislature, judiciary, and, of course, by the executive (emperor). History shows rulers of the Roman Empire to have regularly utilized the pardon process to their benefit, rewarding loyal subjects and negotiating pardon trades.

In England, pardoning power rested with the king as early as the 7th century. While the ensuing centuries would see regular conflict between the king and parliament over the pardoning power, the power rested solely in royal hands by 1535. The pardon became a capricious tool of absolute monarchs who exercised the power to celebrate anniversaries, coerce military service, and generate revenue. While the royal pardon gradually grew more constricted by way of Parliamentary influence, pardons were still generally permissible in most circumstances save for impeachment and treason.

Not surprisingly, the development of the pardon within the United States closely followed protocols and precedents established by England. Surprisingly, however, the United States adopted the pardon in its 1789 Constitution ahead of one world power, France. However, with France's adoption of the pardon power in 1803, no major country has been without some sort of clemency system since. The pardoning power did not come to fruition in the United States without some debate. Some within the Constitutional Convention wished to place restraints on the president's executive clemency. Certain delegates, such as Virginia delegate Edmund Randolph, wanted to place English-style checks on the power in certain instances. Randolph proposed that the Senate confirm pardons of crimes such as treason. He thought the power to be "too great a trust" for any one man. The debate over the power of the president to pardon in cases of treason lasted until the very last day of the convention. In the end, the delegates thought it necessary to give the president the power to even pardon those guilty of treason against the United States. While the pardon power was meant to be invested in the president so that he might, as Alexander Hamilton's Federalist number 74 states, "be a more

eligible dispenser of the mercy of the government than a body of men,” their purpose for including the power to pardon those guilty of treason transcended simple justice. For many of the delegates, the pardon offered an opportunity for the president to enact quick change that might save the Union. Hamilton explains their rationale in Federalist 74:

[...in seasons of insurrection or rebellion, there are often critical moments, when a welltimed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal.]

In other words, the founders believed that a legislative check on the power of the president to pardon those guilty of treason could hamper the president’s ability to mitigate a difficult situation, or, in extreme cases, could prevent the president from preserving the very democracy for which they labored and warred to create. While their concerns on an absolute power invested in one individual certainly had merit—to be sure these concerns grew largely from their own oppression inflicted by the absolute power of the English monarch—they were willing to risk abuses of power and trust the will of the people by placing the pardon power in the hands of the president.

History shows the framers’ trust in the presidential prerogative to be both rewarded and abused. In over two hundred years, from George Washington to George W. Bush, over 25,000 pardons have been issued by United States presidents. Most of these pardons have received incredibly low levels of scrutiny and publicity—and for good reason. Most presidents’ high approval rate for clemency applications combined with low levels of scrutiny or public disapproval (as measured by news stories and public approval ratings) likely indicates that the vast majority of pardons granted in US history were granted justly, or at least had some degree of objective good intentions behind their issuance. However, this paper will primarily seek to classify pardons that often have received public and academic scrutiny. I have three simple reasons for my methodology. First, most notable pardons receive publicity because of the controversy they generate. Thus, information on them, particularly on those outside the modern presidency, is easier found and the pardons’ motivations thus more easily determined. Secondly, it is precisely because of the controversy and debate raised with some pardons that make the entire pardon process worth discussing. If all pardons were issued equally and efficiently, there would be very little literature and scholarship and likely very little reason to second guess the process. While these pardons and their respective motivations will be classified later in this paper, it is important to gain an understanding of the pardoning process. Finally, I wish to study and classify notable pardons because, as this paper will explain, they have increased in both frequency and in percentage share of total pardons issued, as the number of pardons

issued through the regular process has decreased and the number of pardons issued under special circumstances (e.g. those usually inciting controversy) has increased since 1980. However, while the ebb and flow of the pardon process as well as the motivations behind controversial pardons are to be classified later, a brief introduction must be given to understand the different types of pardons that are issued as well as the processes by which clemency is granted.

THE PROCESS

Semantics are incredibly important in gaining a clear understanding of the pardon process. Three general forms of executive clemency exist today. The first, and most common, is the post-conviction pardon. By and large, this form of executive clemency comes to individuals who have already satisfied the terms of their sentences. In order to apply for a post-conviction pardon, an applicant must wait from five to seven years after the conclusion of their prison sentence or other conviction not accompanied by jail time to even posit a pardon application. The time requirement adjusts according to the severity of the crime. Obviously, the post-conviction pardon does not provide convicted criminals with respites from jail time or fines in these cases; their payments have already been made. Furthermore, the pardon does not even remove a conviction from one's record. However, the pardon does serve the important practical purpose of restoring certain civil and political rights; a convicted felon, for example, is not eligible to vote unless by way of a pardon. More importantly for many convicted criminals seeking clemency, this type of pardon provides a certain sense of vindication. And, as many of these post-conviction pardons come very late in the applicants' lives, vindication is the only tangible reward that most truly receive.

In addition to the post-conviction presidential pardon, the president has the authority to issue commutations. Commutations range from reductions in jail sentences to decreases in fines to complete absolution of all punishment for a convicted crime. Today, commutations are far less common than post-conviction pardons, historically outnumbered by nine to one as compared with the post-conviction pardon.¹ Commutations are often among the most controversial presidential pardons. As most pardons issued to individuals through the Pardon Attorney's office are post-conviction pardons, politicians, media, and academia often decry presidential commutations issued to those "special" individuals not needing to go through traditional means and who are often deemed less worthy than those who do go through regular channels.

Those fortunate enough to receive a post-conviction presidential pardon or a commutation through traditional means, especially recently, have navigated a complex web of bureaucracy and have often waited long periods of time. The application process is coordinated through the Department of Justice. Since 1887, the Department of Justice's Pardon Attorney is responsible for coordinating the post-conviction pardon application process. Today, the Pardon Attorney's office is staffed by just a handful of staff attorneys faced with stacks of clemency

applications made even taller by backlogs from previous years and pardon-reluctant presidents. When summoned, the pardon attorney makes recommendations to the president on those to whom he might bestow executive mercy. As mentioned, those applying for post-conviction clemency must wait a minimum of five years to even apply. After applying, applicants will wait months and even years to receive any status updates. At least those waiting have a tinge of hope. For most, status updates come in the form of the Attorney General closing their petitions for executive mercy.

The term “post-conviction pardon” seems almost redundant. To be sure, one might assume that the very definition of a pardon necessitates—almost *a priori*—that a pardon can only be granted for an offense that was already punished, or, at the very least, is in the process of receiving correction. However, the president’s discretion as it relates to pardons is virtually absolute. For this reason, presidential pardons and presidential clemency can also be granted pre-conviction. The power of the president to issue a pre-conviction pardon was made first affirmed by a Supreme Court ruling in 1833. Writing for the majority, Chief Justice John Marshall ruled in *United States v. Wilson* that:

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages.

In his opinion asserting the presidential pardon power as absolute, Marshall set an important precedent that persists today and has provided the foundation for presidents issuing pardons to individuals and groups who had often never even been formally charged of a crime. While commutations are controversial, pre-conviction pardons almost always stand as the most controversial. There is no formal procedure to apply for a pre-conviction pardon. Thus, virtually all pre-conviction pardons are granted as a result of relation, connection, or executive initiative. For these reasons, virtually all pre-conviction pardons result in some degree of contention as well.

RELEVANT LITERATURE

My paper draws its inspiration and foundation from the great work of previous pardon researchers. However, this “canon” of pardon research is relatively small. For this reason, it is relatively simple to briefly describe previous research. In doing so, I will continue to create a context for this paper and will also create the important distinction between my paper and the research of others.

Historically, much of the literature on pardons comes from Supreme Court opinions. Perhaps due to a United States of fifty years ago that was comprised of a smaller national media, a citizenry with a decreased appetite for scandal, or a more trusting public, little was written on the president’s pardon power before the 1960s and 1970s. This could also be due in part to a twenty first century surge of the political science field or due to greater interest in crime and punishment after federal sentencing laws and probation laws. In any case, much of the literature is historical rather than analytical. While I could summarize some of the more compelling pieces of historical pardon scholarship,ⁱⁱ it is more useful to examine a variety of the current scholarship on the pardon. Much of recent research and opinion on the pardon results from controversial pardons. For example, the lame duck pardons of President Bill Clinton and the Scooter Libby commutation by President George W. Bush each served as the introductions, or, at least impetuses for, a number of recent pieces.

Kathleen Dean Moore’s *Pardons: Justice, Mercy, and the Public Interest*, published first in 1989 and updated in 1997, serves as one of the few modern book-length examinations of the pardon power. Moore’s work is regularly cited by most pardon scholarship. The reason for this is simple: Moore’s work serves as the most comprehensive examination of the pardon available to academics today. While Moore’s work serves to fill an important historical information gap left by the paucity of research available on pardons, its primary purpose is to serve as a philosophical inquest into pardons. However, While Moore’s philosophical arguments are interesting—she, for example, does a superb job of clearly articulating the Founding Fathers’ internal motivations for the presidential pardon power—her work is more relevant to this paper for the historical background that it supplies. Ever the philosopher, Moore’s opinion on the pardon process is heavily veiled until it slips in her very last chapter, “How Presidential Pardoning Practices Should Be Changed.” There, Moore explains that pardons are both immoral and unjust if those who do not deserve pardons are granted them in lieu of those actually deserve them. Pardons, according to Moore, should be used to correct injustices.

Moore’s appeal to fairness and justice finds recent scholarship a kindred spirit. Margaret Colgate Love, the Pardon Attorney at the Department of Justice from 1990-1997, recently authored a journal article entitled “Reinventing the President’s Pardon Power” (October 2007). Love writes her article from the unique perspective of a former Pardon Attorney and shares her insight on the process and her suggestions for changing the process. Love contends that the past four

administrations (Bush, Clinton, Bush, and Reagan) have allowed the power of the presidential pardon to “atrophy”. She further explains that those who are granted pardons are often only issued them because of their status and connection and that those who truly deserve a break are rarely given clemency. She contends that the Framers saw the pardon as a way to restore justice when all else had failed. While she posits some rationales for the decline of the presidential pardon, her intent is clearly to make some suggestions for the future. Love suggests that clemency or commutations for nonviolent criminals, for example, might influence policy changes such as lower federal sentencing standards. She goes on to make the argument that:

The concern for political risk that has informed pardoning for the past twenty years has become a self-fulfilling prophecy: as the power is exercised less and less frequently and produces fewer and fewer grants, it is increasingly regarded with suspicion and cynicism, and is harder and harder to justify. Happily, the process can work in the opposite direction: when pardons are issued generously and at regular intervals, as they were prior to 1980, the power appears more a function of government than a perk of office, and thus more legitimate in the public eye.

Clearly, Love feels that the pardon process has been abused and that the federal court system is not as effective as it could be in delivering justice to the masses. Love advocates for a president to realize the inherent power of the absolute pardon and harness it to rectify failures in the system and also to advocate for policy change.

Finally, H. Abbie Erler’s interesting article, “Executive Clemency or Bureaucratic Discretion? Two Models of the Pardons Process” (*Presidential Studies Quarterly*, September 2007) is worth examining. Erler seeks to trace the paths of pardons issued between 1953 and 2000. She utilizes two models, the presidential model and the agency model, to attempt to classify how pardons are most frequently granted. The presidential model, in its simplest form, sees the president as the primary decision maker in pardon decisions. This model incorporates independent variables that include party affiliation, lame duck status, public approval, and recent conclusion of military conflict in attempting to predict pardon decisions. On the other side, the agency model emphasizes the importance of the Pardon Attorney and the Justice Department in pardon decisions. This model considers the Justice Department’s discretion in making pardon recommendations to the president incredibly important. Thus, Erler uses the independent variables such as crime rate, work load, and the start of a new presidential administration for his agency model. She posits, for example, that a heavy work load might influence the number of pardon applications that the Justice Department could examine. The results of his modeling show that both models can provide interesting predictions. For example, a Republican president receives fewer pardon applications than a Democratic president. Also, her modeling shows that more pardons are generally granted when the Pardon Attorney’s number of pending cases is lower than normal. Myriad explanations can be given to explain the results of Erler’s modeling. Some

of these explanations will be referenced later as this paper looks to analyze pardon trends. Nonetheless, like Margaret Love, H. Abbie Erler also feels that the pardon is underused as a political instrument and that presidents categorically do not understand the potential power of their pardons.

This paper breaks from contemporary scholarship in its aim to categorize presidential motivations for issuing pardons, with a particular emphasis on their motivations for granting controversial pardons. While recognizing the power of the Justice Department to recommend individuals for pardons, it will view the pardon as an independent decision of the president. Surely most of history's most controversial pardons did not have their roots in an application to the U.S. Pardon Attorney. Rather, it was something else that caused them to be issued. To be sure, this paper will analyze the President's motivations for issuing routine pardons, but more attention will be given to analysis of controversial pardons.

CATEGORIZING THE PARDONS

In my examination of pardons throughout presidential history, I have found that presidents often use the pardon power as a result of several different types of motivations. To be sure, many—if not most—pardons could be categorized in multiple areas. Similarly, while this might seem disingenuous, for consistency purposes, I will not draw from presidential journals and papers in attempting to get presidential motivations from their sources. Furthermore, most presidents do not necessarily reflect candidly upon their motivations for issuing a pardon. Thus, the pardons for which we do have “presidential motivation” background would serve as outliers and not necessarily as representative of the other pardons categorized without such background information. With these caveats considered, I posit that motivations for presidential pardons (and commutations) are personal, political, pragmatic, pure, and proactive—alliteration intended.

PERSONAL PARDONS

While the absolute nature of presidential pardons by definition implies that all pardons are issued for personal reasons, I define personal pardons as executive clemency granted because of preexisting familial relationships. Under this category one would find pardons granted to relatives of the president and other ranking executive staff. History shows these personal pardons to be a common occurrence.

In recent history, the last minute pardon of President Bill Clinton's brother Roger Clinton stands as a *prima facie* example of a personal pardon. Roger received a pardon for his conviction resulting from dealing cocaine in the 1980s. To be sure, had Roger Clinton been Roger Smith or Roger Thomas, no pardon would have been granted. However, because of the unique personal—familial—relationship between President Clinton and his brother, this “personal pardon” was issued. This was not the only personal pardon issued by Clinton. In the last

minutes of his presidency, Clinton also pardoned Richard Riley, Jr., the son of his education secretary.

POLITICAL PARDONS

As is the case with personal pardons, one could argue that all pardons have the propensity to have political repercussions and are issued within a partisan, absolute environment, thereby all pardons are inherently political. However, my definition of a political pardon is explained as executive clemency that has as its motivation repayment of political favors. This classification, while certainly overlapping with personal pardons belies personal pardons in that a personal pardon of a family member was not made in order to repay a political favor. These political pardons are made to former campaign financiers who want a return on their investments or to a senator who helped a president secure an early post. Political pardons represent the worst examples of the spoils system. Most political pardons are issued by lame duck presidents.

To be sure, recent memory can serve us well in considering political pardons issued by our last four lame duck presidents. President George W. Bush's commutation of former Vice Presidential aide I. Lewis "Scooter" Libby stands most prominently in recent memory.ⁱⁱⁱ Libby was found guilty of lying to a grand jury in an attempt to cover-up potential wrongdoings by the White House. In pardoning Libby, President Bush likely repaid Libby for "taking the fall" on behalf of the White House and was allowed by this commutation to retain his Fifth Amendment rights and avoid testifying on future matters. President Clinton issued a last minute pardon to former financier Marc Rich, a former campaign contributor at large in Switzerland for masterminding one of the largest tax evasion schemes in United States history.^{iv} On his last Christmas Eve in office, President George H.W. Bush pardoned Casper Weinberger, former defense secretary, and five others associated with the controversial Iran "hostages for weapons" deal in the 1980s. In 1989, President Ronald Reagan issued a pardon to New York Yankees owner George Steinbrenner, convicted of illegal contributions to President Richard Nixon's 1972 campaign.

PRAGMATIC PARDONS

While personal and political pardons certainly do not seem to fit into any sort of noble categorization, pragmatic pardons do seem to often fulfill quite noble motivations of presidents. Presidents are problem solvers. While troubleshooting a budgetary gap or a Senate confirmation hearing is difficult, bureaucratic, and confusing, the presidential pardon allows the chief executive to alleviate problems much larger than an underfunded initiative area—and without the pestering influence and checks of a legislative and judicial body. These pragmatic pardons allow the United States to move forward past difficult times or to save the criminal justice system from adjudicating thousands of individuals whose charges became

seemingly obsolete. While controversial, pragmatic pardons have the country's best interests at heart. As explained by the Supreme Court in its *Biddle v. Perovich* (1926) ruling, a pardon is a "determination of the ultimate authority that the public welfare will be better served" through its issuance. Pragmatic pardons are clearly in line with this ideal.

Some of the prime examples of pragmatic pardons have come in the form of blanket amnesty. For example, Thomas Jefferson pardoned all violators of the Alien and Sedition Acts upon his election in 1800.^v President Lincoln pardoned all Civil War deserters in 1863.^{vi} President Carter continued the tradition by pardoning all Vietnam War deserters on his first day in office in 1977. Each of these instances of blanket amnesty reflected these presidents' desires to move past a difficult period in American history and to embrace the potential of the present and future. Similar motivations could be found by President Gerald Ford's pardon of former President Richard Nixon. While some might interpret the move as purely political, as a former employee paying his dues to his former boss, it can be just as readily interpreted that President Ford wanted to move the nation (and his presidency) forward and to keep it unoccupied with a lengthy and embarrassing trial of a former president.

PURE PARDONS

Pragmatic pardons fix problems. Pure pardons do not fix any sort of problem. Pure pardons are issued by presidents to individuals who have made mistakes, found themselves in trouble, paid the consequences, and, because of the president's mercy, found themselves with a second chance. In many states, those convicted of felonies are ineligible to vote and face difficulties in obtaining jobs due to background checks. And, while a presidential pardon will not erase an offense, it can restore important civic rights and can provide an important reference to a potential employer. These types of pardons are symbolic ones.

Because these pardons are hardly controversial, it is difficult to find many examples of these pardons in recent history. These pardons do not make the headlines. Once issued in scores by former presidents, the issuance of pure pardons has decreased in frequency commensurate to the increase in political pressure and media attention placed upon the pardons process. However, examples of pure pardons can be found in President Clinton's pardons of many drug defendants given long minimum sentences. President Reagan pardoned many individuals for minor crimes—virtually all of whom had satisfied their sentences—ranging from minor tax evasion to copyright infringement to hiding a bottle of whisky.

PROACTIVE PARDONS

Pure pardons do not necessarily correct governmental wrongdoing. Proactive pardons are the result of presidents wanting to make amends for government mistakes in the judicial process. Most pardons today are not proactive. While the Founding Fathers certainly wanted the president to be capable of pragmatism by way of the absolute pardon, they certainly wanted the president to correct wrongdoing as well. However, in today's age, a president is reluctant to correct a judiciary by way of the proactive pardon. This is not necessarily out of a lack of caring or out of a reluctance to rock the boat. To the contrary, modern conveniences such as the appeals process and parole often supplant the Founders' desires for the pardon process. However, in the case of true judicial wrongdoing, something that is not unknown to the United States, the pardons issued to correct the mistakes (deliberate or not) are classified as proactive pardons.

Recent examples of these proactive pardons are few and far between. However, President Clinton did commute the sentence of convicted police informant murderer David Chandler, later found to be validated by Chandler's accuser actually taking the blame. With recent technological advances such as DNA verification and computer modeling, many individuals would be in need of a proactive pardon are obtaining their justice at the appellate court.

PARDONS VS. FOUNDERS' INTENTIONS

To be sure, the pardon has been used in ways completely unexpected—and unintended—by our nation's Founding Fathers. It would be unfair and untrue to imply that the Founders naively thought that all Presidents would use the pardon in order to rectify shortcomings of the criminal justice system. However, at the same time, it is just as untrue to assert that the Founders could have predicted that more pardons today are issued after sentences have been served and that the appeal and parole system would, in many ways, supplant the role of the pardon.

As previously mentioned, the Founding Fathers did have a lot of faith in the Chief Executive, as described in Federalist no. 74:

[...It is not to be doubted, that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatever...]

They expected the president to act justly and wisely. The pardon was a mechanism of justice, an enemy of inequity. Yet, at the same time, the founders were well acquainted with the nature of man. Furthermore, these learned gentlemen were not unaware of historical abuses of absolute power in Britain and elsewhere. The risk that they took by placing the pardon in the hands of the president was not so dissimilar from the risk that the Framers took in placing government in the hands of the people. More than a modicum of faith accompanied this trust of enormous proportion.

The Founders were correct in their summation of man and his proclivities for greed and power. Distributing power throughout many by way of three distinct branches of government has been the linchpin of their democratic republic's sustainability. This is not to say that presidents definitely plan to abuse their powers, President-elect Bill Clinton offered the following comments on President George H.W. Bush's controversial pardons of former secretary of defense Casper Weinberger and associates:

I am concerned by any action that sends a signal that if you work for the Government, you're beyond the law, or that not telling the truth to Congress under oath is somehow less serious than not telling the truth to some other body under oath."^{vii}

The quote, aside from being ironic for obvious reasons related to President Clinton's future impeachment and controversial personal and political pardons, serves as a lesson in how power can corrupt.

Clearly, the Framers' faith in vesting an absolute power with the president has been both rewarded and neglected. Pragmatic uses of executive clemency align quite well with the intentions of the Fathers. For example, one of the main reasons in bestowing the absolute pardon power with the president was to give the executive the ability to negotiate prisoner releases to sustain the country in the event of insurrection without needing to assemble Congress. The Founders would almost certainly meet such exercises with great approval. However, recent trends of excessive numbers of personal and political pardons would not be met with such approval. To be sure, the Founders expected some presidents to use their pardons for personal and political reasons. However, they likely expected these pardons to be among the fewest pardons issued, not the bulk of pardons issued as seen in recent history.

PREDICTIONS FOR THE FUTURE

As previously mentioned, it is difficult to see presidents—especially presidents with reelection concerns—using the pardon in greater frequency. This prediction stems from the increased politicization of pardons, the proliferation of the media, and the increase of legislative interest and oversight in the pardoning process.

While some might argue that pardons first became political following President Ford's pardon of Richard Nixon and his subsequent reelection loss, pardons became a large campaign issue beginning with the 1988 election. In this contest, Vice President Bush heavily criticized opponent Massachusetts Governor Michael Dukakis for pardoning Willie Horton. Following Horton's release, he raped a woman. Bush seized upon this situation as an opportunity to portray Dukakis as irresponsible and weak on crime. The politicization continued during the 1992 election during which Governor Bill Clinton decried President Bush's pardons of those involved with the Iran-Contra affair and made comments (already mentioned in this paper) to the effect that personal connections should not influence

the pardoning process. Finally, last-minute pardons by President Clinton and Scooter Libby's commutation by President Bush, while not deleterious to either individual's reelection, could be seen as indicating corruption within each of their respective parties.

The effect of the expanding media on the pardons process is also a reason why pardons will likely not be issued in greater frequency in the near future. Multiple twenty-four hour news channels, never ending amounts of coverage on the smallest details of political campaigns, and a new breed of investigative journalist found in the contemporary world of the blogger are all reasons why pardons cannot escape massive scrutiny. To the extent that he has been able to exercise his executive privilege, President George W. Bush has suppressed as many details as possible on his own presidential pardons. By definition, each pardon recipient is a former criminal, so virtually any recipient could be torn apart and scrutinized by the news media. Each recipient's dirty laundry and gory details of past misdeeds could be placed online or featured on the television for the world to see. In the end, it is the president who is criticized for forgiving a criminal—not praised for exercising considerable mercy to someone who had made a mistake. Furthermore, issuing a pardon to one individual over another always begs the question of bias. Today's news media almost explicitly requires an explanation for every presidential action. Justifying one pardon over another is likely a game that presidential administrations will not want to play at any time in the near future.

Finally, increased congressional oversight is likely to also detract presidents from issuing more pardons in the future. Following Clinton's last minute pardons, an investigation into the pardons process was launched by Congress. Similar cries were initiated following the Libby commutation by President Bush. While a constitutional amendment to provide additional oversight of the pardons process by Congress is unlikely, both to be initiated and certainly to ever pass, the continual oversight of Congress is a burden that no president, particularly a non-lame duck president, wishes to bear.

In all likelihood, the issuance of presidential pardons will remain quite low, barring an enigmatic president wanting to make a statement through his use of the pardon or possessing the popularity and political capital to do so. Today's world of politicization, media proliferation, and congressional oversight provides enough checks to detract most presidents from further exploring their sole absolute prerogative. However, it is likely that lame duck presidents will continue issuing pardons more freely. After all, politics has not changed too much in the twenty first century. There are still personal and political debts to be paid.

ⁱ From 1945 until 2001, a total of 5,987 pardons were issued. During that same time period, only 679 commutations were granted. (Department of Justice, Office of the Pardon Attorney)

ⁱⁱ I will cite *Pardon and Amnesty Under Lincoln and Johnson* by Jonathan Truman Dorris (1953) and *The Pardoning Power of the President* by W.H. Humbert (1941) as being particularly prolific examples of pre-modern pardon scholarship.

ⁱⁱⁱ In George Lardner's February 4, 2008 *New York Times* Op-ed, "Begging Bush's Pardon" he refers to the Libby situation as a remission rather than a commutation. Consultation of other sources

shows that, while for all practical purposes a matter of semantics, a remission is a termination of a prison sentence while a commutation simply truncates one. Glass, Andrew. "Bush uniquely selective with pardons" *Politico* October 9, 2007.

^{iv} Rich's ex-wife, Denise Rich, may have been more instrumental in obtaining the pardon than Marc Rich himself. Denise Rich continued living in the United States and donated over a million dollars to Democratic Party candidates. Many were aware of the fact that Denise Rich was actively "campaigning" for her husband's pardon. Powell, Michael. "Pardons With a Precedent; Marc Rich Drama Is Latest In a Long Line of Last Acts." *The Washington Post*, February 26, 2001.

^v As duly noted by David Johnston of the *New York Times*, the Alien and Sedition Act was later found to be unconstitutional. "The Pardons; Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-up,'" *New York Times*, December 25, 1992

^{vi} Again, as duly noted by David Johnston, President Johnson further extended the pardon in 1868 to all Confederate soldiers.

^{vii} These remarks were given at a press conference in Little Rock, AR and were reported by David Johnston of the *New York Times* in his December 25, 1992 article "The Pardons; Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-up'.

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