

CLEMENCY AS THE SOUL OF THE CONSTITUTION

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I. INTRODUCTION

Individualism is perhaps the defining characteristic of the American identity. The soul of our Constitution can be found in those sections that vibrate with the frequency of that identity: the apportionment of individual rights, the establishment of democracy, and ability of a single person to give mercy on behalf of the society through the Pardon Power. It is the last of these that can be most controversial. Through all the scandals and triumphs wrought by clemency, it has stood alone as an unchecked power of the president. Even now, it should remain so. To alter its character would be to turn our back on one of our deepest values, the intent of the Framers, and the hopes of the least among us.

Clemency is an ancient thing. In my pocket now, as I write, is a Roman coin minted in Antioch 1700 years ago. The face of the coin shows two figures, and the name of one: *Clementia*, the Roman goddess of mercy. She exemplified a specific kind of mercy; the virtue of forgiveness by the state, through the hand and heart of the emperor. The Romans considered this kind of mercy to be a part of the soul of their culture.

Of course, clemency did not fall with the Roman Empire. The Framers included it in the Constitution, as the presidential Pardon Power. In recent years, it has been at the center of fervent debates as Presidents Obama and Trump used it in varying ways. This essay seeks to establish and explore an essential attribute of constitutional clemency: that it is meant to be untamed. Alone among presidential tools it is virtually unchecked, leaving other governmental actors only to celebrate or bemoan its use (or disuse). It is the “Wild Thing” among constitutional powers, something of the heart rather than the mind, and is designed to reflect nothing so much as the individual passions of the person who has been elected president. The soul of the United States resides in our individualism, and the soul of our Constitution resides in its most individualistic provision.

What is challenging in all this is that a president’s use of clemency is shaped by the deepest values of that president: whether that value be personal loyalty, a desire for healing, or a sense of injustice. We may not agree with the outcomes those values produce, but we must acknowledge that those values were usually evident before the president was elected.

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Many will be uncomfortable with the thought of such an untamed thing within our system of criminal justice. And yet, this is what the Constitution contemplates—and this intention makes sense. The fear in creating presidential powers was tyranny, but clemency is uniquely ill-suited to the purposes of a tyrant. After all, tyrants are enabled by imprisoning those they hate, not by letting people *out* of prison. To put it another way, mercy is at best an inefficient route to a greater evil. In the end, it is the symbolism of clemency that might be most important.

In this essay, I will not call for the abolition or restriction of the Pardon Power, even as we struggle with the seeming unfairness of some recent grants of clemency. Instead, I argue that we must embrace what the Pardon Power is, and recognize the true nature of this tool of mercy. We don't need to drive a stake through its heart. Rather, it requires a more consistent and committed public attention than we have given it, which among other things should include a discussion of its use by those who seek the office of president.

Section II below will offer an overview of the more striking employments of the Pardon Power, with a focus on its uses and abuses by more recent presidents. The controversial aspects of clemency often precisely track the controversial aspects of a president's personality; that is one reason that we see a discontinuity not only in whether clemency is used or not, but in the way that its use reflects different values in different administrations.

Section III will then look backward at the Constitution's soul and its roots. Clemency drew on English precedents, but its core idea of mercy was woven into the culture of the time. For example, it is a primary theme in Shakespeare's *The Tempest*—and George Washington went to see *The Tempest* during the Constitutional Convention. At that Constitutional Convention, the Pardon Clause was actively debated, and its final form survived a direct challenge that proposed the power be shared with the legislature.

Finally, Section IV will consider the arguments for and against maintaining the Pardon Power as an unalloyed tool of the president. In the end, the use of clemency has been a net good, in that the positive uses have outweighed the controversies. The institution continues to connect us to the core value of mercy, maintains the intent of the Framers, and gives hope to those who are incarcerated. This section closes by considering what we can do when we are dismayed by the exercise of clemency, as will happen when an action follows a conscience not our own.

II. THE PARDON POWER AND CONTROVERSY

A. *Non-controversial and Regular Grants*1. *The use of newly-available data*

Sections II.B-G will address some of the extraordinary and scandalous uses of the Pardon Power through American history, but it is worthwhile to first examine the interstices between those crises—that is, to define what “normal” use of clemency has looked like during more mundane periods in our history.

This examination reveals some intriguing truths. For much of American history, even well into the 20th century, clemency¹ was used by presidents of all stripes on a fairly consistent basis. This pierces a common myth: that clemency is usually doled out only as a president is headed out the door. In fact, until the 1980s the Pardon Power was deployed throughout a presidency.² Moreover, the grants often reflected the values of that president—values that were evident before that president was elected.

Until recently, presidents granted clemency at regular intervals, and for a wide variety of offenses. Who received grants during these decades of regular use? Data recently compiled by the late P.S. Ruckman from pardon warrants usually filed with clemency grants give us some insight.³

¹ Clemency under the Pardon Power can take several forms. Most commonly, presidents grant commutations, which reduce prison sentences but do not affect the underlying convictions, and pardons, which do affect at least some of the collateral consequences of the convictions themselves. Less commonly, the grants sometimes have taken the form of remission of fines and respites (which is a delay in the imposition of a sentence).

² When looking at this history of clemency, one fact enhances the disparity between practices before and after the 1980s: the number of federal prisoners has shot up within the last 30 years. When we talk about clemency in the 1980s and earlier, it should be remembered that the denominator matters, and that the relatively large number of grants is even more striking given the much smaller federal prison population at that time. See NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OPTIONS FOR CONGRESS 19-20 (2016) (documenting the population spike in federal prisons since the 1980s).

³ The use of Ruckman’s work requires some explanation. Professor Ruckman, a political scientist who specialized in clemency and its use, spent years in the National Archives compiling data on clemency grants dating back to the Washington Administration. After he completed this work, he committed a horrible crime himself, murdering his two children before committing suicide. Before doing so, he sent his work to this author and others, with the notation “Would want you to have this and use freely.” Corina Curry & Kevin Haas, *Final Messages from P.S. Ruckman Jr. Include Cryptic Social Media Posts, Emails of His Life’s Work*, ROCKVILLE REG. STAR (Mar. 8, 2018), <http://www.rstar.com/news/20180307/final-messages-from-ps-ruckman-jr-include-cryptic-social-media-posts-emails-of-his-lifes-work>. The Ruckman compilations are on file with the author and identified here as “Ruckman Data” along with the relevant volume. It is important to note that the Ruckman data appears accurate, but not complete in the sense of capturing every grant of clemency. Because he reviewed pardon warrants contained in the Archives, that means his data do not include grants of clemency that were not formalized through a pardon warrant or did not find their way to the Archives. For example, it appears that many of President Lincoln’s clemency grants to those who had been court-martialed, including grants to 265 Dakota Sioux who were spared execution in the wake of the Dakota War of 1862, are not reflected in the Ruckman Data. Lincoln, 1861 term, *in* Ruckman Data; see also discussion *infra* Section II.B.2.

While the United States Pardon Attorney's data only go back to the late 19th century when William McKinley was President, Ruckman's compilations extend all the way back to George Washington's first grant. With this broader view, we can clearly see the trend lines in presidential clemency over 22 decades.

I have divided this analysis into three eras. In the first, stretching from Washington through Lincoln, clemency was consistently used in moderate numbers, ranging up to about 250 for a four-year term. From Lincoln to Reagan, the second era, clemency numbers were much higher, often over a thousand for a single term. Finally, from Reagan's presidency to the present, clemency has been unevenly used, with presidents tending to wait until the end of a second term to employ this tool. Through each era we see some indication that a president's own passions and interests play some role in whom they choose to receive mercy.

2. 1789-1865

Early on, presidential clemency was relatively rare. John Adams granted only 37, just six more than his predecessor,⁴ while Jefferson used the Pardon Power about 130 times over his two terms.⁵ Things ramped up somewhat under Madison, who granted just more than 250 petitions,⁶ and this number was typical of the period leading to the Civil War, with one-termers John Quincy Adams (1825-1829),⁷ Martin Van Buren (1837-1841),⁸ and John Tyler (1841-1845)⁹ all granting between 210 and 250 petitions. Like other presidents until recently, those grants were relatively spread out through the entirety of their administrations. In fact, each of them made at least 15% of their grants in their first year.¹⁰

While John Quincy Adams, Van Buren, and Tyler granted similar numbers with roughly equal frequency, they did focus on different kinds of offenses. More than 40 of Adams' involved breach of peace or assault, primarily in the District of Columbia, and another 16 involved gambling in the capital.¹¹ About one-third of Van Buren's grants involved maritime

⁴ Washington, 1789 term; Washington, 1793 term; Adams, John 1797 term, *in* Ruckman Data.

⁵ Jefferson, 1801 term; Jefferson, 1805 term, *in* Ruckman Data.

⁶ Madison, 1809 term; Madison, 1813 term, *in* Ruckman Data.

⁷ Adams, John Quincy, 1825 term, *in* Ruckman Data.

⁸ Van Buren, 1837 term, *in* Ruckman Data.

⁹ Tyler, 1841 term, *in* Ruckman Data.

¹⁰ Adams, John Quincy, 1825 term; Van Buren, 1837 term; Tyler, 1841 term, *in* Ruckman Data.

¹¹ Adams, John Quincy, 1825 term, *in* Ruckman Data. John Quincy Adams also discharged the conviction of Alexander Chesley of Washington, who had been convicted of "habitual intemperance." *Id.*

offenses,¹² and Tyler used the Pardon Power to save 18 condemned people from execution.¹³

3. 1865-1980

After the Civil War and through the following century, clemency was more robustly used. Typical of those years was Rutherford B. Hayes, who served one term from 1877 to 1881. He granted more than 1,000 clemencies, which addressed a remarkable array of crimes.¹⁴ Hayes pardoned those convicted of hundreds of liquor-related offenses, relieved 34 murderers from death row, and even remitted the \$100 fine of an Ohio man convicted of sending a “scurrilous postcard.”¹⁵ These grants were not saved for the end of his one term, either (Hayes had announced he would serve only one term before being elected, and kept his promise). About 250 of those grants came in his first year in office, and more than 300 were delivered in his second year.¹⁶

Benjamin Harrison’s one term (1889-1893) was nearly as active, as he granted about 700 petitions, including more than 120 in his first year in office.¹⁷ His service was bookended by Grover Cleveland (1885-1889 and 1893-1897), who averaged about 600 grants per term.¹⁸

To begin the new century, Theodore Roosevelt granted more than a thousand clemencies through his two terms, which were relatively evenly provided over those eight years.¹⁹ Looking just at his grants from the first year of his administration (which began with the assassination of William McKinley in September of 1901), we see a fairly typical distribution of grants. He wasted no time getting started—McKinley died on September 14, and Roosevelt made his first grant of clemency just ten days later.²⁰ From that point forward, he made grants in every month of his two terms except for July of 1902 and April of 1903.²¹ Those grants were sometimes clumped together, with one in September of 1901, 30 in October, six in November, and eight in December.²² Moving into 1902, he allowed six in January, four

¹² Van Buren, 1837 term, *in* Ruckman Data.

¹³ Tyler, 1841 term, *in* Ruckman Data.

¹⁴ Hayes, 1877 term, *in* Ruckman Data.

¹⁵ *Id.* In another oddity, one John Smith of California received a pardon from his conviction for illegally possessing guitars. *Id.*

¹⁶ *Id.*

¹⁷ Harrison, Benjamin, 1889 term, *in* Ruckman Data. This includes over 70 people (mostly from Utah) who had been convicted of bigamy, polygamy, incest, adultery, and unlawful cohabitation. *Id.*

¹⁸ Cleveland, 1885 term; Cleveland, 1893 term, *in* Ruckman Data.

¹⁹ *Clemency Statistics*, U.S. DEP’T OF JUST., <https://www.justice.gov/pardon/clemency-statistics> (last visited Oct. 12, 2018).

²⁰ Roosevelt, Theodore, 1901 term, *in* Ruckman Data.

²¹ Roosevelt, Theodore, 1901 term; Roosevelt, Theodore, 1905 term, *in* Ruckman Data.

²² Roosevelt, Theodore, 1901 term, *in* Ruckman Data.

in February, nine in March, seven in April, 14 in May, 29 in June, two in August, and six that September.²³

Other 20th century presidents showed the same kind of consistency: typical of the predominant trend, Coolidge granted nearly 1,700 in his six years in office, Hoover approved almost 1200 over four years (his third year being most active), Eisenhower granted over 1100 (with his fifth of eight years bearing the highest numbers), and Nixon approved over 900.²⁴

Even in the more “mundane” times, clemency does seem to reflect the heart as well as the mind of the president. Herbert Hoover, for example, is sometimes remembered only in contrast with Franklin Delano Roosevelt, and cast as a cold-hearted conservative. In truth, he was a life-long Quaker who came to prominence by leading relief efforts in Europe in the wake of World War I and who returned to that role after World War II.²⁵ He was better versed in feeding starving people than in running a government. It should not surprise us that he showed mercy through the Pardon Power more generously than most other presidents.

4. 1980-present

Even Ronald Reagan—who represents the transitional figure from pre-1980s to post-1980s practice—granted over 400 petitions.²⁶ In sharp contrast, his successor, George H.W. Bush, turned off the spigot, providing only 77 grants,²⁷ and six of those were pardons granted to Reagan administration officials who had been involved in the Iran-Contra scandal.²⁸

From that point forwards, clemency became not only less frequent (except for President Obama’s administration), but shifted the use of clemency towards the end of a presidency. Presidents Clinton, George W. Bush, and Obama *collectively* granted zero clemencies during their first two years in office, and only 100 through their first four years in office.²⁹ Yes, clemency in the recent past has been back-loaded, but that is far different than the practice over the preceding two centuries.

Even during this dearth of clemencies through the George W. Bush administration, the few grants allowed still reflected the personality traits of

²³ *Id.*

²⁴ *Clemency Statistics*, *supra* note 19.

²⁵ *Herbert Hoover*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/about-the-white-house/presidents/herbert-hoover/> (last visited Oct. 18, 2018).

²⁶ *Clemency Statistics*, *supra* note 19.

²⁷ *Id.*

²⁸ *The Pardons; Text of President Bush's Statement on the Pardon of Weinberger and Others*, N.Y. TIMES (Dec. 25, 1992), <https://www.nytimes.com/1992/12/25/us/pardons-text-president-bush-s-statement-pardon-weinberger-others.html>. In his statement, Bush argued that these pardons were within the long tradition of pardons granted in the interest of healing after wars (in this case the Cold War): “Presidents have historically used their power to pardon to put bitterness behind us and look to the future.” *Id.*

²⁹ *Clemency Statistics*, *supra* note 19.

the presidents involved. Bill Clinton infamously granted a pardon to fugitive financier Marc Rich, whose ex-wife donated \$450,000 to the Clinton library and \$100,000 to Hillary Clinton's Senate campaign³⁰—a move that cemented Clinton's reputation as a politician who (for good or bad) was always looking to make a deal. There was a part of the Rich saga that speaks more directly to Clinton's heart, though. In the last days before the pardon, and Clinton's last days in office, Rich's ex-wife wrote a letter to the President which successfully alluded to Clinton's own pain and humiliation. As the *Chicago Tribune* later described it, the letter "appealed to Clinton's sense of being unjustly prosecuted during his impeachment."³¹ It worked, remarkably, and Clinton gave the man who had been number six on the FBI's Most Wanted List the ability to come home from Switzerland without penalty.³² The power of personal empathy overwhelmed even the most obvious political risk.

B. Controversial and "[E]xtraordinary" Grants of Clemency

In looking to unusual and historically significant clemency grants or initiatives, it is hard to be comprehensive; nearly every president has likely been criticized for some grants made or left unmade. In the next sections, some of those significant grants are examined: George Washington's pardon of the leaders of the Whisky Rebellion, Abraham Lincoln's wartime pardons of those who had been court martialed,³³ Harry Truman's commutation of the death sentence of the man who tried to kill him,³⁴ Gerald Ford's pardon of Richard Nixon and mass grant of clemency to draft evaders and others,³⁵ Barack Obama's broad initiative directed at those incarcerated in the War on Drugs,³⁶ and Donald Trump's use of clemency to favor those close to him and his cause.³⁷

1. George Washington and the Whisky Rebellion

As with many things, it is appropriate to begin with George Washington. When Washington became the first President of the United States in April of 1789, he literally entered a physical office that was nearly empty.³⁸ It was

³⁰ William Cummings, *FBI Surprises Again, Shares Files on Bill Clinton's Pardon of Marc Rich*, USA TODAY (Nov. 1, 2016), <https://www.usatoday.com/story/news/politics/onpolitics/2016/11/01/fbi-marc-rich-pardon-files/93136458/>.

³¹ Eric Lichtblau & Davan Maharaj, *Clinton Pardon of Rich a Saga of Power, Money*, CHI. TRIB. (Feb. 18, 2001), <http://www.chicagotribune.com/g00/sns-clinton-pardons-analysis-story.html>.

³² *Id.*

³³ See *infra* Section II.B.2.

³⁴ See *infra* Section II.B.3.

³⁵ See *infra* Section II.B.4.

³⁶ See *infra* Section II.B.5.

³⁷ See *infra* Section II.B.6.

³⁸ HARLOW GILES UNGER, "MR. PRESIDENT": GEORGE WASHINGTON AND THE MAKING OF THE NATION'S HIGHEST OFFICE 8-9 (2013).

a fitting symbol, since Washington's job was to define something new: the presidency itself.

Washington's values flowed from two things: the classical and rigorous self-education he sought out as a boy³⁹ and his adult vocation as a military leader.⁴⁰ Both played a role in the way that he defined the office of the president and the first uses of the Pardon Power.

While Washington rejected the notion of royalty, he did establish the presidency as a position of strength, drawing from his sense of military hierarchy. John Yoo has described three models available to him in organizing the Executive Branch.⁴¹ One model would have been to share administrative authority with the Senate. Another would have been to allow his department heads great authority and serve in the way that governmental ministers did in England. He chose a third way, which reflected his military command: executive power would rest solely with the president, who would receive advice from his department heads while determining executive policy. This approach would shape not only his most memorable exercise of the Pardon Power, but also the events leading up to it—The Whisky Rebellion and its undoing.

Once Washington began using the Pardon Power in a significant way, he was well into his second term.⁴² In 1793 and 1794, he issued nine pardons for offenses including the sending of a threatening letter and the theft of stockings.⁴³ For the rest of his term, he granted clemency to 21 citizens—and all but one were from Pennsylvania, the home of the Whisky Rebellion.⁴⁴

Whiskey seems an odd thing to rebel over, but the problem had more to do with taxes. On what was then the American frontier, many farmers preferred to convert their grain to whiskey, which was longer-lasting and more portable than grain itself.⁴⁵ Alexander Hamilton imposed an excise tax on the production of liquor, challenging this financial model.⁴⁶ Farmers did not take it well. Protests broke out in Virginia, Kentucky, and the Carolinas,

³⁹ See generally ADRIENNE M. HARRISON, *A POWERFUL MIND: THE SELF-EDUCATION OF GEORGE WASHINGTON* (2015).

⁴⁰ DAVID H. FISCHER, *WASHINGTON'S CROSSING* 308-345 (2004).

⁴¹ John Yoo, *George Washington and the Executive Power*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 1, 3-4 (2010).

⁴² It appears that Washington may have tried to use executive clemency in his first term on one occasion. A pardon warrant from February of 1791 lists the recipient simply as "Freeman," and the crime as "counterfeiting." It appears that the recipient had not been convicted at the time of the pardon and was a fugitive. Ruckman's records, however, include the note "Pardon not recognized." Washington, 1789 term; Washington, 1793 term, *in* Ruckman Data.

⁴³ Washington, 1793 term, *in* Ruckman Data.

⁴⁴ *Id.*

⁴⁵ UNGER, *supra* note 38, at 133. This transportability became particularly important for Western farmers when the Spanish barred American navigation on the Mississippi River, forcing those farmers to transport their goods over narrow mountain roads. *Id.*

⁴⁶ Yoo, *supra* note 41, at 13.

as well as western Pennsylvania.⁴⁷ The last of these became a national issue when 16 armed men tarred and feathered a tax collector in September of 1791,⁴⁸ and became even more alarming three years later, when the leaders of these western farmers threatened to ally with the revolutionaries who had taken over France.⁴⁹

After a period of inaction, Washington acted decisively in 1794, after hundreds of rebels burned down the home of a tax collector.⁵⁰ Taking seriously (and literally) his position as Commander-in-Chief, Washington called up the militia and personally led a force of about 13,000 men against the rebels in Western Pennsylvania, riding ahead of the troops, followed by Hamilton and the governor of Pennsylvania.⁵¹ His decisive action not only defused the conflict (the rebels disbanded as Washington approached), but proved to be very popular.⁵²

What happened next reflected Washington's values in a different way. Washington received a plantation-based (and largely self-directed) classical education that would likely have inculcated the value of clemency, which was a feature of many ancient Western civilizations.

Two of the rebellion leaders, John Mitchell and Phillip Weigel,⁵³ were convicted of treason and sentenced to death. Washington first put off their executions and then granted both a pardon.⁵⁴ Washington explained his reasoning in his Seventh Address to Congress in December of 1795:

It is a valuable ingredient in the general estimate of our welfare that the part of our country which was lately the scene of disorder and insurrection now enjoys the blessings of quiet and order. The misled have abandoned their errors, and pay the respect to our Constitution and laws which is due from good citizens to the public authorities of the society. These circumstances have induced me to pardon

⁴⁷ *Id.*

⁴⁸ Carrie Hagen, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN MAG. (Aug. 29, 2017), <https://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/>.

⁴⁹ UNGER, *supra* note 38, at 188.

⁵⁰ *Id.* at 189-90. In addition to (and prior to) taking military action, Washington employed other methods to put down the rebellion. For example, he issued a proclamation in February of 1794 offering a bounty of \$200 on the men who had threatened a tax collector. *Proclamation on Violent Opposition to the Excise Tax, 24 February 1794*, NATIONAL ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/?q=Whiskey%20Rebellion%20Period%3A%22Washington%20Presidency%22&s=1111311121&sa=&r=10> (last visited June 13, 2018).

⁵¹ Yoo, *supra* note 41, at 14-15. One suspects that if this precedent had continued—with, say, George W. Bush leading troops into Iraq—the United States would have engaged in far fewer conflicts.

⁵² *Id.*

⁵³ Ruckman describes the second man as Phillip *Vigol*. Washington, 1793 term, *in* Ruckman Data (emphasis added).

⁵⁴ *Id.*

generally the offenders here referred to, and to extend forgiveness to those who had been adjudged to capital punishment. For though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet it appears to me no less consistent with the public good than it is with my personal feelings to mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity, and safety may permit.⁵⁵

And, with that, Washington elegantly set the template for a remarkable and recurring use of clemency to heal national divisions. That willingness and ability, perhaps as much as his military prowess, not only reflected his deepest values but also set a powerful precedent for his successors. His experience as a military leader, able to command through force of personality,⁵⁶ allowed him the confidence as a political leader to act alone in granting grace, even “tenderness,” to those who had taken up arms against his government.

2. *Lincoln and war*

Washington was a soldier who was thrust into matters of law; Lincoln was a lawyer who was forced to confront the realities of war. While Washington dealt with his task of forming a government (and using the Pardon Power) through his experience as a general, Lincoln’s greatest tool—storytelling—derived from his own vocation as a trial lawyer.

Lincoln not only told a great story, but was famously moved by them.⁵⁷ He often met personally in the White House with clemency-seekers or their relatives, and heard them out.⁵⁸ In the case of Job Smith, a soldier who had been court-martialed and sentenced to die, Lincoln met with Smith’s father and a witness reported that Lincoln’s face expressed “a cloud of sorrow” as

⁵⁵ President George Washington, Seventh Annual Address to Congress (December 8, 1795), <https://www.presidency.ucsb.edu/documents/seventh-annual-address-congress>.

⁵⁶ Washington famously put down a potential coup by his subordinate officers in 1783 through sheer gravitas. GLENN A. PHILLIPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 44-46 (1993).

⁵⁷ As Albert Alschuler points out, Lincoln’s response to one plea for clemency was celebrated both in a contemporaneous poem and a 1914 silent film. Albert W. Alschuler, *Christian Virtue and Pardons*, in *CHRISTIANITY AND CRIMINAL LAW* (forthcoming 2019). Most recently, this incident is celebrated in a nine-movement suite by Vermont musician Dan “Banjo Dan” Lindner. *THE SLEEPING SENTINEL* (Vermont Songbag 2016); see also Dan Bolles, *Banjo Dan: The Sleeping Sentinel*, *SEVEN DAYS* (Mar. 8, 2017), <https://www.sevendaysvt.com/vermont/banjo-dan-the-sleeping-sentinel/Content?oid=4482539>.

⁵⁸ Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 *VT. L. REV.* 465, 466-67 (2017).

he heard the tale.⁵⁹ He spared Smith's life, over the objections of his battlefield general, B.F. Butler, who argued that the President should not "interfere" with courts-martial.⁶⁰

Lincoln's most dramatic use of clemency was also triggered by his attention to story. In 1862, conflict arose between settlers and the Dakota Sioux, who had been cheated out of land, money, and food by the government and its agents.⁶¹ Led by Little Crow, Dakota Sioux attacked a station of government agents and then engaged in a broader conflict with militia and settlers, leading to several hundred deaths.⁶² After the indigenous warriors were subdued, hundreds of Dakota Sioux were tried by a five-man military commission, which allowed for almost no due process and completed cases in trials as short as five minutes.⁶³ Three hundred and three of the Dakota Sioux were sentenced to hang, and General John Pope (who had just lost the Battle of Bull Run before taking on the uprising in Minnesota) urged President Lincoln to sign the death warrants.⁶⁴

An intercessor appeared, however, in the person of Reverend Henry Whipple, the first Episcopal Bishop of Minnesota.⁶⁵ Whipple arrived in Washington in mid-September of 1862 and had an audience with Lincoln.⁶⁶ He used that time to tell the whole story: the corruption among the agents who dealt with the Dakota Sioux and the hardships this imposed on the people who had risen up against an oppressor.⁶⁷ Whipple's report to Lincoln had "shaken him down to his boots," and when the 303 names came before him, the President chose to parse through them individually rather than accept Pope's opinion.⁶⁸ In the end, Lincoln chose to spare the lives of 265 of those condemned, leaving 38 to die (which still represents the largest single execution in American history).⁶⁹ He wrote the Sioux names out himself, painstakingly, so that the right people would be spared.⁷⁰

Lincoln's attention to this detail, inspired by the story he had heard from Whipple, is all the more remarkable given the context of that time. The Civil

⁵⁹ *Id.* at 467 (citing Schuyler Colfax, *Leg Cases, in* MEETING MR. LINCOLN: FIRSTHAND RECOLLECTION OF ABRAHAM LINCOLN BY PEOPLE, GREAT AND SMALL, WHO MET THE PRESIDENT 81, 83 (Victoria Radford ed., 1998)).

⁶⁰ *Id.* at 467.

⁶¹ Ron Soodalter, *Lincoln and the Sioux*, N.Y. TIMES: OPINIONATOR (Aug. 20, 2012), <https://opinionator.blogs.nytimes.com/2012/08/20/lincoln-and-the-sioux/>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Gustav Niebuhr, *How a Bishop Moved Lincoln, and Saved 265 Indians*, L.A. TIMES (July 17, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-niebuhr-abraham-lincoln-religion-indians-20140718-story.html>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Soodalter, *supra* note 61.

War was going poorly, his son had died earlier that year, he was pondering an emancipation proclamation, and conflicts arose all around him, yet his attention turned to precision in an act of mercy.⁷¹

3. *Truman and the assassin*

Overall, Truman's record was typical of the period, as he granted about 1,000 clemencies in each of his two terms.⁷² As a post-war president, many of them involved wartime crimes, while a significant number of others involved liquor offenses, including pardons to those convicted of crimes during Prohibition.⁷³

One of Truman's clemency grants stands out as perhaps the most remarkable use of the Pardon Power between Washington's pardon of the Whisky rebels and the Nixon grant by President Ford. Washington pardoned those he had rode to war against; Truman spared the life of his would-be assassin.

In 1950, the White House was under repair and President Truman was temporarily residing at Blair House, across the street from the White House.⁷⁴ On the afternoon of November 1, Truman was catching a nap upstairs at the residence when two Puerto Rican nationalists, Griselio Torresola and Oscar Collazo, stormed the building with the intent to assassinate Truman.⁷⁵ In a 31-shot firefight outside of the building (while Truman watched from a window) Torresola and a White House guard, Leslie Coffelt, were killed and Collazo and two guards were injured.⁷⁶ Collazo was convicted of murder and sentenced to death.⁷⁷

As Collazo awaited execution in 1952, Truman commuted his death sentence to one of life in prison with the possibility of parole⁷⁸ (Collazo was freed by President Jimmy Carter in a second clemency in 1979).⁷⁹

Like Lincoln's partial grant of clemency to the Dakota Sioux,⁸⁰ Truman seems to have been motivated towards mercy in part through some understanding of—and perhaps even sympathy to—the condemned man's cause. Truman viewed himself as “one who had done more for Puerto Rico

⁷¹ DORIS KEARNS GOODWIN, *TEAM OF RIVALS* 418-472 (2005).

⁷² Truman, 1945 term; Truman, 1949 term, in Ruckman Data.

⁷³ *Id.*

⁷⁴ Martin Weil, *Oscar Collazo Dies At 80*, WASH. POST (Feb. 22, 1994), https://www.washingtonpost.com/archive/local/1994/02/22/oscar-collazo-dies-at-80/361489f6-872d-4bb9-a169-445a93616492/?utm_term=.4bf1506b139a.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*; see also Associated Press, *Oscar Collazo, 80, Truman Attacker in '50*, N.Y. TIMES (Feb. 23, 1994), https://www.washingtonpost.com/archive/local/1994/02/22/oscar-collazo-dies-at-80/361489f6-872d-4bb9-a169-445a93616492/?utm_term=.4bf1506b139a.

⁷⁸ JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* 58-59 (2009).

⁷⁹ Weil, *supra* note 74.

⁸⁰ See *supra* Section II.B.2.

that any other president,” and viewed his outlook on the island as one of “compassion.”⁸¹ Only about six months after taking office after Franklin Roosevelt’s death, in fact, Truman had delivered a “Special Message to the Congress on Puerto Rico,” in which he asserted that “It is now time, in my opinion, to ascertain from the people of Puerto Rico their wishes as to the ultimate status which they prefer, and, within such limits as may be determined by the Congress, to grant to them the kind of government which they desire.”⁸²

As we move towards discussion of clemencies darkened by self-interest, it is worthwhile to remember the selfless use of this tool by Truman, who found a way to mercy where few would have expected or demanded it.

4. *Ford and Nixon*

Gerald Ford, of course, was never elected as Vice President or President; he sidled into both jobs successively as first Spiro Agnew and then Richard Nixon resigned in disgrace.⁸³ His own background before those momentous events is significant in understanding his two historical acts of clemency.

After playing center for the University of Michigan, Ford turned down both the Green Bay Packers and the Detroit Lions and chose instead to attend Yale Law School while simultaneously working as an assistant football coach there.⁸⁴ At 35 he ran for Congress and won, and quickly established himself as a moderate Republican positioned between the liberal Republicans led by Nelson Rockefeller and the conservative wing led by Barry Goldwater.⁸⁵

As a moderate leader, Ford was someone who had to get along with everyone—to mend things. His *New York Times* obituary noted that “[i]n a Congress that often seemed akin to a fraternity, he was nearly everyone’s friend,” and further expounded on Ford’s philosophy as a leader in the House by saying:

Mr. Ford generally enlarged his circle of friends by establishing an amicable style of leadership.

When one or another Republican voted against the leadership’s wishes, some party stalwarts sought to persuade Mr. Ford to discipline the offender. There were

⁸¹ CROUCH, *supra* note 78, at 59.

⁸² President Harry S. Truman, Special Message to the Congress on Puerto Rico (Oct. 16, 1945), <http://www.presidency.ucsb.edu/ws/index.php?pid=12314>.

⁸³ John Robert Greene, *On This Day, Gerald Ford Becomes President in a Constitutional First*, NATIONAL CONSTITUTION CENTER: CONSTITUTION DAILY (Aug. 9, 2018), <https://constitutioncenter.org/blog/40-years-ago-gerald-ford-becomes-president-in-a-historic-first>.

⁸⁴ *Id.*

⁸⁵ *Id.*

methods that might have been used: transfer to a minor committee, elimination of funds for overseas travel, loss of campaign money. Mr. Ford said no.

“That’s counterproductive,” he insisted. “That person knows that he disappointed you. To rub it in makes it, the next time, literally impossible to get his cooperation. You can lose one battle, but the most important thing is to win the war.”⁸⁶

Ford’s soul sought equanimity, as was true of many others who lived through the Depression and fought in World War II.⁸⁷ It should not surprise us that he sought the same, in the form of national healing, when he pardoned—before any charge had been laid—his predecessor only a month after taking office. Though not required, Ford chose to issue a proclamation to explain the pardon, where he set out his purpose, saying that “[t]he tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States.”⁸⁸

Less than two weeks later, Ford used clemency again towards the same purpose of national unity, this time to heal some of the damage caused by the Vietnam War. He elected to do this by forming a bi-partisan “Presidential Clemency Board” that would expedite the consideration of clemency for draft evaders, deserters from the military, and others who had committed related crimes.⁸⁹ By the time the Board completed its task, the Board had recommended over 14,000 “conditional pardons” that were in some cases conditioned on the completion of alternative service.⁹⁰ Consistent with Ford’s desire for consensus, the Board itself was led by a moderate-to-liberal Republican former Senator, Charles Goodell, and included the President of Notre Dame (Father Theodore Hesburgh), the head of the Urban League (Vernon Jordan), a “woman lawyer” (Aida O’Connor), and a retired Marine General (Lewis Walt).⁹¹

⁸⁶ James M. Naughton & Adam Clymer, *Gerald Ford, 38th President, Dies at 93*, N.Y. TIMES (Dec. 26, 2006), <https://www.nytimes.com/2006/12/27/washington/27webford.html>.

⁸⁷ Proclamation No. 4311, 32 Fed. Reg. 32,601 (Sept. 10, 1974).

⁸⁸ *Id.*

⁸⁹ Exec. Order No. 11,803, 39 Fed. Reg. 33,297-98 (Sept. 17, 1974).

⁹⁰ PRESIDENTIAL CLEMENCY BD., REPORT TO THE PRESIDENT 124 (1975). It is difficult to know how many of the applicants were able to complete the requirements of the conditional pardons, and for many the question was obviated when Jimmy Carter granted an unconditional pardon to all who had been charged or could be charged with draft evasion. Andrew Glass, *Carter Pardons Draft Dodgers Jan. 21, 1977*, POLITICO (Jan. 21, 2008), <https://www.politico.com/story/2008/01/carter-pardons-draft-dodgers-jan-21-1977-007974>.

⁹¹ Exec. Order No. 11,803, 39 Fed. Reg. 33,297-98 (Sept. 17, 1974).

5. Barack Obama and narcotics prisoners

Perhaps alone among presidents, Barack Obama had a genuine empathy for the urban poor and those who had been accused or convicted of crimes. In a speech in the first year of his presidency, he said “When I drive through Harlem and I drive through the South Side of Chicago and I see young men on the corners,” he said, “I say there but for the grace of God go I.”⁹² He took time to visit a federal prison in Oklahoma, and when he did, it brought him to the same place of personal reflection. As the *New York Times* reported:

In becoming the first occupant of his high office to visit a federal correctional facility, Mr. Obama could not help reflecting on what might have been. After all, as a young man, he smoked marijuana and tried cocaine. But he did not end up with a prison term lasting decades like some of the men who have occupied Cell 123.

As it turns out, Mr. Obama noted, there is a fine line between president and prisoner. “There but for the grace of God,” he said somberly after his tour. “And that, I think, is something that we all have to think about.”⁹³

This intimate connection extended to Obama’s actual use of clemency—on a day in which he granted 61 clemency petitions, he took a group of clemency recipients out to lunch in Washington, D.C.⁹⁴ “Two months ago I was sitting in a cell, and today I was eating lunch with the president,” one of the guests, Angie Jenkins, said. “My heart fell to the ground.”⁹⁵

Given this deep connection, it should not be surprising that (eventually) Obama broke the trend away from clemency and re-claimed the Pardon Power as a tool that could be used broadly towards a principle.⁹⁶ By the end

⁹² Sheryl Gay Stolberg, *Obama Gives Fiery Address at the N.A.A.C.P.*, N.Y. TIMES, (July 16, 2009), <https://www.nytimes.com/2009/07/17/us/politics/17obama.html>.

⁹³ Peter Baker, *Obama, In Oklahoma, Takes Reform Message to the Prison Cell Block*, N.Y. TIMES (July 16, 2015), <https://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html>.

⁹⁴ Michael D. Shear, *Obama Commutes Sentences for 61 Convicted of Drug Crimes*, N.Y. TIMES (Mar. 30, 2016), <https://www.nytimes.com/2016/03/31/us/politics/obama-commutes-sentences-for-61-convicted-of-drug-crimes.html>.

⁹⁵ Casey Tolan, *What It’s Like to Get Lunch with the President Who Gave You Your Freedom*, SPLINTER (Apr. 1, 2016), <https://splinternews.com/what-its-like-to-get-lunch-with-the-president-who-gave-1793855943>.

⁹⁶ President Kennedy had also focused a clemency effort on narcotics defendants, though that project resulted in far fewer grants and was conducted with much less fanfare. Interview with Sam Morrison by Robin Young, *U.S. Launches Clemency Effort for Some Drug Offenders*, NPR (Feb. 3, 2014), <https://www.npr.org/templates/transcript/transcript.php?storyId=271144928>.

of his term, Obama had commuted the sentences of over 1700 inmates,⁹⁷ most of them non-violent drug offenders.⁹⁸ Though the effort was flawed in structure and could have achieved more,⁹⁹ no one would dispute that Obama's efforts were driven by a passion close to his heart.

6. Donald Trump, celebrities, and compatriots

Well before he was elected, two traits marked businessman Donald Trump. One was an affection for celebrity and celebrities: he was, after all, the creator and host of a reality show with the word embedded in its title ("Celebrity Apprentice"),¹⁰⁰ and twice hosted Saturday Night Live¹⁰¹ despite lacking any background in comedy, acting, politics, or music. A second defining trait was loyalty; as he once put it, "I value loyalty above everything else—more than brains, more than drive and more than energy."¹⁰² It is indisputable that Trump values most those who have been loyal to him,¹⁰³ both in and out of government.¹⁰⁴

Trump broke the pattern of inaction established by Clinton, Bush, and Obama early in their presidencies. He began granting clemencies early, and all of them were celebrities, connected to him by friendship, or both. In August of 2017, he pardoned a former sheriff in Arizona, Joe Arpaio,¹⁰⁵ who had been one of Trump's earliest and most ardent supporters, endorsing him before the Iowa caucuses.¹⁰⁶ Just before Christmas, he commuted the lengthy sentence given to Sholom Rubashkin, whose case was promoted by celebrity

⁹⁷ Gregory Korte, *Obama Grants 330 Commutations, Bringing Total to a Record 1,715*, USA TODAY (Jan. 19, 2017), <https://www.usatoday.com/story/news/politics/2017/01/19/obama-grants-330-more-commutations-bringing-total-record-1715/96791186/>.

⁹⁸ Sari Horwitz, *Obama Grants Final 330 Commutations to Nonviolent Drug Offenders*, WASH. POST (Jan. 19, 2016), https://www.washingtonpost.com/world/national-security/obama-grants-final-330-commutations-to-nonviolent-drug-offenders/2017/01/19/41506468-de5d-11e6-918c-99ede3c8cafa_story.html?utm_term=.150256b0bdf7.

⁹⁹ OFFICE OF THE INSPECTOR GEN, U.S. DEP'T OF JUSTICE, REVIEW OF THE DEPARTMENT'S CLEMENCY INITIATIVE, (2018), <https://oig.justice.gov/reports/2018/e1804.pdf>.

¹⁰⁰ Emily Nussbaum, *The TV That Created Donald Trump*, NEW YORKER (July 31, 2017), <https://www.newyorker.com/magazine/2017/07/31/the-tv-that-created-donald-trump>. Trump also wrangled guest spots on "The Fresh Prince of Bel Air," "The Nanny," and even "This Old House," among others. *Id.*

¹⁰¹ Tom Bissell, *Who's Laughing Now? The Tragicomedy of Donald Trump on Saturday Night Live*, HARPER'S MAG. (Oct. 27, 2018), <https://harpers.org/archive/2017/10/whos-laughing-now/>.

¹⁰² Michael Kruse, *I Need Loyalty*, POLITICO MAG. (Mar./Apr. 2018), <https://www.politico.com/magazine/story/2018/03/06/donald-trump-loyalty-staff-217227>.

¹⁰³ Abigail Simon, *Donald Trump's Endorsements Say More About Him Than the Candidates*, TIME MAG. (June 19, 2018), <http://time.com/5316410/donald-trump-endorsements-loyalty/>.

¹⁰⁴ *Id.* Trump famously even sought a statement of personal loyalty from the Director of the Federal Bureau of Investigation, according to that Director. JAMES COMEY, A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP 242-43 (2018).

¹⁰⁵ Pardon Warrant for Joseph Arpaio (Aug. 25, 2017), <https://www.justice.gov/pardon/file/993586/download>.

¹⁰⁶ Kurtis Lee, *Former Sheriff Joe Arpaio Says he is Running for Senate in Arizona to Support Trump's Agenda*, L.A. TIMES (Jan. 9, 2018), <http://www.latimes.com/nation/la-na-pol-arpaio-senate-20180109-story.html>.

lawyer Alan Dershowitz.¹⁰⁷ Next, in March of 2018, he pardoned Kristian Saucier,¹⁰⁸ a sailor who had been convicted of mishandling Navy secrets and whose case had become a celebrity when it was trumpeted on *Fox News*.¹⁰⁹ That was followed by a pardon of well-known former Bush advisor Scooter Libby,¹¹⁰ and (in May of 2018) the pardoning of two more celebrities: a posthumous grant to the boxer Jack Johnson,¹¹¹ and a grant to the very-much-alive conservative activist Dinesh D'Souza.¹¹² In the following July, he pardoned two agitator/celebrities of the right, Dwight and Steven Hammond,¹¹³ and commuted the sentence of Alice Marie Johnson, whose case had been personally promoted in the White House by reality television star Kim Kardashian West.¹¹⁴

From the beginning, for good or bad, it was established that President Donald Trump, like presidents before him, was pushed by his own deepest values in choosing his surprisingly active course of clemency.

III. THE CONSTITUTION'S SOUL

Presidents, from the first, have used the Pardon Power in keeping with what was most important in their own hearts: Washington acted out of the confidence and purpose of a military commander called to unify his

¹⁰⁷ Josh Nathan-Kazis, *Rubashkin Freed After Dershowitz Seized a Moment with Trump to Plead His Case*, FORWARD (Dec. 22, 2017), <https://forward.com/news/390647/rubashkin-freed-after-dershowitz-seized-a-moment-with-trump-to-plead-his-ca/>.

¹⁰⁸ Pardon Warrant for Kristian Mark Saucier (Mar. 9, 2018), <https://www.justice.gov/pardon/page/file/1042416/download>.

¹⁰⁹ Cleve R. Wootson, Jr., *A Felon Pleaded his Case on 'Fox & Friends.' Days Later, Trump Pardoned Him*, WASH. POST (Mar. 10, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/03/10/a-felon-pleaded-his-case-on-fox-friends-days-later-trump-pardoned-him/?utm_term=.c6f78e89e3f6.

¹¹⁰ Peter Baker, *Trump Pardons Scooter Libby in a Case That Mirrors his own*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/us/politics/trump-pardon-scooter-libby.html>.

¹¹¹ Jackson's pardon involved not only his celebrity but that of actor Sylvester Stallone, who had pushed for it. Jackson was the first black heavyweight champion and was convicted of transporting white women across state lines in a prosecution that appeared racially motivated. Derek Wallbank & Justin Sink, *Trump, With Sylvester Stallone Alongside Him, Pardons Jack Johnson*, BLOOMBERG (May 24, 2018), <https://www.bloomberg.com/news/articles/2018-05-24/trump-with-sylvester-stallone-alongside-pardons-jack-johnson>.

¹¹² Peter Baker, *Dinesh D'Souza, Pardoned by Trump, Claims Victory Over Obama Administration*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/us/politics/trump-pardon-dsouza.html>.

¹¹³ Gregory Korte, *President Trump Pardons Oregon Cattle Ranchers Whose Case Inspired Takeover of Wildlife Refuge*, USA TODAY (July 10, 2018), <https://www.usatoday.com/story/news/politics/2018/07/10/donald-trump-pardons-dwight-hammond-steven-hammond-arson-case/771054002/>.

¹¹⁴ Erin Jenson, *Kim Kardashian West Talks 'Mission' of Commuting Alice Johnson, Trump's 'Compassion'*, USA TODAY (June 14, 2018), <https://www.usatoday.com/story/life/people/2018/06/14/kim-kardashian-west-alice-johnson-today-show-hoda-kotb/700890002/>.

troops;¹¹⁵ Lincoln was moved by authentic human stories;¹¹⁶ Truman saved his assassin because he sympathized with his cause;¹¹⁷ Ford pardoned his predecessor and draft evaders because he was at core a reconciler who believed in national healing;¹¹⁸ Obama deeply empathized with the hurt and broken people he found in prison;¹¹⁹ and Donald Trump moves in response to loyalty and a desire for celebrity.¹²⁰ Those facts beg an answer to a central question: is that deeply personal use of clemency what the framers of the Constitution intended?

It seems clear that they did intend exactly that. Moving within a social and legal culture that saw clemency as a virtue flowing from an individual, they considered other models, looked clearly at the potential problems with such a broad grant of power, and chose to include the Pardon Power at the heart of the Constitution as the sole prerogative of the person holding the office of president.

A. Mercy “Enthroned in the Hearts of Kings”

The Framers, of course, were not writing on a blank slate. The power of clemency had existed for millennia. As Paul Larkin properly reflects, “[t]he tempering of justice with mercy has likely existed since families began to organize into societies and has always been a cherished tradition of Western civilization.”¹²¹ Within government, that tradition goes back at least to the Code of Hammurabi and was an integral part of Greek and Roman legal systems.¹²²

The power of clemency came to us, of course, through English law. British monarchs enjoyed the power of clemency in some form from the time of the Magna Carta.¹²³ By 1535, Henry VIII had gained an absolute right to pardon who he wished.¹²⁴ After Charles II controversially pardoned his Treasurer, Thomas Osborne, while he was in the process of being impeached by Parliament,¹²⁵ Parliament sought reforms which eventually (through the Settlement Act of 1700) prohibited the use of clemency in cases of

¹¹⁵ See *supra* Section II.B.1.

¹¹⁶ See *supra* Section II.B.2.

¹¹⁷ See *supra* Section II.B.3.

¹¹⁸ See *supra* Section II.B.4.

¹¹⁹ See *supra* Section II.B.5.

¹²⁰ See *supra* Section II.B.6.

¹²¹ Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J. L. & PUB. POL’Y 833, 842 (2016).

¹²² *Id.* at 843.

¹²³ ANDREW NOVAK, *COMPARATIVE EXECUTIVE CLEMENCY* 18 (2015).

¹²⁴ SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 233 (1644), <http://lawlibrary.wm.edu/wytheopedia/library/CokeThirdPartOfTheInstitutesOfTheLawsOfEngland1644.pdf>.

¹²⁵ Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power From the King*, 69 TEX. L. REV. 569, 587 (1991).

impeachment.¹²⁶ Even with this limitation (later replicated in the United States Constitution),¹²⁷ the Pardon Power remained a remarkable tool of an individual conscience.

William Blackstone, in his *Commentaries* written between 1765-69, wrote favorably of the institution of clemency (at least within a monarchy): “T[his] is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigor of the general law, in such criminal cases as merit an exemption from punishment.”¹²⁸

The power of this idea—mercy in the hands of an individual leader—was explored within the highest expressions of English culture; the redemptive power of a monarch’s clemency is thoroughly explored in William Shakespeare’s plays, all of which were written within a century of Henry VIII’s claim of the Pardon Power as an absolute right. Shakespeare scholar Robert Wiltenburg has described the dispensing of mercy by those with power as “always a key element” in the Bard’s plays, and argues that Shakespeare used it to connect with his audience.¹²⁹ To Shakespeare, mercy by the powerful is a moral good, and those in the audience are “yearning for it to be present and to succeed,” according to Wiltenburg.¹³⁰

Most famously, Portia in *The Merchant of Venice* argues that Shylock should show mercy as “an attribute to God himself”:

The quality of mercy is not strain’d;
It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice blest;
It blesseth him that gives and him that takes:
‘Tis mightiest in the mightiest: it becomes
The throned monarch better than his crown;
His scepter shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this sceptred sway;
It is enthroned in the hearts of kings,
It is an attribute to God himself;
And earthly power doth then show likest God’s

¹²⁶ Act of Settlement 1700, 12 & 13 Will. 3 c. 2, § 3 (Eng.).

¹²⁷ U.S. CONST. art. II, § 2.

¹²⁸ 4 WILLIAM BLACKSTONE, COMMENTARIES *394-402.

¹²⁹ Interview with Robert Wiltenburg by Rebecca King, “*The Quality of Mercy*”: A Shakespearean Theme, HOLD THAT THOUGHT (July 21, 2015), <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-431/>.

¹³⁰ *Id.*

When mercy seasons justice.¹³¹

That clemency is “enthroned in the heart of kings”¹³² comes up repeatedly in Shakespeare’s other plays. Hamlet, the Prince of Denmark, urges mercy, describing its paradoxical nature: “. . . the less they deserve, the more merit is in your bounty.”¹³³ *Measure for Measure* goes directly to the theme of the relationship between justice on behalf of society and mercy administered by an individual. It opened in performance before King James I in 1604.¹³⁴ The play is set in a city full of vice and centered on a forgiving Duke and a strict judge (Angelo). It has been described as a “problem play,” and the problem is the inherent conflict between justice and mercy.¹³⁵ Shakespeare establishes three positions from which clemency by a sovereign leader can be viewed: absolute justice, mercy, and equity (which is positioned between those two poles).¹³⁶ In the end, the Duke fashions a form of equity, sparing Angelo’s life after sentencing him to death and marrying him to Mariana. The Duke, who seeks to heal relationships after the tumult of his absence, announces this with deep emotion: “Joy to you, Mariana! Love her, Angelo.”¹³⁷

Shakespeare’s last play, *The Tempest*, perhaps best captures the individualistic nature of mercy. Prospero, the Duke of Milan, has been shipwrecked on a remote island with his daughter, Miranda, and a trove of instructional magic books after being deposed by his brother.¹³⁸ Using the magic he has learned, he creates a storm that brings his enemy—his brother—to the island he controls (along with others).¹³⁹ In the end, with the opportunity to wreak retribution on his brother and the others as the sovereign of the island, he chooses instead to grant mercy by breaking the spells he has cast and sparing their lives:

Though with their high wrongs I am struck to the quick,
Yet with my nobler reason ‘gainst my fury
Do I take part: the rare action is
In virtue than in vengeance: they being penitent,
The sole drift of my purpose doth extend

¹³¹ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1. Shylock is a powerful merchant, not a monarch, but Portia’s speech is clearly about the power of kings. *Id.*

¹³² *Id.*

¹³³ WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2.

¹³⁴ Arthur C. Kirsch, *The Integrity of ‘Measure for Measure,’ in 28 SHAKESPEARE SURVEY: SHAKESPEARE AND THE IDEAS OF HIS TIME* 89-106 (Cambridge Univ. Press 1975).

¹³⁵ *Id.* The title itself refers to this central problem.

¹³⁶ *Id.*

¹³⁷ WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 5, sc. 1.

¹³⁸ WILLIAM SHAKESPEARE, *THE TEMPEST* act 1, sc. 2.

¹³⁹ *Id.* at act 1, sc. 1.

Not a frown further. Go release them, Ariel:
 My charms I'll break, their senses I'll restore,
 And they shall be themselves.¹⁴⁰

The themes of individualism and redemption that always run in league with clemency has perhaps never been better expressed than in that last line: “And they shall be themselves.”¹⁴¹ That wholeness is the hope behind every principled grant of clemency.

B. The Framers' Debate

Blackstone and Shakespeare both described clemency in terms of personal conscience—so what? Would that have affected the thinking of the Framers? Certainly, they were aware of both sources. The Framers were affluent and privileged white men, able to afford to infuse themselves with the favored theories and culture of their time, and the cultural context of their privileged world included expressions of mercy's value in multiple forms.¹⁴²

Blackstone's work was ubiquitous amongst those learned in the law at that time. Albert Alschuler concluded that the “*Commentaries* should be regarded as the baseline, or shared starting-point, of American legal thought,”¹⁴³ and notes both that nearly as many copies were sold on the American as the English side of the Atlantic Ocean before the Constitution was written.¹⁴⁴ Mary Ann Glendon describes Blackstone's *Commentaries* as “the law book” at the time the nation was formed.¹⁴⁵ Thomas Jefferson referred to it as “the most elegant and best digested of our law catalogue.”¹⁴⁶

The influence of Shakespeare on prominent Americans at the time of the Constitutional Convention was undeniable.¹⁴⁷ George Washington attended a production of *The Tempest* in Philadelphia during the Constitutional Convention itself, and Jefferson likely saw *The Merchant of Venice* at least

¹⁴⁰ *Id.* at act 5, sc. 1.

¹⁴¹ *Id.*

¹⁴² This was particularly true because of the limited role of religion at that time; the end of the 18th century was a historic low point for religious adherence in the United States. GARRY WILLS, HEAD AND HEART: AMERICAN CHRISTIANITIES 8, 203-52 (2007).

¹⁴³ Albert Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996).

¹⁴⁴ *Id.* at 2-5.

¹⁴⁵ MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 23 (1991).

¹⁴⁶ Alschuler, *supra* note 143, at 10. Jefferson was critical of the influence of the book. *Id.* at 11.

¹⁴⁷ That influence was the subject of an entire exhibition at the Folger Shakespeare Museum in Washington, D.C. Shakespeare & Beyond, *America's Shakespeare: Connections Between the Bard and the Founding Fathers*, FOLGER SHAKESPEARE LIBRARY (June 28, 2016), <https://shakespeareandbeyond.folger.edu/2016/06/28/americas-shakespeare-founding-fathers/>.

twice.¹⁴⁸ Thomas Jefferson and John Adams¹⁴⁹ traveled together to visit Shakespeare's childhood home in Stratford-upon-Avon in 1786, a year before the Constitutional Convention,¹⁵⁰ a trip which reflected the general fascination early Americans had with the Bard—a fascination built, in part, around the idea that Shakespeare spoke uniquely to the grand questions the new nation faced.¹⁵¹ Busts of Shakespeare even became common accoutrements in upper-class homes after 1750.¹⁵²

We don't have to simply rely on context, of course; we have some historical record about the actual discussion about the inclusion of the Pardon Power in the Constitutional text, and we know what models the Founding Fathers rejected.

Almost immediately, clemency processes in the new states diverged from the British system of mercy vesting in the sole power of the executive, save for impeachment. By the time of the Constitutional Convention, the majority of states had rejected the British model and allocated at least part of the Pardon Power to the legislature or a legislative council.¹⁵³ Only five states (New York, Delaware, Maryland, North Carolina, and South Carolina) allowed the governor unfettered access to the levers of mercy.¹⁵⁴

The movement away from clemency in the hands of an individual was encouraged by influential thinkers like Cesare Beccaria, an Italian political philosopher who was quite influential among those who created the Constitution.¹⁵⁵ Beccaria was explicit:

Clemency is a virtue which belongs to the legislator, and not to the executor of the laws; a virtue which ought to shine in the code, and not in private judgment. To shew mankind, that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to nourish the flattering hope of impunity, and is the cause of their considering every punishment inflicted as an act of injustice and oppression. The prince, in pardoning, gives up the public security in

¹⁴⁸ *Id.*

¹⁴⁹ Despite their great influence, neither Jefferson nor Adams participated in the Constitutional Convention. *Meet the Framers of the Constitution*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers> (last reviewed Sept. 25, 2018).

¹⁵⁰ Barry Edelstein, *Shakespeare for Presidents*, N.Y. TIMES (Apr. 25, 2009), <https://www.nytimes.com/2009/04/26/weekinreview/26edelstein.html>.

¹⁵¹ William Grimes, *Measuring America's Shakespeare Obsession*, N.Y. TIMES (Mar. 19, 2014), <https://www.nytimes.com/2014/03/20/books/measuring-americas-shakespearean-devotion.html>.

¹⁵² FRANCES TEAGUE, *SHAKESPEARE AND THE POPULAR AMERICAN STAGE* 22-23 (2006).

¹⁵³ Kobil, *supra* note 125, at 590.

¹⁵⁴ *Id.*

¹⁵⁵ James Madison, like others, was "quite familiar" with Beccaria's ideas, and "early American state constitutions certainly show Beccaria's fingerprints." JOHN D. BESSLER, *THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD* 210-11 (2018).

favour of an individual, and, by his ill-judged benevolence, proclaims a public act of impunity.¹⁵⁶

Once they got to drafting, the Framers didn't even consider the Pardon Power as they began discussion; it wasn't included initially in either William Paterson's New Jersey Plan or Edmund Randolph's Virginia Plan.¹⁵⁷ It was South Carolina's John Rutledge who inserted the pardon language into an early draft.¹⁵⁸ Notably, Rutledge had received a legal education at the Inns of Court in London and became a member of the English bar in 1760.¹⁵⁹ It should not be surprising that he inserted the English version of clemency into the Constitution.¹⁶⁰

Predictably, Anti-Federalists pushed back against the Pardon Power, which would be the tool of a strong executive. Roger Sherman of Connecticut sought to amend the clause, so that pardons would ultimately be in the hands of the Senate.¹⁶¹ The proposal was voted down 8-1.¹⁶² Several other modifications were considered and rejected, including a limitation that only allowed for a pardon "after conviction," and another that would bar pardons for those charged with treason.¹⁶³

In the end, the most vigorous debate seems to have been over whether or not to allow the president, by his sole authority, to pardon those accused of treason. In raising this issue, Edmund Randolph was quite clear about his fear: "The President may himself be guilty. The Traytors [sic] may be his own instruments."¹⁶⁴ A committee was formed to examine that question, which then mulled over shifting pardons for treason to the legislature. In the end, the motion to make such an amendment failed.¹⁶⁵

How do we know that the Framers intended the Pardon Power to reflect the individual mores of the president? Three clear facts about the Constitutional Convention prove the point.

¹⁵⁶ CESARE BONESANA DI BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 158 (Albany: W.C. Little & Co., 1872), <http://oll.libertyfund.org/titles/beccaria-an-essay-on-crimes-and-punishments>.

¹⁵⁷ Crouch, *supra* note 78, at 15.

¹⁵⁸ *Id.*

¹⁵⁹ *John Rutledge, 1795, THE SUPREME COURT HISTORICAL SOC'Y*, <http://www.supremecourthistory.org/timelinrutledge.html> (last visited Oct. 28, 2018). Rutledge was later nominated by George Washington to be the Chief Justice of the Supreme Court, but he was rejected by the Senate. *Id.*

¹⁶⁰ One recitation of these events at the Constitutional Convention can be found in the Supreme Court's opinion in *Ex Parte Grossman*, 267 U.S. 87, 112 (1925).

¹⁶¹ Specifically, Sherman moved to amend the Clause to allow the President "to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 419 (Max Farrand ed., Yale Univ. Press, 1911), <http://oll.libertyfund.org/titles/farrand-the-records-of-the-federal-convention-of-1787-vol-2>.

¹⁶² *Id.*

¹⁶³ CROUCH, *supra* note 78, at 15-16.

¹⁶⁴ *Id.* at 16.

¹⁶⁵ *Id.* at 16-17.

First, they did not need to include clemency at all—and, in fact, the initial plans did not include it. They could have maintained that stance. Instead, they imported in full a British power “enthroned in the heart of kings.”¹⁶⁶

Second, they rejected the majority view in the states, where clemency was shared between the executive and the legislature. In choosing to put the election of mercy unchecked and solely in the hands of the president, they veered away from their general aversion to concentrated power. Notably, the option of this kind of power sharing was expressly considered, and overwhelmingly rejected, despite the influence of philosophers such as Beccaria.¹⁶⁷

Finally, the proposed exception for treason was rejected, over the express objection that without such an exception, the president could favor traitors who were “his own instruments.” In imagining this scenario, the drafters were looking at the possible expression of a deep loyalty by the president, one that even favored personal loyalty over devotion to the nation. And with that in mind, they retained the Elder Wand of clemency as fit to a single hand.

C. The Argument for Ratification

Thus, the power of kings remained in the document that was submitted to the states for ratification. It remained controversial; the purpose of the Constitution, after all, was not to create a monarchy, but to avoid one in favor of a Republic. It carefully divides up the power of government in order to prevent the harms that monarchy had visited upon the American colonies. At the same time, it left standing, like an isolated island in the middle of a lake created by engineers and their dam, the power of pardon.

The Constitution was sent to the states for ratification with the Pardon Clause in its current form, directing that “The President . . . shall have Power to grant Reprieves and Pardons for offenses against the United States, except in cases of impeachment.”¹⁶⁸

Criticism of the proposed Pardon Clause focused on the unchecked nature of the power, and its potential for abuse. In response, James Iredell of North Carolina argued that clemency was necessary in cases of unfairness, and could, when judiciously used, help avoid civil war and procure important testimony.¹⁶⁹ Intriguingly, in the Virginia ratification debates, James Madison, arguing for ratification, suggested one possible check on

¹⁶⁶ See *supra* Section III.A.

¹⁶⁷ BECCARIA, *supra* note 156, at 158.

¹⁶⁸ U.S. Const. art. II, § 2, cl. 1.

¹⁶⁹ Kobil, *supra* note 125, at 591-92.

clemency, asserting that the president could be impeached for abusing the Pardon Power.¹⁷⁰

The most significant defender of the presidential pardon was Alexander Hamilton, who addressed the issue in two of the Federalist Papers printed anonymously in 1788. First, in Federalist 69, Hamilton argued that the power accorded to the president under the proposed Constitution should not be feared as creating a new George III, as if “there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior,¹⁷¹ the khan of Tartary,¹⁷² to the Man of the Seven Mountains,¹⁷³ or to the governor of New York.”¹⁷⁴ Federalist 69 also carefully points out the power of impeachment as a counter-balance to the potential for abuse by the executive.

Federalist 74, also written by Hamilton, deals more directly with the individualistic nature of pardoning, arguing that “the benign prerogative of pardoning should be as little as possible fettered or embarrassed,”¹⁷⁵ and that

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. . . .one man appears to be a more eligible dispenser of the mercy of government, than a body of men.¹⁷⁶

The effort, of course, was successful. Despite the fact that it was a suspect power held by kings, despite the example of the majority of the states, despite the counsel of Beccaria, and despite the fear of treason unpunished, the Constitution was ratified with a part of its soul intact: the ability of the president of the United States to undo convictions and sentences for reasons of his or her own conscience alone.

¹⁷⁰ Cass Sunstein, *Impeachment, American Style*, NEW YORKER (Sept. 20, 2017), <https://www.newyorker.com/books/page-turner/impeachment-american-style>. The Supreme Court later suggested the same thing in *Ex Parte Grossman*, 267 U.S. 87, 121 (1925).

¹⁷¹ See *Grand Seigneur*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/grand%20seigneur> (defining “grand seigneur” as “a great lord or nobleman”) (last visited Oct. 28, 2018).

¹⁷² Tartary was a vast region extending from Eastern Europe to the Pacific Ocean. See *Tartary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Tartary> (last visited Oct. 28, 2018).

¹⁷³ This could be a reference either to a Roman citizen or the Roman Emperor. George W. Carey & James McClellan, *Glossary in THE FEDERALIST* (George W. Carey & James McClellan eds., Liberty Fund Gideon ed., 2001), <http://oll.libertyfund.org/pages/federalist-a-glossary>.

¹⁷⁴ THE FEDERALIST NO. 69 (Alexander Hamilton).

¹⁷⁵ THE FEDERALIST NO. 74 (Alexander Hamilton).

¹⁷⁶ *Id.*

IV. KEEPING THE SOUL OF THE CONSTITUTION

A. *The Argument to Alter the Pardon Power*

Complaints about the Pardon Power arise periodically,¹⁷⁷ and with them the occasional demand that federal clemency be changed or amended in some way. I have at times been one of those making such demands.¹⁷⁸ My urgings, though, have been limited to the process by which the president is advised in making his decisions.¹⁷⁹ I have not suggested that the essence of the Pardon Power—resting in the sole discretion of the President—be disturbed, and I do not do so now. To do so would be a risk to the centuries-old fit between our government and our deepest values.

Because it would require a constitutional amendment, it is unlikely that the Pardon Power will be removed from the president's hand.¹⁸⁰ Still, a principled argument does exist to do so. From the beginning, the Pardon Power has been contrary to the way the rule of law is traditionally conceived—that is, it has the potential to undermine proper punishment and any deterrent effects we might hope for. Even when it is employed in a seemingly principled way, as we saw in the Obama administration, some complained reasonably of unfairness as nearly identical cases sometimes resulted in one defendant being released while another was denied a commutation.¹⁸¹ And that is at its best! At its worst, we have seen clemency

¹⁷⁷ Near the end of President Obama's clemency push, one poll showed 50% of those voting wanted to get rid of the Pardon Power. *Is it Time to Get Rid of The Presidential Pardon?*, MLIVE (Dec. 20, 2016), https://www.mlive.com/politics/index.ssf/2016/12/is_it_time_to_get_rid_of_the_p.html. The same kind of poll taken after Donald Trump's first batch of pardons showed nearly identical numbers. *Is it Time to Get Rid of the Presidential Pardon?*, NJ.COM (June 1, 2018), https://www.nj.com/opinion/index.ssf/2018/06/is_it_time_to_get_rid_of_the_presidential_pardon.html.

¹⁷⁸ See Rachel Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM & MARY L. REV. 387, 425-440 (2017); Rachel E. Barkow & Mark Osler, *Reconstructing Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015); Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Clemency System*, 41 VT. L. REV. 465 (2017).

¹⁷⁹ *Id.*

¹⁸⁰ One of the most influential arguments for a fundamental re-making of the Pardon Power was asserted by Professor Daniel Kobil in a 1991 article in the *Texas Law Review*. Kobil, *supra* note 125. There, Kobil concluded that "The lack of any standards or checks on the exercise of the clemency power has not stood the American system in good stead," *id.* at 573, and recommended dividing the Pardon Power between the president and a clemency commission that would act independently. *Id.* at 622-24. Even there, though, Kobil allowed that the president would retain the ability to grant "Justice-neutral acts of clemency [that] can serve a variety of ends, ranging from preserving the unity of the state to advancing the political or financial aims of those granting clemency." *Id.* at 622.

¹⁸¹ For example, Harold and DeWayne Damper are brothers who were convicted together on drug trafficking charges, received the same sentence, and served time together at the same minimum-security prison. DeWayne received clemency from President Obama. Harold was denied. Gregory Korte, *Two Brothers, Two Petitions for Clemency, Two Different Outcomes*, USA TODAY (Jan. 9, 2017), <https://www.usatoday.com/story/news/politics/2017/01/09/two-brothers-two-petitions-clemency-two-different-outcomes/96297020/>.

used to look out for political friends,¹⁸² reward contributors,¹⁸³ and cut investigations short.¹⁸⁴ When controversial figures receive this kind of break—be it Chelsea Manning¹⁸⁵ or Caspar Wienberger¹⁸⁶—it outrages those on the other side of the political divide. Certainly, the use of clemency by President Trump has only intensified this criticism.

B. The Argument to Maintain the Pardon Power

1. A net good

As criticism of pardoning crests, it is the right time to examine its value, taking in both the positive and controversial grants over the centuries.

In whole, the Pardon Power has been a positive good: it allowed Washington to unite the country,¹⁸⁷ Lincoln to temper the imperatives of war with the tincture of mercy,¹⁸⁸ Truman to forgive his would-be assassin,¹⁸⁹ former Naval officer Gerald Ford to forgive draft evaders,¹⁹⁰ and Barack Obama to smooth away a few of the roughest edges of the War on Drugs.¹⁹¹ In retrospect, even Ford's pardon of Nixon,¹⁹² which enraged so many at the time, is generally viewed as the right thing to have done now that we have lived beyond that era. Even Watergate reporters Carl Bernstein and Bob Woodward, who were enraged by the pardon at the time, now see wisdom in Ford's act.¹⁹³

Balancing these positive uses of the Pardon Power in comportment with our best national instincts against the bad—an unearned life in freedom for Marc Rich, say, or the ability of 85-year-old Joe Arpaio to totter away from a contempt of court charge—it would seem that the use of the Pardon Power, even with its controversies, is ultimately a net good.

The truth is that clemency is a poor tool for a tyrant. While a president might use it to reward his friends or prod at an enemy, the nature of it is such

¹⁸² See *supra* Section II.A.4.

¹⁸³ *Id.*

¹⁸⁴ Certainly, the Nixon pardon accomplished this. See *supra* Section II.B.4.

¹⁸⁵ Manning was convicted of stealing and disseminating classified information and had her sentence commuted by President Obama. Laura Jarrett & Gloria Borger, *Obama Commutes Sentence of Chelsea Manning*, CNN (Jan. 18, 2017), <https://www.cnn.com/2017/01/17/politics/chelsea-manning-sentence-commuted/index.html>.

¹⁸⁶ Associated Press, *The Pardons; Text of President Bush's Statement on the Pardon of Weinberger and Others*, N.Y. TIMES (Dec. 25, 1992), <https://www.nytimes.com/1992/12/25/us/pardons-text-president-bush-s-statement-pardon-weinberger-others.html>.

¹⁸⁷ See *supra* Section II.B.1.

¹⁸⁸ See *supra* Section II.B.2.

¹⁸⁹ See *supra* Section II.B.3.

¹⁹⁰ See *supra* Section II.B.4.

¹⁹¹ See *supra* Section II.B.5.

¹⁹² See *supra* Section II.B.4.

¹⁹³ *The Nixon Pardon in Constitutional Retrospect*, CONSTITUTION DAILY (Sept. 8, 2017), <https://constitutioncenter.org/blog/the-nixon-pardon-in-retrospect-40-years-later/>.

that it is grossly inefficient at accumulating power. The tool of the tyrant is and always has been imprisonment and punishment, not its opposite. What do we know of Stalin or Hitler's clemency practices? Nothing. And that should tell us everything.

But beyond the argument that the Pardon Power has resulted in more good than bad, there is a deeper point to be made, woven within our identity. We are meant to be a people with a capacity for mercy, expressed through an individual conscience.

2. *The values of mercy and individualism*

Those who argue that the Christian tradition directly informs the Constitution have little to stand on.¹⁹⁴ It is, after all, a strikingly (for its time) secular document that even bars religious tests for public office,¹⁹⁵ and counters the First Commandment ("You shall have no other gods before me")¹⁹⁶ with the First Amendment ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").¹⁹⁷ And yet, in the idea of mercy we have a value that is not only at the center of the Christian faith but embraced uniformly by other faiths and by belief systems unrelated to faith.¹⁹⁸

Just as Shakespeare's plays presented mercy as a virtue to the Framers of the Constitution, so our own popular culture continues to do so now.¹⁹⁹ To take one example,²⁰⁰ the *Batman* movies directed by Christopher Nolan repeatedly emphasize themes of mercy as an ultimate virtue. In the climax of *The Dark Knight*, the evil Joker has hijacked two ferries rigged with explosives; one is full of prison inmates, the other jammed with civilians. The Joker gives each group a detonator for the other ferry and tells each they will be spared if they activate the detonator and kill those on the other ferry. All prove merciful, however, and both groups decline to activate the

¹⁹⁴ Many, of course, believe that the United States is explicitly a "Christian" nation, despite the secular Constitution. In 2007, a *USA Today* poll found that 55% of Americans believed that the Constitution establishes a "Christian Nation." Andrea Stone, *Most Think Founders Wanted Christian USA*, USA TODAY (Sept. 13, 2007), http://www.usatoday.com/news/nation/2007-09-11-amendment_N.htm.

¹⁹⁵ U.S. CONST. art. VI, cl. 3.

¹⁹⁶ *Exodus* 20:3 (New International Version).

¹⁹⁷ U.S. CONST. amend. I.

¹⁹⁸ For example, the non-theistic Society for Ethical Culture embraces the value of mercy. Dr. Joseph Churman, *Doing Justice, Loving Mercy, and the Struggle to Make Life Whole*, N.Y. SOC'Y FOR ETHICAL CULTURE (Sept. 19, 2010), <http://www.nysec.org/testing/sundayvideo-9-19-2010>.

¹⁹⁹ It should be noted that themes of retribution are also prominent in American popular culture, e.g. *TAKEN* (EuropaCorp 2008), just as retribution is within the Constitution's provisions for "punishing piracies and felonies," the creation of the military, and acknowledgment of the death penalty. U.S. CONST. art. I, § 8, cl. 10-16; U.S. CONST. amend. V.

²⁰⁰ It is impossible to list all of the modern films with themes of mercy, but some of the better ones include *TRAFFIC* (IEG 2000), *CHOCOLAT* (Miramax 2000), and *SCHINDLER'S LIST* (Universal 1993).

detonator. Batman then captures the Joker and, in another act of mercy, spares his life.²⁰¹

The moral touchstone of a generation, the Harry Potter books and movies, also return again and again to themes of mercy and redemption. Sometimes, author J.K. Rowling's presentation deals with the subtlest complexities of the idea of mercy, while presenting it strongly as a moral good. One of the most memorable scenes in the series depicts Harry's mentor, Dumbledore, at the hands of Harry's arch-nemesis, Draco Malfoy, who has come to kill Dumbledore.²⁰² Harry has been immobilized, and watches as Draco, terrified, prepares to cast a killing spell on the calm, feeble Dumbledore. As he steels himself for the kill (unsuccessfully), Draco mewls "[y]ou're in my power . . . I'm the one with the wand . . . You're at my mercy." Unflinching and unflappable, Dumbledore replies "No, Draco . . . It is my mercy, and not yours, that matters now."²⁰³ Power, Dumbledore is telling the unhearing Draco, goes with mercy.

Individualism, too, continues to be a defining value of Americans, one that distinguishes us from other societies. Again, this is reflected not only in our law, but in our culture, where the will of a single person, their soul, is often the fulcrum upon which events turn. Nearly every superhero movie, where an individual fights off armies, exemplifies this. A single person of conscience, say the movies Americans love,²⁰⁴ can win even over tremendous odds.²⁰⁵ We are primed, by our culture, to believe in the ability of a single man or woman to do great good, even if great harm can also result.

3. *The intent of the Framers*

Intellectually, Americans are taught to revere the wisdom of the Founding Fathers.²⁰⁶ Legally, we are bound to their wisdom by the

²⁰¹ THE DARK KNIGHT (Warner Bros. 2008). A 2016 movie not involving Nolan and featuring a notably less merciful Batman, BATMAN V SUPERMAN: DAWN OF JUSTICE (Warner Bros. 2016) was a flop. Ratings for *Batman v Superman: Dawn of Justice*, ROTTEN TOMATOES, https://www.rottentomatoes.com/m/batman_v_superman_dawn_of_justice/ (last visited Aug. 16, 2018).

²⁰² The scene is essentially the same in the book and the movie. J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 591-93 (2005); HARRY POTTER AND THE HALF-BLOOD PRINCE (Warner Bros. 2009).

²⁰³ *Id.*

²⁰⁴ The Star Wars franchise, for example, epitomizes this in the first film made, where Luke Skywalker, flying alone, destroys the Death Star because of his unique ability to access "The Force." STAR WARS: A NEW HOPE (Lucasfilms 1977).

²⁰⁵ The very idea of a protagonist, which is the centerpiece of nearly all the fiction (and often the non-fiction) that we Americans consume, centers morality within a single individual.

²⁰⁶ This near-religious view of the Founding Fathers developed in the United States after the Civil War. Matt Thompson, *We Didn't Always Worship the Founding Fathers*, THE ATLANTIC (Feb. 12, 2015), <https://www.theatlantic.com/politics/archive/2015/02/when-did-americans-start-worshipping-the-founders/385432/>.

constraints the Constitution puts on governments.²⁰⁷ Functionally, we cannot alter their dictates, such as the path of mercy through clemency in the mind and body of a single person, without two-thirds of each house of Congress and three-fourths of the states agreeing.²⁰⁸ Thus, the intent of the Framers binds us three ways, and we find ways to discern and follow that intent.

In regard to the Framers' intent regarding clemency, it is most clearly seen in the plain words of the Pardon Clause, which creates an unchecked power with only one exception. Moreover, their belief in the need to rest the power in a single mind survived the challenge of dark hypotheticals—they expressly considered the possibility that a future president might pardon traitors who had served as his agents in treachery, and even then, they did not limit the Pardon Power to prevent that possibility. As Hamilton put it, they believed that the Pardon Power should be “as little as possible fettered or embarrassed.”²⁰⁹

Certainly, the wisdom of the Framers failed at some crucial junctures; their accommodation of slavery continued the greatest shame of our nation and only decades later was rejected.²¹⁰ But the ideals that underlay clemency, as set out above, still rest at the center of our identity and our own best selves as a nation.

4. *The hopes of the least among us*

Were we to restrict the Pardon Power, it would likely be because we became fed up with a president's grants to the connected and powerful. The collateral damage, though, would be the unconnected and powerless, those people in prison whose only source of hope is clemency. In the aftermath of the Obama clemency initiative, we began to meet the people who had been incarcerated, and the wrongs that their lengthy sentences had entailed.²¹¹ Obama himself was moved by their stories.²¹² One of the great and unseen powers of the Pardon Power is the subtle truth about what it can do: the most powerful person on earth can reach out and change the life of the least powerful person on earth, an exchange that can be both intimate and

²⁰⁷ That limitation was not fully effectuated until the role of judicial review of statutes reached its modern form in *Marbury v. Madison*, 5 U.S. 137 (1803).

²⁰⁸ U.S. CONST. art. V.

²⁰⁹ THE FEDERALIST NO. 74 (Alexander Hamilton).

²¹⁰ U.S. CONST. amends. XIII, XIV.

²¹¹ Lynh Bui & Matt Zaposky, *Norman Brown, Imprisoned in the Last Drug War, Thought he'd Die There. He was Freed Just as the Drug War Resumed*, WASH. POST (Apr. 27, 2017), https://www.washingtonpost.com/local/public-safety/once-the-face-of-the-drug-war-he-now-represents-obamas-attempt-at-the-wars-unwinding-norman-brown-thought-hed-die-in-prison-now-hes-free-and-reinventing-his-life/2017/04/27/fdfe0f74-0da7-11e7-ab07-07d9f521f6b5_story.html?utm_term=.ee6fc95a88a5.

²¹² Michael D. Shear, *Obama Commutes Sentences for 61 Convicted of Drug Crimes*, N.Y. TIMES (Mar. 30, 2016) <https://www.nytimes.com/2016/03/31/us/politics/obama-commutes-sentences-for-61-convicted-of-drug-crimes.html>.

profound. President Obama put that intimacy into words in letters he sent to those who received commutations under his clemency initiative. In those letters he made clear that he, the President, was betting on the success of the prisoner:

I am granting your application because you have demonstrated the potential to turn your life around. Now it is up to you to make the most of this opportunity. It will not be easy, and you will confront many who doubt people with criminal records can change. Perhaps even you are unsure of how you will adjust to your new circumstances.

But remember that you have the capacity to make good choices. By doing so, you will affect not only your own life, but those close to you. You will also influence, through your example, the possibility that others in your circumstances get their own second chance in the future.

I believe in your ability to prove the doubters wrong, and change your life for the better. So good luck, and Godspeed.²¹³

Many of Donald Trump's grants were not presented in a way that would generate broad public support and sympathy, given their partisan tilt.²¹⁴ For example, the pardons given to Dwight and Stephen Hammond were cheered only by a few on the right. They had been convicted of arson on public land, which evidence at trial showed was motivated by a desire to destroy evidence of illegal hunting there.²¹⁵ It certainly seemed, too, that the pardons were a swipe at Trump's predecessor, as the White House's own press release asserted that the Obama administration had "filed an overzealous appeal" to ensure a five-year sentence (mandatory under the relevant statute) that was "unjust."²¹⁶

Even amidst that spate of troubling grants, though, came the freedom of Alice Marie Johnson, whose case was promoted by celebrity Kim

²¹³ Letter from Barack Obama, U.S. President, to Evans Ray, pardoned convict (Aug. 3, 2016), <http://www.documentcloud.org/documents/3700959-Clemency-letter-from-President-Obama.html>.

²¹⁴ Even one of the grants that was non-controversial, the pardon of boxer Jack Johnson, was seen by some as a partisan jab at Barack Obama. Clarence Page, *Trump's Pardon of Jack Johnson a Jab to Obama's Legacy*, CHI. TRIB. (May 25, 2018), <http://www.chicagotribune.com/news/opinion/page/ct-perspec-page-trump-obama-jack-johnson-ken-burns-0527-20180525-story.html>.

²¹⁵ Eileen Sullivan & Julie Turkewitz, *Trump Pardons Oregon Ranchers Whose Case Inspired Wildlife Refuge Takeover*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/us/politics/trump-pardon-hammond-oregon.html>.

²¹⁶ *Id.*

Kardashian West.²¹⁷ Johnson had been denied three times when she petitioned for clemency previously and seemed destined to fulfill a life sentence for a non-violent narcotics conviction.²¹⁸ Her humanity and gratitude upon being released²¹⁹ stood in sharp contrast to Dinesh D’Souza, who principally grumbled about Obama after his own pardon was granted.²²⁰ The fact that Johnson was released, rewarded for her years of accomplishment while imprisoned, should inspire countless others to follow her example while incarcerated and take hope that their day can come, too.

5. *What can we do when pardons dismay us?*

If clemency is to be in the sole authority of the president, subject to his or her whims and biases, what are we to do when the use of clemency seems unfair or rooted in bad values?

First, we can push for more, for an Alice Marie Johnson to follow a Dinesh D’Souza. Every president is capable of shame, it appears, and seeks public approval. The attempt may be futile, but—as with Johnson—the results might surprise the skeptic.

Second, we can pay more attention to the values and the soul, of a president before he or she is elected to the office. Strikingly, we rarely discuss clemency during elections, and the subject has not come up in a modern presidential debate. What we learn if we just ask a candidate how they would use clemency might be very important.

Even if they evade the question, we can still examine the heart of that person to consider how they will use the Pardon Power. During the 2016 election cycle, then-candidate Donald Trump sometimes told a story titled “The Snake.” Here is how the *Washington Post* described it:

The poem describes the story of a snake, freezing outside in the cold, who convinces a woman to take him into her house. After the woman lets the snake in and revives it with “honey and some milk,” the snake delivers a fatal bite to her.

Trump likes to emphasize the last line, taking gusto as he repeats the snake’s words:

²¹⁷ Emanuella Grinberg & Nick Valencia, *Alice Marie Johnson to President Trump: I am Going to Make you Proud*, CNN (June 7, 2018), <https://www.cnn.com/2018/06/06/us/alice-marie-johnson-leaves-prison/index.html>.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Paul LeBlanc, *Dinesh D’Souza Taunts Obama Administration on Twitter, Television After Donald Trump Pardon*, NEWSWEEK (June 1, 2018), <https://www.newsweek.com/dsouza-taunts-obama-administration-twitter-television-following-pardon-953933>.

‘Oh, shut up, silly woman!’ said the reptile with a grin.
‘You knew damn well I was a snake before you took me in,’
Trump will say, his voice often rising to a growl.

Usually, the crowd cheers. Other times, it breaks into a spontaneous chant of ‘U-S-A!’²²¹

The story is supposed to be about the dangers of immigration,²²² but it better fits the relationship between a candidate and his or her values and the clemency they employ once they are let into the (White) House. If anyone had thought to talk about how Trump might use clemency, it would have been easy to predict that he would focus on loyalty and celebrities—those values were already quite clear. In future cycles, it would be better to worry about clemency before, rather than after, the election.

Were that to happen, if we were to examine candidates on how they would use mercy as carefully as we examine how they would use missiles, we might end up learning a lot more than we expect. In the end it is some of those other fragments of the individualistic soul of the Constitution—free speech, free press, the right to vote—that will allow us to fully realize the Founding Fathers’ promise of a hope for mercy through clemency, even for the least among us.

²²¹ Eli Rosenberg, ‘*The Snake*’: *How Trump Appropriated a Radical Black Singer’s Lyrics for Immigration Fearmongering*, WASH. POST (Feb. 24, 2016), https://www.washingtonpost.com/news/politics/wp/2018/02/24/the-snake-how-trump-appropriated-a-radical-black-singers-lyrics-for-refugee-fearmongering/?utm_term=.05d7cf7c7de.

²²² Paul Waldman, *Trump’s Cabinet of Con Artists*, THE AM. PROSPECT (Aug. 13, 2018), <http://prospect.org/article/trumps-cabinet-con-artists>.