CONTROVERSIAL CLEMENCY: THE PRESIDENT’S PROBLEMATIC POWER TO PARDON

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Abstract

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President Obama’s use of the pardon power was widely criticized. Early in his presidency, there were demands that he use his power more often and later in his presidency, the complaints shifted to the idea that he used the power too often. These criticisms suggest two questions for investigation: how did Obama’s use of the power fit into historical and current views of the functions of the power and, more generally, how should the power best be used? In this thesis, I examine both concerns. I conclude that there are legitimate purposes for the use of the pardon power and Obama’s use fits with historical precedent. Other purposes are more questionable, but it is difficult to identify reforms which would prevent possible harms without also impeding the legitimate purposes of the power. Last, the processes for implementing the power pose administrative difficulties regarding financing and control of agents by principals.
Introduction:

The federal power to grant pardons and reprieves is one of the only powers that is given to the President of the United States virtually without limitation. Article II, Section 2, Clause 1 of the United States Constitution provides that: “and [the president] shall have the Power to grant Reprieves and Pardons for offenses against the United States, except in Cases of Impeachment.”

As this thesis will review, many presidents’ use of this federal power has been criticized. The power itself has been controversial at times, due to concerns about both the powers of presidents and how it fits into a system of impartial justice. President Obama’s use of the power raised new concerns about such issues. I will argue that his application of the power fit with some uses by previous presidents, which in turn are in accord with some common understandings of its purpose. Yet difficulties in processing cases also reflected some inherent dilemmas in implementing the power, and concerns raised by other presidents’ applications of the power are difficult to address.

Early in his presidency, Obama was accused of not using his power enough by several scholars in academic publications. The advocacy for more extensive use emphasized concerns that Obama had raised, during his campaign, about excessive sentences for non-violent drug offenses. Thus in 2010, Douglas Berman, a professor at Ohio State University Moritz College of Law, wrote an article suggesting that President Obama could use his power of the pardon to make meaningful changes to the sentences.

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1 Article II, Section 2, Clause 1: United States Constitution. This thesis only examines the federal power to grant pardons and reprieves; it does not examine the clemency power in the several states.
of nonviolent drug offenders, in accord with his campaign promise.4 Similarly, Margaret Colgate Love, an attorney specializing in clemency work and scholarship, wrote articles pleading with Obama to make more frequent use of his pardon power in a way that would advance the political agenda he had discussed on the campaign trail.5

In 2014, the President announced his intention to grant more petitions for clemency for nonviolent drug offenders. He was then publicly criticized by the Pardon Attorney, Deborah Leff, because the President had asked her to process more petitions, had asked people to submit more petitions, but had failed to ensure that she had adequate staff, resources, and contacts at the White House to fulfill his request.6 President Obama appointed a new Pardon Attorney and went on to grant many commutations for nonviolent drug offenders as he had promised and been urged to do. It is unclear what changes were made after the new Pardon Attorney was appointed; however, it is clear that after President Obama requested petitions in 2014, the Office of the Pardon Attorney received over 19,000 petitions for clemency and President Trump inherited just over 11,000 pending petitions.7 This backlog of unanswered petitions is the largest ever inherited by an incoming president.8

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7 Figure 4.2. I arrived at the 19,000 number by adding the number of petitions received for both pardons and commutations for the years of 2015, 2016, and 2017. See Also: "Clemency Statistics: Donald J. Trump.” The Office of the Pardon Attorney. Justice.gov. 3 March 2017. https://www.justice.gov/pardon/clemency-statistics. (Hereinafter Clemency Statistics – Trump)
8 U.S. DOJ Clemency Statistics
In total President Obama commuted the sentences of 1,715 people and pardoned 212 others over the course of his entire presidency, most of them after the midterm elections of 2014. His use of the power mainly took the form of commutation – reduction of sentences – on the grounds that sentences for many drug offenders were excessive as a result of overly harsh mandatory minimum sentence laws.

This more vigorous use of the pardon power was met with different criticism. Some argued that Obama was relying on the pardon power to push his agenda regarding sentencing laws because he had failed to get a bipartisan sentencing reform bill to pass in Congress. From this perspective, he was using the pardon power to avoid the constrictions of the constitutional allocation of powers among three branches of government. Others criticized Obama for failing to follow the recommendations of the Pardon Attorney. From this perspective, he was substituting presidential will for legitimate legal process. Thus criticism had flipped from claims he was not granting clemency enough to claims he was doing so too often and for the wrong reasons.

In this thesis I argue that President Obama used his power to grant clemency in a way that is similar to how several past presidents used the power. Obama is hardly the first president to use the pardon power to address an aspect of the criminal justice system that he saw as patently unfair, unconstitutional, or a result of laws that were no longer accepted. Jefferson pardoned because he believed the Alien and Sedition Act was unconstitutional. Franklin Delano Roosevelt pardoned hundreds who had violated the

9 Clemency Statistics – Obama. ”). President Obama granted 1,702 of these commutations and 156 of these pardons after November 2014 (midterm elections). That means that approximately 99% of all Obama’s commutations and more that 73% of his pardons were granted after the midterm elections in Obama’s final term in office. This fact will be addressed later in Part II.

Volstead Act, during Prohibition and after repeal of the Eighteenth Amendment that had made the Act possible. Presidents Ford and Carter pardoned scores of people who were convicted of evading the draft or deserting the army during the Vietnam War, after the war ended and its unpopularity made that group’s actions look, to some, less like treason. Like these presidents before him, Obama used the power as a tool to rectify what he perceived as an inherently unfair remnant of a legal approach that had been made obsolete by events and changed attitudes.

The possible justification for President Obama’s clemency approach, however, does not come close to exhausting issues about use of the power going forward. Although the president’s power to grant pardons and reprieves is plenary and nearly unlimited by the Constitution which makes legal abuse nearly impossible, political abuse is a more subjective question which has been analyzed by many scholars. The most typical allegation of political abuse is when the power seems to have been used by the president as a means of self-protection. It does not appear that President Obama abused his power to grant pardons and reprieves in either the political sense of the word abuse or the legal sense. However, criticisms of President Obama’s use of the power and the criticisms of his predecessors do highlight problems in the way the power is managed.

This thesis therefore, will analyze the president’s pardon power in a series of steps. Part I defines the power in types and bounds. This includes the controversies about and understandings of the legal bounds of the power developed in Supreme Court jurisprudence over the centuries. Part II then addresses the purposes for which the power may be used and the justifications made for its use. These are not the same, because presidents could use the power for purposes that are not easily justified. We can see
these purposes and justifications in theory and commentaries; in the practices of
governments before the creation of the United States; and in the arguments made at the
time the Constitution was adopted. It concludes with a brief overview of the most
prominent uses of the president’s power to pardon during the nineteenth century.

Part III then discusses at more length how uses varied or developed over time
since 1900. I will review the patterns of applications for and grants of clemency over
time, both from statistics and from scholarly analyses. That will show, for example, that
the demand for pardons is related to the number of federal prosecutions: the availability
of other forms of clemency (especially after institutionalization of parole in 1910);
particular incidents of prosecutions about which second thoughts were developed later
(e.g. Volstead Act); presidents’ concerns as to public opinion about pardons; and the
development of the bureaucracy for processing pardon petitions.

In Part IV I assess the merits of the more prominent criticisms of how the pardon
power has been or could be used, the most prominent criticisms being that the pardon
power is not used often enough and that the pardon power is often abused. In examining
these prominent criticisms, I assess which are more or less plausible. Having concluded
which alleged problems do deserve attention, in Part V I assess the prospects for useful
reforms.

**Part I: The Pardon Power and Its Limits**

The power to grant clemency, traditionally referred to as the pardon power, is
vested in the president by Article II, Section 2, Clause 1 of the United States Constitution.
Thomas Cronin, a political scientist at Colorado College, called the power to pardon, "the
only imperial power a president can exercise.”11 There are five types of clemency that fall under this power.12 The first four types are different types of pardons. The last type of clemency is a reprieve.

The first is a general pardon which is a grant to an individual that makes it as though the conviction never happened.13 There are two major Supreme Court cases that address the legal significance of a pardon. The Supreme Court held in Ex Parte Garland, that a presidential pardon addressed both the punishment imposed and the guilt of the person convicted.14 The Court ruled that a pardon released the offender from all guilt and any punishment imposed. Furthermore, the Court explained, in dicta, if a pardon was granted before conviction it prevented a guilty finding or any imposition of punishment.15 Several decades later, the Court presented a different view of the legal significance of a pardon in the Burdick v. United States decision.16 In Burdick the Court held that in accepting a pardon, a person was admitting guilt.17 Samuel Williston, a well-known professor of law from Harvard Law School, wrote in 1915 that a pardon implied past guilt, but charged society with the task of treating the one pardoned as though he were innocent.18 Therefore, the legal result of a general pardon is that any rights that were forfeited as a result of a conviction are restored to the individual.

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The second type of clemency is an amnesty. Amnesty is a type of pardon that is granted to a certain class of offender.\textsuperscript{19} Amnesties are generally granted to groups of people who are being forgiven because they took some kind of action that might later be looked at as having been beneficial to public welfare or at least that is not viewed as treasonous or criminal behavior. Legally, amnesty works very much the same as a pardon. One difference is how amnesties are viewed politically.\textsuperscript{20} The question of whether general amnesties were included in the president’s power to pardon was taken up by a scholar at the University of Pennsylvania following a Christmas Day declaration by President Andrew Johnson in 1868 granting full pardon and amnesty to anyone who engaged in rebellion during the Civil War.\textsuperscript{21} The author of this article concluded, after an examination of the pardon power in England, that a general amnesty was permissible under the pardon power.

The third type of clemency is a commutation. A commutation is a type of conditional pardon that lessens the punishment that is imposed as a result of conviction.\textsuperscript{22} Commutations may result in a forgiveness of fine with no reduction in jail time, a forgiveness of a jail sentence but no reduction in fine, or a reduction in both jail time and fines. Another example would be commuting a death sentence by changing the

punishment to life imprisonment. Unlike general pardons and amnesties, commutations do not erase the stigma of guilt or restore any rights that were forfeited as a result of conviction.\textsuperscript{23}

The fourth type of clemency is remission. Remission is another form of conditional pardon; it is simply the forgiving of fines and costs imposed as a result of conviction. This type of pardon was at issue in the Supreme Court when they heard the case of \textit{The Laura}. The Court determined that the right of the President to grant remissions was implicit in his power to grant pardons and reprieves.\textsuperscript{24} Like a commutation, a remission does not erase the guilt of the offender or restore any rights that are lost as a consequence of conviction.\textsuperscript{25}

The final type of clemency available for the president’s use is a reprieve. A reprieve is not a pardon, but merely a postponement of punishment as it is instituted; it is a deferment of sorts. One popular example of a reprieve is a stay of execution so that the condemned defendant may complete pending appeals.\textsuperscript{26} When a president exercises his power to grant a reprieve, he does not alter any aspect of the punishment.\textsuperscript{27}

According to the text of Article II, Section 2, Clause 1 of the Constitution, the only limitation on the president’s right to exercise the power is that it may not be exercised in cases of impeachment.\textsuperscript{28} However, the Supreme Court has heard several

\begin{itemize}
\item \textsuperscript{23} Kobil, Daniel T. “The Quality of Mercy Strained: Wrestling the Pardoning Power from the King” 69 Tex. L. Rev. 569, 577 (1991).
\item \textsuperscript{24} The Laura, 114 U.S. 411, 413, 5 S. Ct. 881 (1885)
\item \textsuperscript{25} Kobil, Daniel T. “The Quality of Mercy Strained: Wrestling the Pardoning Power from the King” 69 Tex. L. Rev. 569, 577 (1991).
\item \textsuperscript{26} Kobil, Daniel T. “The Quality of Mercy Strained: Wrestling the Pardoning Power from the King” 69 Tex. L. Rev. 569, 578 (1991).
\item \textsuperscript{27} Kobil, Daniel T. “The Quality of Mercy Strained: Wrestling the Pardoning Power from the King” 69 Tex. L. Rev. 569, 578 (1991).
\item \textsuperscript{28} Article II, Section 2, Clause 1: United States Constitution.
\end{itemize}
cases which questioned the scope and legal effect of the pardon power. These cases further defined the constitutional limitations of the exercise of the pardon power. One of the first cases the Supreme Court heard concerning the procedure for granting pardons was *United States v. Wilson* in 1833. The Court held in this case that a pardon was not complete until it was delivered to the person being pardoned and accepted by that person.

The next case to come before the Court on a question of the President’s ability to pardon was *Ex Parte Wells*. Twenty-two years after the *Wilson* decision, the Court was tasked with deciding whether a pardon commuting the sentence of a man convicted of murder from death to life imprisonment barred the defendant from seeking habeas corpus relief. Wells had accepted the pardon and the condition of life imprisonment, so the court refused to hear his habeas corpus petition. The pardon read, in relevant part, “a pardon of the offence of which he was convicted, upon condition that he be imprisoned during his natural life, that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary at Washington.” The Supreme Court determined that because the defendant accepted the pardon, he had effectively waived his right to seek habeas corpus relief and that he was to remain imprisoned for life per the condition of his pardon. This case recognized that the President could grant conditional pardons and that the conditions were binding if they were accepted by the person being pardoned.

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In 1871, the Supreme Court took the case of *United States v. Klein* which decided the question of whether Congress could pass legislation which limited the legal significance of a pardon granted by the president.\(^{35}\) Congress passed legislation which would limit the ability of people who had been Confederates, but had since taken an oath of loyalty as a condition for amnesty, to make claims for personal property and proceeds from the sale of personal property that the United States government had seized from them because of their participation in the rebellion.\(^{36}\) The Supreme Court found that the legislation was unconstitutional and that the president’s pardons had the effect of fully restoring rights that had been lost.\(^{37}\) The Court further explained that: “Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences.”\(^{38}\)

Just six years later, the Supreme Court revisited the question of the legal effect of pardons in *Knote v. United States*.\(^{39}\) This case also dealt with someone who had been convicted of treason for his part in the Civil War; his lands were seized and sold off by the United States government.\(^ {40}\) One of the major differences between *Knote* and *Klein* is that *Knote* dealt with the sale of real property while *Klein* dealt with the sale of personal property. The other major distinguishing factor between *Knote* and *Klein* is that the proceeds from the sale in *Klein* had already been transferred to the treasury. The Court determined in this case that because the money from the sale had been transferred

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\(^{35}\) *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). Congress had passed legislation concerning the forfeiture of property of people who had participated in the Confederate rebellion. After the president granted pardons, Congress passed legislation that forbade those the president had pardoned from bringing claims in the Court of Claims for the purpose of retrieving their property.


\(^{39}\) *Knote v. United States*, 95 U.S. 149 (1877).

\(^{40}\) *Knote v. United States*, 95 U.S. 149, 152 (1877).
to the treasury, the only way it could be withdrawn would be through an appropriation by Congress. The Court found that the limitation on the power was that it could only have effect going forward, it could not change the civil consequences already suffered. The Court gave a detailed definition of the legal effect of a presidential pardon to assist in clarifying this limitation:

A pardon is an act of grace...It releases the disabilities imposed by the offense and restores...all his civil rights. In contemplation of law, it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights...But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered nor does it impose on the government any obligation to give it.

In 1916, the Supreme Court decided the case of *Ex Parte United States*, which explained that the judiciary could grant reprieves in the form of stays of execution and postponement of punishment for other reasons. While the President has the power to grant pardons and reprieves, the court has concurrent authority to grant reprieves when they find such action prudent for the just outcome of the case.

In 1974, the Supreme Court heard the case of *Schick v. Reed* and held that the president had the power to issue pardons, specifically commutations, with attached conditions if those conditions did not unreasonably interfere with the constitutional rights of the person being pardoned. In this case, the defendant was in the military and had been convicted of murder and sentenced to death under the Uniform Code of Military Justice (“UCMJ”). The UCMJ requires that the president review and give final approval

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41 *Knote v. United States*, 95 U.S. 149, 154 (1877).
to any death sentence imposed in a military court.\textsuperscript{47} In 1960, President Eisenhower reviewed the sentence and commuted the death sentence to life in prison. The condition on the commutation was that Schick would never be eligible for parole.\textsuperscript{48} The Court held that this condition did not offend the Constitution because it was similar to laws that the federal and some state governments had in force at the time that disallowed parole for certain offenses.\textsuperscript{49}

What all these cases show is that the Supreme Court has acknowledged that the president has broad discretion when exercising the pardon power. However, the Court has also announced some limitation on the use of the power, albeit very broad limitations, which makes clear that the Supreme Court has also asserted its right to review clemency grants that face constitutional challenges. In addition to expressing the limitations that exist on the president’s pardon power, the Supreme Court has also recognized some of the different purposes for the pardon power. The Court has called the power “an act of grace” and one that “removes penal consequences.”\textsuperscript{50} However, these are not the only purposes that justify the use of the president’s pardon power.

\textit{Part II: Purposes, Justifications, and Roots of the Power:}

There are at least ten different purposes for using the pardon power and they fall in three categories: 1) Interests of the State, 2) Justice Related Interests, and 3) Personal Interests of the Executive.\textsuperscript{51} This list is by no means exhaustive, but does encompass many famous and infamous pardons which have garnered national attention throughout

\textsuperscript{47} Schick v. Reed, 419 U.S. 256, 95 S. Ct. 379 (1974)
\textsuperscript{51} These three categories are categories and nomenclature I decided to use based on the entirety of my research. These categories are not taken from any one source or group of sources directly.
history. Because the president’s power to pardon is plenary and there are so few defined limitations, the purposes of using clemency and the reasons used to justify granting clemency are almost limitless. It is important to understand that not every purpose the power might be used for is justifiable. For example, the purposes I list under “Personal Interests of the Executive” can be criticized as abuse of the pardon power. As such, no president would actually justify a grant of clemency by saying that it served his own interest.

1. State Interests:

There are three specific purposes for using the pardon power that might be justified as serving a state interest. First, the president may pardon as a means of preserving the Union in times of civil unrest or upheaval. This is a purpose that was specifically addressed by Alexander Hamilton when the Constitution was being considered for ratification. Hamilton wrote in *Federalist 74* that: “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; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.”

George Washington and Alexander Hamilton were both concerned with the fate of the Union when Washington became the first to use the pardon power after the Whiskey Rebellion in 1794. Washington marched troops into Western Pennsylvania and put down

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52 “Federalist LXXIV.” Barnes & Noble Inc., comp. *The Constitution of the United States of America and Selected Writings of the Founding Fathers.* New York: Barnes & Noble, 2012. Hamilton also wrote that the power should be vested in one man (the president) who should have the sole power of the pardon because the sense of responsibility would be stronger and the power would be easier to wield particularly in emergencies if it was wielded by only one man. Further, Hamilton was concerned that, particularly in times of civil unrest, that the power might need to be exercised quickly and that formalized governmental processes might take too long; a delayed grant might cause the government to miss a chance to curb unrest and rebellion.
a rebellion that was fermenting in that region. Two of the participants were arrested and
convicted of treason. Washington was uneasy about the entire affair and feared that the
convictions for treason seemed too much like the draconian laws of Ancient Athens.
Accordingly, Washington granted pardons to the two men who were convicted in 1795.53
This same fear over preservation of the Union, particularly strengthening the political
order, was present when Abraham Lincoln and Andrew Johnson, following the Civil
War, pardoned several Confederate rebels.54 In fact, several of the cases discussed earlier
show how it was the pardons of Lincoln and Johnson that led to several of the Supreme
Court decisions on the limitations and effects of a presidential pardon.55 A similar
justification was used by Presidents Ford and Carter when they granted pardons and
amnesties to people who had been charged or convicted of draft evasion and other war-
time crimes during the Vietnam War.56 They were concerned with healing societal
divisions across the country that resulted from the United States’ involvement in
Vietnam. President Ford instituted a conditional amnesty program.57 President Carter
gave unconditional pardons to draft evaders but, unlike Ford, excluded deserters and
soldiers who were dishonorably discharged.58 The first two of these examples are from a
time when there was full and armed rebellion against the United States government.

54 Kobil, Daniel T. “The Quality of Mercy Strained: Wresting the Pardoning Power from the King” 69 Tex.
55 See: Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867); United States v. Klein, 80 U.S. (13 Wall.) 128
(1871); and Knote v. United States, 95 U.S. 149 (1877).
56 Schorr, Lauren. “Breaking into the Pardon Power: Congress and the Office of the Pardon Attorney.” 46
http://content.time.com/time/specials/packages/article/0,28804,1862257_1862325_1862316,00.html.
http://content.time.com/time/specials/packages/article/0,28804,1862257_1862325_1862316,00.html.
Presidents Ford and Carter responded to civil unrest that was expressed more by widespread protest than by armed rebellion.

Second, the president could pardon because there is mounting political pressure to grant clemency to someone. One example of this purpose for using the power is the pardon of Eugene Debs in 1921. Debs was the founder of the American Railway Union and was convicted of sedition in 1918 for criticizing the United States government’s prosecutions of people for violations of the 1917 Espionage Act. Debs also ran for president several times and in 1920, while he was still in prison, won 915,000 votes. After serving three years of a ten year sentence, and an extensive pardon campaign, Debs was pardoned by President Warren G. Harding. Debs’ supporters on the left led marches demanding he be freed. President Wilson’s Attorney General requested that President Wilson pardon Debs, a request that was denied. Finally, after recommendations from his own Attorney General, it was President Harding who pardoned Debs and later invited him to the White House for a meeting, actions that upset many of Harding’s supporters on the right and even his wife.

The third purpose in this category is bringing closure to a situation and allowing the country to move beyond a controversial issue or set of issues that has caused political or social tensions. In many ways, this purpose is very much like the purpose of preserving unity; however, the biggest difference is that there is no organized civil unrest here. The best example of this purpose is the pardon of former President Nixon by President Ford. Ford stated in his proclamation granting Nixon a pardon that he feared a trial could actually cause civil unrest and uprising.\textsuperscript{63} Certainly some of these purposes and the justifications used may overlap. Furthermore, there may be other cases where a president has granted clemency for the purpose of placating some state interest and used a totally different justification. These three examples are a mere overview of some of the purposes of using the power and justifications that have been utilized to defend that use.

Though some of the examples used in this section were viewed as controversial at the time, particularly the Nixon pardon, there is a reasonable argument for using the power in this way. The purpose of using the power to placate state concerns is something that aligns with Hamilton’s concerns about preventing insurrection and unrest. While we do not know how any of these examples may have turned out if the president had not exercised the power to pardon, it is easy to imagine that tensions would have come to a head in an unpleasant way. For example, if Washington had not pardoned the rebels who were sentenced to death for their participation in the Whiskey Rebellion, one could imagine outrage over the executions resulting in another uprising in Western Pennsylvania. Repeated uprising could easily threaten the Union and create political

unrest within the country and perhaps even in the international community. So, using the power to placate state interests is a course of action that should be entered into carefully and sparingly, but which does serve an important purpose.

2. Justice Related Interests:

There are four specific uses of the pardon power that can be justified as serving justice related interests of the state. The first use under this category is correcting for a conviction in a case of actual innocence. As with anything run by human beings, the judicial system is fallible and may convict an innocent person. Over time, however, the federal judicial system has developed other review processes which attempt to safeguard against these type of errors and may also allow correction without resorting to presidential clemency. However, these safeguards and corrective measures are not full proof and the pardon power serves as a final protection for actual innocence.

The second purpose under this category is protecting against cases of “unfortunate guilt.” This is to say, cases when someone is guilty but there are certain facts should mitigate the degree of punishment but have not been used as such.64 One basic idea behind this use of the power is sometimes there are cases that the court is not adequately equipped to consider. This is the argument, that James Iredell made for the pardon power in his speech at the North Carolina Ratifying Convention. Iredell said, “It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore, an inflexible adherence to it, in every instance, might frequently be the cause of

very great injustice.” As society and technology advance, there may be times when courts are confronted with new fact patterns and mitigating circumstances with which they are unfamiliar and ill-equipped for considering. This is not to say that a person may not be guilty of a crime, but rather that a sentence for the crime would be grossly disproportionate because of the facts surrounding the commission of the crime. An example of unfortunate guilt, that existed not long ago, was when a person is convicted of possessing marijuana and sentenced to jail time even though the marijuana is for medical use related to the defendants’ cancer. The law and courts took many years to recognize, though some states and the federal government still do not, the efficacy of treating certain cancer side effects with marijuana.

The third purpose under this category is to repair lasting consequences of laws that are no longer supported by society. This purpose overlaps with the other purposes in this category and also with some of the state interest purposes of granting clemency. This purpose is also based on the idea that as society and law change, there are some things in the criminal justice system that are simply become outdated and punishments that become unjustifiable. For example, Jefferson pardoned everyone still in prison for violating the Alien and Sedition Act when he took office. Jefferson believed that the Alien and Sedition Act was patently unconstitutional. State executives have also used the pardon power for this reason. George Ryan, the governor of Illinois in 2005, commuted the sentences of everyone on death row in his state to life imprisonment

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because he felt that the death penalty was being administered in an unfair way. Accordingly, he believed that it was his duty to act and use his power to grant clemency to those on death row.  

The final purpose under this category is mercy. Unlike cases of actual innocence this purpose acknowledges that the petitioner is indeed guilty. Also, unlike unfortunate guilt or unfairness, there are no mitigating factors that the justice system failed to take into account or some kind of procedural shortcomings. This purpose is simply giving someone another chance or making an attempt to enhance the broad meaning of justice in some way.  

Mercy can be a means of furthering justice by adding the human element to the system which “partakes so much of necessary severity.”  

3. Personal Interests of the Executive:

Presidents may also use clemency for purposes that fit their personal interests but are more difficult to justify in principle. Pardons that seem to fit these purposes are often criticized as forms of “abuse.” Specifically, the president may use the power for someone with whom he have a personal relationship. A president may also use the power to give political favors, gain political advantage, or for self-protection.

The president might use the pardon power to pardon a friend or family member. A recent example of this is President Clinton’s January 20, 2001 pardon of his brother Roger Clinton for convictions of cocaine distribution and conspiracy. It should be noted that at least one president rejected the notion that the president or any other person

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should be able to secure clemency for a purely personal reason. William Taft, wrote that the idea that someone could secure clemency for a friend simply because he was a friend was a “curious notion…”

A president may pardon someone for the purpose of exchanging political favors. President Clinton pardoned Marc Rich, a friend of the Clintons who was convicted of tax evasion and racketeering among other things. It is widely believed that Rich’s ex-wife helped Rich by bribing Clinton for the pardon by donating a large sum of money to Clinton’s presidential library. So, the exchange of favors here is the pardon for the donation to the library.

The president may also use the power to gain political support. An example of this is the pardon of Jimmy Hoffa in 1971 by President Nixon. Jimmy Hoffa was the leader of the Teamsters Union and was convicted of mail fraud and jury tampering. President Nixon pardoned Hoffa in 1971 on the condition that he would not have any further dealings with managing the Union for a period of ten years. President Nixon was motivated to pardon Hoffa particularly because there was a promise of support by the

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Union. It is possible that this was also part of a political favor, evidenced by some conversations that President Nixon recorded in the oval office.

The other purpose under this category for which a president might use the pardon power is to grant clemency to someone who could implicate him in some criminal behavior. The most prominent alleged example of thus in recent history is President George H. W. Bush’s pardon of Caspar Weinberger. Weinberger was Ronald Reagan’s Secretary of Defense and was involved with the Iran-Contra Affair. Once again, the lines are blurred because in addition to precluding further investigation into his own role in the Iran-Contra Affair, President Bush had served with Weinberger in the Reagan administration and the two were friends. Bush pardoned Weinberger on December 24, 1992 saying that he wanted to spare the “patriot” a costly legal battle. Bush also considered Weinberger’s debilitating illness, that the Iran-Contra Affair was one of the most investigated matters in history, and Bush’s belief that Weinberger deserved to be honored by his nation and to have the opportunity to care for his ailing wife without distraction. Lawrence Walsh, the special prosecutor tasked with investigating the Iran-Contra Affair denounced the pardon as a means by which Bush was covering up his own involvement in the criminal activity and ending any further investigation into that.

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involvement.\textsuperscript{81} Walsh proclaimed, “The Iran-Contra cover-up, which has continued for more than six years, has now been completed with the pardon of Caspar Weinberger.”\textsuperscript{82} This pardon was controversial, widely debated, and even led to calls for reform by scholars.\textsuperscript{83}

\textit{Roots of the Pardon Power:}

The pardon power dates from at least the eighteenth-century B.C. and the Code of Hammurabi. However, because an exhaustive history is impractical for this paper, a brief exploration of the Ancient Athenian democracy, the Roman Republic, and the English prerogative of the King will be used to inform on the historical use and understandings of clemency power. The pardon power in the United States was modeled after the English prerogative of the King and also seems to have been informed by the justice system of the Athenian democracy based on Washington’s concern that the death penalty not be seen as a remnant of the Code of Draco.\textsuperscript{84} The English prerogative of the King was influenced by the justice system of the Roman Republic. Therefore, a review of these three systems is prudent for understanding the roots of the pardon power and of its potential purposes in the United States.

\textsuperscript{83} Jorgensen, James N. “Federal Executive Clemency Power: The President’s Prerogative to Escape Accountability.” 27 U. Rich. L. Rev. 345, 362 (1993). The University of Richmond also held a symposium the same year on the controversial pardons President Bush granted to people involved in the Iran-Contra Affair.
The pardon power in the Ancient Athenian democracy was a fairly simplistic process that was not subject to many rules or exceptions. Criminal complaints were brought to magistrates by private citizens and then the magistrate would order either a sort of arbitration or a trial. Trials were characterized by rules of evidence and procedure just as courts are today. In Ancient Athens defendants were tried before a jury of citizens who were tasked with determining the guilt or innocence of the person on trial. Typically, appeals were not permitted, and there were very few reasons that a person could be granted a new trial. This meant that most verdicts were final and thus the punishments imposed were final; the only remaining hope was a grant of clemency. Clemency was hard to obtain in the Ancient Athenian democracy because the person petitioning for the grant of clemency had to have the support of 6,000 citizens in a secret poll. Because the threshold for receiving clemency was so high, grants often had more to do with fame and popularity than with the administration of justice.

The Roman Republic had a more developed criminal justice system than the Athenians and by extension, a more developed clemency process. The judicial process in the Roman Republic was initially characterized by trials before magistrates not juries in temporary courts that were established as needed. The Romans later developed permanent courts in an attempt to rectify the problem of corrupt magistrates who were

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extorting money from citizens.91 Once the permanent courts were established, the Romans developed elaborate systems of criminal, civil, evidentiary, and courtroom procedure.92 During this time, clemency had many uses in the Roman Empire, most of them having nothing to do with resolving injustice. Roman leaders pardoned people for crimes that served some kind of patriotic purpose. An example of this would be a man killing his sister for speaking out against Caesar.93 The Romans also used clemency to preserve military units in cases of mutiny. Only one in ten soldiers in a mutinous unit would be executed and the rest would receive clemency.94 The Romans even pardoned out of a sense of superstition or chance.95 Typically, if a person who was on his way to be executed accidentally encountered a vestal virgin and she smiled at him, he would be pardoned. There was no particular reason for these pardons; it was really a matter of chance and a sort of superstition that the encounter was a sign from the gods.96 Finally, the Romans also pardoned as a show of mercy on holidays. The most famous example of this in our world was the pardon of Barabbas rather than Jesus Christ at the time of Passover.97

Roman uses of the pardon power were known to the framers of the United States Constitution and foreshadow its uses and justifications in the United States. As

97 Gospel of John Chapter 18.
mentioned above, Alexander Hamilton specifically spoke of using the power to preserve the Union in *Federalist 74.* The broad scope of the pardon power also allows the president to grant clemency for nearly any reason that he chooses and by any process he sees fit. The president could grant pardons for holidays or for no reason at all if he chose. Like the system in the United States, the Roman system for granting clemency was quite broad. The Roman system also provides a source for using the pardon power as a political tool for advancing state interest, particularly those that are not related to justice.

Although the Athenian and Roman examples of the clemency process present similarities, the founders certainly drew some inspiration from the English power to pardon. It should be noted here that the Roman system particularly influenced the English power to grant clemency. William Blackstone recognized this influence when writing about the execution of a pregnant woman of the Isle of Guernsey. Blackstone believed the execution to be barbaric and something that was not in step with the influence of Roman law. The power of English monarchs to grant clemency has existed from at least the time of the Norman invasion in the eleventh century.

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100 This is something that presidents have done. President Andrew Johnson granted amnesty to many former Confederate soldiers on Christmas Day in 1868. See: Andrew Johnson: "Proclamation 179—Granting Full Pardon and Amnesty for the Offense of Treason Against the United States During the Late Civil War," December 25, 1868. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project.* [http://www.presidency.ucsb.edu/ws/?pid=72360](http://www.presidency.ucsb.edu/ws/?pid=72360).
that time until the mid-sixteenth century, the power to pardon was vested not only in the monarch, but also with clergy, Parliament, some members of nobility, and even appendages of the judiciary. Over three centuries the power was slowly consolidated and there were struggles in Parliament to keep the monarch from being the only person able to grant clemency. This struggle was rooted in grants of clemency for personal gain by the monarch to cover up criminal activity by trusted advisors. Despite these struggles, in 1535, the power to grant clemency was fully vested in the monarch, Henry VIII.103

Although there were occasional calls for changes in the pardon prerogative of the monarch after 1535, Parliament did not put forth another major challenge to the monarch’s use of the power again until 1678. That year, King Charles II ordered the Earl of Danby, Thomas Osborne, Lord High Treasurer of England to draft a letter to the King of France offering a peace accord. This order came just days after Parliament had passed a resolution to fund a war with the French. Because Parliament had no recourse to punish the king, they tried to impeach Osborne. The king was called to testify before the House of Lords where he revealed that he had ordered Osborne to write the letter and that he was granting Osborne a full royal pardon. The Parliament was outraged and declared the pardon illegal in an attempt to continue Osborne’s impeachment. A legal battle ensued as the Parliament attempted to limit the king's power to grant pardons or to take it away altogether. Meanwhile, King Charles II was attempting to keep a loyal servant in his employ. As tensions built the king realized compromise was necessary and he made a deal with Parliament. It was agreed that: 1) the pardon would stand, 2) Osborne would

ultimately resign his position, 3) the impeachment proceedings would not be resumed, but also 4) Osborne would remain in the Tower of London for five years.104

In response to the Osborne case, Parliament included language in the new 1700 Act of Settlement which limited the pardon power because it prevented people from using a royal pardon to escape impeachment proceedings. However, the monarch was still able to pardon after impeachment proceedings were concluded.105 Here we can see how the framework of the pardon power in the United States Constitution was influenced by the English prerogative of the monarch to grant clemency. That included negative examples: thus the Constitution rejected English practice that allowed pardons after impeachment proceedings had concluded. 106

The English prerogative is another historical source for using the power to advance state interests. However, the Osbourne scandal also shows how executives have and may use the power to pardon to further their own interests. As with the power in the United States; although what King Charles II did was not necessarily wrong in the legal sense, it was criticized as a political abuse of the prerogative. The response from

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105 Duker, William F. "The President's Power to Pardon: A Constitutional History." 18 W&M L. Rev. 475, 469 (1977). It seems that the monarch cannot pardon to impede impeachment proceedings, but may in fact pardon an official for the crimes that led to the impeachment after the proceedings have finished. Such a pardon may or may not negate the impeachment, that point is unclear.

Parliament was to amend the law to prevent monarchs from taking similar action in the future.

Today, Queen Elizabeth II maintains the power to grant pardons. She has the power to grant either full or conditional pardons. However, there are limitations on her power to grant pardons and those she does grant are reviewable by the other governmental bodies of the monarchy.  

Parliament also has the power to grant pardons as evidenced by the passage of a recent resolution which pardons hundreds of men who were convicted of Gross Indecency, which is ostensibly being in a homosexual relationship. These modern day examples of the English power focus more on the use of the pardon prerogative as a means of furthering justice related interests.

When settlers first began relocating to the new English colonies in North America, there were varying schemes of power. However, as each colony became officially subject to English rule, the power of the pardon was vested in the royal governor of each colony who was appointed by the king. Clemency power was exercised by the governors much as it was exercised by the king. After the Revolutionary War, the colonists were distrustful of strong executives and thus there was no real national executive framework and certainly not one that vested great powers in any one

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108 Bowcott, Owen. "UK issues posthumous pardons for thousands of gay men." The Guardian. January 31, 2017. They have put safeguards in place to ensure that the men pardoned were in consensual relationships and of the age of majority at the time of conviction which eliminates pardons for acts that are still crimes in the monarchy, specifically rape. This act by Parliament was inspired in part by the Queen’s posthumous pardon of Alan Turing, a mathematician and inventor of fundamental principles of elections computing whose work on breaking the German Enigma Code made him a British World War II hero. The law is aptly named Turing's Law.
person or group. The Articles of Confederation provided no national criminal law, courts, or executive; and therefore, no occasion for a national pardon power. A few states, namely Maryland, North Carolina, New York, and South Carolina, did vest the power to grant clemency solely in the executive. The rest of the states vested the power jointly in the executive and legislative bodies or in the legislative body alone.

The Framers took some of their direct arguments for and against the clemency power being vested in the president from the works of scholars like John Locke, James Wilson, and Joseph Story. In Locke’s Second Treatise of Government, John Locke suggested that an executive in a democracy needed the power to “mitigate the severity of the law.” Scholars like William Blackstone and Baron de Montesquieu warned that the pardon power could not and should not exist in a democracy because the executive who made the laws would be contradicting himself if he granted pardons to people who had broken the law. It was James Wilson, a lawyer who is one of the only people to have signed both the Declaration of Independence and the Constitution, who argued that vesting the pardon power in the president would not give way to the dangers suggested by Montesquieu and Blackstone because the president himself was not above the law. Blackstone’s concern in the United States can be explained through the take-care clause

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and the apparent contradiction of that to the pardon clause.\textsuperscript{115} If the president has the duty to ensure that the laws are faithfully executed, how can he then absolve people of punishment for breaking the laws? Joseph Story, an early Supreme Court justice, later argued that because there was a separation of power, the pardon was not likely to give way to the dangers envisioned by Blackstone.\textsuperscript{116} Having lived under the English system of pardon so long, it is easy to understand how that may have influenced the Founding Fathers in drafting the Constitution.

On May 29, 1787, Charles Pinckney was the first to propose that the Constitution have a pardon clause.\textsuperscript{117} Pinckney proposed a clause which was virtually identical to the English Act of Settlement from 1700.\textsuperscript{118} After it was agreed that the Constitution should have a pardon clause, several other delegates made proposals about how the clause should be written and which branch or branches of government should have the power. Hamilton proposed an amendment to the clause that added the word offenses. Edmund Randolph proposed adding a caveat that the power could not be exercised in cases of treason. Another delegate at the convention, Roger Sherman, suggested that the Senate have the power to consent to pardons. George Mason believed that the Senate already had too much power under the framework that was in place. On September 10, 1787, a Committee of Style was appointed to take the issues that had been agreed upon and draft provisions to be voted on. Because the committee added the pardon clause, basic understandings that the power would be firmly vested in the president must have been

\textsuperscript{115} See: Article II, Section 3: United States Constitution. \url{http://constitutionus.com/}.
\textsuperscript{117} Messing, Noah A. "A New Power?: Civil Offenses and Presidential Clemency." 64 Buff. L. Rev. 661, 702 (2016).
agreed upon at that time. The committee brought the pardon clause to a vote on September 15, 1787 and the provision was approved with no recorded changes; that is the provision that is currently found in Article II, Section 2, Clause 1 of the Constitution.\footnote{Peterson, David Todd. "Congressional Power Over Pardon & Amnesty Legislative Authority in the Shadow of Presidential Prerogative." 38 Wake Forest L. Rev. 1225, 1229-1230 (2003).}

As the Constitution was put to the states for ratification, the pardon power was a matter which garnered attention. Alexander Hamilton composed \textit{Federalist 74} in defense of the pardon power and clarified his understanding of the goals of the pardon power. He called the power a "benign prerogative" which "should be as little as possible fettered or embarrassed" as a matter of "humanity and good policy." Similarly, James Iredell explained his view of the pardon power in a speech at the North Carolina Ratifying Convention. Iredell explained "There 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."\footnote{Krent, Harold J. "Conditioning the President's Conditional Pardon Power." 89 Calif. L. Rev. 1665, 1674 (2001).} With the ratification of the Constitution the pardon power for federal crimes was fully vested in the president of the United States. Hamilton’s defense shows that he believed the power was meant to be flexible and used as a political tool. Iredell’s defense makes it clear that the power was also meant to function as a check on or safety valve for the criminal justice system.

Hamilton’s anticipations about use of the pardon power were soon put into practice. Washington made use of the power during the Whiskey Rebellion and Jefferson pardoned people who were convicted under the Alien and Sedition Act.\footnote{Andrews, Evan. "7 Famous Presidential Pardons." \textit{History.com}. A&E Television Networks, 23 July 2013. \url{http://www.history.com/news/history-lists/7-famous-presidential-pardons}.} There would be a series of other cases in which the pardon power was used in pursuit of state interests.
pursuing political stability, even at the expense of justice. For example, President James Buchanan pardoned Brigham Young, the man who founded Salt Lake City, Utah and was a leader in the Mormon Church, for his participation of an incident related to a standoff with the army. Troops had been sent to the Utah Territory to take back control of the territory from Mormon leaders the government feared would institute a theocracy. The standoff lasted more than a year and the only major violence during the entire ordeal was the mass murder of more than 100 members of a wagon train that was headed to California. Buchanan pardoned Young and many other followers who participated in the massacre as part of the resolution to the standoff that included a peace accord between the Mormon group and the federal government.¹²²

There is some data on the number of pardons each president granted in the nineteenth century. Washington granted 16 pardons and from that time on use of the pardon power grew and became a staple of presidential administrations.¹²³ James Buchanan granted approximately 150 pardons and President Lincoln granted approximately 343. These numbers along with the policy of President Lincoln help explain why the president sought assistance in reviewing the incoming petitions for clemency.

¹²³ Figure 3. See Also: Hughes, Mark. "Presidential Pardons." Infoplease. Infoplease, 2000-2017. Web. https://www.infoplease.com/history-and-government/us-presidents/presidential-pardons. The numbers given for the 19th century are not completely reliable. By analyzing the figures given for the 20th and 21st centuries and comparing it with another source, it seems that the number of pardons is actually a combination of the number of general pardons and the number of commutations granted by each president. It does not appear that these numbers take into account amnesty, remission, or reprieves. However, this source is useful for obtaining an estimation of how many clemency petitions each president in the 19th century. Only two presidents, William Henry Harrison and James Garfield, failed to grant any petitions for clemency. Because their terms in office were so short, it is likely that these men never granted clemency because they did not consider any issues in their presidency to be so pressing as to warrant grants of clemency so early in their tenures. Many presidents grant clemency after serving more than one year in office.
In 1865, Congress created the Pardon Clerk which was a position in the Attorney General’s office. The Pardon Clerk was charged with preparing clemency requests for the Attorney General to review.\textsuperscript{124} The position of Pardon Clerk was created in an appropriations bill which was subject to little debate and passed by Congress on May 3, 1865.\textsuperscript{125} Prior to this legislation, that pardon power was always managed by the Attorney General and the Secretary of State who issued warrants of pardon on the president’s behalf.\textsuperscript{126} In 1891, in response to the growing number of pardons, Congress passed legislation replacing the Pardon Clerk with the Office of the Attorney in Charge of Pardons.\textsuperscript{127} Like the previous legislation, the Office of the Attorney in Charge if the Pardons was created by an appropriations bill which was not much debated according to the congressional record.\textsuperscript{128} The Office of the Attorney in Charge of Pardons was situated in the Department of Justice, which was created in 1870, even though it was meant to operate separately.\textsuperscript{129}

The office was renamed the Office of the Pardon Attorney in 1894 through an informal process.\textsuperscript{130} This change occurred after President Grover Cleveland issued an executive order which took pardon responsibilities that had been managed by the


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Secretary of State and vested them all in the Office of the Pardon Attorney and the Attorney General. The first regulations on the process used by the pardon attorney were put in place by the president in 1898. Today, there are a number of criteria considered by the pardon attorney when considering a petition for clemency including: post-conviction character, seriousness of the offense, remorse, and the need for relief. These criteria as well as the performance of the Office and proposals for its reform will be explored in the following parts.

**Part III: The Modern Presidency: From 1900 to Present Day**

In the years of the modern presidency, there have been many controversial grants of clemency. In addition to those already mentioned, President George W. Bush controversially commuted the jail sentence of Scooter Libby, an aide to Vice President Cheney, for his participation in Plamegate. The House of Representatives Judiciary Committee held hearings about the alleged misuse of the pardon power in response to Libby’s commutation. At the hearing, Professor Douglas Berman described his concern that Libby was shown more compassion by Bush than others for inappropriate reasons. The Libby commutation is arguably the most recent example of a president using the pardon power to advance an interest of the executive. As such uses are often met with criticism, Bush’s commutation of Libby was no exception. The commutation was the

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subject of several criticisms like those voiced by Professor Berman. Most pardons, however, receive much less attention.

The Office of the Pardon Attorney keeps extensive data on the number of clemency petitions granted by each president since 1900 shortly after the office was created. These statistics show per year: the number of petitions pending, the number of petitions received, the number of petitions granted, the number of petitions denied, and the number of petitions that are closed without presidential action. I have compiled the data from the Office of the Pardon Attorney into one table, Figure 1. The numerical analysis in this section cannot address whether there have been pardons that have been “abusive” in the sense of serving the President’s interests at the expense of justice or representative government. Instead, this section will focus on the patterns of other pardons that are revealed both by data and by the work of some other scholars.

One thing that affected the necessity for use of the pardon power was that until 1879, there was no right for review. In 1891, Congress passed the Evarts Act which created circuit courts of appeal. At first the types of cases which were allowed to be appealed were quite limited, but over time the right to appeal was expanded and became statutorily protected by 1907. However, 1910 saw the first major shift away from

136 One example is the pardon of George William Lindgren. Lindgren was convicted on charges of Bank Embezzlement in New York in 1975. (See: U.S. DOJ clemency recipients – Clinton). He was pardoned by President Clinton in the fall of 1994. It is unclear why Clinton believed this man deserved to be pardoned twenty years after his conviction.
137 Figure 1. It is important to note that this data only includes clemency decisions by president. It does NOT include data on larger grants of amnesty that were accomplished in any part through the legislative process (i.e. Presidents Ford’s and Carter’s Vietnam era amnesties and pardons).
clemency with the establishment of the parole process. Soon parole became the major way of reducing sentences rather than clemency.\footnote{Barkow, Rachel E. “Clemency and Presidential Administration of Criminal Law.” 90 N.Y.U. L. Rev. 802, 814-815 (2015).} It appears that the creation and institutionalization of the parole process reduced the need for commutations as opposed to other types of clemency. Although this decline is not apparent by looking solely at the number of commutations granted,\footnote{Figure 1.} it becomes more apparent when comparing the number of commutations granted to the number of federal cases resolved at the same time.\footnote{Moore, Kathleen Dean. “Pardons: Justice, Mercy, and Public Interest.” Oxford University Press: New York. 1989. p.217.} From 1910 through 1917 there were sharp increases in the number of cases disposed of while the number of commutations granted remained fairly stable and within sixty petitions of the 1910 level.\footnote{Figure 1.}

I have also compiled a chart that compares the numbers of clemency grants during each president’s term(s) to the number of criminal cases terminated over that same time and the number of petitions received as Figure 2.\footnote{Figure 2. See Also: U.S. DOJ Clemency Statistics. \url{https://www.justice.gov/pardon/clemency-statistics}; Federal Judicial Center. “Caseloads: Criminal Cases, 1870-2016.” \url{https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2016}.} While Figure 1 observes clemency decisions year by year, Figure 2 observes clemency decisions by presidential terms and adds figures on the number of cases resolved over the same time period which allows us to observe how clemency changes both in terms of demand during a single presidential term and in terms of change between first term and second term presidents. Figure 3 is a combination of the data from both the Office of the Pardon Attorney and infoplease
which tracks the number of pardons and commutations granted by each president over their entire presidency.\textsuperscript{145} Figures 4.1-4.3 are a snapshot of President Obama’s use of the pardon power.\textsuperscript{146}

   These figures, show that the use of general pardons and the use of commutations has ebbed and flowed over time. These numbers show a few interesting points. First, they show spikes in grants because of the surges in prosecutions associated with Prohibition and after World War I. Prohibition, which began in 1920 and ended in 1933 contributed to an over 200% rise in the number of federal cases being resolved each year. Another factor that contributed to this rise in cases was criminal prosecutions for war time crimes related to selective service and prohibited interactions with the enemy during World War I.\textsuperscript{147} Edward Rubin, a lawyer who studied at Duke University School of Law in the 1930s, conducted a study of federal prosecutions from 1901 to 1933 and which confirms the inference that can be drawn from my data; that war related crimes and Prohibition have an effect on the president’s pardon power. Rubin concluded that the number of federal prosecutions remained rather stagnant if he removed the war and Prohibition cases from the total number of cases commenced.\textsuperscript{148} After 1933, which marked the repeal of the Eighteenth Amendment, the number of federal cases resolved each year dropped by nearly 50% and then plateaued for approximately three decades. During this time, the number of cases resolved stayed mostly between 20,000 and 50,000


\textsuperscript{146} Figure 4.1; Figure 4.2; Figure 4.3; and U.S. DOJ Clemency Statistics. https://www.justice.gov/pardon/clemency-statistics.


cases per year and under 200,000 cases resolved in any presidential term.  
Similarly, although the number of clemency petitions received during these decades is more varied year to year it remains between 1000 and 2000 petitions per year until 1964, just three years before the number of federal cases saw its first jump above 12,000 case resolved per year since 1933. From these figures, we can see that demands on the use of the pardon power are also important in evaluating claims made about the pardon power.

While, the exact reason for the spike is unknown, the number of cases being resolved and the number of petitions being submitted to the Office of the Pardon Attorney increased as the United States became involved in the Vietnam War. Because we have seen that war has an effect of the number of federal prosecutions each year and the number of pardon petitions received, we can infer that the Vietnam War contributed to the increase. Furthermore, after the United States withdrew from the Vietnam War both the number of federal cases resolved and the number of petitions received declines again. With this example, it is important to remember that the data in this thesis does not taken into account the clemency legislation for those people convicted of draft evasion or desertion under the Ford and Carter administrations.

The data shows a sharp decline in the number of petitions that were granted starting in 1981, following the election of Ronald Reagan. However, the number of federal cases being resolved each year began to increase and continued on an upward trajectory for a decade. These figures appear to be associated with a rise in political pressures to be “tough on crime” that occurred in both national and state politics. Since

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149 Figure 2. *See Also:* Federal Judicial Center. “Caseloads: Criminal Cases, 1870-2016.” [https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2016](https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2016).

150 Figure 1. *See Also:* Figure 2; Federal Judicial Center. “Caseloads: Criminal Cases, 1870-2016.” [https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2016](https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2016).
the 1980s, tough on crime policies have expanded and there has been comparatively little update to the process of pardons. It is important to note that during this time, the number of requests for clemency remained fairly constant.

The number of petitions received compared to the number of petitions granted fit and help explain the claim that the president was not using the pardon power often enough, which became a more common criticism in the 1990s. Presidents were granting clemency less both in absolute numbers and compared to the number of cases resolved. Margaret Colgate Love argued that presidents feared political backlash from exercising the power.\textsuperscript{151} She further suggested that sentencing reforms in the 1980s created an idea that “appearing soft on crime could only get an elected official into trouble.”\textsuperscript{152}

The trend continued to fall under presidents following Reagan. Furthermore, each president after Reagan was accused of abusing the power in some way. The data does show that none of these controversial pardons (i.e. Bush – Weinberger; Clinton – Rich; and Bush – Libby) are representative of that president’s pardon policy. For example, Weinberger was only one of seventy-seven petitions for clemency that President Bush granted. When similar grants of clemency occur, they draw criticism which leads to debate and commentary and so the grant becomes an example that defines understandings or misunderstandings of the power. President Obama broke the downward trajectory of the trend. Obama campaigned on the issue of reforming mandatory minimum sentencing


laws. In 2014, President Obama began soliciting more clemency petitions and asked the Office of the Pardon Attorney to revise their procedure for making recommendations on clemency petitions with the goal of processing more petitions. However, despite these calls for more petitions, Obama did not begin granting large numbers of clemency petitions until after the midterm elections in 2014. This is a historical practice that is reflected in the data and becomes a pronounced trend in the 1990s. Finally in 2016 and 2017, President Obama granted clemency to hundreds. In so doing, Obama not only granted more clemency than most presidents in history, he also reversed the trend of clemency.

Events at the state level support the argument that political pressures to be “tough on crime” constrained use of executive clemency, as similar pressures applied to governors that applied to the president. The evidence about state clemency suggests that, since around 1980, changes in clemency practice at the federal level have been driven by broad political forces about crime and punishment that influenced all levels of government. Clifford Dorne and Kenneth Gewerth, criminal justice professors from Saginaw Valley State University, cite several examples of how the “tough on crime” movement has influenced state clemency systems. This movement led some states to

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155 Figure 5. Figure 5, a graph showing grants of clemency since 1980, shows this trend over the past three decades. In election years, the number of petitions granted drops significantly. So, in figure 5, election years are typically characterized by low valleys while the years between elections are typically characterized by peaks. See Also: Figure 1; Figure 4.2.  
give notice of clemency petitions to victims and their families, the judge, the prosecutor, and even the public. These notification often make obtaining clemency more difficult if the petition is opposed by anyone who is subject to the notification requirements.\textsuperscript{157}

Some legislatures made certain crimes, like sexual offenses against a child and child abuse, ineligible for clemency.\textsuperscript{158} Finally, many prisons created wards for the sick and elderly that were meant to protect those who cannot be housed in general populations because they require constant medical care. These wards allow the states to keep offenders imprisoned without risking backlash from the public for granting parole or pardons.\textsuperscript{159}

A specific example of how states responded to the “tough on crime” movement is Ohio’s legislation that required the governor to receive a report from the Adult Parole Authority before granting pardons. That law was changed to include commutations and reprieves after the Ohio Supreme Court ruling in \textit{State ex. rel. Maurer v. Sheward.}\textsuperscript{160}

The governor’s power to grant commutations had not been subject to the same constraint and the governor commuted a sentence which the legislature opposed on the grounds of the restraint. The Court determined that the legislation did not apply to commutations.\textsuperscript{161}

The response was to amend the law to subject commutations to the same restraints as

\textsuperscript{161} \textit{State ex rel. Maurer v. Sheward.} 1994-Ohio-496, 71 Ohio St. 3d 513, 524, 644 N.E.2d 369, 378.
pardons.\textsuperscript{162} The Ohio example shows that many of the issues and criticisms that face the federal power also face the states.

However, state data also shows that the recent shift in how pardons are viewed at the federal level may also apply to the states. Recently, the governor of Vermont, Peter Shumlin, was moved to asked for applications from people who were convicted of minor marijuana possession charges.\textsuperscript{163} Governor Shumlin did grant hundreds of pardons to people with minor marijuana possession charges and he received praise, although some was given with guarded enthusiasm.\textsuperscript{164} In 2012, Governor Jerry Brown of California pardoned seventy-nine people, which was a departure from how the pardon power had been used in that state for some time.\textsuperscript{165} Although California and Vermont are states that tend to be more liberal, the change can be seen in more conservative states as well. Governor Mike Beebe of Arkansas pardoned over 500 individuals during his time in office.\textsuperscript{166} While many governors were using the pardon power more generously, that is not the case in every state. Governor Scott Walker maintained the practice of using the power sparingly in Wisconsin.\textsuperscript{167}

\textsuperscript{162}Ohio Rev. Code Ann. § 2967.07.
The data available on the use of the pardon power shows that there is a clear ebb and flow not only in use by presidents but also in demands of the use of the power. However, it also shows that there is some correlation between the demand for use and the actual use. Furthermore, while President Obama granted more clemency than most presidents, he received more petitions than most too. Moreover, President Obama used his powers in a way that was analogous to other presidents. President Obama used his power to grant pardons as a policy tool to reduce the sentences of hundreds of nonviolent drug offenders. President Obama believed the minimum sentencing laws, particularly as they pertained to drug offenses, were a broken and unfair part of the criminal justice system. So, Obama used this tool to remedy a broken aspect of the criminal justice system and to serve a cause of justice. The way he approached fixing what he saw as an inherent problem was not novel since Jefferson used the pardon power to release those in prison for violating the Alien and Sedition Act and Roosevelt used it to release people convicted under Prohibition laws. Furthermore, Obama used the power in a way that is easily encompassed by the ideas of Hamilton, Iredell, and Taft.

**Part IV: Criticisms of How Presidents Have Used the Pardon Power:**

The alternating criticisms of President Obama’s alleged underuse or misuse of the pardon power were part of a long history of concerns. There are many theories about the proper use of the pardon power by presidents and how the power might be abused. However, there have been three main types of criticism in recent decades. The first is that the pardon power is not used often enough. The second criticism is that the power is abused by presidents who use the power improperly. Finally, as I mentioned above, there
are criticisms of management of the power under the Office of the Pardon Attorney. In this section, I summarize some of those claims and assess their merits.

1. Criticisms of the Use of the Power

As I mentioned in the last section, Love has suggested that the power of the president to grant pardons is underused and reached some conclusions of why that might be the case. Love’s conclusions are shared by several other commentators. Daniel Kobil is a law professor at Capital University who has studied the pardon power extensively for many years and has written several law review articles, newspaper pieces, and contributed to several books written on the subject. Kobil suggests that the power has fallen into disuse because there are no standards regulating the use of the power. Because Kobil has written several publications on the subject he has also proposed and evaluated several avenues of reform. Like Love, Kobil views the pardon power primarily as a tool for promoting justice interests.

This criticism has some validity. First, there has been a backlog of unprocessed clemency petitions so that suggests that more decisions should be made. There have been more petitions pending than decisions about petitions for over sixty years. However, more decisions does not necessarily mean that the president should grant more petitions for clemency, but that he and the staff charged with making recommendations should process more petitions and make determinations about grants and denials.

170 U.S. DOJ Clemency Statistics.
reviewing each petition that has been submitted for clemency; there is no objective means for determining whether the president is granting fewer petitions than is proper. Further, determining what is a proper grant of clemency is difficult because it is a definition that changes with political and social attitudes. The criticism of underuse is also marred by the fact that it would become an irrelevant concern if demand for the power were to decrease. However, there is an argument to be made that what President Obama accomplished in trying to eradicate sentencing disparities by using the pardon power served a legitimate justice related interest and that many such interests exist to which the pardon power could be applied. However, this leads to a question of whether those state interests could be better addressed through some mechanism other than use of the pardon power. The issues addressed by Obama, for example, could be addressed through passing new sentencing reform laws. Nevertheless, underuse does not seem an adequate foundation on which to build a case for meaningful and lasting reform because of the shortcomings of the argument.

The second major criticism of how the pardon power has been used is that it has been abused, particularly in recent decades. The criticism of abuse includes fears that the president will pardon people who are undeserving, pardon advisors to prevent investigation into his own wrongdoing, or the president might even pardon himself for his own wrongdoing. This argument is based on one of two motivations. The first motivation for the criticism of abuse is that by using the pardon power in a specific case threatens to frustrate the goals of the criminal justice system.\footnote{Johnson, Scott P. and Smith, Christopher E. “White House Scandals and the Presidential Pardon Power: Persistent Risks and Prospects for Reform.” 33 New Eng. L. Rev. 907, 929-930 (1999).} Two scholars who make this allegation are Scott Johnson, a political science professor from Frostberg State
University, and Christopher Smith, a criminal justice professor at Michigan State University. They claim that Clinton may have issued pardons to people who had been involved in the Whitewater land scandal to prevent any further investigation by Kenneth Starr into Clinton’s own involvement in the land deal. The premise of their argument that the president, in this particular case Clinton, could use the pardon power to conceal his own wrongdoing and evade justice. Furthermore, the people he did pardon did not deserve clemency.

This argument has some validity in that pardons that are meant for self-protection or simply because the president knows or gets something from the recipient are political abuse. However, compared to the number of cases resolved each year, the percentage of clemency grants is very small. There are too few cases to make this motivation for the abuse of criticism a valid argument; there are not enough cases to have a meaningful effect on the justice system. Even if a president were trying to undermine some aspect of the criminal justice system or some mission of the system, the number of pardons granted would have to account for a large percentage of cases resolved.

The second motivation for the abuse criticism is that the president might use the power to pardon himself for some wrongdoing. This idea is a bit ridiculous, because it has never happened. One scholar who studied this question, Brian C. Kalt, a law professor at Michigan State University College of Law, admits that this has never been the case.
happened.\textsuperscript{177} It is his position that the matter should be resolved preemptively, because
the abuse of the power by Clinton and Bush suggest that presidents are on a slippery
slope that may lead to self-pardon.\textsuperscript{178} Furthermore, this argument lacks validity because,
it seems unlikely the President would admit guilt or wrongdoing that comes with
acceptance of a pardon.\textsuperscript{179} First, it seems that the Supreme Court would be unlikely to
accept such a pardon as valid if it were challenged. However, Congress has the power to
impeach the president for abusing his power. This seems to me to be the best punishment
for such an act and the best defense against this concern.\textsuperscript{180}

While neither argument about abuse of the power seems to justify making
extensive reforms to the pardon power, there is an ethical argument to be made that
pardoning advisors to cover up wrongdoing is political abuse. It seems that no
convincing argument exists to prove that past abuses that have happened have been
dangerous to the republic. These cases have not threatened the established rules of any
branch of government nor have they been used to usurp authority for the purpose of
undermining the government. In fact, Hamilton mentioned that occasional abuse was a
possibility in \textit{Federalist 74}, but cautioned that having the power vested in one man was
better than having it vested in a large body.\textsuperscript{181} In my opinion, if abuse were to ever be

\textsuperscript{179} \textit{Burdick v. United States}, 236 U.S. 79, 35 S. Ct. 267 (1915). (Holding that accepting the pardon was an
admission of guilt by the offender.)
\textsuperscript{180} Haase, Paul J. “Oh My Darling Clemency: Existing or Possible Limitations on the Use of the
\textsuperscript{181} “Federalist LXIV.” Barnes & Noble Inc., comp. \textit{The Constitution of the United States of America and
perceived as truly dangerous to established systems of governance, the solution would be impeachment.

2. Criticism of Management of the Power

The pardon power is managed by the Office of the Pardon Attorney and there has been ample criticism of this system. In this section, I explain how the office works, the criticism, and the merits of that criticism.

The Office of the Pardon Attorney is tasked with assisting the president in exercising his executive clemency. The office receives most of the petitions for clemency, investigates them, and makes a recommendation to the president about how to proceed with each petition. The office also prepares the legal documents necessary for the president to proceed with a grant of clemency and notifies petitioners of the status of their petition. Essentially, the Office of the Pardon Attorney is tasked with advising the president about how and when to exercise his clemency power.

Typically, once a defendant exhausts his appeals and his federal habeas proceedings, the only recourse in a grant of clemency from the President of the United States. Generally, defendants must observe a waiting period before applying for clemency, which they can accomplish through the Office of the Pardon Attorney according to announced procedures. In some cases, pardons can be requested before a sentence has been completed or even before conviction, but these exceptions are atypical. Petitions are then reviewed and a determination is made and passed on to the Deputy

Attorney General. If the recommendation is endorsed by the Deputy Attorney General, it is sent to the president who is free to accept or reject it. If a president grants a pardon, he must sign a warrant of pardon which must be delivered to and accepted the defendant before it becomes legally binding and irrevocable. This process takes a great deal of time and there is a large backlog of petitions as evidenced by the number of petitions currently pending. This backlog is one thing that some commentators have cited to support their argument that the pardon power should be used more frequently.

Although the power was delegated to other executive officials before the creation of the pardon clerk in 1865, this marked the beginning of the bureaucratization of the pardon power. The 1865 appropriations bill allotted funds for one pardon clerk. However, in 1894, just under thirty years later, funds were appropriated for an office with not just an attorney but also support staff. As the office grew and developed into an agency, the president was faced with the typical principal-agent dilemma. The president is the principal holder of the pardon power but he relies on his agent to help him exercise the power.

185 "Office of the Pardon Attorney," The United States Department of Justice. United States Department of Justice, n.d. Web. https://www.justice.gov/pardon. The criteria that the Pardon Attorney considers when determining whether to recommend clemency are available on the Pardon Attorney’s website. The website also contains application forms and instructions sheets that further explain the process of the office.
188 See: Figures 1 and 4.2. See Also: U.S. DOJ Statistics. This has existed for several decades and was created by the increased number of federal cases resolved per year as well as the number of clemency petitions being filed per year.
In political settings, the principal-agent relationship exists between a branch of the government controlled by elected officials, in this case the president, and agencies that are made up of bureaucrats who are not elected. One way that this relationship can go wrong is through a lack of oversight by the principal which could lead to abuse of discretion on the part of the agent. There can also be a problem if divergent goals exist between the principal and the agent, that is to say that the agent’s goals do not align with the goals of the principal. These are just two of the ways that the principal-agent relationship can be strained, but are most compelling to this discussion.

The most dramatic evidence that the principal-agent problem can apply to the pardon power was revealed in 2014. Former Pardon Attorney Ronald Rodgers was criticized for blocking a high-profile clemency petition in 2008 and withholding pertinent information. Rodgers was being investigated by the Inspector General for disparities in the race of those who were having their clemency petitions granted and those who were having their petitions denied. However, it was the high-profile case of college football star, Clarence Aaron, that cemented Rodgers image as a poor agent. Evidence surfaced that Rodgers sent e-mails to other Justice Department employees stating that he hoped Aaron’s petition would be denied. Aaron was part of a drug conspiracy; however, he was not the buyer, seller, supplier, or dealer yet he received three life sentences.

a campaign by civil rights groups and even some politicians who lobbied for a pardon; many of these supporters also pushed for Rodgers’ removal when it came to light that he had concealed key evidence in the clemency investigation from President Obama and his administration.196 Rodgers was replaced by Deborah Leff around the same time that President Obama announced his intention to extend clemency to nonviolent drug offenders who were sentenced under mandatory minimum sentencing laws and his request for more clemency petitions.197

If a president would decline to take advice from the Office of the Pardon Attorney, he may be met with political resistance. However, the search for loyal agents to appoint may lead to calls that such a system is contradictory to the idea that recommendations should be impartial. Under the current organization, it is impossible for the Office of the Pardon Attorney to be neutral because it is housed in the Department of Justice, which is tasked with prosecutions, and the Pardon Attorney reports directly to the Deputy Attorney General who makes decisions about who should be prosecuted and on what terms. The Office of the Pardon Attorney has existed for over a century with the main purpose of advising the president and this has generally been the organization from the beginning. The office has gained a place in the executive bureaucracy that is considered important in the political sphere.198 As such, the agency cannot be easily constrained and neutrality is not something that is easily attainable given that it is part of

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The question regarding the Office of the Pardon Attorney then is whether there is a way that the president can continue to rely on the office as an advice structure while ensuring that he has access to all prudent information in light of the fact that he may not always have loyal agents in the office on whom he can rely for absolute candor.

Another related criticism of the Office of the Pardon Attorney is the fact that the office is housed inside the Department of Justice. Originally, the Pardon Attorney reported his recommendations about clemency petitions to the Attorney General who in turn passed it to the president. However, in 1978, Attorney General Griffin Bell passed the responsibility to the Deputy Attorney General. The Deputy Attorney General is also the person in charge of making decisions about who should be prosecuted for criminal offenses against the United States. There is a clear ethical dilemma that exists in this system. The person who makes the decisions about whom to prosecute and to what extent to prosecute them is unlikely to see a need for the people successfully convicted to be granted any sort of mercy. In fact, this is the sort of problem that Blackstone envisioned when he believed that if the power to pardon existed in a democracy, the person charged with using the pardon power would be the person in charge of making the law and there would be a great deal of self-contradiction. Blackstone thought that the

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contradiction inherent in having the same person dispense mercy that made the laws would weaken the legitimacy of the power.  

The Office of the Pardon Attorney has also come under scrutiny in the press for being understaffed and backlogged. Former pardon Attorney, Deborah Leff, wrote that president Obama announced his intention to grant more clemency and asked the Office of the Pardon Attorney to consider nearly 10,000 petitions. Arguably, part of the problem was caused by the president creating the increased workload by asking for more petitions. No one can discount the necessity of having support for any project, in this case having adequate staff to handle the increased number of petitions. One of Leff’s chief complaints was that her office was woefully understaffed. It is unclear whether the president could account for these needs without the support of Congress to appropriate more money to pay more staff members. The only action the president could foreseeably take without Congress would be to ask for petitions and cap acceptance at a number of petitions that could be handled by the staff in the Office of the Pardon Attorney. This would involve the Pardon Attorney occasionally refusing to accept new petitions while the staff processed what they had. Such a system is not likely to be received well if such a system could be properly implemented at all.

Leff also complained that she was denied access to the Office of White House Counsel. After recommendations go through the Deputy Attorney General they are

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reviewed by White House Counsel before going to the President. She alleged that this is different from the tenures of previous Pardon Attorneys and had the effect of depriving the president of conflicting opinions on specific petitions for clemency. This may highlight an lack of communication that always exists on some level but was particularly destructive to Obama’s clemency initiative.

The issue of resources is something that must be addressed if any president intends to grant clemency in the way Obama hoped to. An office cannot work beyond its capacity, but more staff requires money and money must come from congressional appropriations. Furthermore, communication is crucial to trying to streamline the process so that getting a petition from the Office of the Pardon Attorney to the President can be done along a path with little resistance. If all links in the chain understand what is crucial to having a petition granted, the recommendation at the Pardon Attorney level can be structured to convey the positive or negative aspects of a petition in the shortest possible form. So, if the criteria outlined by the Office of the Pardon Attorney is the most important to all these offices, recommendations can be structured to focus on these alone. If the Office of Legal Counsel has other criteria for considering recommendations those can be included in Pardon Attorney investigations and recommendation forms. Moreover, collaboration between the links in the chain with open lines of communication can facilitate quick resolution to problems and miscommunications that are inevitable with such a large and ongoing project. This is something that must come from within the

Office of the Pardon Attorney, the Deputy Attorney General and White House Counsel. Further, all three offices should be working on clear direction from the President who is tasked with the ultimate decision of whether to grant or refuse a petition.

As for the suggestion that the Office of the Pardon Attorney be moved, that is something that would need to be supported by Congress through appropriation. As appropriation bills have lots of moving parts, it is unclear how undertaking such a dramatic step which, would likely be quite costly, would be received. Furthermore, even if the office were moved to the White House, the President would likely still suffer the principal-agent dilemma because he would be unable to directly oversee the Pardon Attorney; he would at least have to rely on his chief of staff. The most important concerns of management that deserve consideration are resource issues and communication issues. The president will need the support of Congress for the resources, but could issue agency directives to try to deal with the communication issues. Furthermore, the president should resolve the issues of communication first, because if the process could be more streamlined, then fewer new resources may be required.

**Part V: Proposed Reforms and the Future of Presidential Clemency**

The scholars who have advocated for change of the pardon power on the basis of abuse have proposed reforms that target that problem. Similarly, scholars who have advocated for change of the pardon power on the basis of underuse have proposed reforms aimed at addressing that concern. The problem, having identified that there is at least some validity to both concerns, is that no reform takes both problems into account. The closest proposal to addressing both is one that has no formal institution of reform, but rather relies on each president to make the pardon power and its politically moral use
a priority. This may require support from Congress in the form of more resources; however, it does not necessarily mean stretching the capacity of the office by inviting new petitions. This could also mean clearing out the backlog and ensuring that there are good management techniques in place to ensure that the office is operating at its maximum level of productivity. There are also proposals that advocate changes to the management of the power by making changes to the Office of the Pardon Attorney. These proposals are not without problem either. In this section, I will examine these reforms and discuss their merits.

Scholars whose predominant concern is abuse of the pardon power tend to suggest Constitutional amendments to protect against this problem. Having concluded that abuse is not prevalent enough to warrant calls for reform, it nevertheless makes sense to consider whether any proposed reforms are likely to accomplish more good than harm. There have been three different proposals for how the Constitution might be amended to restrict the pardon power with the intention of preventing abuse. First, the Constitution could be amended to grant the Senate the power to override a presidential grant of pardon by a two-thirds vote of each house Congress within 180 days. This proposal is not novel; it was considered at the Constitutional Convention and in 1974 after President Ford pardoned former President Nixon. In 1974, this type of amendment was proposed by Senator Walter Mondale and has more recently been advocated for by a few legal scholars.


Another proposed amendment in 1977 inspired by President Ford’s 1974 pardon of Richard Nixon was that the Constitution should be amended to completely strip the president of his power to pardon.209 This proposal was made by William Duker, a Ph.D. student at Cambridge who eventually went on to become a prominent attorney. Such an amendment would divest the president of the power altogether in favor of placing it with another government branch or eliminating it entirely.210 The decision to grant the president the power to grant clemency was debated at the Constitutional Convention. Furthermore, Alexander Hamilton noted that the debate surrounding the power was whether and how to limit the executive.211 This suggests that the idea of allowing the chief executive some, if not exclusive, power to grant clemency seemed commonplace at the time. Hamilton and Iredell lauded the power as a political tool to preserve the Union and as a tool to ensure that justice was served in each case. Hamilton also stated that it was better for one man to have the power than a group because being solely responsible would cause the person with the power to try to steward it appropriately which a body of men with the power might rely on the power in numbers to misuse the power.212 Given this, I find the idea of stripping the pardon power from the president to be an overreaction at best and perhaps foolish at worst.

or Possible Limitations on the Use of the President’s Pardon Power.” 39 Am. Crim. L. Rev. 1287, 1304-1305 (2002).
The third proposal for a Constitutional amendment would impose a requirement on the president to provide a specific reason for every grant of clemency. Daniel Kobil, a law professor at Capital University, proposed this idea in 2001. The idea is that it would force the president to make better clemency decisions by forcing him to consider how he would justify the pardon. Ultimately though, Kobil decided that the need was not compelling because when explanation about a grant of clemency is needed, it is generally supplied by the executive. I tend to agree that a reason requirement might make the executive consider how to justify a pardon; however, it seems clear that such a requirement would not necessarily deter misuse. Everyone can justify things that they want to do, and there is no suggestion that the justification would have to be a good one. Therefore, it is unclear what purpose such an amendment would serve, particularly if it could easily be circumvented to grant pardons that are politically abusive. Furthermore, there is already a remedy for abuse of power by the President, impeachment.

These three possibilities, while reforms that address abuse, do not address concerns of underuse. In fact, some might actually exacerbate those concerns. The first proposal, involving the Senate, feeds the concern that Hamilton had in Federalist 74 when he suggested that if a group of men were to have control of the clemency power they may begin to act contrary to the moral need for the power and take comfort in the safety that comes with numbers. Furthermore, adding this additional step undermines the idea that the president can use the power to put down insurrections and political unrest.

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The second proposal, to eliminate the power entirely, certainly contradicts concerns of underuse because then the power would not be used at all. Even if this was adopted in favor of vesting the power in Congress, it is unclear how that would cure underuse. Finally, it makes no sense to impose a reason requirement when Kobil, the man who proposed the amendment, does not even see the usefulness in imposing it. However, it does not seem that this proposal would actually exacerbate underuse, but it is unlikely that such a requirement would compel the president to grant clemency more often.

While I disagree with the imposition of any of the proposed amendments, amendment is the only way that abuse of the power could be meaningfully addressed. Because the pardon clause in Article II of the United States Constitution is practically limitless, it would need to be amended to define and forbid abuse. Such a reform is impractical; in 240 years, the Constitution has only been amended eighteen times. Such reform also has the potential to frustrate the goals of the power as they were announced by Hamilton and Iredell if it is not done in a very cautious way. Pardons that were meant to release the safety valve on the criminal justice system or to preserve the Union during a rebellion could be prohibited by overly-broad prohibitions.

Scholars who are predominantly concerned with the power being underused tend to propose some type of congressional regulation or legislation on the use of the power through various forms of legislation. There are several proposals for legislation; however, the major downfall here is that any of the proposals would operate concurrent to the president’s power without addressing concerns of abuse. Congress could create
new bodies to be responsible for the pardon process. Daniel Kobil proposed an independent clemency board as a means of curing underuse. This would have to be an act of Congress because it would need to be created and funded through appropriations. Moreover, Congress would have to take appropriate legislative action to disband the Office of the Pardon Attorney in favor of this new body. This idea has some validity because it proposes that the board be made of experts in the field of law, psychology, medicine, sociology, and criminology. However, this board would exercise power of clemency concurrent to the president. Therefore, the president could still make decisions that were politically abusive. Therefore, while the idea may lead to more grants of clemency, it would not address concerns over abuse of the power.

Congress could impose new standards on the process of the pardon attorney through restrictions on appropriations. This proposal has been championed by two legal scholars in particular: Brian Hoffstadt and Todd Peterson. Both scholars suggest that in appropriations bills which fund the Office of the Pardon Attorney, Congress could impose restrictions on how funds could be allocated and require the Pardon Attorney to appear for oversight hearings to answer questions about how resources are spent and how

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220 Hoffstadt is a judge for the 2nd circuit court of appeals. Peterson is a professor of law at George Washington University.
the office is managed. Constant oversight may address concerns of underuse, because of accountability requirements. However, in the long term, this could also have the opposite effect. The Pardon Attorney may need to use resources to prepare for oversight hearings rather than on the process of granting clemency. Furthermore, whether this proposal proved effective or not, it would not prevent the President from disregarding recommendations from the Pardon Attorney or bypassing the Office of the Pardon Attorney entirely for any reason including granting pardons that are politically abusive.

Congress could create a judicial cause of action for clemency sending the process to the judiciary. The judicial cause of action would be a concurrent power to pardon with the president. This action too would not replace the president’s power but would be supplementary to it. Hoffstadt also proposed this as a means of ramping up use of the power. This proposal suffers from the same problem as other proposals of Congressional legislation, it in no way prevents abuse. Furthermore, it does not even guarantee that clemency would be granted more often; it only allows the Court, which is responsible for sentencing in the first place, to review their decisions at the request of a defendant. This proposal does not even guarantee that underuse, the concern it is meant to address, would be adequately addressed and for that reason seems to lack viability as a way of fixing any part of the pardon power.

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Finally, Congress could take pardoning upon themselves by passing private clemency bills by resolution.\(^{223}\) This was considered as a mechanism for addressing underuse by Hoffstadt. However, this means of granting clemency was protected by the Supreme Court in the case of *Brown v. Walker*.\(^{224}\) In *Brown*, the Court determined that Congress had the power to legislate amnesties.\(^{225}\) Like every other proposal, this would not abridge the president’s ability to grant clemency. Therefore, this would not prevent abuse. Furthermore, Congress having the power concerned Hamilton as a situation that might cause the Congress to act against the interest of clemency and justify it by their numbers.\(^{226}\) In addition, Congress is not known for resolving any issues in a timely manner, therefore it is unclear that this would actually prevent underuse in a meaningful way. It may ensure that more clemency is granted in terms of absolute numbers but it may take months or years for these bills to be passed which may not have the effect intended; to meaningfully increase clemency grants.

The idea behind congressional legislation that makes some sense is that Congress could use this power to assist in determining when there were interests that could be solved using the pardon power. For example, Congress could have used any of the proposed reform methods to suggest that mandatory minimums in nonviolent drug cases were too high and could have assisted in granting clemency to defendants who were victims of that inherent unfairness in the system. However, congressional regulation is costly to propose, enact, and implement. Those cost might be better spent correcting

issues of management of the pardon power like providing additional resources for the Office of the Pardon Attorney.

Congressional legislation would also be necessary to implement any reform on the management of the power through the Office of the Pardon Attorney. However, in this case, that regulation would be through appropriations. Congress could use appropriations to impose regulations on how petitions were processed. Congress could also use appropriations to fix the staffing problems that former Pardon Attorney Leff complained of as a basis for her resignation.

However, as I have mentioned, another major issue with the Office of the Pardon Attorney is the principal-agent problem. To solve this problem, the president could move the Office of the Pardon Attorney into the White House and exercise more direct supervision of the Pardon Attorney. This approach eliminates the need for relying on a third-party agency for supervision; however, it also assumes that the president or his chief of staff has the time to supervise the Pardon Attorney. As part of this solution, the president could also eliminate the requirement that the Pardon Attorney report to the Deputy Attorney General, and replace it with reporting to the Office of Legal Counsel or directly to the president. This type of solution may resolve some of the bias that is inherent in the current hierarchy of power over clemency petitions. While this proposal strikes me as a possible way of solving the principal-agent problem, it would not

necessarily address the valid concerns of underuse or abuse and so this too falls short as a suggestion for compelling reform.

Several scholars have suggested that a final reform option that would preserve flexibility in the process is that the president reform the process by taking it upon himself to ensure that clemency is a priority and work with the resources available to him without further legislation by Congress.\(^{229}\) This type of approach would be subject to the president’s own ethical and moral leanings.\(^{230}\) This is an appealing position because it is reform that does not require a great deal of cost to be paid in lobbying for new legislation or constitutional amendment. It also does not cost more in terms of political cost than any president is willing to spend. However, the problem is that this type of reform lacks permanency. The power to pardon is broken at least in terms of management and there is definitely some political abuse of the power. There is no suggested means of reform that is ideal for addressing the valid concerns about the power and so, Personal accountability and personal initiative by the president to fix the problems of management and address the political concerns associated with the pardon power is the best of only bad options.

**Conclusion:**

While criticisms that President Obama abused his power to grant pardons and reprieves prove unfounded, the power has been recently subjected to some abuse and thus some changes may be in order. President Obama’s use of the pardon power to correct what he viewed as an unfair and outdated aspect of the criminal justice system, overly

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harsh mandatory minimum sentencing laws, fits with historical understandings and uses of the pardon power. But concerns over underuse and political abuse have proved valid in that there is an existing backlog of unanswered petitions and there have been a few notable cases of abuse.

Existing proposals do not adequately address both aspects of concern over the pardon power. Calls for Constitutional amendment address concerns of abuse but not of underuse. Proposals for various kinds of Congressional legislation address concerns of underuse but not abuse. The proposal that is most compelling is that each president make the use of the power a priority of his administration.

Presidents should view using the pardon power in an ethical and moral way as a priority. First, the president should address management issues of the Office of the Pardon Attorney. The president should make his clemency initiatives clear and issue agency directives for realizing those initiatives to the Office of the Pardon Attorney, the Deputy Attorney General, and the Office of Legal Counsel. By building open channels of communication, the president can help streamline the process of getting a petition from the Office of the Pardon Attorney into his own hands. Notwithstanding the principal-agent issues that could arise, when every link in the chain understands their role and the role of the other links, barriers can be decreased and productivity increased. Increased productivity by all parties means more decisions made, whether for or against granting clemency, as well as eliminating and preventing backlogs of petitions. Once communication issues are resolved, the president can evaluate whether more resources are necessary to meet demands on the clemency power. If more resources are necessary, the president can lobby Congress for additional appropriations.
By placing responsibility for adequate management of the pardon power in the hands of the president, we can maintain the vision of the founding fathers. The pardon power can remain a “benign prerogative” which is “as little as possible fettered or embarrassed.” By preserving this vision, we preserve the flexibility with which the power was meant to be used. We also prevent legislation or amendments that could become outdated. It is my opinion that the president should make careful stewardship of the pardon power a priority; a call that has been part of his office since the founding of the nation.

### Figure 1

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Pardons Granted</th>
<th>Commutation Grants Granted</th>
<th>Remission Grants Granted</th>
<th>Denied or Closed without Action</th>
<th>Petitions Received and pending</th>
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<td>1900</td>
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<td>3,252</td>
<td>133,747</td>
</tr>
</tbody>
</table>


\(^{234}\) U.S. DOJ Statistics. See Also: Figure 1.

\(^{235}\) Federal Judicial Center. "Caseloads: Criminal Cases, 1870-2016." https://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2016. In years when a new president took office or a new presidential term began, I resolved the number of cases resolved issue by taking the number cases resolved and then dividing the total by twelve to achieve an average number of cases resolved per month. I then used that number to split the number between the presidential terms. This does create a small margin of error in the data; however, any deviation that may exist between the numbers here and the numbers contained in the original source does not change the outcome of the research.
<table>
<thead>
<tr>
<th>President</th>
<th>Years</th>
<th>Call 1</th>
<th>Call 2</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harry S. Truman</td>
<td>1949-1953</td>
<td>913</td>
<td>1,778</td>
<td>151,315</td>
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<tr>
<td>Dwight D. Eisenhower</td>
<td>1953-1957</td>
<td>451</td>
<td>2,269</td>
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<tr>
<td>Dwight D. Eisenhower</td>
<td>1957-1961</td>
<td>706</td>
<td>1,831</td>
<td>120,848</td>
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<tr>
<td>John F. Kennedy</td>
<td>1961-1963</td>
<td>575</td>
<td>1,749</td>
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<td>Lyndon B. Johnson</td>
<td>1963-1965</td>
<td>481</td>
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<td>31,054</td>
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<tr>
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<td>706</td>
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<td>127,054</td>
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<tr>
<td>Richard Nixon</td>
<td>1969-1974</td>
<td>926</td>
<td>2,591</td>
<td>224,588</td>
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<tr>
<td>Gerald Ford</td>
<td>1974-1977</td>
<td>409</td>
<td>1,527</td>
<td>104,492</td>
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<tr>
<td>James Carter</td>
<td>1977-1981</td>
<td>566</td>
<td>2,627</td>
<td>141,360</td>
</tr>
<tr>
<td>Ronald Reagan</td>
<td>1981-1985</td>
<td>240</td>
<td>1,909</td>
<td>131,589</td>
</tr>
<tr>
<td>Ronald Reagan</td>
<td>1985-1989</td>
<td>166</td>
<td>1,495</td>
<td>157,592</td>
</tr>
<tr>
<td>George H. W. Bush</td>
<td>1989-1993</td>
<td>77</td>
<td>1,466</td>
<td>214,480</td>
</tr>
<tr>
<td>William Clinton</td>
<td>1993-1997</td>
<td>56</td>
<td>2,970</td>
<td>176,955</td>
</tr>
<tr>
<td>William Clinton</td>
<td>1997-2001</td>
<td>403</td>
<td>4,519</td>
<td>212,928</td>
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<tr>
<td>George W. Bush</td>
<td>2001-2005</td>
<td>40</td>
<td>4,880</td>
<td>249,958</td>
</tr>
<tr>
<td>George W. Bush</td>
<td>2005-2009</td>
<td>160</td>
<td>6,194</td>
<td>272,540</td>
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<tr>
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<td>2009-2013</td>
<td>32</td>
<td>8,664</td>
<td>307,293</td>
</tr>
<tr>
<td>Barack Obama</td>
<td>2013-2017</td>
<td>1,895</td>
<td>27,880</td>
<td>255,184</td>
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</table>
## FIGURE 3

<table>
<thead>
<tr>
<th>PRESIDENT</th>
<th>YEARS</th>
<th>PARDONS GRANTED(^{236})</th>
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</thead>
<tbody>
<tr>
<td>George Washington</td>
<td>1789-1797</td>
<td>16</td>
</tr>
<tr>
<td>John Adams</td>
<td>1797-1801</td>
<td>21</td>
</tr>
<tr>
<td>Thomas Jefferson</td>
<td>1801-1809</td>
<td>119</td>
</tr>
<tr>
<td>James Madison</td>
<td>1809-1817</td>
<td>196</td>
</tr>
<tr>
<td>James Monroe</td>
<td>1817-1825</td>
<td>419</td>
</tr>
<tr>
<td>John Q. Adams</td>
<td>1825-1829</td>
<td>183</td>
</tr>
<tr>
<td>Andrew Jackson</td>
<td>1829-1837</td>
<td>386</td>
</tr>
<tr>
<td>Martin Van Buren</td>
<td>1837-1841</td>
<td>168</td>
</tr>
<tr>
<td>William H. Harrison</td>
<td>1841</td>
<td>0</td>
</tr>
<tr>
<td>John Tyler</td>
<td>1841-1845</td>
<td>209</td>
</tr>
<tr>
<td>James K. Polk</td>
<td>1845-1849</td>
<td>268</td>
</tr>
<tr>
<td>Zachary Taylor</td>
<td>1849-1850</td>
<td>38</td>
</tr>
<tr>
<td>Millard Fillmore</td>
<td>1850-1853</td>
<td>170</td>
</tr>
<tr>
<td>Franklin Pierce</td>
<td>1853-1857</td>
<td>142</td>
</tr>
<tr>
<td>James Buchanan</td>
<td>1857-1861</td>
<td>150</td>
</tr>
<tr>
<td>Abraham Lincoln</td>
<td>1861-1865</td>
<td>343</td>
</tr>
<tr>
<td>Andrew Johnson</td>
<td>1865-1869</td>
<td>654</td>
</tr>
<tr>
<td>Ulysses S. Grant</td>
<td>1869-1877</td>
<td>1,332</td>
</tr>
<tr>
<td>Rutherford B. Hayes</td>
<td>1877-1881</td>
<td>893</td>
</tr>
<tr>
<td>James Garfield</td>
<td>1881</td>
<td>0</td>
</tr>
<tr>
<td>Chester Arthur</td>
<td>1881-1885</td>
<td>337</td>
</tr>
<tr>
<td>Grover Cleveland</td>
<td>1885-1889</td>
<td>472</td>
</tr>
<tr>
<td>Benjamin Harrison</td>
<td>1889-1893</td>
<td>613</td>
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<table>
<thead>
<tr>
<th>President</th>
<th>Term</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grover Cleveland</td>
<td>1893-1897</td>
<td>692</td>
</tr>
<tr>
<td>William McKinley</td>
<td>1897-1901</td>
<td>918</td>
</tr>
<tr>
<td>Theodore Roosevelt</td>
<td>1901-1909</td>
<td>981</td>
</tr>
<tr>
<td>William H. Taft</td>
<td>1909-1913</td>
<td>758</td>
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<tr>
<td>Woodrow Wilson</td>
<td>1913-1921</td>
<td>2,480</td>
</tr>
<tr>
<td>Warren G. Harding</td>
<td>1921-1923</td>
<td>800</td>
</tr>
<tr>
<td>Calvin Coolidge</td>
<td>1923-1929</td>
<td>1,545</td>
</tr>
<tr>
<td>Herbert Hoover</td>
<td>1929-1933</td>
<td>1,385</td>
</tr>
<tr>
<td>Franklin D. Roosevelt</td>
<td>1933-1945</td>
<td>3,687</td>
</tr>
<tr>
<td>Harry Truman</td>
<td>1945-1953</td>
<td>2,044</td>
</tr>
<tr>
<td>Dwight D. Eisenhower</td>
<td>1953-1961</td>
<td>1,157</td>
</tr>
<tr>
<td>John F. Kennedy</td>
<td>1961-1963</td>
<td>575</td>
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<tr>
<td>Lyndon B. Johnson</td>
<td>1963-1969</td>
<td>1,187</td>
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<td>Richard Nixon</td>
<td>1969-1974</td>
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</tr>
<tr>
<td>Gerald Ford</td>
<td>1974-1977</td>
<td>409</td>
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<tr>
<td>James Carter</td>
<td>1977-1981</td>
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<tr>
<td>George H. W. Bush</td>
<td>1989-1993</td>
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<tr>
<td>William Clinton</td>
<td>1993-2001</td>
<td>456</td>
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<tr>
<td>George W. Bush</td>
<td>2001-2009</td>
<td>176</td>
</tr>
<tr>
<td>Barack Obama</td>
<td>2009-2017</td>
<td>1,927</td>
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</table>
## Figure 4.1: President Obama’s First Term

<table>
<thead>
<tr>
<th>Year</th>
<th>Petitions Pending</th>
<th>Petitions Received</th>
<th>Petitions Granted</th>
<th>Petitions Denied</th>
<th>Petitions Closed without Presidential Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009 Pardons</td>
<td>1,040</td>
<td>232</td>
<td>0</td>
<td>0</td>
<td>132</td>
</tr>
<tr>
<td>2009 Commutations</td>
<td>903</td>
<td>1,086</td>
<td>0</td>
<td>0</td>
<td>120</td>
</tr>
<tr>
<td>2010 Pardons</td>
<td>1,140</td>
<td>262</td>
<td>0</td>
<td>0</td>
<td>116</td>
</tr>
<tr>
<td>2010 Commutations</td>
<td>1,869</td>
<td>1,902</td>
<td>0</td>
<td>0</td>
<td>340</td>
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<tr>
<td>2011 Pardons</td>
<td>1,285</td>
<td>331</td>
<td>17</td>
<td>872</td>
<td>84</td>
</tr>
<tr>
<td>2011 Commutations</td>
<td>3,431</td>
<td>1,585</td>
<td>0</td>
<td>3,104</td>
<td>389</td>
</tr>
<tr>
<td>2012 Pardons</td>
<td>643</td>
<td>383</td>
<td>5</td>
<td>147</td>
<td>48</td>
</tr>
<tr>
<td>2012 Commutations</td>
<td>1,523</td>
<td>1,547</td>
<td>1</td>
<td>689</td>
<td>148</td>
</tr>
</tbody>
</table>

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237 U.S. DOJ Statistics - This table is adapted from the information available from the Office of the Pardon Attorney with the intention of creating a reference specifically for this thesis.
### Figure 4.2: President Obama’s Second Term

<table>
<thead>
<tr>
<th>Year</th>
<th>Petitions Pending</th>
<th>Petitions Received</th>
<th>Petitions Granted</th>
<th>Petitions Denied</th>
<th>Petitions Closed without Presidential Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013 Pardons</td>
<td>826</td>
<td>303</td>
<td>17</td>
<td>314</td>
<td>44</td>
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<tr>
<td>2013 Commutations</td>
<td>2,232</td>
<td>2,370</td>
<td>0</td>
<td>1,577</td>
<td>240</td>
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<tr>
<td>2014 Pardons</td>
<td>754</td>
<td>273</td>
<td>13</td>
<td>154</td>
<td>36</td>
</tr>
<tr>
<td>2014 Commutations</td>
<td>2,785</td>
<td>6,561</td>
<td>9</td>
<td>1,226</td>
<td>222</td>
</tr>
<tr>
<td>2015 Pardons</td>
<td>824</td>
<td>294</td>
<td>12</td>
<td>142</td>
<td>6</td>
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<tr>
<td>2015 Commutations</td>
<td>7,889</td>
<td>2,999</td>
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<td>782</td>
<td>915</td>
</tr>
<tr>
<td>2016 Pardons</td>
<td>958</td>
<td>997</td>
<td>6</td>
<td>0</td>
<td>34</td>
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<tr>
<td>2016 Commutations</td>
<td>9,115</td>
<td>11,028</td>
<td>583</td>
<td>6,507</td>
<td>1,701</td>
</tr>
<tr>
<td>2017 Pardons</td>
<td>1,920</td>
<td>320</td>
<td>142</td>
<td>79</td>
<td>8</td>
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<tr>
<td>2017 Commutations</td>
<td>11,355</td>
<td>4,071</td>
<td>1,043</td>
<td>4,864</td>
<td>177</td>
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</tbody>
</table>

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238 U.S. DOJ Statistics - This table is adapted from the information available from the Office of the Pardon Attorney with the intention of creating a reference specifically for this thesis.
### Figure 4.3: Totals from President Obama’s Presidency

<table>
<thead>
<tr>
<th>Year</th>
<th>Petitions Pending</th>
<th>Petitions Received</th>
<th>Petitions Granted</th>
<th>Petitions Denied</th>
<th>Petitions Closed without Presidential Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Pardons</td>
<td>3,395</td>
<td>212</td>
<td>1,708</td>
<td>508</td>
<td></td>
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<tr>
<td>Total Commutations</td>
<td>33,149</td>
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<td>18,749</td>
<td>4,252</td>
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</tbody>
</table>

239 U.S. DOJ Statistics - This table is adapted from the information available from the Office of the Pardon Attorney with the intention of creating a reference specifically for this thesis.
Figure 5:
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