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A Federalist Conception of the Pardon Power

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Abstract
The growth in criminal law today reflects a divergence from its treatment early in our republic and under traditional common law rules of Anglo–American culture. This is most evident in such areas as overfederalization of criminal law and the dilution of the "guilty mind" requirement. Yet there is one area in which this divergence is particularly acute that has not received the same attention: the atrophying of the executive's pardon power. Properly understood, the pardon power is one of the great bulwarks of individual liberty. It is, in effect, the personification of the government acting as a check on the institutions of the government. Leaders today would do well to remember the value of the pardon power and restore it to its former prominence.

This paper, in its entirety, can be found at **http://report.heritage.org/lm89**

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The growth in criminal law today reflects a divergence from its treatment early in our republic and under the traditional common law rules of Anglo–American culture. We have, for example, diluted the traditional requirement that criminal acts required a criminal intent.[2] We have expanded concepts of civil liability and wrongdoing into the criminal sphere such that those who cause an injury that traditionally required compensation are now jailed.[3] We have seen the federalization of criminal laws, formerly thought of as the proper domain of the state's police power.[4] And we have diverged from the Founders' conception of the separation of powers, allowing the devolution of unchecked authority to unelected prosecutors without the oversight of the other branches of government.[5]

But there is yet another way in which criminal justice no longer resembles the justice system that the Founders would recognize: the atrophying of the executive's pardon power. For much of America's history, the President used his pardon power to correct wrongs, forgive transgressors, and temper justice with mercy.[6] Governors likewise used their power to prevent the perpetuation of an injustice.[7]

Key Points

- Despite its prominence throughout the history of the American Republic, the pardon power is seldom used today.
- Though many theories for this decline can be offered, the most plausible is that the atrophy of the pardon power arises from its institutionalization.
- Reinvigorating the notion of clemency as a virtue is urgently required, both as a practical matter and as a matter of fidelity to the original Founders' understanding of the proper scope of criminal law.
- What is needed is an institutional solution that honors the Founders' expectation of personal justice and political reality. The institution should therefore reflect the sentiments of its presidential sponsor while affording the President a realistic and unbiased opportunity to review cases and make an informed decision.
- Such reform could lead to the amelioration of harsh justice in America today and the restoration of a traditional conception of presidential power.

Today, those instincts have died, buried under a legacy of prosecutorial zeal and a fear of adverse political criticism.[8] That is a shame, for the pardon power, properly understood, is one of the great bulwarks of individual liberty. It is, in effect, the personification of the government acting as a check on the institutions of the government. Leaders today would do well to remember the value of the pardon power and restore it to its former prominence.

Pardons and Justice: A Founder's Conception

How the American legal system and its Founders treated the pardon authority is (and ought to be) relevant to both policymakers and jurists alike—those charged with developing and interpreting contemporary American criminal statutes. For example, if Americans were to conclude that the Founding generation was skeptical of the exercise of pardon authority, then we might approve of our current practice of limiting clemency. Conversely, if we were to conclude that the exercise of the pardon authority was more frequent and linked to intentionality of conduct, we might develop a greater skepticism of, say, the movement toward felony punishment for simple negligence offenses, and we might be curious about the current disuse of clemency in modern America.

THERE WAS, IN THE FOUNDERS' CONCEPTION, A LINK BETWEEN CRIMINAL LIABILITY AND SOME FORM OF MORAL BLAMEWORTHINESS—A LINK THAT LED TO MITIGATION OF PUNISHMENT WHERE CRIMINAL INTENT WAS LACKING.

At the time the Constitution was framed, the pardon was conceived of as having a dual purpose both as a political means of ameliorating dissent,[9] broadly understood, and as a moral expression of just deserts.[10] There was, in the Founders' conception, a link between criminal liability and some form of moral blameworthiness—a link that led to mitigation of punishment where criminal intent was lacking.

The presidential power to pardon is granted under Article II, Section 2 of the Constitution: "The President... shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[11] The text does not provide any standard for the presidential exercise of this power. For all it appears, the power can be exercised for any reason or no reason at all.[12] Substantively, there is only one limitation: impeached officeholders cannot be pardoned.

What is the purpose of such a broad and unfettered pardon power?

1. A longer version of this paper will appear as Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. Crim. L. & Criminology. (2012) (forthcoming). My thanks to the participants in the conference at Northwestern, where I delivered an earlier version of this paper, and to the staff of the *Journal of Criminal Law and Criminology* (most particularly Ms. Jennifer Won) for their helpful comments and editorial suggestions.
2. Paul Rosenzweig, *The History of Criminal Law*, *in* One Nation Under Arrest 127, 139–143 (Paul Rosenzweig & Brian Walsh eds., 2010).
3. A classic example of the criminalization of formerly civil offenses was *United States v. Park*, 421 U.S. 658 (1975), imposing criminal liability on the manager of a food storage warehouse company for maintaining unsanitary conditions.
4. One example of the phenomenon, subject to the limitation of the Commerce Clause power, was Congress's effort to make all violence against women a federal offense. *See* United States v. Morrison, 529 U.S. 598 (2000).
5. Brian W. Walsh & Benjamin P. Keane, *Overcriminalization and the Constitution*, Heritage Found. Legal Memorandum, Apr. 13, 2011, *available at* http://thf_media.s3.amazonaws.com/2011/pdf/lm64.pdf.
6. Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. Crim. L. & Criminology 1169, 1169 (2010) ("For most of our nation's history, the president's constitutional pardon power has been used with generosity and regularity to correct systemic injustices and to advance the executive's policy goals.").
7. Joanna M. Huang, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 Duke L.J. 131, 133 (2010) ("Executive clemency['s]...flexible and broad nature allows the president and state governors to pardon or commute sentences at will, including those sentenced during the mandatory-injustice period.").
8. A recent example of which was the decision of Mississippi Governor Haley Barbour to pardon more than 200 during his last days in office—a decision that generated a firestorm of criticism. *See infra* notes 46–48.
9. *See* Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. Rev. L. & Soc. Change 43, 50 (1998) ("[T]he Framers, themselves steeped in the tradition of English law, were in substantial agreement about the need for an executive pardoning power and favored its adoption.... [A]n executive pardon would allow the President to heal the country in times of civil unrest, thereby protecting national security.").
10. *See* Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 Brandeis L.J. 85, 89 (2002) ("[P]ardons may be issued when justice would otherwise not be served either because the sentence was too harsh or because the person was wrongly convicted.").
11. U.S. Const. art. II, § 2, cl. 1.

It was considered essential for both normative reasons of justice and utilitarian reasons of power. First, the pardon power coincided with the Founders' conception of justice. As Alexander Hamilton put it in *Federalist* No. 74:

> 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. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow creature depended on his *sole fiat*, would naturally inspire scrupulousness and caution: The dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind.[13]

Thus, Hamilton concluded, "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed."

Hamilton was not alone in his view that the purpose of the pardon power is to temper justice with mercy. Chief Justice John Marshall said much the same thing: "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."[14]

But pardons were also seen as playing a practical role in public policy. Here is Hamilton on the use of pardons as a critical component of reconciliation: "In seasons of insurrection or rebellion, there are often critical moments, when a well timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth."[15] Likewise, James Wilson argued during the Constitutional Convention that a "pardon before conviction might be necessary in order to obtain the testimony of accomplices."[16]

FOR THE FOUNDERS, THE PARDON POWER WAS AN AUTHORITY THAT WAS BOTH UTILITARIAN IN NATURE AND AN EFFORT TO DEVELOP A CONSTITUTIONAL CONCEPTION OF JUST DESERTS. AS JUSTICE OLIVER WENDELL HOLMES PUT IT, "A PARDON IN OUR DAYS IS NOT A PRIVATE ACT OF GRACE FROM AN INDIVIDUAL HAPPENING TO POSSESS POWER. IT IS A PART OF THE CONSTITUTIONAL SCHEME."

For public policy reasons, as much as anything else, President George Washington granted an amnesty to those who participated in the Whiskey Rebellion,[17] and Abraham Lincoln and Andrew Johnson did the same for Confederate soldiers who fought in the Civil War.[18] Indeed, this aspect of the pardon was used relatively recently when Gerald Ford

12. Indeed, even Bill Clinton's infamous pardon of donor Marc Rich did not violate the Constitution. To be sure, it was contrary to every understanding of good governance (the selling of justice has been anathema at least since the Magna Carta). *See* Magna Carta ch. 40 (1215) ("To none will we sell, to none will we deny, to none will we delay right or justice"). But no constitutional barrier to the exercise is apparent. *See* Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. Crim. L. & Criminology 1131, 1168 (2010).
13. The Federalist No. 74 (Alexander Hamilton).
14. United States v. Wilson, 32 U.S. 150, 160 (1833).
15. The Federalist No. 74 (Alexander Hamilton).
16. *Madison Debates August 27*, Yale Law Sch., avalon.law.yale.edu/18th_century/debates_827.asp (last visited Feb. 27, 2012). The practice that has arisen regarding the compulsion of testimony under a grant of immunity (*e.g.*, 18 U.S.C. § 6002 (2006)) makes this particular ground for the pardon power a historical curiosity.
17. Jonathan T. Menitove, Note, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 Harv. L. & Pol'y Rev. 447, 452 (2009) ("[T]he President's ability to pardon federal offenders swiftly has helped to heal the nation and serve the public interest. George Washington used the first presidential pardon in 1795 when he granted amnesty to participants in the Whiskey Rebellion.").
18. *Id.* ("Perhaps the best known examples of the presidential pardon being employed to restore tranquility to the nation arose during and after the Civil War. In 1863, President Lincoln issued a proclamation of general amnesty to those who rebelled against the Union; President Andrew Johnson, on Christmas Day 1868, pardoned Jefferson Davis and other confederate soldiers in what one scholar has called 'the most salient exercise of executive clemency to date.'") (citation omitted).

pardoned President Richard Nixon and Jimmy Carter granted amnesty to Vietnam-era draft evaders.[19]

For the Founders, therefore, the pardon power was an authority that was both utilitarian in nature and an effort to develop a constitutional conception of just deserts. As Justice Oliver Wendell Holmes put it, "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme."[20]

Indeed, as Akhil Reed Amar has noted in his history of the American Constitution, the federal pardon power was far broader than that possessed by state governors.[21] The governor of Massachusetts, for example, could issue a pardon only with "the advice" of a legislatively chosen council. New York's governor could not pardon before trial and, for murder and treason, could only suspend a sentence pending legislative review of the matter. For this reason, Amar characterizes the pardon power as one of the "threads that defined America's presidency" and allowed for decisiveness of action and the unity of executive power.

The conception of the pardon as an exercise of justice found a ready echo in some of the early enactments of the new federal government. The most prominent example was the Mitigation and Remittance Act of 1790.[22] About one year earlier, Congress had enacted a number of forfeiture provisions and penalties relating to the avoidance of customs duties. For example, it was unlawful to unload a ship after dark (an act that might facilitate the evasion of tariffs) or without a license (an early example of a *malum prohibitum* crime).[23] Other early customs penalties imposed fines or forfeiture for failing to get clearance to sail[24] and departing without a manifest.[25]

THE CONCEPTION OF THE PARDON AS AN EXERCISE OF JUSTICE FOUND A READY ECHO IN SOME OF THE EARLY ENACTMENTS OF THE NEW FEDERAL GOVERNMENT.

Within a year, however, it became apparent that a number of ship owners had incurred liability for penalties or forfeitures principally through ignorance of the recently enacted customs regulations, tariffs, and duties.[26] The First Congress provided a means of mitigating the punishments (in effect, a statutory pardon) with district judges finding the facts of the matter and reporting on them to the Secretary of the Treasury. The Secretary, in turn, had the "power to mitigate or remit" any penalty "if in his opinion the same was incurred without willful[l] negligence or any intention or fraud."[27] In other words, Congress recognized that it had created criminal liability where intent might be lacking and provided a mechanism for the mitigation of punishment for those deemed to lack criminal intent.[28]

The sentiment behind mitigating penalties when criminal intent was lacking was no stray or isolated thought. Indeed, it survived even in times of conflict on the brink of war. In 1800, when Congress passed a law suspending commerce with France, it imposed a series of penalties and forfeitures to enforce the adopted restrictions.[29] Yet even here, in the midst of heightened tensions, Congress also saw fit to extend the provisions of the Mitigation and Remittance Act and apply them to "all penalties and forfeitures incurred by force of this act."[30]

The same was true nine years later, in 1809, when Congress

19. *Id.* at 453 ("Similarly, on his first full day in office, Jimmy Carter pardoned those who had evaded the draft during the Vietnam War in an effort to 'bind the wounds that an unpopular war had inflicted on society and on its young people, so that healing could begin.'") (citation omitted).
20. Biddle v. Perovich, 274 U.S. 480, 486 (1926).
21. Akhil Reed Amar, America's Constitution 189 (2006).
22. Mitigation and Remittance Act of 1790, ch. 11, 1 Stat. 122.
23. Act of Jul. 31, 1789, ch. 5, 1 Stat. 29.
24. Act of Sept. 1, 1789, ch. 11, 1 Stat. 55.
25. 1 Stat. at 63.
26. David P. Currie, The Constitution in Congress 50–51 (1997).
27. 1 Stat. 122, 122–23. Although initially passed as a temporary measure, the provision suspending operation of the Act was repealed in 1800, making the underlying provision a permanent part of the law. Act of Feb. 17, 1800, ch. 6, 2 Stat. 7.
28. *See* David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 U. Chi. L. Sch. Roundtable 161, 213 (1995); *see also* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. Chi. L. Rev. 775, 827 (1994) ("Congress perceived no constitutional impediment to this convenient use of judicial officers for purely administrative purposes." (citation omitted)).
29. Act of Feb. 27, 1800, ch. 10, 2 Stat. 7.
30. *Id.* § 9.

imposed an embargo on trade with Great Britain in the run-up to the War of 1812.[31] Though the embargo was a critical component of American opposition to British actions on the high seas, the mitigation and remittance provisions were again adopted to excuse those who acted without willful negligence or the intent to defraud.[32]

Finally, a broad acceptance of the pardon power can be seen throughout the early practice of the republic. Although Washington and John Adams made little use of the pardon power (16 and 21 pardon statements, respectively), other early Presidents were far more generous with their mercy.[33] Thomas Jefferson signed at least 119 pardon statements; James Madison, 196 (or possibly 202, the records are unclear); James Monroe, 419; and John Quincy Adams, 183.[34] Plainly, the pardon was a regular aspect of the criminal justice system early in American history.

The Atrophy of the Pardon

Today, the pardon power is seldom used. While the Constitution places no significant limitations on the ability of a President to grant pardons, Presidents have come to issue fewer and fewer of them over the years. Abraham Lincoln granted more than 200 pardons in his first two years in office.[35] He once granted clemency to 62 deserters in a single day.[36]

The commonplace of 150 years ago is the exception today. The Office of the Pardon Attorney in the U.S. Department of Justice (DOJ) keeps statistics on the issuance of pardons over time that reflect this decline.[37] At the start of the 20th century, Presidents routinely granted between 100 and 200 pardons every year. As recently as 1933, President Franklin Roosevelt granted 204 pardons in his first year in office. By contrast, President George W. Bush granted only 200 pardons or commutations during his entire eight-year term. And in his first three years in office, President Barack Obama granted only 22 pardons along with one grant of clemency.

This is all the more stunning a figure when one considers the radical growth in federal prosecutions. President Obama's 22 pardons are but a miniscule fraction of the 200,000 federal prisoners today: Indeed, strictly speaking, since all of President Obama's pardons have been granted to those who had already served their term of imprisonment, not a single individual has been released from prison by virtue of a presidential pardon in the Obama Administration. By contrast, in the early 1900s, when fewer than 10,000 federal prisoners were incarcerated nationwide,[38] pardons averaged roughly 300 each year.[39] Both in absolute terms and, far more notably, as a percentage, the rate of pardons has decreased significantly.

BOTH IN ABSOLUTE TERMS AND AS A PERCENTAGE, THE RATE OF PARDONS HAS DECREASED SIGNIFICANTLY. THOUGH MANY THEORIES FOR THIS DECLINE CAN BE OFFERED, THE MOST PLAUSIBLE IS THAT THE ATROPHY OF THE PARDON POWER ARISES FROM ITS INSTITUTIONALIZATION.

Though many theories for this decline can be offered, the most plausible is that the atrophy of the pardon power arises from its institutionalization. Before the Office of the Pardon Attorney was established,

31. Act of Jan. 9, 1809, ch. 5, 2 Stat. 506.
32. *Id.* § 12.
33. P. S. Ruckman, Jr., Policy as an Indicator of "Original Understanding": Executive Clemency in the Early Republic (1789–1817), at 6–7 (Nov. 1994) (paper presented to Annual Meeting of the Southern Political Science Association), *available at* http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper7.pdf.
34. Actual pardon numbers are difficult to state with certainty, both because of the age of the records and because early Presidents frequently made pardon or clemency grants to a number of people in a single instrument. In general, the actual number of people receiving pardons is greater than the number of pardon signing statements: For example, Madison's approximately 200 pardon statements granted relief to more than 250 individuals. The data offered in the text are taken from *id.* at 7; P. S. Ruckman, Jr., Federal Executive Clemency in United States, 1789–1995: A Preliminary Report 16 tbl.2 (Nov. 1995) (paper presented to Annual Meeting of the Southern Political Science Association) (on file with the Journal of Criminal Law and Criminology).
35. Love, *supra* note 6, at 1170 (citing P. S. Ruckman, Jr. & David Kincaid, *Inside Lincoln's Clemency Decision Making*, 29 Presidential Stud. Q. 84 (1999)).
36. Ruckman & Kincaid, *supra* note 35, at 85.
37. All data in the text are taken from the Office of the Pardon Attorney, U.S. Dep't of Just., Clemency Statistics, http://www.justice.gov/pardon/statistics.htm (last visited March 28, 2012).
38. For example, in 1925, only 6,430 prisoners were incarcerated in federal prisons. *See* Langan, Fundis, Greenfield & Schneider, Historical Statistics on Prisoners in State and Federal Insitutions, Yearend 1925–86, Table 1 (Dept. of Justice, Bureau of Justice Statistics, 1988), *available at https://www.ncjrs.gov/pdffiles1/digitization/111098ncjrs.pdf.*
39. Love, *supra* note 6, at 1188.

Presidents considered pardons individually, often on their own time. Now the pardon attorney is resident in the Department of Justice and assists the President in reviewing requests for pardons according to a settled guideline.[40] These recommendations from the pardon attorney are just that—recommendations and nothing more. The President is not required to follow them and retains full pardon authority. And yet it would be a bold—or a foolhardy—President who overrode the recommendations of his pardon attorney.[41]

More important, the advent of a pardon attorney has institutionalized the hostility of prosecutors to exercises of the pardon power. When the President exercised the pardon power directly or, more recently, when he reviewed recommendations made by the Attorney General, pardon applications were examined with two views in mind. To be sure, they brought the perspective of law enforcement officers sworn to uphold the law and take care that federal criminal statutes are faithfully executed. But, as political actors, the President and the Attorney General also brought to the review a more finely tuned sense of political judgment and a generalized appreciation for the American body politic and its sensitivity to criminal law.

That has changed. In the late 1970s, Attorney General Griffin Bell delegated the recommendation role to the same officials who made prosecution policy.[42] This has had the natural tendency of modifying the DOJ's approach to pardon applications: They are now seen as a challenge to an Administration's law enforcement policy rather than as an effort to individualize justice.

POLITICAL CONSIDERATIONS GIVE THE LEGISLATOR EVERY INCENTIVE TO BE OVERINCLUSIVE IN CRAFTING CRIMINAL LAWS RATHER THAN UNDERINCLUSIVE. THE SAME POLITICAL IMPULSE TENDS TO LIMIT THE WILLINGNESS TO USE THE POWERS OF CLEMENCY.

Under President Ronald Reagan, this trend only accelerated as a tighter control of pardon authority was instituted in order to ensure that the policy "better reflect[ed] his administration's philosophy toward crime."[43] This approach is not "wrong" as a matter of philosophy; however, using career prosecutors to screen pardon applications[44] has the natural tendency of subjecting pardon applications to greater scrutiny with less lenity to be expected, because career prosecutors (like any human beings) are products of their culture and less likely to see flaws in the actions of their colleagues.

In addition, political considerations give the legislator every incentive to be overinclusive in crafting criminal laws rather than underinclusive.[45] The same political impulse tends to limit the willingness to use the powers of clemency.

Indeed, if any proof that the political winds disfavored mercy were thought necessary, the recent experiences of former Mississippi Governor Haley Barbour demonstrate the point.[46] Barbour, widely regarded as a conservative executive, granted more than 200 pardons as his term as governor neared its conclusion. More than 25 of these pardons were to individuals still serving terms of imprisonment, and a few were even for individuals convicted of violent murders.

Though sometimes couched as a legal dispute,[47] the hailstorm of criticism that rained down on Governor Barbour had, one suspects, far more to do with a generalized objection to the use of a pardon authority to show mercy than it did to any real concern about the legal niceties of

40. 28 C.F.R. §§ 1.1–1.10 (2011).
41. President Clinton, for example. *See* Alschuler, *supra* note 12, at 1136–60 (detailing numerous questionable, end-of-term pardons issued by President Clinton).
42. *See* Love, *supra* note 6 at 1197.
43. Pete Earley, *Presidents Set Own Rules on Granting Clemency*, Wash. Post, Mar. 19, 1984, at A17 (quoting David C. Stephenson, Acting U.S. Pardon Attorney).
44. All but a handful of the individuals officially responsible for approving Justice Department clemency recommendations since 1983 have been former federal prosecutors. *See* Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Practice of Pardoning*, 13 Fed. Sent'g Rep. 125, 132 n.23 (2001).
45. Paul Larkin, *Overcriminalization: The Legislative Side of the Problem*, Heritage Found. Legal Memorandum, Dec. 13, 2011, 1, *available at* http://www.heritage.org/research/reports/2011/12/overcriminalization-the-legislative-side-of-the-problem.
46. There are hundreds of reports of the controversy generated by the Governor's pardons. One example: Richard Fausset, *Pardons Could Haunt Barbour*, L.A. Times, Jan. 13, 2012, at A1.
47. The Mississippi Supreme Court has agreed to resolve the legal question surrounding proper notice to be a valid pardon. *See Miss. High Court Steps into Flap Over Pardons*, USA Today, Feb. 2, 2012, at A3.

the mechanism by which the pardons were granted. Governor Barbour has defended his actions, but at some significant cost to his political reputation.[48]

Toward a New Approach

How, then, to navigate the Scylla and Charybdis of pardons—allowing the invocation of mercy and the amelioration of an excessive criminal code while avoiding the specter of lawless, unprincipled, and, in some cases, overly politicized exercise of the pardon power?

In an ideal world, the need for clemency would exist at the margins of the law to take care of extraordinary cases. This would be the result of a well-developed and well-regulated, moderate criminal law. As the philosopher Cesare Beccaria put it while opposing the power of a pardon as a lawless exercise, "Clemency is...a virtue which ought to shine in the code, and not in private judgment."[49]

Sadly, America's current system does not see the judicious application of punishment as a virtue. Rather, it has become a system where being a criminal no longer requires criminal intent and where traditional concepts of responsibility for the acts of another have become subsumed within amorphous doctrines with names like "responsible corporate officer."[50] In short, within the confines of our prosecutorial structures, there is no virtue of clemency.

Reinvigorating that spirit is urgently required, both as a practical matter and as a matter of fidelity to the original Founders' understanding of the proper scope of criminal law. But we cannot get there with the current architecture of pardon review. It simply is asking too much for DOJ prosecutors to review their own work.

WHAT IS NEEDED IS AN INSTITUTIONAL SOLUTION THAT HONORS THE FOUNDERS' EXPECTATION OF PERSONAL JUSTICE AND POLITICAL REALITY.

On the other hand, no matter how much an originalist might wish for a return to limited government, it is also asking too much for us to expect a President to find time to personally conduct an independent inquiry and consider every application for a pardon or the commutation of a sentence. That just is not feasible at this juncture.

What is needed is an institutional solution that honors the Founders' expectation of personal justice and political reality. The institution should therefore reflect the sentiments of its presidential sponsor while affording the President a realistic and unbiased opportunity to review cases and make an informed decision. The current institutional solution—locating the Office of the Pardon Attorney under the Deputy Attorney General in the Department of Justice and staffing it with a career prosecutor—does not meet this need.

The pardon authority is an unfettered executive power. The President needs no statutory authority to change how he administers pardons and reviews clemency applications. He is free to change the current rules as and when he sees fit. If the current Administration (or any Administration, for that matter) wanted to reinvigorate the pardon power and return it to its original function, it would:

- Recreate a pardon reviewing authority either outside of the Department of Justice, as part of the Executive Office of the President, or as a direct function of the Attorney General as the President's personal representative, and

- Staff the new Pardon Office with a range of staff, including prosecutors, sociologists, psychologists, historians, and even defense attorneys.

Doing either or both of these things would alleviate most of the systemic problems that plague the current way in which the pardon process is implemented. Moving the office outside of the Department of Justice would restore the pardon function to its traditional status as an exercise of pure presidential authority. Including staff who are not exclusively career prosecutors would bring a more balanced perspective to the decision-making and eliminate

48. Not everyone was opposed to the pardons. For one of the few editorials in support of Governor Barbour, see *A Quality of Mercy in Haley Barbour's Pardons*, Christian Sci. Monitor (Jan. 24. 2012), http://www.csmonitor.com/Commentary/the-monitors-view/2012/0124/A-quality-of-mercy-in-Haley-Barbour-s-pardons.

49. C. B. Beccaria, An Essay on Crimes and Punishment 158 (photo. reprint 1953) (2d ed. 1819).

50. The responsible corporate officer doctrine, first developed in *United States v. Dotterweich,* 320 U.S. 277 (1943) and *United States v. Park,* 421 U.S. 658 (1975), stands broadly for the proposition that a corporate officer can be convicted of a crime even though he took no direct part in its commission if he stands in some "responsible relationship" to the criminal actions (as, for example, if he has a duty and capability of preventing their occurrence). *See generally,* Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction: Standards of Liability, *92* Harv. L. Rev. 1243, 1263–64 (1979).

the natural and understandable institutional tendency of prosecutors to be confident in the rectitude of their own judgment.

The location of the reinvigorated office is, naturally, capable of some debate. Placing it in the Executive Office of the President would return the pardon to its original status as a matter of the personal judgment of the President. It would also greatly diminish concerns that agents and prosecutors are strongly motivated to defend their investigative and charging decisions.

But placing the Pardon Attorney in the White House might be seen as further politicizing the process rather than dealing with those concerns. The alternate compromise, which might be a "best of both worlds" solution, would staff the Office of the Pardon Attorney with professionals from various fields but place the office as part of the Attorney General's office, with the Pardon Attorney reporting directly to the Attorney General without going through the Deputy Attorney General. An alternative might be to have the Pardon Office be a separate independent agency (much like the Sentencing Commission).

If the President were to delegate the initial review of clemency applications to this new Pardon Office, we just might see a positive result: the amelioration of harsh justice in America today and the restoration of a traditional conception of presidential power.

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