# Pardon Power: The Executive Cornerstone of the Separation of Powers

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Pardon Power: The Executive Cornerstone of the Separation of Powers

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A Thesis in the Field of Government
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Abstract

This study investigates the under recognized procedural and administrative properties accompanying grants of presidential pardon. Of all the Article II powers vested in the executive branch, pardoning authority confers the president with the most administrative and procedural liberties. Procedural and administrative properties like single-branch control, rearward application, discretionary design, statute interposition, and binding directive parallel those similarly exhibited by Congress and the Supreme Court. These properties are inherent to the pardon power and are tacitly acknowledged by federal court opinions upholding this constitutional authority as a whole. Executive clemency’s notable scholars and critics alike see it solely for its mercy dictate, not for the procedural and administrative benefits it can give the president. Once identified, each pardon property will be compared to Congress and the Supreme Court’s respective procedural attribute. These comparisons will make evident the equivalent administration of duties among the executive branch and its constitutional counterparts. Moreover, these comparisons will be considered in the reform settings of those critical of the pardon’s already sweeping and permanent nature. The primary objective of the critics’ reforms is to bring transparency to the pardoning process. But their efforts to reform and rid the pardoning process of abuse simultaneously impair the procedural advantages it can offer the president. Historical and contemporary grants of clemency confirm this argument’s perspective of pardon. Virtually all reforms would structurally vitiate one or many of the mentioned pardon properties. If their reforms are enacted, the president can no longer be considered a procedural or administrative coequal in relation to Congress and the Supreme Court. Therefore, the president’s policy lever of clemency must remain untouched.
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In our constitutional republic, the president has an exclusive monopoly over the exercise of clemency. The United States Constitution formally vests the pardon authority in the executive branch. Article II, section 2, clause 1 enumerates, “The President...shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”¹ The Supreme Court began judging the merits of the president’s pardoning authority in 1833.² Since its first legal inquiry, the Supreme Court and other Article III Courts have rarely ruled against this formal authority’s sweeping effect, scope, and reach. Their jurisprudence and pronouncements are not without criticism. Critics see the unfettered nature of pardoning as a means to seize the criminal procedure functions of the judiciary and legislature.³ Critics aim their opposition, namely, at the effortless proclamation needed to pardon, wide range of pardonable offenses, and its absolute effect. To confirm their assertions, they can point to abusive pardons granted by former presidents.

While their concerns are true, critics are overlooking the necessity of this constitutional arrangement. Their opposition towards the president’s pardon authority

¹ U.S. Const. art. II, § 2, cl 1.
raises questions. Do their grievances overly focus on the result of pardoning instead of the processes accompanying it? Are the absolute effect and ease of pardoning mutually reinforcing? If not, then why? Have courts been giving the president too much latitude when it comes to pardon? Have courts excessively relied on the British King’s model of pardon to justify the president’s?

This thesis centers on the pardon authority’s interaction with the constitutional principle of separation of powers. Scholarly articles and the public frame pardoning around mercy in how it tempers an overzealous judiciary or rigidly drafted laws. Their characterizations are certainly true and adhere to how the Framers intended it. But their views of pardoning are nearsighted, in that they only see it as a means to achieve exculpatory ends. They overly focus on the outcome of a pardon grant rather than the procedural benefits it can accrue. They overlook how pardoning affords the president the capacity to rival Congress and the Supreme Court’s administrative maneuvering.

The implicit properties of the Pardon Clause, strengthened by case law, suggest that they can procedurally match the other branches. These properties include single branch control, discretionary choices of exercise and design, retrospective usage, binding directive, and statute interposition. Together as a package, these six properties are tantamount to the other branches’ administrative maneuvering. This thesis contends that the pardon authority puts the president on comparable procedural footing to that of Congress and the Supreme Court. The critics, wishing to curtail an extensive pardoning power, lose sight of the procedural benefits it can yield. Critics can cite the undeniably sharp decline in pardoning and claim the president stands to lose little procedural
ground.\textsuperscript{4} Despite this statistic, their reform proposals are restricting the only provision allowing the executive branch to operate as a procedural coequal. This analysis aims to show how critics’ reforms and views are incompatible with this perspective of pardon. When exercised within the confines of the Constitution, the pardon’s operation has to remain broadly interpreted in its understanding for the president to achieve equivalent status.

This thesis will evaluate the pardon authority within a historical-legal context. This analysis will survey pardoning from the perspectives of critics and their policy reforms to encumber its exercise. To further validate their claims, dissenting court opinions and legal scholars will be used. Original source documents surrounding the Constitutional Convention will help illustrate the Framers’ rationale and concerns during the Pardon Clause’s drafting. Select court opinions affirming the pardon power’s exercise will trace the evolution of its broad interpretation. Court cases reining in this authority will not be as applicable to this thesis. To draw comparisons to the pardon’s procedural abilities, general illustrations of Congress and the Supreme Court’s administrative workings will be employed. Ultimately, the convergence of critics and the body of case law upholding the pardon power will elicit its procedural abilities. This analysis will further expound upon Justice Holmes’ notion of the “constitutional scheme” in his \textit{Biddle v. Perovich} opinion.\textsuperscript{5} The president’s pardon power goes beyond the conventional “check and balance” taught in civics class. After doing exhaustive research on this topic, it has


\textsuperscript{5} \textit{Biddle v. Perovich}, 274 U.S. 480, 47 S. Ct. 664, 71 L. Ed. 1161 (1927).
yet to be analyzed through the prism of the pardon authority’s procedural properties. At its core, this analysis’s argument is a structural one, in that pardoning authority can emulate the administrative and procedural mechanisms exhibited by Congress and the Supreme Court.

This area of constitutional research is narrow and its scholarship is limited. Presidential pardoning mainly receives attention from law reviews, journalists, and Congress. Legal scholars enjoy debating the merits of a pardon’s expungement limitations, beneficiary’s repercussions, and constitutional restrictions. 6 Other scholars scrutinize pardons issued in the closing months of an outgoing president, who is no longer accountable to voters. Postelection pardons can become fodder for the media, especially if the pardoned individual(s) is controversial. In the wake of controversial pardons, members of Congress may propose constitutional amendments to blunt their usage and hold committee hearings to bring attention to them. 7 Few books have been written on the subject of federal pardon. The leading authorities on this matter include names like D.H. Humbert, William Duker, Dan Kobil, Jeffrey Crouch, and P.S. Ruckman. This thesis will not add to the already large body of scholarship debating a pardon’s exculpatory effect and punishment removal. Nor will this thesis attempt to identify explanations for federal clemency’s underuse.


Chapter II

Terms

“Procedural and administrative properties”: are in reference to the bundle of supplementary benefits accompanying a pardon grant. “Procedural” and “administrative” properties are used interchangeably. These terms speak to the president’s exclusive operation of all pardoning stages and its other procedural advantages. Some of these stages consist of a pardon’s initial consideration, subsequent decision to grant, conditional design choices and its binding compliance, if conditionally granted. Its other advantages include rearward usage and criminal statute interposition. The abovementioned administrative properties couched in the Constitution’s Pardon Clause are tacitly recognized by federal case law. These administrative attributes will be used as points of comparison to Congress and the Supreme Court’s corresponding abilities.

The term “pardon” encompasses the five clemency types recognized by Article III Courts. Generally, a full grant of pardon removes the punishment of an offense when accepted by its recipient and can assist in restoring lost civil rights. Since an accepted pardon conveys guilt, it cannot be forced upon its recipient. Pardons can be offered unconditionally or conditionally.

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8 *ex parte Garland*, 71 U.S. 333, 18 L. Ed. 366, 886 (1866).

To be valid, the terms of a conditional pardon must be met and are binding upon its recipient.\textsuperscript{10} Reprieves delay the execution of a punishment.\textsuperscript{11} In all instances, commutations lessen sentenced punishments by reducing or substituting them with lesser ones. Commutations do not carry the exculpatory weight of a full pardon and can be conditionally granted.\textsuperscript{12} An amnesty can be issued to a class of offenders sharing a common crime.\textsuperscript{13} Lastly, pardons can remit fines and forfeitures owed to the government.\textsuperscript{14} Pardons may not be issued for the benefit of third parties in civil cases or vested property paid into the U.S. Treasury.\textsuperscript{15} For any pardon variant to be lawful, it must be issued after the commission of a crime and cannot be exercised “in Cases of Impeachment.”\textsuperscript{16} Pardons granted for criminal contempt of court are pardonable offenses.\textsuperscript{17} Presidential grants of pardon are applicable to only federal offenses, not state level ones.\textsuperscript{18}

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\textsuperscript{10} \textit{ex parte Weathers}, 33 F.2d 294 (S.D. Fla. 1929).
\textsuperscript{11} \textit{ex parte Wells}, 59 U.S. 307, 15 L. Ed. 421 (1855).
\textsuperscript{13} \textit{Garland}.
\textsuperscript{14} \textit{Osborn v. United States}, 91 U.S. 474, 23 L. Ed. 388 (1876).
\textsuperscript{15} \textit{Knote v. United States}, 95 U.S. 149, 24 L. Ed. 442, 2143 (1877).
\textsuperscript{16} U.S. Const. art. II, § 2, cl 1.
\textsuperscript{17} \textit{ex parte Grossman}, 267 U.S. 87, 45 S. Ct. 332, 69 L. Ed. 527 (1925).
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Chapter III

Pardon History

The Constitution’s Framers incorporated only the pardon feature from the British monarchy tradition. Under this tradition, the king exercised an extensive pardon prerogative throughout his land. The Framers rejected monarchy outright by enveloping their executive figure in a republican government. They were reluctant of an unrestricted pardon power, which would ultimately reside in a single person. During its drafting, they debated how to couple clemency with impeachment to guard against executive overreach. They were quite aware of the pardon abuses predating King George III’s rule, “Thus, prior to the seventeenth century, the English monarch’s power to pardon was absolute.”

The British pardon tradition underwent major reform when Parliament confronted the king over his habitual self-dealing. Parliament eventually responded by passing the 1700 Act of Settlement, “The Act stated ‘[t]hat no pardon under the great seal of England [shall] be pleadable to an impeachment by the commons in parliament.’” This Act guarded against the crown attempting to conceal its own wrongdoing. Parliament’s

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20 Duker, “The President’s Power,” 487.

21 Duker, “The President’s Power,” 489.

22 Duker, “The President’s Power,” 496.

impeachment measure to curb the crown’s abuse served as an analogue for the
Constitution’s Framers to follow.

The Constitution’s Framers briefly considered the scope and limitations of the
Pardon Clause’s language.24 Advocates of the clause’s incorporation tried assuaging the
concerns of those warning of its possible abuses. Its vocal proponent, Alexander
Hamilton, viewed pardon as an essential policy tool best placed in a single person, “The
dilatory process of convening the legislature, or one of its branches, for the purpose of
obtaining its sanction to the measure, would frequently be the occasion of letting slip the
golden opportunity.”25 The president was and still remains anything but a deliberative
figure, for its ability to grant clemency swiftly. By “golden opportunity”, Hamilton
envisioned pressing moments of mass insurrection with little time to act.26 Sharing
Hamilton’s view of an exclusive pardon, the Constitution’s drafters voted against the
Senate having any involvement in the president’s clemency decision.27 During the
Constitutional Convention, James Wilson noted the benefit of permitting presidential
pardons for pre-conviction offenses. Wilson convinced fellow delegates that pre-

24 Christopher C. Joyner, “Rethinking the President’s Power of Executive Pardon,”


Yale University Press, 1911), 2: 627.
conviction pardons could assist in matters of conspiracy involving multiple collaborators.  

And lastly, the Constitution’s Committee of Style decided that the president could not pardon “in Cases of Impeachment.” They undoubtedly designed the impeachment provision to be all encompassing, intended to halt abuse committed by the president and its executive branch officers. The Framer’s deliberately situated impeachment in the House of Representatives, due to it being beyond the reach of the president. They reasoned that a simple House majority vote, most connected to the electorate, would prudently exercise impeachment. To date, only Presidents Andrew Johnson and William J. Clinton have been impeached for offenses unrelated to clemency abuse. Both Presidents Johnson and Clinton were eventually acquitted by the Senate.

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30 Kalt, “Pardon Me,” 780.

Chapter IV

Coordinate Branches’ Administrative and Procedural Abilities

Most of Article II’s vesting language constrains the executive branch to a passive supervisory role, especially in comparison to its legislative and judicial counterparts. With the exception of being Commander in Chief of the armed forces, the president is not typically seen as an initiating force or for possessing much constitutional agency.\(^{32}\) For its primary constitutional engagements with the coordinate branches, the president serves as the government’s chief law administrator. While ensuring faithful execution of law, the executive branch is often on the receiving end of the other branches’ policy decisions.\(^{33}\) All presidents, present and future, are the bearers of the federal government’s operative laws. Prevailing Supreme Court decisions and its constitutional interpretation are expected to be enforced, regardless of the president’s personal feelings.\(^{34}\) In terms of policy participation, the Constitution relegates the president to a humble bystander status. The Constitution prevents the president from exceeding its primary duty of law administration and morphing into a unilateral policymaker.

\(^{32}\) U.S. Const. art. II, § 2, cl 1.

\(^{33}\) U.S. Const. art. II, § 1, cl 8.

The president’s other formal duties of appointment and treaty making reveal its lack of administrative fulfillment. The president can make federal court appointments only if there are vacancies and the Senate is willing to confirm them.\(^\text{35}\) The president may have input in nominating judges but no guarantee of their confirmation. Likewise with treaty making, the president can complete this undertaking only with the approval of a Senate supermajority.\(^\text{36}\) For most presidential duties to be exercised, they must receive congressional authorization. These constitutional engagements incidentally represent the core of the executive branch’s Article II duties. They are indicative of how the president is incapable of initiating and consummating its desires.

The Constitution explicitly allocates the powers of legislating and adjudicating to Congress and the Supreme Court. Their power allocations are visibly embedded with administrative properties. The most visible of which is Congress and the Supreme Court’s unilateral exertion of constitutional agency. These two branches have full control over their vested powers. On certain occasions, Congress can independently pass legislation if each House can muster supermajorities to bypass a veto.\(^\text{37}\) If each congressional House possesses large enough partisan majorities, they can essentially run the entire legislative process. The Supreme Court has complete discretion over which cases it hears and its justices solely determine the contours of its rulings. As the federal government’s highest court of appeal, the Supreme Court has the final say on all constitutional clarification, “whether the action of that branch exceeds whatever authority

\(^{35}\) U.S. Const. art. II, § 2, cl 2.

\(^{36}\) U.S. Const. art. II, § 2, cl 2.

\(^{37}\) U.S. Const. art. I, § 7, cl 2.
has been committed, is itself a delicate exercise in constitutional interpretation, and is responsibility of this Court as ultimate interpreter of the Constitution." These two branches can virtually function autonomously, without needing each other’s assistance or the president’s for that matter. The constitutional agency these branches display is obvious and yields them extensive agenda setting over their entrusted duties.

With their large allotment of agency, Congress and the Supreme Court are permitted to navigate policy terrain with a high degree of rearward mobility. Both branches are free to embark upon new policy issues but also revisit prior ones. Congress has the liberty to repeal or amend legislation passed during a previous legislative session, “As this is not a constitutional provision, but a general law enacted by the legislature, it may be repealed, amended or disregarded by the legislature which enacted it.” Barring the Constitution’s formal prohibition of ex post facto law, Congress is free to retrospectively change laws and could theoretically devote an entire session doing so. Equally, the Supreme Court is entitled to review and overrule any prior court decision, while having complete discretion in choosing which cases to hear. The Court’s decisions have profound policy ramifications, as their opinions guide all lower federal court case law. These two branches are outfitted to operate in a rearward manner, while having substantial policy effect.


40 U.S. Const. art. I, § 9, cl 3.

41 Carp, et al., Judicial Process in America, 90.
The executive branch cannot engage in rearward policy making with the lasting influence of its counterparts. This branch is largely a forward looking institution, having to await policy opportunities to come before it. Naturally, the president can issue executive orders or proclamations in a retrospective manner to change the policies of their predecessors.\(^2\) These directives, however, are mainly seen as cosmetic adjustments to existing laws or executive agencies. They cannot create new policies from scratch, making them contingent upon operative legislation.\(^3\) Executive directives more aimed at individuals than agencies do not have the binding principle of law, “Because the president’s power is more limited in the area of individual activities than governmental activities, proclamations are generally hortatory in nature and not legally binding.”\(^4\) New legislation can supplant their effect on government policy.\(^5\) The passage of laws and court decisions require the consent of convening government bodies. Executive directives can be easily rescinded by future administrations, as their enactment rests with the decision of a single person.\(^6\)

Congress and the Supreme Court’s decisions have compulsory policy impact on the people. Criminal offense contexts fittingly reveal how these branches’ entrusted

\(^{2}\) U.S. Const. art. II, § 1, cl 1.


\(^{4}\) Cash, “Presidential Powers,” 44


powers can directly affect individuals, “[T]he right to try offences . . . and to impose the punishment provided by law is judicial . . . [T]he authority to define and fix the punishment for crimes is legislative. . . .”47 Criminal statutes are always prescribed onto the people as a means of norm enforcement. Should a person violate a criminal statute and be found guilty, they can expect to be punished. These branches can directly impose their will and hold the people to certain standards. For matters of law enforcement and prosecution, the president may only use the active laws passed by Congress, not its own.

When compared to the president, Congress and the Supreme Court have the advantages of discretionary policy design and choice. The partisan cohesion of Congress directs the manner in which it designs legislation, “Within the boundaries set by the Constitution, and subject to the veto power of the Executive, Congress can dictate any policy outcome it desires.”48 Should partisan majorities be insufficient to override a president’s veto, Congress is free to use ambiguous language to design a bill.49 Its usage of ambiguous language encourages statutory compromise amongst lawmakers.50 Combined with its incalculable design, Congress has unlimited choice in taking on a legislative agenda worth pursuing. The strength of a partisan majority can dictate the legislative accomplishments of a given Congress, as the New Deal and Great Society Congresses can attest.


The Supreme Court’s ideological makeup influences the scope of its opinion writing. Its justices can strategically draft opinions broadly or narrowly to gain support, “The writer seeks to persuade justices originally in the minority to change their votes and to keep his or her majority group intact. A bargaining process occurs, and the wording of the opinion may be changed to satisfy other justices or obtain their support.”51 The Supreme Court’s discretionary docket is as open-ended as their opinion writing, enabling it to select whichever case it desires.52 The cases it chooses to hear determine whether it will overrule a decision or traverse new legal terrain. These branches are empowered to creatively function, which is an attribute the president is usually without.

In contrast to the president, Congress and the Supreme Court have disproportionate power when interposing statutes. The president’s statutory engagements with the coordinate branches are typically in absolute terms. The president is expected to either accept or reject a bill in its entirety upon presentment.53 For vetoed bills returned to Congress, the president may symbolically include policy objections or question their constitutional standing. The president can only act on the outcome of bills passed by Congress, never their design.54 Where Congress does not delegate statutory discretion, the president is precluded from discretionary execution. Once criminal statutes are reviewed by federal courts, the president is expected to enforce them according to their interpretation or refrain from using them to prosecute all together. Given certain

52 Carp, et al., Judicial Process in America, 337.
53 U.S. Const. art. I, §7, cl 2&3.
exceptions, the president’s customary engagements with statutes are just as absolute as its acceptance of legislation.

The Supreme Court and Congress, however, are far more equipped to insert their authority within any statute’s construction. Should the constitutionality of a statute’s language come into question, the Supreme Court does not have to necessarily strike down the entire law, “judges may, if possible, invalidate only that portion of a law they find constitutionally defective instead of overturning the entire statute.”  

In a recent instance, the Supreme Court invalidated outdated provisions of the landmark Voting Rights Act of 1965. The Court in *Shelby County, Ala. v. Holder* decided that the standard of measurement used by Congress to assess racial discrimination in voting was obsolete, “Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years.”

As a result of their finding, federal preclearance requirements aimed at states that engaged in previous discriminatory practices were removed. Despite striking down these provisions, the adjoining sections and purposes of the Act remain undisturbed. Congress can similarly modify statutes in a segmented manner. Without having to fully repeal, Congress can amend the language of any statute of its choosing. As displayed in *Shelby County*, federal courts can prompt Congress to revisit laws to revise or update


57 *Shelby*. 

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problematic sections to satisfy their findings. The differences in how each branch is able to approach statutes are quite evident. Apart from presidential clemency, the executive branch does not have any of the aforementioned procedural abilities.

The pardon power confers incredible procedural latitude to the executive branch. Among all of Article II’s vesting language, only the Pardon Clause can procedurally arm the president to the degree of the coordinate branches. Criminal prosecution is a subset of the president’s law administration responsibility. The exercise of clemency is the obverse of the president’s prosecutorial duty, “[T]he right to relieve from the punishment, . . . belongs to the executive department.” Clemency is always available to the president, provided that an offense has been committed and not granted during “Cases of Impeachment.” The pardon provision offers the president the most administrative options and privileges, which get under recognized.

The pardon power’s abilities are a consequence of legal discovery and historical precedent. Federal court opinions upholding the pardon power as a whole implicitly identify them. Beginning with its independent nature, this authority allows the president to solely set its agenda. From its initial consideration, the president has absolute discretion in choosing an offense or offender to pardon, while being able to stipulate the conditions of which. The president has the capability of designing a pardon grant as it sees fit. Irrespective of all the procedural liberty accompanying a conditional offering, pardoning may not be used as tool for abuse. Its end result must still achieve some form


59 *ex parte United States* (1916).

60 U.S. Const. art. II, § 2, cl 1.
of mercy for its recipient. Pardoning allows presidents to act on events predating or within their term of office. Pardons can be retrospectively applied to any federal offenses predating the president’s term of office, without having to interact with Congress. If conditionally granted, the president can single-handedly hold recipient(s) to the terms of a pardon. And lastly, an act of pardon is the only instance allowing the president to marginally interpose penal statutes. These six pardon properties are analogous to the earlier mentioned procedural qualities demonstrated by Congress and the Supreme Court. As a group, they are never considered as points of comparison by presidential clemency defenders or used as arguments to counter critics’ reforms.
Chapter V
Pardon Defenders

Proponents in favor of the pardon’s current construal justify it on historical and normative grounds. Jerry Carannante’s *New York Law School Law Review* article defends controversial grants, in the aftermath President Clinton’s last minute pardons. Like this thesis, Carannante lists the reform proposals offered by Mondale, Jorgensen, Frank, and other critics. He characterizes their reforms as impassioned overreactions to controversial incidents: “We inherited our constitutional plan, but it does not belong exclusively to this generation.”^61^ He bases his objections on the longstanding tradition of the Framers’ intent.^62^ Regardless of how reprehensible a pardon recipient or offense may be, the last resort of pardon must always be available in its fullest form. At times, clemency might be the only hope to remedy a miscarriage of justice and excessive criminalization.^63^ Like the critics he opposes, Carannante places too much weight on the result of a pardon grant instead of the administrative processes surrounding it. Unlike Carannante, this thesis will not take the “tradition” route to illustrate how and why a broadly construed pardon is integral to our constitutional system.


Writing for the *Wake Forest Law Review*, Todd David Peterson defends the president’s exercise of pardon from congressional intrusion. Peterson uses a textual commitment argument to protect the president’s exclusive use of pardon. The fact that the Constitution textually vests pardoning authority in the executive branch implies that Congress is without this power. He cleverly notes that a congressional pardon would conflict with the president’s decision not to pardon, “The difficulty with this argument is that *any* exercise of legislative clemency conflicts with the implicit decision of the President not to grant a pardon to the parties involved.”

He too uses Hamilton’s rationale for an undivided pardon. This thesis agrees with Peterson’s view of an undivided pardon power but will illustrate it by comparing it to the other branches’ administrative attributes.

Harold J. Krent’s *California Law Review* article defends conditional grants of pardon from a normative perspective. Contrary to Carannante’s historical defense of controversial pardons, Krent validates some of the most controversial conditional pardons ever granted. He asserts that the political process and judicial branch serve as the best checks against offensive or extreme conditions. If pardon conditions prove to “shock the conscience” of society, judges should intervene and review them accordingly. Pardon conditions must not increase the original punishment nor inhibit constitutional

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66 Krent, “Conditioning the President’s Conditional Pardon Power,” 1694.
Krent views the president as a constitutional actor facing persistent mutual opposition from the other coordinate branches. A watchful electorate and vigilant courts are in the best position to counter the unlawful or egregious terms of a pardon. Krent does not go to the lengths of the critics who call for reforming the Pardon Clause structurally or its reinterpretation by federal courts. Krent is instead arguing for institutions outside of the executive branch to do their job as a government check. He understands that pardoning is a necessary policy tool in a tripartite republican government. Again, this thesis will be a departure from historical and normative pardon explanations. Analogous to the critics, Carannante and Krent do not consider how this power can confer the president with the mentioned administrative properties. The pardon power can exceed its clemency purpose for rivaling the procedural commands exhibited by Congress and the Supreme Court. Select federal case law upholding the pardon and its prior usage sustain this alternative view. The forthcoming analysis thematically outlines and analyzes each of the pardon’s administrative properties.


68 Krent, “Conditioning the President’s Conditional Pardon Power,” 1670.

69 Krent, “Conditioning the President’s Conditional Pardon Power,” 1674.
Chapter VI
Case Law Upholding Pardon

During the Post-Civil War, the Supreme Court in *ex parte Garland* and *U.S. v. Klein* unequivocally demarcated the president’s exclusive exercise of pardon. In *Garland*, the Supreme Court weighed the validity of pardoning in a legislated punishment context. Congress took drastic measures to penalize confederate sympathizers and rebellion participants.\(^70\) The Republican dominated Congress passed Acts to disenfranchise confederate sympathizers from practicing in federal courts and seize their property.\(^71\) In one instance, sympathizers were forced to take loyalty oaths to the Union if they wanted to resume law practice in federal courts.\(^72\) The Supreme Court majority led by Justice Field found that overriding legislation undermined the restoration effects of a pardon, he wrote, “This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, or exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him, cannot be fettered by any legislative restrictions.”\(^73\) *Garland* is renowned for upholding the pardon’s obliteration of punishment. But it additionally nods to the executive branch’s ability to realize the


\(^{71}\) Dorris, *Pardon and Amnesty*, 397-398.

\(^{72}\) *Garland*.

\(^{73}\) *Garland*. 
expectations of its grant. *Garland* further recognizes an effectuated pardon as one that is immune to legislative riders and can be modified only by its issuer. The majority keeps pardoning an exclusive executive branch operation, just as legislating is lodged entirely in Congress. The Court’s landmark *Garland* opinion would serve as guidance for future courts weighing other aspects of pardon.

In *Klein*, the Supreme Court used the logic of *Garland* when it reasserted the restoration effects of a pardon in a property dispute. Congress wanted the Court of Claims to interpret an accepted pardon as evidence of confederate sympathy.\(^74\) By instructing courts to interpret a pardon in this fashion, it denied claimant Klein the right to his seized property. Again, the Supreme Court sided with the petitioner and upheld the president’s pardon directive. The punitive measures enacted by Congress overly infringed on the president’s authority. In its opinion, the Court compartmentalized each branch’s primary constitutional duty, “It is the intention of the Constitution that each of the great co-ordinate departments of the government — the Legislative, the Executive, and the Judicial — shall be, in its sphere, independent of the others.”\(^75\) The Court’s *Klein* decision mostly receives acclaim for upholding the pardon’s ability to lawfully restore seized property. Additionally, the majority categorizes the pardon authority as being the president’s own power center. The president is entitled to initiate a grant of pardon with the confidence that it will remain free from congressional interference, “Now it is clear that legislature cannot change the effect of such a pardon any more than the executive can


\(^{75}\) *Klein*. 

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change a law.” The Court’s Klein opinion shows profound deference to the separation of powers doctrine by not ceding to the view of Congress.

In The Federalist No. 47, James Madison could foresee the mindset of Garland and Klein’s majority opinions. While trying to convince other delegates to ratify the Constitution, Madison understood that certain government functions would separately reside in their respective branches. Madison used Montesquieu’s reasoning to defend republican government’s division of powers, “that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.” Madison’s concern of concurrent government power is relevant to the pardon’s self-directed exercise. In our complex republic, the main government functions of legislating, adjudicating, and execution are situated in distinct branches. This type of government structure becomes problematic when one branch simultaneously controls two functions. Therefore, as a precaution, certain government powers must be completed at an intra-branch level. Congress and the Supreme Court are entitled to internally work and produce an outcome free of any branch interaction. If the same branches that design or judge criminal law have any involvement in pardoning, its exercise would get held up. For this reason, executive clemency is the only formal constitutional tool requiring an individual’s pronouncement.

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76 Klein.


In the unlikelihood of conflicting pardons between the executive and legislative branches, the president’s grant must prevail. Despite the Supreme Court in *Garland* and *Klein* prohibiting congressional interference in a president’s grant of pardon, Congress may still confer pardons in the form of legislative immunity, also considered amnesty. *Brown v. Walker* recognized an act of amnesty as not being exclusive to only the president, “Although the Constitution vests in the President ‘power to grant reprieves and pardons for offences against the United States, except in cases of impeachment,’ this power has never been held to take from Congress the power to pass acts of general amnesty,” 79 In *Brown*, Congress did not grant a pardon to an offender, in the formal sense. Rather, Congress passed an immunity statute allowing a witness to give full testimony without fear of self-incrimination. 80

If Congress can confer a pardon variant to the extent of the president, it would be overriding the executive branch’s only unilateral outlet. 81 For instance, if Congress and President conferred a conditional amnesty upon the same group of recipients, which directive should be honored? Should it be the amnesty directive that came first? Or should it be the directive that offers the most favorable terms? 82 The conflicts would be endless. Regardless of this hypothetical situation, pardoning is the only unilateral exercise vested in the president yielding an outcome. Congress is entitled to have the final word on the passage of legislation, just as the Supreme Court is permitted to have

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80 *Brown*.

81 Peterson, “Congressional Power over Pardon,” 1278.

82 Peterson, “Congressional Power over Pardon,” 1278.
the last word on an opinion’s language. The president must be allowed to make the ultimate decision over a process it can exclusively initiate and finish.

Even pardon critic Gregory C. Sisk acknowledges how clemency bestows unmatched unilateral agency to the president. In his Missouri Law Review article, Sisk explains how the pardon is unlike any of the other powers vested by Article II, “The President’s decisions to wage war, make treaties, appoint public officers and judges, and execute the laws are dependent upon congressional assent or may be overridden by legislative action.”83 He is the only reform proponent to recognize this specific procedural benefit while making an internal comparison to the president’s other Article II powers. He could cite how pardon directives are not necessarily reliant upon congressional funding, as well. Should a pardon necessitate non-vested funds to fulfill its granting, Congress may not intentionally deprive funding, “Thus, Congress could not restrict presidential pardon authority by passing an appropriations rider that precluded the expenditure of any funds to implement a particular pardon.”84 If this practice is allowed, Congress would have an indirect say in clemency matters.85 The pardoning of a federal offense relies only on its commission and that it is externally granted of “Cases of Impeachment.”86 In distinction to Sisk, this thesis will explore the additional administrative properties inherent to the pardon authority and how they parallel the coordinate branches.

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84 Peterson, “Congressional Power over Pardon,” 1247.
86 U.S. Const. art. II, § 2, cl 1.
The exercise and application of presidential pardoning are quintessentially retrospective. An act of pardon is the only instance where the president is guaranteed to leave an indelible mark. In response to court decisions it disapproves of, the president can of course appoint likeminded federal judges in the hopes that they will reinterpret the law. Court appointments, however, are not compelled to follow the president’s ideological leanings and their judicial philosophy can evolve over time. With pardoning, the president can single-handedly revise criminal prosecution decisions of the past with resolve, “Additionally, the President may disagree with enforcement actions that occurred during a prior administration, just as Presidents disagree with executive orders and rules of prior administrations.”87 President Jefferson’s condemnation of the Alien and Sedition Acts confirms the pardon’s rearward operation, “Jefferson had attacked the constitutionality of the act prior to the election, and then used his power subsequently to ensure that those convicted under what he believed an unjust law were exonerated.”88 Before Jefferson assumed presidential office he voiced his opposition towards the Acts. Once formally armed with executive pardon, he was able to legally act on his dissatisfaction by making his constitutional vision a reality.89

Contemporary grants of clemency maintain its rearward usage. The total number of commutations and pardons granted by President Obama surpassed those of his modern contemporaries.89


89 Krent, Presidential Powers, 200.
era predecessors.\textsuperscript{90} President Obama’s utilization of executive clemency was exhibited most during the latter years of his second term. In total, he commuted 1,715 sentences and granted 212 pardons.\textsuperscript{91} He directed the majority of his clemency directives, commutations specifically, at drug possession offenses.\textsuperscript{92} These non-violent drug laws were enacted during the federal government’s purported “war on drugs.” These laws were regularly drafted to include mandatory minimum sentencing, which disproportionately affected racial minority offenders. President Obama’s clemency decisions revisited some of the most stringent drug policies, all of which predated his term of office by more than a generation.

Beyond the drug offenses forgiven and mercy conferred, the president is able to target a class of offenders sharing a common crime.\textsuperscript{93} When presidents wield their clemency authority as Obama and Jefferson did, they are able to challenge the criminal laws of prior Congresses, “The Constitution vests the president with the authority to check the legislature’s judgment in creating the framework for punishment.”\textsuperscript{94} When particular crimes are selectively pardoned, the time and energy expended to originally enact them become wasted endeavors. Due to public criticism and political expediency,


\textsuperscript{93} \textit{Garland}.

\textsuperscript{94} Krent, “Conditioning the President’s Conditional Pardon Power,” 1697.
President Obama could not feasibly commute every drug related sentence as a class. Drug offenders account for nearly half of the federal prison population, totaling nearly eighty-two thousand. The massive class of offenders serving these sentences exceeds the respective group overturned by Jefferson by incalculable magnitudes. Presidents Obama and Jefferson’s decisions to grant clemency are driven by committed offenses and their related nature.

Pardoning is not a self-starting action; it is incumbent upon the commission of a federal offense. The Supreme Court in *Young v. U.S.* outlined its application, “The pardon is of the offence, and, as between the offender and the offended government, shuts out from sight the offending act. But if there is no offence against the laws of the United States, there can be no pardon by the President.” Although a pardon’s application is limited to federal offenses, it affords the president tremendous reawarded policy movement with an enduring result. But under no circumstances may the president pardon in advance of the commission of an offense. To issue a pardon predating an offense would be the equivalence of law dispensation, “The pardon can immunize criminal conduct only prior to the effective date of the pardon, not after. In other words, the president cannot shield anyone from the law’s future commands, or wield a broad dispensation power.” If the president could pardon before an offense, its practice would

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give the appearance of legislative preemption. This logically grounded check on the pardon power ensures that some kind of offense(s) materializes prior to its issuance.

In keeping with a pardon’s application, *Murphy v. Ford* addresses the sequencing of clemency by examining President Ford’s pardon of Mr. Nixon. President Ford, an appointed, unelected, executive branch officeholder, pardoned the first president to ever resign.98 The plaintiff Gregory F. Murphy claimed that President Ford’s pardon of Nixon was improperly granted, “The plaintiff contends, among other things, that the pardon could not be validly granted to a person who had never been indicted or convicted and who had therefore never been formally charged with an offense against the United States.”99 Aside from offense qualifications, commentators impugn President Ford’s pardon of Nixon by claiming it was done to meet “self-serving” ends and did not reflect “prudent public policy judgement.”100 The Michigan District Court reiterated the pardon power’s unlimited application by citing the majority opinion from *Garland*, “It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.”101 Even though Congress did not act in time to formally charge Mr.

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101 *Garland.*
Nixon with criminal conspiracy or obstruction of justice, an executive office holder did engage in wrongdoing.\textsuperscript{102}

Murphy’s grievance would allow pardoning for only eligible offenses. The exclusion of pre-indictment and pre-conviction offenses from pardon would severely curtail its rearward application. The number of pardonable offenses occurring within and predating the president’s term of office would certainly be limited. The criminal justice process can be slow and drawn out. Murphy’s complaint would significantly affect the scheduling of a pardon grant. The timing of a pardon’s issuance is essential, as it can determine the collateral implications of an offense.\textsuperscript{103} No public record exists if an offender is pardoned prior to their trial. If a person is pardoned after a guilty verdict, the facts and record of the trial remain. This is not to say that a pardoned offense is the equivalence of a jury’s acquittal either.\textsuperscript{104} The pardon authority’s vast rearward application is as broad as its flexible design.

The pardon authority’s extensive design feature emanates from the Supreme Court’s \textit{ex parte Wells} opinion. The Supreme Court tested whether the president could grant a conditional pardon to a convicted criminal (Wells) sentenced to death. President Fillmore offered Wells a pardon on the condition that he remains in jail for life. Wells voluntarily accepted terms of pardon but later filed a petition against president for exceeding his constitutional authority.\textsuperscript{105} He believed the president could pardon only in

\textsuperscript{102} \textit{Murphy.}

\textsuperscript{103} \textit{Garland.}

\textsuperscript{104} \textit{United States v. Noonan,} 906 F.2d 952 (3d Cir. 1990).

\textsuperscript{105} \textit{Wells.}
absolute terms, not conditional. The majority’s opinion in *Wells* emphasized the plural interpretation of the Constitution’s “Reprieves and Pardons” language. The Court specified, “The real language of the constitution is general, that is, common to the class of pardons, or extending the power to pardon to all kinds of pardons known in the law as such, whatever may be their denomination.” Aside from absolute pardons, the president is fully capable of conditionally measuring its grants. This opinion affords innumerable conditional pardon choices to the president. Within reason, their designs are entirely at the president’s choosing and desire, “The condition imposed may be of any nature, so long as it is not illegal, immoral or impossible of performance.” Conditional pardons can manifest the president’s discretionary formulations. Besides considerations of an offense or an offender’s character, a condition’s design can be fashioned by what a pardoned recipient(s) can reciprocate for mercy, “he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend.” To protect the liberties of an offender, a pardon with a condition affixed must be voluntarily accepted. Although not in a substantial policy sense, the granting of conditional pardons enables the

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106 *Wells*.

107 U.S. Const. art. II, § 2, cl 1.

108 *Wells*.

109 *Kavalin v. White*, 44 F.2d 49 (11th Cir. 1930).

110 *Wells*.

111 *Wells*.
president to be a creative constitutional participant. The realm of clemency is the only area allowing the executive to craft lasting policy with the precision and innovation of the other coordinate branches. Executive clemency’s discretion is found not only in its design but also its deployment.

Twentieth-century federal court decisions bolster and outline the pardon’s discretionary consideration. In *Yelvington v. Presidential Pardon & Parole Attorneys*, a pardon seeker appealed because his petition had not received any consideration from the president.\(^{112}\) He cited the Code of Federal Regulations, which instructed pardon petitions to be “submitted to the president.”\(^{113}\) The D.C. Court of Appeals did not agree with the petitioner’s interpretation of the regulation, it held, “It is doubtless that the President intended that pardon applications should reach him in every case where the requisites of the regulations had been met. But this intention is not necessarily one which the courts should attempt to enforce.”\(^{114}\) This appellate court keeps the unlimited discretion of pardoning at the inclination of the president. By using Garland’s sweeping opinion to support their ruling, the court is able to prevent pardoning from becoming a regulated right or systematic expectation. The validation of this petitioner’s contention would resemble an indirect legislative encroachment and may give too much influence to worthy applicants. Presidents would become inundated if they had to screen every eligible clemency petition. The large volume of offender petitions could possibly displace clemency’s grace dimension.


\(^{113}\) *Yelvington*.

\(^{114}\) *Yelvington*. 
The appellate court in *Yelvington* could even go to the lengths of comparing the pardon’s discretion to that of the Supreme Court and Congress. Citizens who petition the Supreme Court to have their cases heard are not guaranteed a hearing as a matter of right.\(^{115}\) The Supreme Court selects only an infinitesimal amount of certiorari petitions from the many thousands it receives.\(^{116}\) Constituencies with grievances can raise issue awareness but Congress does not have to act on them. At times, members of Congress have to balance the passions of their constituencies with their own personal beliefs. In these examples, the decision to act is informal and left entirely up to the respective branch.

The discretionary employment and design of President Nixon’s pardon grant were tested in *Hoffa v. Saxbe*. President Nixon offered former teamster leader James Hoffa a conditional commutation to reduce his prison sentence. The conditional commutation stipulated that Mr. Hoffa could not engage in union organizing.\(^{117}\) Hoffa claimed the condition was unconstitutional and had unfair motives; the D.C. District Court said otherwise, “But this fact alone, even if proven, would never be enough to vitiate an otherwise proper exercise of Constitutional power for the same reason that one cannot attack the validity of an Act of Congress on the grounds that the Congressmen who voted in favor of it did so for improper motives.”\(^{118}\) This district court’s decision keeps the


\(^{118}\) *Hoffa*. 

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formulation of a conditional pardon an unquestionable executive exercise.\textsuperscript{119} If upheld, Hoffa’s complaint would further encumber an already formally checked Pardon Clause. His grievance would open the door to pardon recipients and possibly other branches questioning the motives a grant. Aside from congressional motives, this district court could additionally cite the Supreme Court’s discretionary docket to support their opinion. At times, the Court selects cases to level out conflicting lower court opinions regarding an important constitutional matter. There are instances when it chooses cases to simply correct the errors of lower courts, should they go astray.\textsuperscript{120} Their decisions have tremendous policy making effects on lower courts. The other coordinate branches may not question the decision making the Supreme Court uses to select cases to hear.

The executive branch oversees criminal law administration and is in the best position to see how it affects people. The president has to have complete control over a conditional pardon’s design, right down to the smallest detail, “Such a result would be contrary to the essential concept of the pardoning power, whereby there is placed in the executive a special discretion to mitigate the more precise demands of the criminal law in a manner consistent with the unique requirements of the individual applicant for clemency.”\textsuperscript{121} With this recognition from Hoffa, the president is able to tailor the conditional terms of a pardon to better fit an offender’s circumstances. On balance, the president’s right to condition a pardon grant is not limitless. Hoffa shows us that attached conditions enclosed with a clemency grant must directly relate to the original conviction

\textsuperscript{119} Hoffa.

\textsuperscript{120} Carp, et al., Judicial Process in America, 339.

\textsuperscript{121} Hoffa.
while balancing a recipient’s constitutional rights.\textsuperscript{122} To meet these two requirements, it is essential that the president have a broad pardoning authority. No other formal constitutional provision affords the president a creative outlet to design policy.

An accepted conditional pardon is the only instance in which the president can solely pressure its recipient to act. Once agreed to, a conditional pardon’s stipulated terms are binding upon its recipient. The benefit and mercy gained from a conditional pardon’s acceptance are contingent upon its recipient maintaining their end of the clemency bargain. The president may revoke a pardon if its conditions are not being satisfactorily performed by its recipient, “And if the felon does not perform the condition of the pardon, it will be altogether void; and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced.”\textsuperscript{123} Commutations, equally with full pardon offerings, may have conditions attached to them, “In revoking the commutation and directing the appellant to be returned to prison, the President was acting within his powers. The constitutional power to grant reprieves and pardons includes the power to grant commutations on lawful conditions.”\textsuperscript{124} Federal courts have no sympathy for pardon grantees that flout conditions and describe their binding directive as, “being mere surplusage.”\textsuperscript{125} In each case, the courts emphatically uphold the conditional pardon’s obligatory nature. The obligations a conditional pardon can impose upon their recipients are similar to the force of laws passed by Congress. The compelling nature of

\begin{thebibliography}{9}
\bibitem{122} Hoffa.
\bibitem{123} Wells.
\bibitem{124} Lupo \textit{v. Zerbst}, 92 F.2d 362 (5th Cir. 1937).
\bibitem{125} Weathers.
\end{thebibliography}
an accepted conditional pardon can certainly affect the conduct of its recipient. The recipient is well aware of the consequences if they choose to disobey the conditions attached.

The compliance of a conditional pardon is assessed by the president granting it and their successors.\textsuperscript{126} When a lawful conditional pardon is accepted, federal courts and Congress may not interfere with the agreement made between the president and its recipient. The president’s assessment of a condition’s compliance is an intra-branch duty, “Courts, therefore, have permitted the president to be the sole judge of whether an offender satisfied the conditions attached to the pardon.”\textsuperscript{127} This process enables the president to be the judge of dynamic ongoing policies, not just anticipate new bills from Congress. At this clemency stage, the president can impose its own judgment when appraising the fulfillment of a given condition.

The president’s appraisal of a specified condition can be guided by its textual precision. If an accepted conditional pardon has unequivocal terms, the president and their successors have firmer grounds to revoke a grant. Textual precision can be mutually advantageous to both the pardon grantor and grantee. The definite terms of a condition make it easier to detect demonstrable noncompliance. Clear language serves as a benefit to grantees, giving them concrete guidance to remain compliant. An example of such a condition that could be open to interpretation is from \textit{ex parte Weathers}. In \textit{Weathers}, the conditional pardon granted to A. H. Weathers specified several conditions and was

\begin{itemize}
\item \textsuperscript{126} Krent, “Conditioning the President’s Conditional Pardon Power,” 1688.
\item \textsuperscript{127} Krent, “Conditioning the President’s Conditional Pardon Power,” 1689.
\end{itemize}
eventually revoked, “That hereafter he shall commit no crime punishable under the laws of the United States, or of any State or Territory of the United States; shall abstain from the possession and use of intoxicating liquor; shall not associate with persons of evil character; shall lead an orderly, industrious life;”128 The condition stipulating “shall not associate with persons of evil character” is not entirely clear-cut and could be construed differently by subsequent presidents.129 There is no definite standard to determine one’s character. Perhaps the association condition could be rephrased as, “shall not associate with former or publically recognized criminals.” Narrower condition language at least factually categorizes the types of people a pardon recipient cannot have engagements with, instead of relying on ambiguous character traits. To date, no federal court has struck down any condition for being constitutionally infirm.130

128 Weathers.

129 Weathers.

130 Krent, “Conditioning the President’s Conditional Pardon Power,” 1679.
Chapter VII
Critics and Reforms

The criticisms, commentaries, and dissenting court opinions of controversial clemency grants inadvertently reveal the president’s administrative properties under consideration. When politicians and legal scholars accuse the executive branch of overreach after controversial pardons, reform proposals follow. Their proposals are intent on restraining the pardon power’s overall potency and swiftness. In their pursuits to restrain the pardon’s clemency function, their reforms simultaneously restrict the procedural footholds it arms the executive branch. Supreme Court cases with dissenting opinions echo the pardon reformers’ aims. Dissenting justices criticize the majority for overly drawing from British monarchy traditions of clemency to support the president’s. The dissenting and majority opinions in these cases are not exempt from critique; neither side considers the pardon’s administrative properties. Each of their proposals and court findings touch upon one of the previously analyzed clemency attributes.

A notable reform comes from former Vice President Mondale after President Ford’s controversial pardon of Richard Nixon. His proposal would allow for House and Senate supermajorities to override abusive pardon grants within a reasonable timeframe, he raises the Framers’ original observations, “they rejected the notion of giving the legislative branch the power to grant the pardon, not the power to review the a grant. Moreover, their reasons for rejecting a legislative role were based on considerations of
transportation delay and lack of public scrutiny that are not relevant to our time."\textsuperscript{131}

Mondale’s undertaking would require a constitutional amendment to modify the Pardon Clause’s language. In addition to impeachment, his reform would make the pardon authority the only constitutional provision with two formal checks on it.

Of the reforms proposed, Mondale’s would most fundamentally transform the clause’s spirit. This proposal would remove any assurance the president has of having the final word over a grant. The offense and punishment obliteration of an unconditional pardon would no longer have the guarantee of executive branch consummation. Under his proposal, pardoning would essentially become a shared action between the president and Congress. In his article, Mondale echoes only the Framer’s original concerns during the clause’s initial drafting. He ignores all the pardon related case law occurring after the Constitution’s ratification. His article does not even reference \textit{Garland} or \textit{Klein} once, as both these landmark cases recognize clemency as belonging to and wielded by the president exclusively. Conversely, law review authors are not as severe in their policy prescriptions and like Mondale’s would require a constitutional amendment.

Ronald J. Glick, of the \textit{Southern University Law Review}, builds on the outrage caused by the highly unusual circumstances surrounding Ford’s pardon of Nixon. At the time, the optics of President Nixon stepping down and his appointed successor pardoning him were highly suspect. They conjure up visuals of possible backroom dealing between the two highest executive branch officeholders. To deter such questionable deal making, Glick says that the president ought to come before Congress or a Court of Justice before

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granting clemency.\textsuperscript{132} His policy would apply only to pardons granted to public officeholders, not ones issued during exigent circumstances.\textsuperscript{133} His proposal would require that the president consult with either branch prior to granting, ceasing its complete unilateral deliberation. This consultation with the other coordinate branches would likely have a chilling effect on its discretionary use and application. Congress and the Supreme Court are each able to enact policy that could directly affect its respective branch’s membership; neither are required to give advanced notice prior to acting.

Writing for the \textit{University of Richmond Law Review}, James Jorgensen takes issue with the way President Bush pardoned six Reagan Administration officials involved in Iran-Contra. They were pardoned on Christmas Eve by an outgoing president who lost his reelection bid.\textsuperscript{134} But most striking, two indicted officials were pardoned before their trial.\textsuperscript{135} The shrouded manner in which Bush pardoned them influences Jorgensen’s reforms. He advocates for the adoption of two measures, the first would permit pardoning only for convicted offenses.\textsuperscript{136} The president may be knowledgeable of certain White House officials engaging in illegal activity. If he pardons them prior to a trial and

\begin{itemize}
\item[\textsuperscript{132}] Glick, “The Presidential Pardon,” 167.
\item[\textsuperscript{133}] Glick, “The Presidential Pardon,” 167.
\item[\textsuperscript{135}] Schneider.
\end{itemize}
conviction, it forecloses the possibility of a prosecution.\(^{137}\) And without a trial, all the facts related to an indicted offense can never be ascertained by the public.\(^{138}\)

Jorgenson’s trial and conviction requirements would significantly limit the number of pardons that may have to be granted during a president’s term of office. Jorgensen’s grievance regarding the pardon’s application is identical to the plaintiff’s in *Murphy*. If enacted, clemency would lose its standby readiness to pardon freshly committed offenses. Massive civil unrest may demand that a president pardon a controversial figure(s) who has not been formally charged or convicted. His reform runs counter to Hamilton’s vision of executive clemency, “Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”\(^{139}\) The addition of qualification layers to an offense would surely inhibit clemency’s swift rearward application. The application of executive clemency would turn on the speed of a trial and conviction instead of the materialization of an offense.

Jorgensen additionally wants the president to specify offenses in a pardon grant. He is not alone in making this reform proposal.\(^ {140}\) Presidents Ford and Bush used open-ended language in their pardon grants and did not list any specific offenses. Instead of outlining major criminal offenses like conspiracy or obstruction of justice, they used all-encompassing language like “all offenses against the United States” to cover any possible

\(^{137}\) Jorgensen, “Federal Executive Clemency,” 368.


\(^{139}\) Kesler, *The Federalist Papers*, 446.

\(^{140}\) Smith and Johnson, “Presidential Pardons and Accountability,” 1129-1130.
offense that may have been committed.\textsuperscript{141} Presumably, presidents pardon controversial offenses and offenders in a broad manner to save face and dampen public scrutiny. Jorgensen’s policy would allow for unspecified charges to be tried and prosecuted.\textsuperscript{142} One has to ask, to what degree and detail must charges be specified in grant? The Pardon Clause makes no mention of how the president is to articulate a clemency pronouncement. The Constitution correspondingly makes no mention of how broad or narrow the Supreme Court is to rule on a case. With the formal exception of bills of attainder and ex post facto laws, the Constitution is silent as to how Congress is expected to design legislation.\textsuperscript{143} Even though an offense(s) is not being specified in detail to Jorgenson’s liking, an accepted pardon still taints its grantees with guilt.\textsuperscript{144} The acceptance of a pardon becomes public record. The court of public opinion will judge its recipient accordingly. The pardoning of unspecified offenses will eventually be discovered by a demanding public and inquiring media.

Other critics believe that pardons ought to be granted for only appropriate reasons. Kathleen Dean Moore’s piece from the \textit{University of Richmond Law Review}, takes issue with the lack of justification needed to pardon and how the process overly serves the president’s self-interest, “In fact, most presidential pardons are issued without


\textsuperscript{142} Jorgensen, “Federal Executive Clemency,” 369-370.

\textsuperscript{143} U.S. Const. art. I, § 9, cl 3.

\textsuperscript{144} \textit{Burdick}. 
any statement of justification beyond the assurance that good reasons do exist.” Moore is of the belief that pardoning ought to be reserved for true miscarriages of justice, “Good and sufficient reason to pardon exists when a person convicted of a crime may not have committed that crime.” If we are to interpret the Pardon Clause as Moore does, it would make its exercise contingent upon sufficient reasons instead of committed offenses. The Pardon Clause does not make any reference to “reasons.” Her policy recommendation would excessively intrude upon the president’s discretionary use of clemency. When it comes to the president’s decision to grant clemency, we have to be willing to accept the least worthy recipients with ones that are the most. The pardon authority is a public policy tool and it should be treated as such. President Ford’s pardon of former President Nixon appeared to be politically expedient on its face. Nixon’s pardon was issued during the refugee crisis at the conclusion of the Vietnam War, an oil embargo, and out of control price inflation. Amidst all the other pressing issues, the prospect of Nixon’s impeachment could have overwhelmed the federal government.

As previously mentioned, Gregory C. Sisk warns of the irreversibility of a pardon grant while commending a congressionally sponsored reform proposal. Sisk praises a practical proposal offered after President Clinton pardoned 176 individuals at the eleventh hour of his presidency. The unsavory figures and manner in which President

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146 Moore, “Pardon for Good,” 286.

147 *Murphy.*

Clinton granted pardons created such bipartisan outcry, that it prompted him to explain himself in a *New York Times* article.\(^{149}\) Figures ranging from infamous tax evaders, partisan allies, to his brother Roger Clinton were pardoned.\(^{150}\) Sisk agrees with Democratic Representative Barney Frank’s response to Clinton’s pardons, which would bar the president from granting pardons from October 1\(^{st}\) through inauguration day.\(^{151}\) With the necessity of a constitutional amendment to implement, Frank’s reform would essentially prevent a pardon grant from a lame duck president with nothing to lose.\(^{152}\) Frank’s reform has merits due to the permanent nature of a president’s pardon, “The pardon power, however, can be exercised in isolation and solitude by a president—and its effects are permanent and beyond challenge.”\(^{153}\) Sisk is correct in saying a full pardon’s effect is forever, as no future president may undo it.\(^{154}\) A full, unconditional pardon applies only to the original offense(s) committed, not subsequent ones. There remains the possibility that a pardoned individual may wind up committing future offenses. Pardons may not be granted in a prospective manner to anticipate future offenses either.\(^{155}\) If the recipient of a conditional pardon disobeys the terms attached, its issuer or future


\(^{154}\) Kalt, “Pardon Me,” 798.

presidents can always revoke it. Indeed, the process of initiating and granting a pardon is an isolated one, but its absolving effect is not indisputably permanent.

Supreme Court cases with dissenting voices set forth the different interpretations of the pardon’s statutory latitude. The majority in Wells interpreted the “Reprieves and Pardons” Clause language to bestow other pardon types on the president, conditional included.156 In a dissenting opinion, Justice McLean criticized the majority for using the British King’s pardon to justify the pardon types a president could grant. Justice McLean warned that the president’s pardon was not a regal relic, he said, “The executive office in England and that of this country is so widely different, that doubts may be entertained whether it would be safe for a republican chief magistrate, who is the creature of the laws, to be influenced by the exercise of any leading power of the British sovereign.”157 For that reason, the life sentence condition offered to Wells should have been initially authorized by statute, not fashioned by the president.158

The distinction Justice McLean makes is warranted. American presidents are elected office holders, whose tenure is term limited and constrained by a written constitution.159 British monarchs, conversely, are permanent fixtures whose tenure depends upon their very existence. The all-powerful king personifies the sovereign itself, any offenses committed are explicable personal, “As the king personally, though his

156 Humbert, The Pardoning Power, 36.

157 Wells.


159 U.S. Const. amend. XXII.
omnipresence in the court room, vended justice and mercy, the general power to pardon was an ‘inseparable incident to the crown,’ and ‘he is the best judge of his own mercy.’” The king’s omnipotent executive status emboldens his striking pardon prerogative. On the contrary, the American executive is immersed in a latticework of statutory permission and limitations authorized by a legislature. For Justice Mclean, the government apparatus surrounding each executive type is essential and significantly influences the pardon authority’s latitude.

Justice McLean attributed the majority’s problematic reasoning in Wells to its predecessor U.S. v. Wilson. Chief Justice Marshall authored the first opinion addressing the president’s grant of pardon. In Wilson, the Court solely reviewed the acceptance requirement of a pardon to become effective, not its conditional and operational particulars as it did later in Wells. Chief Justice Marshall concluded that American jurisprudence use the British King’s pardon as an analogue for the president’s, “The power of pardon in criminal cases had been exercised from time immemorial by the executive of the nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon,” Mindful of its Anglo origins, Chief Justice Marshall must have recognized clemency’s incongruence in our constitutional system. The Framer’s outfitted this executive power with impeachment, which incidentally, is the most draconian check

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161 Wilson.

162 Wilson.
the Constitution provides. The clemency provision was not joined with the conventional legislative vetoes and approvals seen in other executive branch powers. Like the British monarchy tradition, the majority opinions in *Wilson* and *Wells* made pardoning an expansive proposition so long as the recipient agreed to a grant’s terms. *Wilson* began the clemency discussion, which put future legal debates regarding the clause’s scope in a regal context, as *Schick v. Reed* would later reveal.

Prior to *Schick* though, the Supreme Court revisited a variation of the Pardon Clause’s interactions with capital punishment. In *Biddle v. Perovich*, President Taft commuted the death sentence of Vico Perovich. Unlike Wells, Perovich had no say in his punishment substitution; President Taft unilaterally decided his fate. Perovich characterized the president’s action as unconstitutional for creating a new punishment. The Court unanimously reasoned that the president acted within the bounds of the Constitution, “*Biddle* merely rejects the antiquated notion that the President’s clemency decision-making is strictly a matter of private conscience beyond the demands of public justification.” The jury that initially convicted Perovich had the option of sentencing him to life in prison. Justice Holmes reasoned that President Taft remained within the statute’s original framework when commuting Perovich’s sentence. Taft’s act of commutation did not violate *Burdick’s* legal prohibition of compulsory pardons, as

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163 U.S. Const. art. II, § 2, cl 1.

164 *Biddle*.


166 *Biddle*.

167 *Biddle*.
Perovich was already found to be guilty by a jury.\(^{168}\) *Biddle* determined that the president could act on behalf of a convict insofar that substituted sentence reduces original punishment and is statutorily prescribed. The majority opinions of *Wells* and *Biddle* would later be tested when the president conditionally commuted a death sentence.

The Supreme Court revisited pardoning in another capital punishment setting in *Schick*. Here, the Court tested the pardon’s conditional flexibility in a complex statutory scheme. President Eisenhower commuted the sentence of Maurice Schick who faced a death sentence with parole eligibility. President Eisenhower commuted his sentence to life in prison without the possibility of parole.\(^{169}\) President Eisenhower foreclosed any possibility of Schick receiving punishment by death. Schick petitioned against the president’s commutation for its parole exclusion, claiming it was done outside of the original penal statute’s language.\(^{170}\) The Court ruled that President Eisenhower did not exceed the constraints of the Pardon Clause. The majority again leaned on the British King’s vast pardoning authority to justify the president operating outside of the original statute’s construction. Chief Justice Burger said that any limitation on the pardon power must be found in the Constitution, “the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress.”\(^{171}\) After *Schick*, Congress’s only remaining option to curtail executive

\(^{168}\) *Burdict*

\(^{169}\) *Schick*.

\(^{170}\) *Schick*.

\(^{171}\) *Schick*. 
clemency is by constitutional amendment. A constitutional amendment, initiated by Congress or the states, can directly change the language of the Pardon Clause to alter its interpretation.

The dissent’s response, written by Justice Thurgood Marshall, claimed that the president exceeded his authority by not commuting punishment within statute’s original framework. Justice Marshall questioned the majority’s use of the British King’s pardoning practices to support their decision and for not properly seeing the president’s role in a republican government, “By virtue of the pardon power the Executive may abstain from enforcing a judgment by judicial authorities; he may not, under the aegis of that power, engage in lawmaking or adjudication.” Despite Justice Marshall’s concern for the separation of powers principle, Schick solidifies federal clemency’s ability to conditionally insert itself in capital eligible statutes.

The dissenting and to some extent the majority opinions of Wells and Schick incorrectly approach the pardon’s conditional capabilities. This thesis diverges from both their views to justify the pardon power’s ability to operate outside the boundaries of a given statute’s framework. The president’s pardon can be considered its own republican institution, without having to rely on the British King’s prerogative to enlarge its scope. The dissenting opinions in Wells and Schick are insistent upon treating pardon as a binary

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172 Smith and Johnson, “Presidential Pardons and Accountability,” 1127-1128.

173 U.S. Const. art. V.

174 Schick.

exercise, by having the president strictly adhere to only legislated punishment options. If we are to take their positions, the president can choose only the lesser statutorily specified punishment a grantee is convicted under or simply grant an unconditional, full pardon, “The reasoning advanced by the dissenting justices would turn this constitutional check on its head by rendering the President’s clemency options merely to a subset of the possible punishments prescribed by Congress for a particular offense.”\textsuperscript{176} Depending on the complexity and provisions of a statute’s design, Congress would be empowered to indirectly control the president’s clemency options. If this was the case, what is to stop Congress from designing all criminal statutes like Schick’s? The statutory coupling of capital punishment and parole eligibility, under which Schick is convicted, appears unusual to say the least. But should Congress decide to design all their capital statutes as Schick’s, the president would be put in a difficult position. The pardoning authority would lose its conditional flexibility, making it an all-or-nothing grant. The variety of pardon options allowed would be drastically limited. If clemency is to be exercised in such a mechanical fashion, presidents may refrain from using it all together where they need it most.\textsuperscript{177} It is essential that presidents be allowed to conditionally commute, especially in matters related to capital punishment.

The president is a constitutional actor whose counterparts have the luxury of inserting their authority into statutory schemes. The engagements Congress and the Supreme Court have with statutes cannot be recognized as absolutes. Without having to

\textsuperscript{176} Kobil, “The Quality of Mercy Strained,” 596.

\textsuperscript{177} Kobil, “The Quality of Mercy Strained,” 596.
completely repeal, Congress can alter any provisions of a law while still maintaining its underlying intent. The Supreme Court can strike down the faulty portions of a statute while preserving its lawful components. In these examples, Congress and the Supreme Court can apply their respective powers to assist in the slight modification of a statute’s language. These two branches are not compelled to only utilizing their powers in an absolute fashion like the president. Presidential clemency cannot remain an inflexible tool when capital punishment is enveloped in a complex statute. In certain scenarios, punishment may need to be lessened by a gradation, not outright. Without the power to conditionally commute a Schick like sentence, presidents would appear reckless when their only recourse is to pardon a contemptible grantee in full. To deny the president the pardon type used in Schick would go against the pluralism precept of Wells, “The power as given is not to reprieve and pardon, but that the President shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. The difference between the real language and that used in the argument is material.” The forced conditional commutation exhibited in Schick is simply one of the many pardon options available to the president. In this instance, to achieve an outcome of clemency, pardon grants must be capable of exceeding the boundaries of legislated criminal statutes. Schick harmonizes the guarantee of clemency for its intended recipient while preserving the pardon type desired by the president.

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178 Carp, et al., Judicial Process in America, 94.

179 Wells.
The Supreme Court’s decision in *Schick* is appropriately sweeping but not unlimited. The majority’s decision unquestionably broadens the breadth of a pardon’s design and deployment to reciprocate the penalty aspect of a given statute. A commutation, just as a full pardon grant, is still predicated on the commission of an offense articulated by Congress. These observations suggest that the sophistication of a statute’s design determines the pardon response needed to contravene it. But the Court’s recognition of statute interposition does not excessively bolster the Pardon Clause’s reach. The pardoning prerogative does not confer the president with the expansive policy making terrain of Congress and the Supreme Court, “Although presidents may serve welfare goals through exercise of the pardon power indirectly, the constitutional authorization for pardons does not represent a grant of substantive power and never did in retain or in the colonies.”¹⁸¹ No act of clemency can “touch moneys in the treasury of the United States,” to misappropriate funds or alter policy funding in any way.¹⁸² Far from being an extravagant policy making tool, presidential clemency applies exclusively to the realm of federal criminal law. For the abovementioned reasons, conditional commutations have to be understood as giving the president the capability to interpose criminal statutes.

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¹⁸⁰ *Young.*

¹⁸¹ Krent, “Conditioning the President’s Conditional Pardon Power,” 1681-1682.

¹⁸² Knote.
Chapter VIII
Summary and Conclusions

The justifications for a sweeping pardoning authority are not only found in its compassion dictate. In the abstract, a grant of pardon primarily serves as a check against the legislature and judiciary as “a negative execution of the law.” But its exercise can empower its user, the president, in our constitutional system. The formal limitations the Constitution places on the executive branch are obvious. Its main function of law administration makes the executive the most passive and absolutist branch, in a policy sense. Due to this configuration, the president is permanently subject to the innovative laws and court decisions made by the coordinate branches. Current and prior laws as well as federal court opinion are expected to be enforced in their entirety. This republican framework of government effectively prohibits any resourceful policy creation and maneuvering from the president. The systemic disadvantages imposed on the president are evident.

Only the pardon authority, albeit in a narrow policy capacity, can put the president on the administrative level of the other branches. The president has full control over choosing a pardon’s application and its exercise. The president can measure the contours of its pardon grant to forgive an offense partially or entirely. When a pardon is

conditionally granted, the president can independently enforce its expectations upon its recipient. In certain settings, a pardon can be fashioned to interpose the original framework of a criminal statute to achieve clemency. These pardon attributes are borne out of case law and should not be regarded as exaggerations. When these properties are considered as a group, they are proportional to the administrative maneuverings of Congress and the Supreme Court.

Proposed pardon reforms are incompatible with the clause’s current interpretation. The critics’ efforts to rid the pardoning process of abuse simultaneously diminish the procedural advantages it can afford the president. If critics’ findings are legislated, the president would stand to lose the procedural latitude gained from the Constitution’s clemency provision. By design, the Constitution equally imposes burdens and benefits upon each branch. If only one of the mentioned reform proposals or dissenting opinions is adopted, the potential benefits of the Pardon Clause cannot be entirely realized. The president would be deprived of all the possible administrative and procedural properties that federal clemency can offer. For the president to be regarded as an administrative coequal, structurally speaking, the previously analyzed pardon properties must all remain intact.

Of the reforms proposed, Representative Frank’s appears to be the most mild which would bar post-presidential election pardons. Frank’s proposal at least keeps with the scheduling tradition of the Twentieth Amendment, which changed the date of

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presidential inauguration.\textsuperscript{185} The exclusion of pre and post presidential election pardons is merely calendrical. His reform does not fundamentally change the pardon power’s operation to the extent of the mentioned critics. His proposal does not confiscate the procedural and administrative abilities that clemency can bestow upon the president. If Frank’s reform becomes ratified, presidents would have to evaluate the risks of expending political capital needed for controversial pardons. None of the six pardon properties analyzed would be impaired by Frank’s proposal.

The impeachment measure incorporated in the Pardon Clause is an already sufficient check against abuse. Impeachment ensures that pardon granting is not completely sealed off from coordinate branch oversight. Impeachment is the only entryway through which Congress has to gain control over pardoning, just as Madison intended it, “he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other.”\textsuperscript{186} Each branch is entitled to higher volumes of agency over certain functions, for the president it happens to be clemency. While clemency affords the president unmatched agency and application in comparison to its other executive branch powers, its usage can still be reined in via impeachment. The process of impeachment becomes effective immediately after a majority in the House votes on its articles.\textsuperscript{187} If the House votes to impeach any executive branch officer, president included, the president may not grant pardons related to the proceeding, “Thus, from a textual perspective, the Constitution appears to bar not only pardons for

\textsuperscript{185} U.S. Const. amend. XX.

\textsuperscript{186} Kesler, The Federalist Papers, 299.

\textsuperscript{187} U.S. Const. art. II, § 4.
impeached officials themselves, but also for any witnesses called to testify during the impeachment proceedings." Impeachment is a powerful catch-all provision; it prevents clemency from preempting congressional fact finding. The problem with impeachment is that it is hardly ever utilized as a check, let alone for abusive pardons.

\[188\] Berger, “The Effect of Presidential Pardons,” 182.
Bibliography


Kalt, Brian C. “Pardon Me? The Constitutional Case against Presidential Self-Pardons.” 


U.S. Const. Art. I, II, V, and amend. XX, XXII.

Court Cases


*ex parte Garland*, 71 U.S. 333, 18 L. Ed. 366, 886 (1866).


*ex parte Weathers*, 33 F.2d 294 (S.D. Fla. 1929).

*ex parte Wells*, 59 U.S. 307, 15 L. Ed. 421 (1855).


*Kavalin v. White*, 44 F.2d 49 (11th Cir. 1930).


*Lupo v. Zerbst*, 92 F.2d 362 (5th Cir. 1937).


