

Executive Clemency in the United States: Origins, Development and Analysis (1900-1993)

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Abstract

Throughout our nation's history, the exercise of executive clemency has rarely prompted widespread controversy. As a consequence, it is likely presidents have utilized the clemency power with much greater frequency than the average American would commonly assume. Where scholarly literature addresses clemency, there is a general focus on historical or legal development, extraordinary cases or classic constitutional issues. In this study, I review the current literature with the specific intention of building a theoretical foundation for empirical analysis of this important Article II power. I also present summary statistics on the exercise of clemency in seventeen administrations (from William McKinley to George Bush). The analysis and discussion center on trends and possible explanations for the outcomes of the 71,205 clemency applications covered by the data. A cogent framework for future multivariate statistical analysis is thus provided.

Introduction

The Constitution vests the President of the United States with "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment" (Article II, § 2). The granting of pardons, reprieves, and manifestations of the executive clemency power in general have been variously described as "entirely discretionary" (Ledewitz and Staples 1993), "unilateral," "notoriously non-reciprocal" (Orman and Rudoni 1979), "virtually unassailable" (Boudin 1976), "absolute" (Stephenson 1980), and "perhaps the most imperial" of presidential powers (Adler 1989). On the other hand, these powers have also been described as "anomalous" (Sebba 1983), "delicate" (Adler 1989), "shrouded in mystery" and "fraught with arbitrariness at a time when other

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aspects of our judicial system are becoming more open and fair pursuant to the dictates of the Due Process Clause" (Kobil 1993).

Academic discussions of executive clemency powers typically trace their interesting origins and transformation in common law, their brief consideration at the constitutional convention and subsequent developments in classic Supreme Court decisions (see, for example, Adler 1989; Boudin 1976; Cowlshaw 1975; Duker 1977; Jorgensen 1993). Other scholars have specifically focused on the exercise of executive clemency in particular areas of law, such as the death penalty (Abramowitz and Paget 1964; Bedau 1990; Kobil 1993; Ledewitz and Staples 1993; Radelet and Zsembik 1993) or address more political concerns in highly publicized, controversial cases (Adler 1989; Boudin 1976; Clark 1984; Jorgensen 1993; Orman and Rudoni 1979; Rozell 1994; Shichor and Ranish 1980; Smith and Johnson 1989). Examinations of clemency powers do, however, share two common characteristics. They usually appear outside the social science journal format¹ and rarely involve the analysis, or even presentation of data.

In this study, I review current literature with respect to the origins and development of executive clemency in the United States. I then briefly explain procedural guidelines for federal clemency applications and examine the major explanations of executive action in the literature. I then present summary statistics on clemency from the administration of William McKinley (in 1900) to that of George Bush. After presenting summary statistics more appropriate for comparative analysis (between administrations), I give some attention to trends in clemency actions throughout the century. Concluding remarks address the importance of this study as well as the need for (and appropriateness of) multivariate statistical analyses of clemency decision making.

Origins, Development of Executive Clemency

At common law, the King possessed broad powers to pardon offenses, with or without

1. The author's extensive review of the literature uncovered a mere four articles related to executive clemency in social science journals. Each appeared in *Presidential Studies Quarterly* (Orman and Rudoni 1979; Pederson 1977; Rozell 1994; Shichor and Ranish 1980).

condition, either before or after indictment, conviction and sentencing (Jorgensen 1993). Although clemency power ultimately became an exclusive royal prerogative, the crown originally had many competitors vying for this power; including the Church, the great earls, the feudal courts, and Parliament (Ringold 1966).

Adler (1989) notes the historical record shows "the pardon was not so much an act of grace as it was a tool of pecuniary and political aggrandizement. From the outset, the pardon was abused for personal gain" (213). The sale of pardons was a common abuse and pardons requiring fees occasionally allowed for the possibility of deferred payments (Adler 1977; Cowlishaw 1975).² "Conditional" pardons were used as a means of populating the colonies (Cowlishaw 1975) and general pardons were customarily issued subsequent to declarations of war. Armies were supplemented by the forgiveness of homicides and felonies in return for one year's service in the military (Duker 1977). On one occasion, Edward III, granted a "general and special pardon for all crimes, treason itself not excepted, without any fine, or paying of fees [and] set all debts to the crown, and prisoners for criminal matters at liberty" in order to celebrate his fiftieth year of rule (Duker 1977, 479). The systematic abuse of the pardoning power and the "arbitrary and irrelevant" reasons supporting issuances provoked several complaints from Parliament (Adler 1989, 213). The record, beginning with the first formal complaint in 1309 (Duker 1977), is "littered with defeats," but in 1389 Parliament enacted a statute that forbade the issue of pardons in the case of serious crimes unless the pardon specified the nature of the crime and contained the name of the culprit (Adler 1989, 213; see also Duker 1977, 480-87).³ The statute remained a part of the law of pardons, but was considerably weakened by a general lack of enforcement and another string of Parliamentary defeats (Adler 1989; Duker 1977). By the time of Henry VIII (1535), the power to extend clemency became the sole right of the Crown.

2. James II sold pardons for 16,000 pounds sterling. He kept half and divided the rest between the two ladies "then most in favor" (Moore 1993, 282).

3. For a brief, but excellent discussion of the development of the pardoning power prior to 1300, see Duker 1977, 476-80.

The absolute vesting of clemency power in the Crown remained essentially unchanged until 1678 when a controversy arose over whether Charles II could employ his power to grant clemency to frustrate Parliament's impeachment of Thomas Osborne, the Lord High Treasurer of England. Following the Osborne impeachment, Parliament restricted the King's authority to extend clemency by enacting measures prohibiting royal clemency in cases in which persons were convicted of causing others to be imprisoned outside the realm, depriving the King of the power to suspend the operation of a given law or to disregard its execution, and prohibiting the use of pardoning powers in impeachment cases.⁴

English practice greatly influenced those who drafted the state constitutions during the revolutionary war period. The general pattern in the royal colonies was to permit the governor to pardon in all cases except treason and wilful murder. In the remaining colonies, the chief executive exercised the clemency power with occasional assistance from other authorities (Abramowitz and Paget 1964). Post-revolution constitutions naturally sought to curtail the powers of the executive. Most states would not allow pardons in the case of impeachment. Some, like Pennsylvania and New York, would not allow pardons in cases involving treason. The Massachusetts Constitution of 1780 permitted pardons only after conviction. The Georgia Constitution of 1777 strictly forbade the governor from issuing pardons and the New Hampshire Constitution of 1784 vested such power exclusively in the legislature (Adler 1989, 215).

There was "relative paucity of debate" at the Federal Convention on the matter of pardoning powers (Jorgensen 1993, 352), but the issue of pardons in the case of treason was "particularly troublesome" for the framers. It "provoked an impassioned debate" that was not resolved until the last day of the convention (Adler 1989, 216). Charles Pickney's *Draft of a Federal Government* and Alexander Hamilton's *Plan of Government* included considerations of the pardoning power, but the

4. Habeas Corpus Act of 1679 (31 Car. 2, ch. 2, § 11 Eng). 1689 Bill of Rights (W. & M., ch. 2, § 2 Eng). Act of Settlement (13 H.C. Jour. 625 - 1700, 16 H.L. Jour. 738 - 1700).

major plans, the Virginia plan and the New Jersey plan, contained no such provisions.⁵ The resolutions adopted by the Convention and submitted to the Committee on Detail were also silent on the topic. The Committee on Detail, however, adopted a suggestion placed in the margin of the Virginia plan by one of its members, John Rutledge of South Carolina.⁶ Rutledge added to the powers of the executive "the power of pardoning" except in the case of "an impeachment" (Humbert 1941, 15). The Committee later reported a power "to grant reprieves and pardons," and added pardons "shall not [be] pleadable to an impeachment." Roger Sherman of Connecticut suggested limiting the granting of reprieves "until the ensuing session of the Senate" and allowing pardons "with the consent of the Senate." Luther Martin of Maryland moved to insert "after conviction" after the words "reprieves and pardons." The Convention accepted only a slight modification suggested by Virginia's George Mason: the words "except in cases of impeachment" were inserted after "pardon" (Adler 1989, 216; Duker 1977, 501-2).⁷ There was little further discussion of the pardoning power at the state ratifying conventions (Duker 1977; Humbert 1941).⁸

The Supreme Court has been the ultimate interpreter of the clause granting the president clemency power. While some commentators hold the view that the Court has granted the president a wider scope of authority than was enjoyed by the monarchs (see, for example, Jorgensen 1993), all agree that the scope of clemency powers is broad.⁹ Chief Justice John Marshall set the tone for the

5. *Draft of Government* provided that the executive "shall have power to grant pardons and reprieves, except in impeachments." *Plan of Government* provided "the supreme executive authority [the] power of pardoning all offenses, except in treason, which he shall not pardon, without the approbation of the Senate" (Humbert 1941, 15).

6. Rutledge served on the Committee along with William Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and James Wilson of Pennsylvania.

7. Edmund Randolph of Virginia, with the support of George Mason (also of Virginia), sought to further except "cases of treason" (Adler 1989, 216; Duker 1977, 502; Jorgensen 1993, 345, 352 at note 54).

8. "Some arguments against placing the power of granting pardons in the executive, except in the case of impeachment, were presented. These arguments in turn evoked replies, most of which can be found in the number of *The Federalist* [74] contributed by Hamilton" (Humbert 1941, 17).

9. For a brief discussion of the Court rulings dealing with the limitations of executive clemency, see Jorgensen (1993, 357-8).

Court's interpretation of the pardoning power in *U.S. v. Wilson* (1833).¹⁰ Marshall described the power as "exercised from time immemorial by the executive of that nation whose language is our language" and prescribed looking "into their books for the rules prescribing the manner in which it is to be used." The Court has since declared the right of presidents to remit fines and forfeitures,¹¹ pardon criminal contempt of court,¹² award conditional pardons,¹³ commute sentences¹⁴ - even against the wishes of the individual(s) involved,¹⁵ and has declared the pardoning power "unlimited" (with the exception of treason) and "not subject to legislative control."¹⁶

Highlights in Executive Clemency

George Washington initiated the use of the pardoning authority in 1795 when he issued a proclamation of amnesty to participants in the so-called Whiskey Rebellion (Adler 1989). In August of the previous year, Washington issued a proclamation commanding insurgents in western Pennsylvania to disband their increasingly organized protests of an excise tax on whiskey contained in Hamilton's fiscal program. Thirteen thousand militiamen (from Pennsylvania and surrounding states) were called out after a three week 'grace' period. The uprising then quickly disintegrated and a few of its leaders were tried for treason (Kelly, Harbison and Belz 1991, 128). Washington pardoned the only two persons convicted, describing one as a "simpleton" and the other as "insane" (Ifft 1985, 176). Few grants of executive clemency have generated much controversy since the "whiskey rebels," but some acts have certainly been more notable than others.

In 1799, President John Adams faced another insurrection against the collection of a federal tax, this time in the eastern part of Pennsylvania. Federal assessors were assailed by a mob of

10. 32 U.S. (7 Pet.) 150.

11. *The Laura*, 114 U.S. 411 (1885), *Illinois Central Railroad v. Bosworth*, 133 U.S. 92 (1890).

12. *Ex Parte Grossman*, 267 U.S. 87 (1925).

13. *Ex Parte Wells*, 59 U.S. (18 How.).

14. *Armstrong v. United States*, 80 U.S. (13 Wall) 128 (1871).

15. *Chapman v. Scott*, 10 F.2d 156 (D. Conn. 1925), *Biddle v. Perovich*, 274 U.S. 480 (1927).

16. *Ex Parte Garland*, 71 U.S. (4 Wall) 333 (1866).

German American farmers who were, in turn, taken into custody by a federal marshall and his posse. Jacob Fries then led an armed group of about one hundred men against the Marshall, forcing the release of the farmers. Adams requested a contingent of militia from the Governor of Pennsylvania, mobilized United States army troops stationed in New York and New Jersey, and sent members of a voluntary cavalry to the scene. There was no show of resistance upon the arrival of the forces, and Fries was apprehended peacefully. He and two others were indicted on the charge of treason, found guilty and sentenced to be hanged.¹⁷ Against the unanimous advice of his Cabinet, Adams pardoned the condemned men and all of those involved in the affair. Smith notes "most Americans approved the pardon and applauded the President for granting it" (1962, 1034). The Alien and Sedition Acts (1798) made it illegal for any person to write, print or publish "any false, scandalous and malicious writing [against] the government of the United States, or either House of Congress [or] the President [with] intent to defame [or] to bring them, or either of them, into contempt or disrepute; or to excite against them the hatred of the good people of the United States." The Adams administration vigorously enforced the Act, securing fifteen indictments and ten convictions (Kelley, Harbison and Belz 1991, 132). Thomas Jefferson, however, described the Sedition Act as a "nullity" and compared it to Congress ordering all "to fall down and worship a golden image" (Fisher 1990, 641). After the elections of 1800, Jefferson pardoned every person prosecuted under the Acts. Later, Congress also pronounced the statute "unconstitutional" and "void," appropriating funds to reimburse those subjected to fines (Fisher 1990, 620).

In 1815, James Madison pardoned a class of individuals known as the "Barataria Pirates." The group, about 800 strong, was led by Jean Laffite and maintained its headquarters on one of islands in the many bay and inlets on the Mississippi delta off the coast of Louisiana. The British government offered Laffite \$30,000, a pardon, and a captaincy in exchange for assistance in the

17. The guilty verdict of the first trial was nullified as it was established that one of the jury members used harsh expressions respecting Fries *after* being summoned. A second trial was conducted by Supreme Court Justice James Iredell in Philadelphia.

attack on New Orleans. Laffite not only refused the offer, but informed the government of the United States and offered it the services of barataria smugglers (Hickey 1989; Mahon 1972).¹⁸

Deserters and polygamists have also been the recipients of acts of executive clemency but, until the Civil War, the exercise of the pardoning authority had not provoked serious controversy or question (Adler 1989, 219; Boudin 1976, 14; Duker 1977, 509; Humbert 1941, 36-7; Sebba 1983, 59). From the very beginning of his administration, Lincoln "applied a policy intended to encourage desertions from the enemy without fear of punishment" (Dorris 1953, 86). His December 1863 proclamation of general amnesty was greeted with much opposition by the people of the north and, consequently, many regarded his assassination as "a godsend to the country" (Dorris 1953, 94). Andrew Johnson's 1865 clemency program sparked the initial threats of his impeachment (Dorris 1953, 305), but his December 25, 1868, pardon of Jefferson Davis and other confederate soldiers was certainly the most salient exercise of executive clemency to date. Davis was charged with complicity in the assassination of Lincoln and his captors were rewarded \$100,000.¹⁹ Johnson received thousands of passionate letters arguing for and against further punishment of Davis. To complicate matters, Davis (unlike General Lee) refused to petition the President for clemency. In fact, Davis told the 1884 Mississippi legislature, "repentance must precede the right of pardon, and I have not repented." Davis added he "would again do" what he did in 1861 "if it were to do over again" (Dorris 1953, 304). As the end of Johnson's administration approached, Davis was the only civil leader of the Confederacy imprisoned. The awkward nature of the imprisonment and the persistent lobbying of prominent individuals encouraged Johnson to issue the amnesty.

President Warren G. Harding's December 23, 1921, commutation of the sentences of twenty-four political prisoners, including labor organizer and socialist Eugene Debs, received some

18. After the war, Laffite established the town "Campeachy" on Galveston Island and proclaimed himself Governor. Returning to his pirating ways, he raided the coast of Louisiana and scuttled an American ship. In 1821, the U.S. government sent an expedition to destroy the establishment. Laffite, however, set the island afire and sailed away.

19. Dorris (1953) notes "no indictment for murder was ever returned against [Davis]. In fact, the evidence upon which the atrocious charge was made proved to be absolutely fraudulent" (279).

notoriety. Debs's conviction and ten year sentence had been upheld by Justice Oliver Wendell Holmes and the Supreme Court in 1919.²⁰ Woodrow Wilson had also earlier announced the "traitor" (Debs) would "never" be pardoned during his administration (Adler 1989, 220).

In 1971, Richard Nixon commuted the sentence of James R. Hoffa, former President of the International Brotherhood of Teamsters. The commutation was in many respects controversial. In 1960, the Justice Department, under the Eisenhower administration, withdrew an indictment against Hoffa because he supported Nixon during the presidential election (Orman and Rudoni 1979). After Nixon's defeat by John F. Kennedy, the Justice Department reactivated the indictment and Hoffa served time for convictions of mail fraud and jury tampering. Absent presidential action, Hoffa's parole application would have been considered in June 1972 and - even if denied - he would automatically have been released by November of 1975 (Boudin 1976). Instead, his sentence was commuted to six and one half years with the provision he refrain from "direct or indirect management of any labor organization." If the provision of the commutation was violated, Hoffa was to return to prison to complete his sentences.²¹ Hoffa argued, in District Court, the non-involvement condition was illegal, but lost. His case was then appealed to the Court of Appeal for the District of Columbia where it was argued, then removed from the calendar as a result of Mr. Hoffa's disappearance.

Nixon, of course, found himself on the other end of the clemency power just three years later. Gerald Ford told Congressional confirmation committees "the American people would not stand for a [Nixon] pardon" and that he did not intend to grant one (Orman and Rudoni 1979). Within one month of assuming the presidency, however, Ford granted "a full, and free and absolute pardon" to Nixon "for all offenses against the United States [committed] or taken part in during the period from January 20, 1969 through August 9, 1974."²² Orman and Rudoni conclude Ford

20. *Debs v. United States*, 249 U.S. 211, 39 S.Ct. 252, 63 L.Ed. 566.

21. Boudin (1976) provides interesting details of the origin and execution of the commutation at pp 21-2.

22. Pres. Proc. 4311, 39 Fed. Reg. 32601-02 (1974).

"closed the decision-making process to dissenters, secretly developed his own response, and then took unilateral, non-reciprocal, discretionary action without adequately assessing the costs of his action on the criminal justice system" (1979, 420). Within one week of the pardon, Ford's public 'approval rating' plummeted in the polls from 71 to 50 percent (Orman and Rudoni 1979). The pardon "haunted Ford throughout the remainder of his presidency and, in all likelihood, doomed his chances for election to that office" (Adler 1989, 223).

George Bush's decision to pardon former Secretary of Defense Casper Weinberger and five other former Reagan administration officials on Christmas Eve 1992 was certainly the most controversial act of clemency since Ford's pardon of Richard Nixon.²³ A *New York Times*-CBS poll, taken during the Reagan administration, found 64 percent of the public were opposed to a pretrial pardon of the officials charged with conspiring to defraud the United States by illegally providing Nicaraguan rebels with profits from the sale of weapons to Iran (Adler 1989, 223). Six years and thirty-five millions dollars after the commencement of the independent counsel, Bush delivered six Christmas Eve pardons (Jost 1993). Close to 60% of the respondents in a December 1992 Gallup poll disapproved of Bush's action and 49% were willing to state their belief the pardons were issued by Bush "in order to protect himself from legal difficulties or embarrassment resulting from his own role in Iran-Contra" (Hugick 1992).

The Clemency Process

As the previous section illustrates, there have been relatively few instances in which the exercise of clemency has provoked widespread attention or public controversy. Humbert (1941) suggests the very "administration" of the power is "of such a character as not to attract wide attention" (5). The president looks to the Department of Justice and the Deputy Attorney General

23. Bush pardoned Weinberger, Robert C. McFarlane, Elliot Abrams, Duane R. Clarridge, and Alan D. Fiers, Jr., and Clair George. Five others (Carl R. Channell, Richard R. Miller, Albert A. Hakim, Richard V. Secord, and Thomas G. Clines) were found guilty, but not pardoned, and three others (John M. Poindexter, Joseph M. Fernandez, and Oliver L. North) had their cases dismissed (Jorgensen 1993, at note 136).

for advice on matters concerning executive clemency. The Deputy Attorney General, in turn, depends upon recommendations drafted by the Office of the Pardon Attorney. The Office was established by an 1891 Act of Congress to prepare cases for the president to consider.²⁴ In effect, the Pardon Attorney receives and reviews all applications for clemency and manages the paper flow throughout the remaining stages of process: investigation, preparation, consideration and action, and notification (Adler 1989; Humbert 1941).²⁵ Investigations include a detailed background analysis by the Federal Bureau of Investigation, consultation with relevant parties (including sentencing judges, the prosecuting attorney, probation personnel, employers and friends) and an examination of all pertinent documents and records. The Pardon Attorney's recommendation is then made to the president via the Deputy Attorney General and White House counsel (Clark 1984). The Deputy Attorney General's opinion carries great weight with the president, although some presidents, such as Andrew Johnson, have often insisted on reviewing the requests themselves (Adler 1989, 212). In an 1984 article, Clark notes the period of time from application to a presidential decision is generally two years (2879).

W. H. Humbert's 1941 study, *The Pardoning Power of the Presidency*, suggests "the motives which prompt the executive in the exercise of the pardoning power are a topic of the greatest importance in clemency" (124). Humbert's work remains, however, the sole empirical investigation

24. 26 Stat. 946. The clemency process was previously housed in the Department of State (1789 to 1854). Humbert notes "using a record book from 1854 to 1884, the Attorney General or his assistant fairly accurately recorded data on clemency cases except for the first six years of this period. After 1884, the Attorney General included in his annual reports uniform and reliable data on clemency cases" (1941, 95).

25. Clemency powers include five distinct forms of leniency: pardon, amnesty, reprieve, commutation and remission of fines (Jorgensen 1993). Pardons may be extended before or after conviction and may be full or partial. Pardons may be "absolute," or "conditional" by limiting forgiveness in time or upon the performance or nonperformance of acts specified (Cowlshaw 1975). Amnesties are typically extended to individuals who are subject to trial but have not yet been convicted while reprieves temporarily postpone the execution of a sentence for a specified time period (Jorgensen 1993). Commutations substitute a lesser sentence for the original punishment. The president's power to remit fines and forfeitures is limited to monetary penalties which have not yet been paid to the United States (*Knote v. United States*, 95 U.S. 149, 1877).

of the official justifications for clemency actions. Humbert compiles thirty-eight "principle" and fifty-six "less frequent" explanations cited in clemency statements from 1885 to 1931 (Tables V and VI inserted at 124). The discussion notes statements in the study typically contain more than one justification but, generally, "the brevity of the statements and the failure to distinguish [the] primary and secondary reasons for granting clemency" make it "very difficult to determine the president's real reason for granting clemency in each case" (124-5). The range of influential factors cited in presidential statements (from mental infirmity of judges to the desire to save a farmer's crops) is nonetheless remarkable. Presidents have been encouraged to grant clemency as a result of a petitioner's "poverty" or "friendless condition." They have been likewise moved by a petitioner's "respectable" family or "favorable home condition." Pardons have been extended both on the basis of "youth" and "old age." They have been given to those who are "sincerely penitent" and those who have engaged in "good conduct" and are "reformed." Clemency has also been granted to "encourage reformation" in individuals and "good conduct among other prisoners."

Despite the wide range of factors cited in executive statements, many of the explanations in Humbert's study are quite similar in nature. In fact, Humbert's study and commentary by other observers of the process reveal at least three broad but distinct categories of formal, public explanations for clemency actions. The first category of explanations are "*legal*" or "*technical*" in nature. Generally such explanations relate to (1) the potential, probable or certain innocence of the petitioner (2) mitigating factors or (3) concern for proportionate punishment. Humbert's study, for example, found the following factors cited in clemency statements: (1) irregularities at trial, insufficient evidence, conflicting testimony, mistaken identity, grave doubt as to the justice of convictions, disclosure of new evidence, confessions of true offenders (2) absence of premeditation, the heat of passion or extreme provocation, insanity, intoxication (3) technical guilt, pettiness of the crime, excessive punishment, sufficient punishment, and a desire to equalize punishment for all participants in the crime.

"Legal" and "technical" explanations invite little controversy, and probably constitute the

majority of explanations which would widely be considered "good" and "sufficient" reasons for executive clemency (see comments in Moore 1993). Thus, Franklin Roosevelt probably felt little anxiety in pardoning convicted bank robber Martin Prisant on the grounds that Prisant was "innocent" of the offense for which he was being held. Likewise, Ronald Reagan probably ran little risk commuting the three year prison sentence of Marvin Mandel, former governor of Maryland. Mandel's co-defendants were each granted parole and the Justice Department recommended action promoting equity in punishment (Clark 1984). "Legal" and "technical" explanations are not, however, exempt from criticism. The subjective hurdles in the classification and weighing of mitigating circumstances are a routine source of controversy in criminal law. Jimmy Carter's commutation of Patricia Hearst Shaw's sentence (to time served) on the basis of the coercive influence of the Symbionese Liberation Army well illustrates the potential for disagreement on these grounds.

A second category of formal, public clemency explanations concerns *humanitarian compassion or mercy*. Clemency rationales in this category are criticized more frequently, but the appeals to sympathy and emotion in this category of explanations may serve as a powerful shield to the executive.²⁶ Many pardons, for example, have been issued to federal prisoners near death (Adler 1989; Humbert 1941). While some may fail to find even the smallest degree of sympathy for a dying criminal, the most hard-line critic might take some satisfaction in the end of a criminal's life and may experience a sense of increased personal safety (however small, or illusory).²⁷ In some instances, pardons have been issued to those whose health threatened that of other inmates (Humbert 1941). A well-argued statement emphasizing the extreme age, ignorance, or questionable degree of

26. Moore (1993) holds "a president abuses the pardoning power when he makes decisions based only on self-interest or narrow partisan interest, or when he is moved by pity or concern for the welfare of the accused. A president uses the pardoning power properly when he uses it to prevent or correct a potential injustice" (285).

27. Taft once pardoned two men after being assured by prison authorities that death was "imminent." In the words of Taft: "one man died and kept his contract. The other recovered at once, and seems to be as healthy and active as any one I know" (Humbert 1941, 129).

sanity in the recipient of clemency may sway sympathy as well as any "death bed" scenario. Interestingly, timing may contribute to both the willingness of the president to think in 'humanitarian' terms and the willingness of the public to accept a pardon defended on such grounds. Lincoln and Johnson certainly counted on the Christmas season to soften hearts toward grants of amnesty.²⁸ George Bush thus drew a heavy handed 'sympathy card' in his 1992 Christmas Eve pardon of Casper Weinberger (75 years old and physically ailing). Bush took care to describe the pardon as "an act of compassion" (Jost 1993).

A third and final category of formal, public clemency explanations concerns *judgments on reform, or rehabilitation*. Explanations in this category may well provide the greatest potential for controversy. As Moore (1993) notes, presidents run certain risks when they attempt to assess the reality and degree of a prisoner's 'transformation.' How indeed does one know when another is truly a 'new' person? In the past, presidents have been swayed by the religious conversion of prisoners, charity work (Clark 1984), and promises "never to violate the law again" (Humbert 1941, 124). Ronald Reagan was impressed to see a former armed robber turned boyscout leader (Moore 1993).

Although Humbert's study and the analyses of various commentators support some classification of formal, public explanations for executive clemency actions, they also direct us to a distinct set of private-personal, political and administrative factors which influence the decision to extend clemency. Humbert assumes the difficulty of determining the "actual" reasons why positive clemency decisions are made since "officials favoring the granting of clemency probably give as their reasons only those which will evoke least opposition to the use of the pardoning power" (1941, 124). Most commentators would in fact agree "there are motivating forces which lead pardon officials to grant pardons or commutations [which] are not given as reasons for acting" (Newman 1968).

28. Truman issued a proclamation on Christmas Eve, 1945, restoring the rights of ex-convicts who had served in the military for at least a year and had been honorably discharged. Harding is said to have moved up the effective date of Debs's commutation because of a desire to see Debs "eat his Christmas dinner with his wife" (Kobil 1991, 602).

The background, experiences, attitudes and concerns of *the president* are occasionally reflected in the clemency process. Presidents Lincoln and Johnson were, for example, favorable toward the requests of petitioners from their native states, Kentucky and North Carolina (Dorris 1953). Other presidents take office with a well-advertised 'hard-line' stance on crime, the sincerity of which they may feel obligated to demonstrate in areas like the pardoning process. Humbert concludes "the most effective influence in checking the growth in acts of clemency" has been the "determination of officials, who administered the pardoning power [to] avoid any flagrant misuse" and the desire for "more rigid enforcement of the laws" by individual administrations (1941, 120-1). Writing over forty years after Humbert, Clark (1984) attributes part of the decrease in pardons during the Reagan administration (the least generous administration in a half-century) to its "hard line on crime" (2878). Thus, when explaining an administration's use of clemency powers, the partisan identification and political ideology of the president cannot be ignored.

"Political" influences on clemency would include (but are not limited to) such factors as public opinion, the social status of a petitioner and his/her supporters, specific foreign policy concerns or the outbreak of war. Influences in this category can be quite complex and, in some circumstances, are related. Public opinion, as noted above, can both encourage and discourage presidential action, as well as offer after-the-fact condemnation and/or praise. Warren Harding supported amnesty for political prisoners in his campaign for the presidency, but there is little doubt three hundred thousand signatures and seven hundred organizational endorsements encouraged the release of Eugene Debs and twenty-three others (Adler 1989). Lyndon Johnson, on the other hand, received so much criticism for his 1966 and 1967 clemency actions, he reduced pardons and commutations significantly in 1968 (Clark 1984). Andrew Johnson and Gerald Ford ignored public opinion (however mixed) with severe consequence. Clark (1984) notes social prominence "often appears to play a role" in who gets pardoned (2879). The eventual grant of clemency for Jefferson Davis was encouraged by lobbying from such notables as Horace Greeley and Cornelius Vanderbilt (Dorris 1953). Jimmy Carter was also pressured by various opinion leaders to grant

some form of clemency to Patricia Hearst (Orman and Rudoni 1979). Thus, there is probably little harm done to the odds of an extension of clemency if the potential recipient is a Jimmy Hoffa, George Steinbrenner III,²⁹ Armand Hammer,³⁰ or former President of the United States.

Narrow and specific foreign policy considerations as well as the out-break of war can affect executive decision making with respect to the clemency power. Jimmy Carter apparently viewed the opinion of the "international community" a factor more critical than lack of remorse in an individual who attempted to assassinate President Truman, and three others who sprayed bullets from the gallery of the U. S. House of Representatives. Carter, in explaining the commutations, cited pressure from Puerto Ricans in and outside the United States and pressure from various Third World countries (Clark 1984). As noted above, British monarchs at war utilized clemency powers in a manner most beneficial to military recruitment. It is quite interesting that Humbert's study of clemency in the United States 1885-1931 suggests wars "have perhaps occasioned the most distinctive increases and decreases in the use of the pardoning power" (1941, 122).

Finally, the exercise of clemency can be affected by *administrative considerations*. The number of pardons granted in any given year, for example, will be a function of the number of requests received. Changes in the procedures of the Office of the Pardon Attorney can also be relevant. Prior to 1962, the Office sent only those petitions to the president which, in the opinion of the Pardon Attorney, deserved 'positive' action and those petitions which involved the death penalty. In 1962, however, the Office began also sending petitions to the president for which it recommended denial.

In May of 1983, the Reagan Justice Department "tightened" the rules for granting clemency "by increasing the time that pardon applicants must wait to become eligible after completing a prison term, or after a conviction in cases where the sentence did not involve prison." Applicants were

29. New York Yankees baseball club owner pardoned by Ronald Reagan in 1989 after being convicted of making illegal contributions to Richard Nixon's 1972 re-election campaign.

30. Chairman of Occidental Petroleum, pardoned in 1989 by George Bush after pleading guilty to illegally contributing to Richard Nixon's 1972 re-election campaign.

required to wait five years for lesser crimes and seven years for serious crimes ("the longest period ever") and the Department "expanded its list of crimes considered serious enough to require the longer waiting period" (Clark 1984, 2878).³¹

It is also reasonable to expect a period of adjustment for incoming Justice Department officials. The clemency process is not likely to be a top-priority consideration in the early stages of an administration and officials may feel the need to familiarize themselves both with specific cases and the overall process before acting on applications.

The Exercise of Executive Clemency, 1900-1993

I have acquired executive clemency statistics for the period 1900 to 1993 from the Office of the Pardon Attorney in the U.S. Justice Department. The data are arranged by fiscal year³² and include the number of clemency requests received, pending, granted (in the form of pardons, commutations, or remissions - see note 25), and denied or closed without presidential action. The data do not include clemency actions on draft resistors, or military deserters and absentees during the Vietnam era. Table 1 reports summary statistics for each of the seventeen administrations serving during this ninety-four year period.

Table 1 - about here

There are several striking aspects to the data. First, the seventeen presidents from William McKinley to George Bush received a total of 71,205 requests for clemency. This results in an average of 4,189 requests per president, 756 requests per year. If we also factor in the number of

31. The waiting period was changed back to five years for all offenses in October 1993, by President Clinton (personal correspondence with the Office of the Pardon Attorney - March 1, 1994).

32. Eighty-six of the 104 fiscal year units in the data represent a length of time equivalent to a full calendar year. In 12 instances, more than one president served in the fiscal year unit as a result of the election of a new president (1953, 1961, 1969, 1977, 1981, and 1989). In 6 additional instances, multiple presidents served in the fiscal year unit as a result of presidential death or resignation (1954, 1964, and 1975).

requests pending from previous years, the yearly average rises to 1,225 considerations.³³ The one hundred and forty-one month administration of Franklin Roosevelt considered the largest number of requests (13,343) while the Bush administration received the lowest number of requests (1,465) since the administration of William McKinley. Further calculations revealed the Bush administration also has, on average, the lowest number of requests per year (366). The administration of Calvin Coolidge, on the other hand, has the highest average number of requests per year (1,626).

Many may not be astonished by the large number of requests for executive clemency in the data, but few might expect the seventeen presidents to have authorized close to twenty thousand acts of executive clemency. The total includes 13,593 pardons, 5,223 commutations and 1,083 remissions of fines. In fact, the seventeen presidents averaged over two hundred acts of clemency per year. The administration with the highest average number of 'positive' clemency actions is that of Warren Harding. Harding's administration, covering portions of three fiscal years, granted an average of 419 acts of clemency per fiscal year unit. Woodrow Wilson's administration (two terms) has the second highest average, with 319 grants per year. Once again, the Bush administration is distinguished by relatively low averages. In two complete fiscal years of the Bush administration (1990 and 1992), *no* pardons, commutations or remissions were granted.³⁴ In the last eight and a half months of 1989, only ten warrants were issued (nine pardons and one commutation). As a result, the Bush administration has the lowest average number of 'positive' clemency actions per year, 19 (15 per fiscal year unit).

The data do reveal some differences in terms of partisanship. The six Democratic presidents,³⁵ covering portions of forty-four fiscal years, averaged 1,768 acts of clemency -241 per

33. In the ninety-four year period, 44,087 cases were categorized as "pending" from a previous period (an average of 469 per year).

34. Only one other complete fiscal year is characterized by an absolute halt in 'positive' clemency action. In 1969, Presidents Johnson (serving 6.5 months) and Nixon (serving 5.5 months) issued no clemency warrants.

35. Wilson, Roosevelt, Truman, Kennedy, Johnson, and Carter.

fiscal year unit. The eleven Republican presidents averaged 844 positive actions in portions of fifty-nine fiscal years - 157 per fiscal year unit. There is, of course, no small danger in attempting comparative analysis on the basis of the data in Table 1. The total number of fiscal years covered by an administration will be directly related to the length of the president's term. Likewise, the length of the president's term will affect both the number of requests a president will potentially receive and, consequently, the potential number of positive clemency actions. Furthermore, as noted, the Office of the Pardon Attorney has arranged the data by fiscal year. As a result, more than one president is represented in the same year, for several years (see note 32).

In order to view the data in a manner more convenient for comparative analysis, I have used the frequency and result of clemency requests in each fiscal year unit to compute the outcomes of requests in terms of percentages (Table 2). Average percentage scores allow a comprehensive view of each administration's exercise of the clemency power without reference to the span of the administration, the number of fiscal years in which it operates, or the number of months covered in any given fiscal year unit.

Table 2 - about here

Table 2 also presents percentages for request outcomes from the standpoint of two populations: the total number of requests in the fiscal year unit and the total number of requests for which some action was taken. Column "a" presents averages for the outcomes of clemency requests for each administration in terms of the population of requests for each fiscal year unit. During the administration of Theodore Roosevelt, for example, an average fiscal year unit would find 21% of the requests resulting in a pardon, commutation or remission. Roosevelt's administration also denied 64% of the total requests, on average, and left 15% pending. By these calculations, it appears the administration of William Taft is the most lenient of the seventeen, granting an average of 33% of the requests it received per fiscal year unit. The Bush administration, on the other hand, appears to be the least generous administration, granting an average of 2% of the requests received per fiscal

year unit.³⁶

Column "b" represents a different approach to comparative analysis utilized by Clark (1984). The column measures grants of clemency as a percentage of requests for which some action was taken. A president's generosity, or severity, is thus not measured in terms of cases which remain "pending" in a given period of time. The failure to act is removed from the equation. This measure has some appeal (especially in terms of judging the general 'attitude' of an administration toward clemency) and appears to make a considerable difference in the overall portrait of several administrations. Truman, for example, now appears to be the most lenient president in the ninety-four year period (granting an average of 42% of the requests acted upon per fiscal year unit). Presidents Kennedy, Ford, Eisenhower, Johnson and Carter also appear much more generous with respect to clemency by this measure.³⁷ On average, shifting the population of focus (from total requests in a fiscal year unit to total actions) raises each president's score in the "granted" columns eight percentage points. President Bush's score for clemency grants increases only three percentage points, however, and remains the lowest for the seventeen presidents.

Once again, a closer look at the data reveals differences between Republican and Democratic administrations. In terms of the population of requests per fiscal year unit (column a), Democratic administrations have an average 'positive' decision rate of 19%. Republican administrations, on the other hand, have an average 'positive' decision rate of 16%. In terms of requests for which some action was taken (column b), Democratic administrations have an average 'positive' decision rate of 32%. Republican administrations have an average 'positive' decision rate of 23%.

36. The range for percentage of total requests granted in each fiscal year unit extends from '0' (1969-Johnson, 1969-Nixon, 1975-Nixon, 1977-Carter, 1981-Reagan, 1990-Bush, 1992-Bush) to '49' (1920-Wilson). The range for percentage of total requests denied in each fiscal year unit extends from 16 (1964-Kennedy) to '100' (1969-Nixon, 1975-Nixon, 1977-Carter, 1981-Reagan, 1990-Bush and 1992-Bush). The range of percentage of total requests left pending in each fiscal year unit extends from '0' (1975-Nixon) and '6' (1901-McKinley) to '88' (1969-Nixon).

37. The range for percentage of actions involving a grant of clemency in each fiscal year unit extends from '0' (1968-Johnson, 1968-Nixon, 1975-Nixon, 1977-Carter, 1990-Bush, 1992-Bush) to '59' (1961-Eisenhower).

Whether we examine the number of requests received, the number of 'positive' clemency actions, or the average number of requests granted per fiscal year unit (from the total population or cases acted upon), the administration of George Bush stands out as the least lenient, or least generous administration of the century. The Reagan administration appears to run a close second for this distinction. It is entirely possible however, that the Bush and Reagan administrations are less distinctive if one considers trends in clemency actions throughout the ninety-four year period. The Reagan and Bush data may in fact represent points in a more general trend (or a set of trends) throughout the data. Rising crime rates and public concern about crime, for example, have not always been central elements of campaign rhetoric. The data may be sensitive to the rise of the "law and order" campaign rhetoric which developed in the 60's and remains a critical element in presidential elections. In order to explore the possibility of trends in the data, I have plotted each fiscal year score for the percentage of total actions which are 'positive' (column b in Table 2).³⁸

Figure 1 - about here

Figure 1 reveals wide variation in the percentage of requests granted per fiscal year by the seventeen administrations. Several unusual patterns appear in the data, but the trend line indicates a distinct negative trend in the exercise of clemency. Thus, while the Bush administration has been the least generous with respect to clemency policy, the data indicate Bush followed a trend beginning (arguably) in the early 1950's.

In future research, I intend to explore explanations for trends in these data through more sophisticated forms of statistical analyses.³⁹ This study, however, provides an important theoretical

38. Multiple presidents served in nine fiscal year units (see note 32 above). In such instances, I have entered the average of the percentage scores of each president.

39. Multivariate time-series (or Box-Jenkins) models are appropriate tools for analysis of these data. In developing and testing hypotheses with respect to the outcomes of the clemency process, it will be particularly important for researchers to simultaneously employ variables which control for the effects of the variety of other factors which can influence presidential decision making in this area. This is especially true absent information with regard to the specific content of individual clemency warrants. When properly employed, multivariate models allow for explications of processes which are both rigorous and cautious.

foundation for hypothesis building. It is quite possible, for example, that the long and short term trends in Figure 1 may be explained by some of the factors discussed above. The most recent decline in the rate of 'positive' clemency actions does in fact appear to coincide with recent public concern about crime. The period is, of course, also characterized by Republican dominance in the White House. I have discussed the apparent relationship between the outcomes of clemency applications and the partisan identification of the president, but there may be additional value in directing future research toward the relationship between the outcomes of clemency policy and more specific measures of public concern about crime.

The data (which, again, do not include clemency actions on draft resisters, or military deserters and absentees during the Vietnam era) do not appear to be particularly sensitive to engagement in war. In exploring the relationship between war and clemency policy, future research might focus both on the immediate impact of war (if any) and potential variation in clemency policy in the aftermath of war. The effect of war, in these data, may be quite complex, and perhaps beyond discovery absent sophisticated statistical modeling techniques which would allow us to capture the 'true effects' of war as a result of considering (or 'controlling' for) the individual and combined impact of other factors which potentially influence clemency policy. Similarly, the separate and distinct effects of policy changes in the Office of Pardon Attorney might be more properly estimated through the use of 'multivariate' statistical models.

As presented, the data in Figure 1 *do* seem to support the notion that administrations require a period of time to adjust to process. Adjustment, in turn, results in an increase in 'positive' clemency actions. The average 'positive' clemency rate for administrations in their first fiscal year unit is 22%. In their second and third fiscal year units, administrations have average 'positive' clemency rates of 24% and 29% respectively. The average for the last fiscal year unit of each of the seventeen administrations (regardless of length of tenure) is 33%. It will be interesting to see if the idea of an 'adjustment' period remains plausible after future studies conduct simultaneous tests of the various alternative hypotheses presented in this study.

Conclusion

Analyses of executive clemency in the United States are typically historical, legal, or theoretical and normative. For this reason, they largely appear outside the social science journal format and do not include presentation or analysis of data. In this study, I have summarized the major premises of the literature to date and, in doing so, have laid the foundation for empirical analysis of this interesting, but often ignored topic. A glance at Table 1 will indeed convince many that executive clemency is exercised with much greater frequency than is commonly supposed. Table 2 demonstrates wide variation among administrations in the use of clemency and Figure 1 reveals a distinct general decline in the rate of 'positive' clemency decisions. The review of the literature provided in this study will serve as an excellent basis upon which to build and test hypotheses in multivariate models. As the discussion here reveals, it is impossible to control for *all* of the potentially important influences in the decision making of the executive. Multivariate political models may, however, serve as useful tools for discovering intriguing relationships between quantifiable non-legal factors and outcomes of the process.

TABLE 1
EXECUTIVE CLEMENCY STATISTICS (1900-1993)

	<u>Requests</u> ¹	<u>Pardons</u> ²	<u>Commutations</u> ³	<u>Remissions</u> ⁴	<u>Denials</u> ⁵
William McKinley (1900-1901)	1,473	291	129	26	1,028
Theodore Roosevelt (1902-1908)	4,050	578	319	51	2,957
William Taft (1909-1912)	1,913	391	319	64	1,203
Woodrow Wilson (1913-1920)	6,891	995 ⁶	1,403	152	4,213
Warren Harding (1921-1923)	3,685	474	733	51	2,516
Calvin Coolidge (1924-1928)	6,502	613	613	97	5,059
Herbert Hoover (1929-1933)	6,318	832	585	149	4,600
Franklin D. Roosevelt (1934-1945)	13,343	2,721	491	475	9,575
Harry S. Truman (1945-1953)	5,030	1,911	120	13	2,887

Dwight Eisenhower (1953-1961)	4,100	1,110	47	0	3,179
John F. Kennedy (1961-1964)	1,749	472	100	3	831
Lyndon B. Johnson (1964-1969)	4,537	959	227	1	2,830
Richard M. Nixon (1969-1975)	2,591	863	62	1	2,614
Gerald Ford (1975-1977)	1,527	382	27	0	900
Jimmy Carter (1977-1981)	2,627	534	32	0	746
Ronald Reagan (1981-1989)	3,404	393	13	0	1,517
George Bush (1989-1993)	1,465	74	3	0	519

¹ Includes cases in previous years that were re-opened.

² Includes full pardons, pardons to restore civil rights, and "conditional pardons."

³ Includes reprieves and remissions of jail sentences. Since 1953, may also include remissions of fine which are not reported separately.

⁴ Includes remissions of costs and forfeited recognizance. After 1952, may be included with commutations if not reported separately.

⁵ Includes cases closed administratively because, e.g., the petitioner was paroled, the prison term had expired, the application was premature or the applicant failed to provide additional required information.

⁶ Includes a presidential proclamation of pardon and amnesty dated June 14, 1917 for an indeterminate number of cases in which sentences had been deferred or suspended. Issued in response to a 1916 decision of the United States Supreme Court making suspension of the imposition or execution of sentences by judges illegal.

* **Source :** *Office of the Pardon Attorney, U.S. Department of Justice*

TABLE 2
COMPARATIVE EXECUTIVE CLEMENCY STATISTICS (1900-1993)

	a.Total Requests ¹			b.Total Actions ²	
	Fiscal Year Unit Average: ³			Fiscal Year Unit Average: ³	
	Granted	Denied	Pending	Granted	Denied
William McKinley (1900-1901)	29%	65%	7%	31%	70%
Theodore Roosevelt (1902-1908)	21%	64%	15%	24%	76%
William Taft (1909-1912)	33%	50%	18%	40%	61%
Woodrow Wilson (1913-1920)	30%	51%	19%	37%	63%
Warren Harding (1921-1923)	29%	58%	13%	34%	66%
Calvin Coolidge (1924-1928)	18%	68%	14%	21%	79%
Herbert Hoover (1929-1933)	21%	63%	16%	26%	74%
Franklin D. Roosevelt (1934-1945)	19%	49%	32%	28%	72%

Harry S. Truman (1945-1953)	21%	28%	51%	42%	58%
Dwight Eisenhower (1953-1961)	14%	35%	51%	27%	73%
John F. Kennedy (1961-1964)	15%	23%	63%	39%	62%
Lyndon B. Johnson (1964-1969)	12%	30%	58%	25%	75%
Richard M. Nixon (1969-1975)	15%	36%	49%	24%	76%
Gerald Ford (1975-1977)	15%	32%	53%	35%	65%
Jimmy Carter (1977-1981)	10%	34%	56%	22%	78%
Ronald Reagan (1981-1989)	4%	29%	66%	13%	87%
George Bush (1989-1993)	2%	37%	61%	5%	95%

¹ Calculated as the sum of requests received (including cases in previous years that were reopened) and requests pending.

² Calculated as the sum of pardons (including full pardons, pardons to restore civil rights, and "conditional pardons"), commutations (including reprieves and remissions of jail sentences), remissions (of costs and forfeited recognizance) and cases denied (including those closed administratively because, e.g., the petitioner was paroled,

the prison term had expired, the application was premature or the applicant failed to provide additional required information).

³ Some totals greater than 100 due to rounding.

* **Source** : *Office of the Pardon Attorney*, U.S. Department of Justice.

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