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Suspending the Pardon Power During the Twilight of a Presidential Term

Gregory C. Sisk*

I. THE PROBLEM: A PATTERN OF ABUSE OF THE PARDON POWER ON THE EVE OF THE EXECUTIVE'S DEPARTURE FROM OFFICE

"These are not very happy days for Tennessee," said Lamar Alexander as he was sworn in as governor in a secret ceremony arranged three days early in 1979 to block outgoing Governor Ray Blanton from granting executive clemency to more convicted criminals in the waning hours of his term.¹ With just days left before the planned inauguration of his successor, Blanton—already under investigation by a federal grand jury for selling pardons—had freed fifty-two prison inmates, including twenty-three murderers, in a late-night signing session.² (Blanton was later convicted on federal mail fraud charges for demanding kickbacks to issue liquor licenses while he was in office, although some counts were overturned on appeal; two of his aides were also convicted for accepting bribes in exchange for paroling prisoners.)³

* Richard M. & Anita Calkins Distinguished Professor, Drake University Law School (greg.sisk@drake.edu). B.A., Montana State University 1981; J.D., University of Washington 1984. I thank Professor Bernard Hibbitts of the University of Pittsburgh School of Law for creating and moderating an Internet roundtable on presidential pardons on the JURIST web site, on which I initially raised the constitutional revision proposed in this essay, and Professors Garrett Epps, Paul Finkelman, Brian Kalt, William G. Ross, and Ralph M. Stein who joined in the critique of my proposal. See generally JURIST Presidential Pardons Roundtable, at <http://jurist.law.pitt.edu/pardonslist.htm>. Candor requires me to add that none of these scholars endorsed (indeed all opposed, with greater or lesser vehemence) my suggestion. I also thank the *National Law Journal*, and editor Josephine Novak, for allowing me to present this proposal in the form of an opinion-editorial published in the April 16, 2001, issue of the *National Law Journal* (© 2000 NLP IP Company). Simultaneously with, but independent of, my development of this idea, Congressman Barney Frank (D-Mass.) introduced a proposed constitutional amendment preventing use of the presidential pardon power during the period from a month before a presidential election until the next inauguration day. H.R.J. Res. 22, 107th Cong. (2001). No doubt pretentiously on my part, I would like to think that our concurrent proposals are evidence that great minds think alike, but the reader is entitled to be the judge.

1. Howell Raines, *Gov. Blanton of Tennessee Is Replaced 3 Days Early in Pardons Dispute*, N.Y. TIMES, Jan. 18, 1979, at A16.

2. *Id.*; *Going Free in Tennessee: Blanton Releases 23 Murderers*, TIME, Jan. 29, 1979, at 20.

3. PETER MAAS, MARIE, A TRUE STORY 414-15 (1983); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L.

In January 2001, the singular executive power to grant official absolution was back in the public spotlight and on the scholarly roundtable with President Bill Clinton's last-minute pardons of or commutations granted to nearly two hundred people, several of which are difficult or impossible to justify.⁴ Topping the list of infamy was the now-notorious billionaire fugitive Marc Rich, who fled the country and renounced his American citizenship rather than face charges of tax fraud and illegal trading in oil with Iran, a nation that had seized the United States embassy and held American citizens hostage.⁵ In other words, Rich was an accused black marketeer who traded with the enemy—an act of treason.⁶

Also benefiting from dubious exercises of mercy during the waning hours of the Clinton Presidency were: the President's brother, Roger Clinton, pardoned from his conviction for conspiring to distribute cocaine;⁷ a wealthy herbal supplement peddler, A. Glenn Braswell, pardoned from his conviction for a mail-order marketing scam involving a quack remedy for baldness, even while he was the target of a new criminal investigation for tax evasion and money laundering;⁸ Carlos Vignali, a convicted cocaine trafficker whose father was a

REV. 569, 607 (1991); *Blanton Crushed in Congressional Primary*, BATONROUGE STATE TIMES, Aug. 5, 1988, at 7C.

4. On January 20, 2001, his last day in office, President Clinton issued 140 pardons and commuted thirty-six prison sentences; for a full list of those pardons and commutations, see BARBARA OLSON, *THE FINAL DAYS* 121-23 (2001).

5. Editorial, *Unpardonable (Cont'd)*, WASH. POST, Jan. 30, 2001, at A16; Morris Weinberg, Jr. & Martin Auerbach, *Rewarded for Flouting Justice*, WASH. POST, Jan. 31, 2001, at A21; Morris Weinberg, Jr., *Your Case Has No Merit, Mr. Clinton; These Are the Facts You Never Asked to Hear*, WASH. POST, Feb. 25, 2001, at B1.

6. See also Aaron Lucchetti et al., *Open for Business: While Marc Rich Was Fugitive, Firm Dealt with Pariah Nations*, WALL ST. J., Feb. 23, 2001, at A1 (reporting that, after being indicted and fleeing from the country, Marc Rich and his partner, Pincus Green, continued engaging in oil and other trading, through non-United States subsidiaries or other intermediaries, with a long list of nations that supported terrorism or engaged in human rights abuses—including Iran, Libya, Cuba, and apartheid South Africa—and quoting federal prosecutor Morris Weinberg as saying that Rich and Green “have apparently made vast sums of money over the past twenty years by trading with virtually every enemy of the U.S.”).

7. John F. Harris, *For the Clintons' Last Act, Reviews Don't Look Good*, WASH. POST, Jan. 27, 2001, at A1; Michael Isikoff & Daniel Klaidman, *His Brother's Keeper*, NEWSWEEK, Feb. 26, 2001, at 33.

8. James V. Grimaldi & Peter Slevin, *Hillary Clinton's Brother Was Paid for Role in 2 Pardons*, WASH. POST, Feb. 22, 2001, at A1 [hereinafter Grimaldi & Slevin, *Paid for Role*]; Stephen J. Hedges, *Clinton's In-Law Got Fees Tied to Pardon*, CHI. TRIB., Feb. 22, 2001, at § 1, 1; Peter Slevin, *Another Pardon Stirs Controversy; Herbal Marketer Faces U.S. Tax Evasion Probe*, WASH. POST, Feb. 6, 2001, at A3.

prominent Democratic Party contributor;⁹ Susan McDougal, pardoned from her conviction of bank fraud and who had been jailed for contempt for refusing to testify about Clinton's alleged participation in financial irregularities in the Whitewater matter;¹⁰ and heiress Patty Hearst, who was kidnapped by and then joined a radical group in committing an armed robbery in the 1970s, to whom Clinton granted clemency.¹¹ In a move that in retrospect is particularly disturbing given the subsequent terrorist attacks on America on September 11, 2001, Clinton also released from prison two members of the Weather Underground domestic terrorist organization, including Susan Rosenberg, who drove the getaway car in an armored-car heist that left a security guard and two police officers dead, and who had been arrested in a New Jersey warehouse unloading 640 pounds of explosives—which she called “combat materiel.”¹²

While a federal criminal probe into the matter appeared to be “very much alive” at the end of 2001¹³ and more information eventually may emerge pursuant to a federal court order requiring disclosure of documents by lawyers who lobbied for the Marc Rich pardon,¹⁴ there is no hard evidence yet of a direct

9. James V. Grimaldi & Peter Slevin, *Senator Clinton's Brother in Pardons Controversy*, WASH. POST, Feb. 25, 2001, at A3 [hereinafter Grimaldi & Slevin, *Senator Clinton's Brother*].

10. Editorial, *Unpardonable*, WASH. POST, Jan. 23, 2001, at A16; Amy Goldstein & Susan Schmidt, *Clinton's Last-Day Clemency Benefits 176; List Includes Pardons for Cisneros, McDougal, Deutch and Roger Clinton*, WASH. POST, Jan. 21, 2001, at A1.

11. Debra Rosenberg et al., *Thinkin' About Tomorrow*, NEWSWEEK, Jan. 29, 2001, at 32, 34.

12. OLSON, *supra* note 4, at 21-24; Goldstein & Schmidt, *supra* note 10. Charges against Rosenberg arising out of the murders during the armored-car robbery were dropped when she was convicted on weapons charges and sentenced to fifty-eight years in prison. OLSON, *supra* note 4, at 22-23; Goldstein & Schmidt, *supra* note 10.

13. Greg B. Smith, *Judge: Release Papers in Rich Pardon Outcry*, N.Y. DAILY NEWS, Dec. 14, 2001, at 18 (reporting on a federal judge's order that lawyers for Marc Rich who lobbied the White House on his behalf could not assert attorney-client privilege and must turn over documents); see also John J. Goldman, *N.Y. Prosecutor in 6 Terrorism Trials to Resign*, L.A. TIMES, Nov. 16, 2001, at A25 (reporting the resignation of United States Attorney Mary Jo White and reporting that the grand jury has heard testimony about Clinton's pardon of fugitive Marc Rich and involvement in a pardon scheme by brother Roger Clinton, but no indictments have been issued); Paul Kane, *Daschle Seeks End to Probes; White's Exit Could Close Clinton, Torricelli Investigations*, ROLL CALL, Nov. 19, 2001 (reporting that Clinton-appointed United States Attorney Mary Jo White from the Southern District of New York was resigning effective January 1, 2002, and noting the continuation of the criminal probe into last-minute Clinton administration pardons).

14. *In re Grand Jury Subpoenas Dated Mar. 9, 2001*, 179 F. Supp. 2d 270, 274 (S.D.N.Y. 2001) (finding that “[t]he Marc Rich lawyers were acting principally as lobbyists, working with public relations specialists and individuals—foreign government

quid pro quo. Nonetheless, the conclusion is inescapable that many of these individuals were pardoned because they employed influential insiders—the President’s former lawyer, Democratic Party fundraisers and big contributors, and even the President’s brother-in-law—to intercede with President Clinton.¹⁵ This extraordinary back-channel route to the White House bypassed the Department of Justice pardon office and excluded the views of the prosecutors handling these cases.¹⁶ The invitation to submit pardons directly to the White House, the flurry of lobbying by relatives, insiders, donors, and cronies, the late-night sessions presided over by an insomniac President, and the constant revising of the pardon registry as the President’s mood changed¹⁷ was likened by former Attorney General Richard Thornburgh to “a Middle Eastern bazaar.”¹⁸ The late commentator Barbara Olson said that the White House had been “turned into a palace of favors, with a memorable mélange of characters coming and going at all hours.”¹⁹

And this was not the first time in recent history that a departing President acted to excuse the sins of others during the transition period between the presidential election and inauguration of the new chief executive. Eight years

officials, prominent citizens and personal friends of the president—who had access to the White House” and “were not acting as lawyers or providing legal advice in the traditional sense,” and, thus, holding that lawyers who lobbied for the pardon could not assert work product protection or attorney-client privilege to avoid disclosing internal documents pursuant to grand jury subpoena or being required to testify).

15. See James V. Grimaldi, *Denise Rich Gave Clinton Library \$450,000*, WASH. POST, Feb. 10, 2001, at E1; Grimaldi & Slevin, *Paid for Role*, *supra* note 8; Grimaldi & Slevin, *Senator Clinton’s Brother*, *supra* note 9; Robert O’Harrow, Jr., *Secrecy Stressed in Bid to Win Rich’s Pardon; Hearing Told of Lawyers’ Strategizing*, WASH. POST, Feb. 9, 2001, at A1; Peter Slevin, *Access to the White House Opened Door to Clemency*, WASH. POST, Feb. 8, 2001, at A14.

16. Peter Slevin & George Lardner, Jr., *Rush of Pardons Unusual in Scope, Lack of Scrutiny; Back-Door Lobbying Had Large Role in Clinton’s Decisions, Observers Say*, WASH. POST, Mar. 10, 2001, at A3.

17. Weston Kosova, *Backstage at the Finale*, NEWSWEEK, Feb. 26, 2001, at 30-34; Rosenberg et al., *supra* note 11, at 34; Slevin & Lardner, *supra* note 16.

18. Margaret Colgate Love, Testimony Before the Subcommittee on the Constitution Committee on the Judiciary United States House of Representatives (Feb. 28, 2001) [hereinafter Testimony of Margaret Love] (From 1990 to 1997, Margaret Colgate Love was the Pardon Attorney in the Department of Justice.), *available at* http://www.house.gov/judiciary/love_022801.htm.

19. OLSON, *supra* note 4, at 7. Barbara Olson, a conservative commentator and book author, died tragically aboard the hijacked airplane that was crashed into the Pentagon during the terrorist attack on America on September 11, 2001; her book, *The Final Days*, about the closing hours of the Clinton Presidency, was published after her death. OLSON, *supra* note 4, at iii-iv.

earlier, President George Bush likewise had acted during the finale of his term to grant clemency to several key players in the Iran-Contra debacle, a scandal that threatened to enmesh the President himself.²⁰ During the Iran-Contra affair, officials in the Reagan administration conceived of a secret plan to sell weapons to Iran and use the proceeds to fund the Contra rebels against the Marxist government of Nicaragua.²¹ Former Defense Secretary Casper Weinberger was awaiting a January 1993 trial on charges of perjury and obstructing congressional investigators.²² By granting a Christmas Eve pardon in 1992, Bush became the first President to confer clemency “to block the trial of someone who had been indicted”²³ (a path that Clinton later followed by pardoning fugitive Marc Rich before trial).

President Bush justified the pardons as necessary to heal the nation from a lingering scandal and protect patriotic public servants from an overzealous independent counsel.²⁴ Moreover, in contrast with the recent Clinton episode, key Democratic leaders in Congress had expressed advance support for, or at least neutrality regarding, a pardon of Weinberger, making it more difficult to attack Bush’s grant of clemency as partisan or patently unfair.²⁵ Nonetheless, critics speculated that Bush was motivated by political revenge against the independent counsel or desired to pre-empt the continuing investigation, which was beginning to focus upon Bush’s alleged role in the Iran-Contra scandal.²⁶ Such cynicism, deserved or not, was inevitable given the timing of the pardons. As with Clinton eight years later, Bush chose not to hand down these pardons before election day, when he would “have faced the judgment of the American People on his action.”²⁷

Looking further back in time but still within living memory, both Presidents Ronald Reagan and Harry Truman granted pardons near the end of their terms—pardons that also provoked outcries of favoritism for political cronies or the well-connected.²⁸ Thus, while the recent Clinton episode is shocking due to the

20. Bob Cohn, *Anatomy of a Pardon: Why Weinberger Walked*, NEWSWEEK, Jan. 11, 1993, at 22-23; Evan Thomas et al., *Pardon Me*, NEWSWEEK, Jan. 4, 1993, at 14-18.

21. Thomas et al., *supra* note 20, at 16-18.

22. Cohn, *supra* note 20, at 22-23; Thomas et al., *supra* note 20, at 16-18.

23. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-10, at 721 (3d ed. 2000).

24. Cohn, *supra* note 20, at 22-23.

25. Cohn, *supra* note 20, at 23.

26. Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883, 883 (1992); Michael Powell, *Pardons with a Precedent; Marc Rich Drama Is Latest in a Long Line of Last Acts*, WASH. POST, Feb. 26, 2001, at C1; Thomas et al., *supra* note 20, at 18; Walsh on the President: *The Horror of It*, NEWSWEEK, Jan. 4, 1993, at 16-17.

27. Carter, *supra* note 26, at 887.

28. Slevin & Lardner, *supra* note 16.

excessive number of last-minute pardons, as well as their sweeping breadth, eleventh-hour pardons were hardly without precedent and, indeed, had become almost routine for a departing President. Surely, the Clinton endgame now provides ample occasion to declare that enough is enough.

II. BACKGROUND: THE CONSTITUTIONAL PARDON POWER AND PUBLIC ACCOUNTABILITY

Underlying the constitutional grant of various powers to the chief executive is the essential premise that the President always remain answerable to the public for the proper exercise of those prerogatives. As James Madison wrote in *The Federalist No. 51*, “[a] dependence on the people is, no doubt, the primary control on the government.”²⁹ The President’s constitutional “Power to grant Reprieves and Pardons for Offences against the United States”³⁰ should be no exception to the principle of public accountability.

Yet, Professor Laurence Tribe observed that there are only three “limited and rather clumsy checks on the abuse of the pardon power.”³¹ First, the President is subject to impeachment and removal from office for corrupt issuances of clemency.³² At the Constitutional Convention in 1787, James Wilson responded to concerns that the President might be able to pardon his own confederates in treasonous wrongdoing by observing that, “[i]f [the President] be himself a party to the guilt[,] he can be impeached and prosecuted.”³³ The prospect of impeachment, of course, is little deterrent to a President who bestows pardons as he or she is walking out the door.

Second, if a President is still in office and grants a controversial pardon before election day, that President—or, I would add, the party’s anointed successor—may be rebuked at the polls.³⁴ Indeed, President Gerald Ford lost the 1976 election to Jimmy Carter after granting a pardon to former President Richard Nixon. The electoral constraint on misbehavior, however, disappears after election day. Had Clinton acted *before* the November 2000 election, Vice President Al Gore undoubtedly would have paid a further price in lost votes by

29. THE FEDERALIST NO. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961).

30. U.S. CONST. art. II, § 2, cl. 1.

31. TRIBE, *supra* note 23, § 4-10, at 721.

32. TRIBE, *supra* note 23, § 4-10, at 721.

33. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626 (Max Farrand ed., 1911) (reprinting James Madison’s notes).

34. See TRIBE, *supra* note 23, § 4-10, at 721; Carter, *supra* note 26, at 887 (“[T]he wrath or approbation of the voters is one of the very few checks on the pardon power that exist.”).

virtue of his association with Clinton. But both Clinton on this occasion and Bush eight years earlier shrewdly delayed the dubitable grants of clemency until the election was safely past.

Third and finally, if the President is at the end of his or her term, Tribe noted that the prospect of an unfavorable judgment by history or moral opprobrium might check abusive conduct.³⁵ At the Constitutional Convention of 1787, James Iredell of North Carolina said that he doubted a man honored by his countrymen with the office of the Presidency would apply the pardon power in a corrupt fashion and thereby suffer the “damnation of his fame to all future ages.”³⁶ But, alas, Iredell’s sanguine faith was based on the now-disproved assumption that no President, even when departing office, ever would sacrifice a venerable reputation for the immediate gratification of granting immunity to friends and family or the self-indulgent pleasure of wielding uncontrolled political power according to personal whim. Furthermore, to be concerned about public reprobation, a person must have the ability to feel shame.

Yet, despite the always-present potential for and occasional actuality of abuse, the pardon power should not be stripped from the President. Imposing the fullest measure of punishment for every breach of the letter of the law, without allowing for the possibility of error in human judgment or gradation in guilt, is neither wise nor just.³⁷ Alexander Hamilton wrote in *The Federalist No. 74*:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.³⁸

35. TRIBE, *supra* note 23, § 4-10, at 722.

36. William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 503 (1977) (quoting PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 351-52 (P. Ford ed., 1968)).

37. James Iredell, Address at the North Carolina Ratifying Convention (July 28, 1788), in 4 THE FOUNDERS’ CONSTITUTION 17 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Address by James Iredell] (“[T]here may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy.”). See generally Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483 (2000).

38. THE FEDERALIST NO. 74, at 473 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

In the words of early Supreme Court Justice Joseph Story, the pardon power is a “tacit acknowledgment of the infirmity of the course of justice.”³⁹ In his 1833 *Commentaries on the Constitution*, Story further explained:

A power to pardon seems . . . indispensable under the most common administration of the law by human tribunals; since, otherwise, men would sometimes fall a prey to the vindictiveness of accusers; the inaccuracy of testimony; and the fallibility of jurors and courts. Besides, the law may be broken, and yet the offender be placed in such circumstances, that he will stand, in a great measure, and perhaps wholly, excused in moral and general justice, though not in the strictness of the law.⁴⁰

Moreover, the President in his or her law enforcement role may find it necessary to offer clemency as a means of securing the assistance of confederates in prosecuting leaders of a criminal conspiracy. When it was proposed at the Constitutional Convention of 1787 that the President be barred from conferring pretrial clemency, James Wilson “objected that pardon before conviction might be necessary in order to obtain the testimony of accomplices”—an objection that prompted withdrawal of the motion to limit the power.⁴¹ At the North Carolina ratifying convention in 1788, James Iredell further explained:

This [pardon] power is naturally vested in the President, because it is his duty to watch over the public safety; and as that may frequently require the evidence of accomplices to bring greater offenders to justice, he ought to be intrusted with the most effectual means of procuring it.⁴²

Accordingly, when exercised with discretion, the power of presidential remission of official sins is both a safety valve and a weapon in the criminal justice system.

Nor would it be wise to force the President to share the pardon power with others, such as by requiring legislative assent or allowing Congress to overturn a grant of clemency. The constitutional Framers feared that a joint pardon power would be unwieldy and inefficient, as well as unduly augment the powers of the

39. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 770, at 547 (Carolina Academic Press 1987) (1833) [hereinafter STORY, COMMENTARIES].

40. *Id.* at 549.

41. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 33, at 426.

42. Address by James Iredell, *supra* note 37, at 18.

legislative branch.⁴³ Instead, the chief executive should take individual responsibility for making clemency decisions, which, under ordinary circumstances, enhances personal accountability to the public.

III. THE REMEDY: WITHDRAWING THE PARDON POWER DURING THE TRANSITION PERIOD

But no President, after losing a bid for re-election (such as President Bush eight years ago) or after watching his or her party lose the White House on election day (such as President Clinton this time around), should be permitted to absolve the criminal wrongdoing of others when, due to the lateness of the hour, the President is exempt from meaningful responsibility. As stated by Margaret Colgate Love, the former pardon attorney at the United States Department of Justice, "it is perhaps inevitable that a chief executive will be tempted to make pardon grants just prior to leaving office, but it is equally inevitable that giving in to this temptation tends to bring the power into disrepute."⁴⁴ The sad events of January 2001 confirm the truth of that observation and, in my view,⁴⁵ call for elimination of the source of that temptation.

The proper exercise of the pardon power would not be much constrained, and public accountability would be much enhanced, if the Constitution were amended to suspend the power of presidential clemency (other than temporary reprieves of executions) during the transition period between a presidential election and the inauguration of the new President. Allowing the lamest of lame ducks to grant pardons creates the potential for abuse or even criminal corruption, heightens the tendency to act in haste without carefully weighing all factors, and enhances the temptation to act imprudently, with improper favoritism, or out of selfish spite.

43. THE FEDERALIST NO. 74, at 475 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure [granting pardons to reduce civil unrest], would frequently be the occasion of letting slip the golden opportunity."); Address by James Iredell, *supra* note 37, at 17-18; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 33, at 419 (reporting that a proposal to require Senate approval of pardons was rejected overwhelmingly by a vote at the 1787 Constitutional Convention).

44. Love, *supra* note 37, at 1511 n.96.

45. While I believe that Margaret Colgate Love's point about the greater temptation to make inappropriate eleventh-hour pardons justifies the proposed constitutional revision described next in this Article, I should clarify that Love herself does not believe that a constitutional amendment to restrict or control the President's pardon power is wise. Testimony of Margaret Love, *supra* note 18.

IV. ANTICIPATING AND RESPONDING TO OBJECTIONS TO THE PROPOSAL

At least three objections might be raised to this proposal for a temporary moratorium on clemency during the denouement of a presidential term. First, it may be contended that the constitutional Framers knowingly excepted the exercise of the pardon power from those prerogatives for which a President would be held publicly accountable. To be sure, the clemency authority is unique among the enumerated powers conferred upon the President by the Constitution in that it falls within undivided executive control and is not subject to any direct check or balance by another branch of government. The President's decisions to wage war, make treaties, appoint public officers and judges, and execute the laws are either dependent upon congressional assent or may be overridden by legislative action.⁴⁶ By contrast, with the explicit exception of cases of impeachment⁴⁷ and the implicit exception that a pardon may not be granted in anticipation of un consummated offenses,⁴⁸ the exercise of the power is "left entirely to the dictates of [the President's] own bosom"⁴⁹ and "cannot be modified, abridged, or diminished by the Congress."⁵⁰

However, establishing that the President has plenary responsibility for the exercise of the pardon power is not the equivalent of saying that the power may be exercised without answering to the polity from whom the President's power derives. Indeed, as Justice Story observed, entrusting the pardon power solely to the individual office of the chief executive "brings home a closer responsibility."⁵¹ By making it impossible for the President to disclaim personal credit or culpability for these decisions, public accountability is advanced. Whereas politicians often seek to avoid political liability for public failures by pointing fingers at others who share collective responsibility for governance—"a large assembly might naturally encourage each other in acts of obduracy, as no

46. See U.S. CONST. art. II.

47. U.S. CONST. art. II, § 2, cl. 1.

48. TRIBE, *supra* note 23, § 4-10, at 720 (stating that the pardon power "does not include authority to pardon in *anticipation* of offenses, for that would amount to a presidential arrogation of authority to *dispense* with the laws—and hence the rule of law—altogether").

49. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 331 (1803).

50. Schick v. Reed, 419 U.S. 256, 266 (1974).

51. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 280, at 216 (Regnery Gateway Bicentennial ed., 1986) (1840).

one would feel much apprehension of public censure”⁵²—the President, and the President alone, must answer for exercise of the clemency power.

In any event, even assuming that the Framers had failed to fully anticipate the extreme risk posed by preservation of the pardon power during the closing act of a presidential administration, the events of the past eight years have revealed a problem worthy of attention and resolution. To the extent that the delegates at the Constitutional Convention in 1787 believed that abusive exercise of the clemency authority would be rare or inconsequential, “[w]ith the benefit of hindsight, Americans at the dawn of the twenty-first century have reason to doubt the validity of the framers’ assumption.”⁵³

Second, some would suggest that the immunity from constituent sanction enjoyed by an outgoing President in considering pardon petitions is a positive attribute, not an evil, of the transition period. Dean Kathleen Dean Moore wrote in her book on pardons:

Public opinion is important when it comes to making the laws that define crimes and punishments. But pardon decisions counteract the effect of the laws, make exceptions to the laws. Public opinion should not be heard here. Pardoning to win an election is morally indistinguishable from pardoning to win a buck.⁵⁴

Thus, Professor William G. Ross argued that “a retiring President’s liberation from political pressures may enable him to make politically unpopular pardons that are just and wise. The dispensation of such disinterested mercy is at the heart of the pardon power.”⁵⁵ For these reasons, Professor Paul Finkelman

52. STORY, COMMENTARIES, *supra* note 39, § 722, at 550 (discussing the importance of repositing pardon authority in the executive rather than in the legislative branch of government).

53. See Scott P. Johnson & Christopher E. Smith, *White House Scandals and the Presidential Pardon Power: Persistent Risks and Prospect for Reform*, 33 NEW ENG. L. REV. 907, 908, 923 (1999) (raising concerns about the possibility of a President using the pardon power to cover up his or her own improper behavior and suggesting reforms, such as withholding the pardon power until after a recipient had been tried and convicted).

54. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 204 (1989).

55. Posting of Professor William Ross, William.G.Ross@samford.edu, to the JURIST Presidential Pardons Roundtable (Feb. 28, 2001), at <http://www.jurist.law.pitt.edu/pardonslist.htm>; see also Posting of Professor Ralph Stein, rstein@law.pace.edu, to the JURIST Presidential Pardons Roundtable (Mar. 2, 2001) (arguing that “the ability to pardon at the end of a term is not an unintended consequence” but rather “reflects a value . . . that justice and mercy may best, perhaps in some instances only, be dispensed when the President has nothing much to lose”), at <http://www.jurist.law.pitt.edu/pardonslist.htm>.

suggested that the period after a presidential election is perhaps the “best time” for a President to consider pardon or commutation in a politically-sensitive case where a miscarriage of justice has occurred.⁵⁶

In my view, this objection misses the target. To be sure, a President ought to act with conviction and impartiality in evaluating requests for mercy; indeed, repositing this plenary authority in the person of the chief executive serves that laudable goal:

As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance.⁵⁷

The expectation of principled and moral leadership, however, does not conflict with the democratic principle of public accountability. Public responsibility is not satisfied by consulting the latest polls. “[I]t is part of the President’s job to take risks in this regard.”⁵⁸ A true leader does not conform subserviently to the transitory ebb and flow of public opinion but, rather, forthrightly entreats the people to higher ideals. However, if a President fails to lead, if the public declines the President’s summons, or if the President acts irresponsibly, the electorate in a democracy must be able to call that President to account. No less so in the context of clemency, the President must be willing to take responsibility for those decisions at a point in time when a political price can be paid and a public verdict thereby can be rendered.

Third, some commentators have argued that the malady of presidential pardon abuse will prove to be self-healing. They have argued that the outrage and scandal that has attached to President Clinton’s inauguration-eve pardons, as well as the earlier criticism that attended President Bush’s last-minute pardons, will deter future Presidents from falling into the same error.⁵⁹ In other words, the problem has resolved itself, and this transgression will not be repeated. In truth, I do not doubt that most future inhabitants of the White House

56. Posting of Professor Paul Finkelman, paul-finkelman@utulsa.edu, to the JURIST Presidential Pardons Roundtable (Mar. 1, 2001), at <http://www.jurist.law.pitt.edu/pardonslist.htm>.

57. THE FEDERALIST NO. 74, at 473-74 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

58. Love, *supra* note 37, at 1511.

59. Testimony of Margaret Love, *supra* note 18 (“Future misuse of the pardon power is particularly unlikely in view of the *in terrorem* example of President Clinton’s final grants.”).

will eschew Clinton's dissolute mode of executive operation and will learn this episode's object lesson. But I also do not doubt that something like these abuses, or something worse, will happen again—later if not sooner.

Human nature being what it is, and presidential politics serving as the ultimate stroke of the oversize egos of most successful White House contenders, Bill Clinton will not be the last President to think of himself as above the rules and, thus, tempted to act self-indulgently when he thinks he can get away with it. When the adult supervision of the electorate is withdrawn after election day, the pardon power becomes an attractive nuisance to a President with an immature psyche. While Clinton's abuse of the pardon power, like so much of his misbehavior during his tenure, was notable in its amplitude and vulgarity, it was not different in kind from that of numerous other Presidents acting on the eve of their departure or that may be anticipated to be exhibited again by future dethroned executives. And, although the particular Clinton episode seems more the stuff of petty cronyism than outright corruption, the pardon power remains an open invitation to evil for the President who has been disgraced in office or has suffered the humiliation of electoral rejection.

The temptation to offer clemency as a favor to personal and political allies or to spite political enemies will be especially heightened when an incumbent has been defeated in a re-election bid and, thus, may feel betrayed by, or indignant toward, the electorate. The risk that a wounded President may lash out with anger through abusive exercise of other executive powers is mitigated by the President's need to rely upon others to carry out his or her orders. The issuance of executive orders or administrative regulations can be overturned by future legislative action. Even with deployment of the military, where wrongdoing by a President could have the most dire of consequences, the lines of authority between the President and the soldier—including layers of presidential assistants, the Defense Secretary, and generals and other officers—serve as a protective buffer. The pardon power, however, can be exercised in isolation and solitude by a President—and its effects are permanent and beyond challenge.

Moreover, the constitutional Framers probably never imagined that a President might be impeached by the House of Representatives, avoid a vote of conviction in the Senate, and then go on to issue pardons to his friends, relatives, and political contributors after his designated heir had been defeated in a bid for the executive office. Bill Clinton is almost surely not the last President who will be subject to an impeachment investigation, although we might be permitted to hope that such occasions will be infrequent. In just the last quarter century, two Presidents have faced serious impeachment inquiries. A President who has been disgraced, even if he or she survives in office because the Senate is unable to muster the two-thirds vote for conviction, is less likely to be concerned about current or historical reputation. While it would be inappropriate to cripple an impeached-but-not-convicted President by withdrawing presidential powers

generally, we realistically should appraise the danger that the ordinary sanction of public censure has been weakened in such a case. At least, we must realize that, after the final referendum on that Presidency is taken on election day, with the President personally or the party's nominee for successor on the ballot, the last constraint of public accountability has been removed.

In the happy event that our Republic perseveres for yet another two centuries, sober prognostication suggests the nation is likely to see a future President having been so discredited through scandal or defeat for re-election as to have lost any regard for historical legacy or public estimation. Such a repudiated executive then might act, as did Tennessee Governor Ray Blanton, to extend pardons out of spite, malice, or partiality. While a President acting corruptly might be subject to subsequent criminal prosecution, the absolution of criminal wrongdoing would remain in full force and could not be overturned. This need happen only once to be disastrous. Indeed, I suggest that the most important aspect of the Clinton affair is to remind the nation of the potential for abuse during the peculiar transition period and to force us to apprehend that a future episode could be much, much worse.

V. CONCLUSION

Because they knew that men were not angels, the Framers of our Constitution designed our system of government to limit power and to check the influence of any branch or particular official.⁶⁰ Nevertheless, the Framers failed to appreciate the magnified risk of abuse of the clemency power that exists between the twilight of one presidential administration and the dawn of a new one. While preserving the full substance and breadth of the valuable pardon power at other times, the remedy suggested in this Article is calibrated precisely to the harm by suspending that authority only during the distinct period of greatest jeopardy. Representative Barney Frank (D-Mass.) has introduced a proposed constitutional amendment that, in pertinent part, reads:

The power to grant reprieves and pardons for offenses against the United States shall not be exercised between October 1 of a year in

60. THE FEDERALIST NO. 51 reads in pertinent part:

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

THE FEDERALIST NO. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961).

which a Presidential election occurs and January 21 of the year following; except that after October 1 in said year a President may delay the execution of a sentence of death until January 25 of the year following.⁶¹

The door to executive clemency should close before the votes of the electorate are cast in a presidential election and reopen only on inauguration day.

61. H.R.J. Res. 22, 107th Cong. (2001).

