

# **The Pardoning Power: The *Other* “Civics Lesson.”**

or

*Clinton’s Clemency Caper in Context*

By

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Reporters and commentators routinely spoke of the recent presidential election as a kind of “civics lesson.” But this paper argues the real “civics lesson” of 2001 was delivered on January 20. On his last day in office, Bill Clinton pardoned more people than he had in any single day of his presidency. When members of the national news media set out to place Clinton’s behavior in context, they quickly learned that political scientists have a rich and glorious tradition of ignoring federal executive clemency. Despite the fact that presidents have averaged almost 200 acts of clemency per year for the last ninety years, no “top” journal in the discipline has ever published an article featuring systematic analysis of this Article II power. This paper provides a brief overview of clemency literature (such as it is) and explains the neglect of the discipline. It then makes the case for incorporating federal executive clemency in our undergraduate textbooks and professional journals. After a discussion of basic terminology, the history and development of the power, and “notable” acts of executive clemency, I (perhaps for the first time) place President Clinton’s “last minute” pardons and overall clemency record in a meaningful context.

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Depending on when you went to bed election night, you may have thought 1) Al Gore would be the next President of the United States 2) George Bush would be the next President of the United States or 3) nobody really knew who would be the next President of the United States. Ironically, the people who lost the most sleep had the best, up-to-date information ... and, of course, they knew the least. It would be months before anyone knew who won the 2000 Presidential Election and some would continue to explore who “really” won months after the “official” answer.<sup>1</sup>

While the votes were counted and recounted, and litigation sailed through state and federal court systems, the national news media soon picked up on a catchy way to spin the events. *Christian Science Monitor* reported the election was “serving as a real-life civic lesson for the country’s young people.” *USA Today* reported the phrases “Election 2000” and “Electoral College” had toppled Pamela Anderson in a *Lycos* listing of most popular web searches. Americans had temporarily forsaken their “lust” for “smut” and were searching for “an impromptu civics lesson.” Wolf Blitzer of *CNN* called the election’s “civics lesson” in “law and politics” a “silver lining.”<sup>2</sup>

Although there was no small amount of ambiguity about the exact nature of the supposed “lesson,” there was one fairly common theme: the Electoral College. The major parties and their candidates are, of course, well aware of the importance of electoral votes and campaign strategies are clearly adjusted to expectations about such votes. Members of the news media also routinely conduct pre-election discussions in terms of electoral votes.<sup>3</sup> On election night, the typical “electoral map” projected by the major networks is a map of states colored in accordance with who has won the electoral vote in each state. Many maps include the actual number of electoral votes. The capture of electoral votes is just about always announced before the popular voting is calculated, or even complete. And election night reporting is just about always couched in terms of who has won how many electoral votes. The winner is declared on the basis of those projections.

Thus, it is difficult to imagine many voters are completely unaware of the existence (and importance) of the Electoral College.<sup>4</sup>

It is certainly wonderful that our media are free to color the reporting of political events in almost any fashion, and communicate in language featuring varying degrees of rigor. But, as a teacher of political science (with my own freedom to define my own idea of a good “civics lesson”), I would suggest the recent presidential election as a “civics lesson” does not work well.

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<sup>1</sup> The author wishes to express appreciation for assistance in the gathering of material for the writing of this paper from the Office of the Pardon Attorney (U.S. Department of Justice), a research team at the University of Chicago currently headed by Richard Posner, David Kincaid and Norman Farnam. The opinions and views of this paper should not be interpreted as indicators or reflections of the opinion and views of any of these persons or institutions. Any errors herein are entirely the responsibility of the author.

<sup>2</sup> “Wolf Blitzer on the Historic U.S. Presidential Election.” *CNN.com*, November 15, 2000; Francine Keifer. “Electoral Side Effect: Kids Are Paying Attention.” *Christian Science Monitor*, November 21, 2000; Leslie Miller. “Net Visitors Lust After Civics Info, Not Smut.” *USA Today* Tech Report. December 20, 2000.

<sup>3</sup> Some even predicted that Bush would win the popular vote in the 2000 election, but Gore might win the presidency on the basis of the electoral vote!

<sup>4</sup> The author recognizes that there is much about the Electoral College that probably remains completely mysterious to the average voter. Who are the electors? How does one become an elector? When do the electors they vote? Where do they vote? What rules (if any) govern how they vote? Most of these mysteries were, of course, left out of the national “civics lesson.”

If a good “civics lesson” involves teaching things that are rarely taught or easily (and usually) forgotten, if a good “civics lesson” features information that is interesting and relevant to the American political process, but rarely ever discussed, presented well or understood, if a good “civics lesson” captures the imagination by informing students a great deal about things they know little or nothing about and are not likely to ever know but for the “lesson,” if a good “civics lesson” has a clear, distinct message, then the real “civics lesson” of 2001 took place on January 19, President Clinton’s last day in office.

### CLINTON’S CLEMENCY CAPER

On January 20, with only a few hours left in his presidency, Bill Clinton granted 140 pardons and 36 commutations of sentence. *CNN* reported the “vast majority” of the individuals pardoned were “unknown to the public.” But the list did include former Housing and Urban Development Secretary Henry Cisneros, John Fife Symington (former Governor of Arizona), Patricia Hearst, Whitewater figure Susan McDougal, former CIA Director John Deutch, and Democratic Congressman Mel Reynolds.<sup>5</sup> The list of clemency recipients also included the president’s brother, Roger Clinton, and one of the FBI’s top-ten “most wanted” fugitives from justice, Marc Rich.

Henry Waxman (D-CA) called Clinton’s “last-minute” pardons a “mess” that should “embarrass every Democrat in America.”<sup>6</sup> Former President (and fellow Democrat) Jimmy Carter called the “last-minute” pardons “one” of Clinton’s “most serious mistakes.” Carter called “a number” of the pardons “quite questionable” and summarized the entire episode as “disgraceful.”<sup>7</sup> A former U.S. Pardon Attorney rebuked Clinton for being “shortsighted” and fueling the “appearance of cronyism and influence peddling.”<sup>8</sup> President Bush said he was particularly “troubled” by Clinton’s pardon of Marc Rich.<sup>9</sup>

On February 15, Clinton called Geraldo Rivera on the set of “Rivera Live” and said he was “blindsided” by the controversy surrounding his pardons. He told Rivera that he “just wanted to do what other presidents [had] done.” Clinton (frequently tagged as one of the more savvy politicians of this century) also said that he was “bewildered” by the reaction to his pardon of a “most wanted” fugitive whose former wife had contributed millions to his campaigns and presidential library. Two days later, Clinton took the unusual step of defending his pardons in a *New York Times* editorial.<sup>10</sup> One month later, a Zogby Poll revealed 56% of Americans viewed Clinton unfavorably – his most negative rating since he entered office in 1992.<sup>11</sup>

Clinton’s “last-minute” pardons were not the first “controversial” clemency decisions of his administration, but they probably represent the ones he will be most often remembered for. The intensity of the reaction to the pardons seemed to have been rivaled only by Gerald Ford’s pardon of Richard Nixon. The pardoning power was back in the

<sup>5</sup> “In One of His Last Acts as President, Clinton Grants 140 Pardons.” *CNN.com*, January 20, 2001.

<sup>6</sup> Peter Slevin and George Lardner, Jr., “Rush of Pardons Unusual in Scope, Lack of Scrutiny.” *Washington Post*, March 10, 2001.

<sup>7</sup> “Carter Rips Rich Pardon.” *ABC News.com*, February 21, 2001.

<sup>8</sup> “Ex-Pardon Attorney Criticizes Clinton.” *MSNBC.com*, February 28, 2001.

<sup>9</sup> “Bush Won’t Touch Pardon of Financier.” *MSNBC.com*, January 29, 2001.

<sup>10</sup> Bill Clinton, “My Reasons for the Pardons.” *New York Times*, February 18, 2001.

<sup>11</sup> Susan Page, “Case Shows the Value of Well-Placed Middlemen.” *USAToday.com*, March 19, 2001.

news with a vengeance and lists of “controversial” pardons were, once again, popping up everywhere.

*The Available “Literature”*

But Clinton’s “last-minute” clemency caper produced more than criticism. It also produced an intense, widespread desire to judge the pardons in the light of a clear, accurate historical context (Ruckman, *forthcoming*). When members of the national news media attempted to consult political scientists and the literature of the discipline for this context, we were generally “weighed in the balance and found wanting.”

The *American Political Science Review* (APSR), *American Journal of Political Science* (AJPS) and *Journal of Politics* (JOP) – widely regarded as the “top” journals in the discipline - have never featured an article which systematically examines clemency (state or federal). In the 1900’s presidents averaged almost 200 acts of clemency per year, but political scientists were busy looking elsewhere (Ruckman 1997). Indeed, my 1993 review of the literature uncovered a mere four articles on clemency in the journals of political science. All four appeared in *Presidential Studies Quarterly* (Orman and Rudoni 1979; Pederson 1977; Rozell 1994; Shichor and Ranish 1980) and only one (Pederson 1977) involved anything like systematic analysis of clemency data.<sup>12</sup>

As Clinton’s administration ended, the most informative and relevant work on federal executive clemency produced within the discipline was probably David Gray Adler’s essay, “The President’s Pardon Power.” Adler’s essay constitutes a chapter in Thomas E. Cronin’s *Inventing the American Presidency* (1989). It provides relevant history, legal analysis, political insight and information on the clemency process. Adler also discusses numerous famous examples of presidential pardons and limitations on the use of the power. Despite its lower profile, this essay probably remains the single, best-written article on the topic of clemency by a political scientist.

The more savvy reporter/researcher may have discovered a 1941 publication by the American Council on Public Affairs, W.H. Humbert’s *The Pardoning Power of the President*. Humbert’s book-length work provides what the “top” journals of political science have not provided in the sixty years since – a serious effort to systematically explore the uses of the clemency power and trends through history. *The Pardoning Power* examines the legal and political development of the clemency power, but also employs data from the Department of State and Justice Department (stretching back to the 1860’s) to examine trends in pardons and commutations, applications for clemency, and the explanations that presidents have given for clemency decisions. In addition, Humbert places clemency statistics in the context of other relevant data (population, crime rate, prison population, etc.). But, of course, 1941 was a long time ago. No modern day Humbert has appeared – in, or outside, of the discipline.<sup>13</sup>

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<sup>12</sup> I have since published articles in *Presidential Studies Quarterly* and *Social Science Quarterly* (Ruckman 1993; Ruckman 1995).

<sup>13</sup> Humbert’s work is also somewhat less attractive because of the nature of the data that he employs – aggregate data arranged by calendar or fiscal year. Thus, few generalizations emerge from his work with respect to particular acts of clemency, particular presidents or administrations. Presumably, Humbert considered the avoidance of such generalizations to be a goal in the creation of his work.

Even further afield from the discipline, was the only book in print in early 2001 that was solely dedicated to the topic of pardons, Kathleen Dean Moore's *Pardons: Justice, Mercy and the Public Interest*. Moore's well-written work provides an interesting and valuable discussion of the moral justifications for the exercise of clemency and possible reforms. But, again, it provides little in the way systematic analysis of clemency policy or practice. When Moore does attempt to generalize about trends in the use of clemency (within or across administrations), her analysis is frequently hampered by the use of data from the Department of Justice (aggregate data arranged by fiscal year) or a complete lack of data from the first one hundred years of our nation's history (see further discussion below).

The end result of scholarly indifference in the discipline of political science is that most of the literature on federal executive clemency exists in the law review format. The further result is that one is hard pressed to find anything in the literature that smacks of systematic analysis of the use of the pardoning power, or trends across administrations. Statistical analysis is nowhere to be found. More commonly, one finds essays on the origins of the power, discussion of particular acts of clemency or classic cases before the United States' Supreme Court.

William F. Duker's 1977 *William and Mary Law Review* article, "The President's Power to Pardon: A Constitutional History" and Daniel T. Kobil's 1991 *Texas Law Review* article, "The Quality of Mercy Strained: Wresting the Pardoning Power from the King" represent what is probably the very best of this literature. These articles are wonderful examples of meticulous research presented in an interesting and informative manner. While neither presentation particularly focuses on data analysis or trends in clemency policy, they remain excellent measures of the quality of a writer's research on this topic. That is to say, at this point in time, failure (in this literature) to cite Duker and Kobil amounts to a critical error.

#### *The Simple Explanation: Hurdles*

Why have political scientists so meticulously avoided the systematic study of federal executive clemency? Why did we have so little to offer when the national news media came to us for a context for Clinton's behavior? In large part, the answer lies in the amount and types of information available to researchers.

If one wants to investigate the exercise of clemency from 1789 to 1893, one must go to seven rolls of microfilm which can be purchased from the National Archives (Microfilm Set T967). These microfilm contain photographs of hand written clemency warrants from the administrations of George Washington to Grover Cleveland. Mixed-in with clemency warrants are warrants of extradition, extra copies of clemency warrants and copies of clemency warrants which were cancelled. The writing is not always easy to read. The warrants are not always in order. And the microfilm do not come with a descriptive pamphlet which informs users of which presidents, or which periods of time, are covered by each roll of microfilm.<sup>14</sup>

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<sup>14</sup> I think the ugly nature of the microfilm can best be summarized by the fact that, as of November of 2001, to the best of my knowledge, I am the only person who has ever gone through all seven rolls, gathered data, and presented summary. To date, these microfilm have never been summarized by the State Department, the Department of Justice or the Office of the Pardon Attorney.

In 1885, the *Annual Report of the Attorney General* comes to the rescue. The *Annual Report* is a hardbound publication. It does not contain copies of clemency warrants, but does contain a listing of every individual recipient of clemency, the offense(s) committed, the state of origin, the official form of clemency (see discussion below) and occasional comments by the Attorney General or the President. The best part, of course, is that the *Annual Report* is typewritten and relatively easy to read.

The joy ride ends in 1933. In that year, the *Annual Report* begins what remains the current practice of the Office of the Pardon Attorney and the Department of Justice. The *Report* provides aggregate (or summary) statistics on clemency and arranges data by fiscal year unit. As a result, it is impossible to tell who was pardoned, what offenses were committed, where the offenses were committed or even when clemency was granted. The arrangement of data by fiscal year unit also masks which presidents granted clemency, in some instances, and makes it impossible to summarize the exercise of clemency by each year of a president's term.

In the aftermath of the Clinton pardons, members of the national news media were amazed to learn that no one in America had constructed (or even could construct) a chart of presidential pardons, by each year of the term, after 1933. No one knew if Clinton had set the record for the number of individual pardons granted in one day. There was a strong sense that he may have set the record for pardons granted on the very last day in office, but no one really even knew that for sure. In a half-hearted response to media inquiries, the Office of the Pardon Attorney created a list of individual pardons granted by George Bush. That was the best anyone could do.

But, the blackout created by the *Annual Report* of 1933 did not suddenly leap upon us in 2001. It was long in the making. Clemency decisions in the 1930's were made without fanfare or explanation, as far below the radar screen as possible. It was a fairly common thing in the 1940's and 1950's for presidential pardons to be reported in newspapers days, or weeks, after they were granted. In some instances, newspapers reported on pardons that were "rumored" to have been granted (Ruckman, *forthcoming*).

Today, award-winning presidential biographies routinely say nothing about considerable changes in clemency policy and extraordinary individual acts of clemency. Clemency statistics are absent from sourcebooks on the Presidency (even as they run into the third and fourth editions). It is easier to discover the height, weight, astrological signs and nicknames of presidents than it is to find the number of pardons that each has granted. Don't even bother to look for the number of pardons granted in each year of a president's term! Presidential libraries are of little help either.

If one searches early volumes of the *New York Times Index*, a heading for "pardons" can be found. As the 1800's come to a close, the heading for "pardons" becomes a sub-category under the name of the current president. As the early 1900's proceed, the heading for "pardons" is placed under the sub-category "crime and criminals," which is itself a sub-category under the name of the current president. As the Justice Department starts to report summary data by fiscal year, the heading "pardons" completely disappears from the *Index*. The *Times* thus becomes a useful tool for researchers only if they happen to already know the names of individuals and the dates of presidential actions - information which the *Annual Report* of the Attorney General stopped reporting in 1933.

### *Recent Developments*

In early 2001, the Office of the Pardon Attorney created a list of individual pardons granted by former President Bush. After Clinton left office, there followed a CD set of the clemency warrants photographed in Microfilm Set T967 and warrants currently located in the Department of Justice. It appears that, in the past, some authors have traveled to Washington to examine warrants located in the DOJ. Either the nature of the trip or the arrangement of the warrants has prevented any successful effort to systematically summarize their contents. Thus, for the first time, researchers can explore clemency in a way that, previously, could only be done for the years 1789 to 1932.

In recent months, I have acquired these CD's from the Office of the Pardon Attorney and exchanged data from the period 1789 to 1932 with a research team headed by Richard Posner at the University of Chicago. Posner's group is in the process of bridging the gap from 1933 to present and I am very appreciative of the group's efforts and generosity.

In my view, the sudden accessibility to clemency data allows – for the first time – the opportunity to place President Clinton's clemency record in a clear, accurate historical context. There is also every chance that the journals of political science may, at last, pay attention to this important presidential power.

### **WHY STUDY FEDERAL EXECUTIVE CLEMENCY?**

There are more than a few justifications for the inclusion clemency in our undergraduate textbooks and professional journals. The clemency power is an important part of our scheme of checks and balances, a routine component of salient events in our nation's political history, and a key factor in the development of our legal system. Perhaps most important is the fact that every generation of Americans has experienced its own seemingly “unforgettable” and “unforgivable” presidential pardon(s). At some point, the discipline should step up to the plate and look for systematic insight where partisanship, speculation and intrigue routinely dominate analyses.

#### *Clemency in the Scheme of “Checks and Balances”*

The clemency power is clearly an important part of our government's system of checks and balances. It is unfortunate, however, that this check is typically lost in discussions with our undergraduates. Congress can pass a law related to criminal offenses and a president can veto such legislation in a spirit of sharp disagreement. While presidential vetoes are rarely overridden, an override does not signal the end of the conflict. The president then retains the power to pardon those who are convicted under the law. The clemency power can thus be viewed as a possible (and Constitutionally legitimate) extension of a president's views on policy. This also invites students to think about the effectiveness and potential consequences of the use of political checks.

I would admit that this point was generally lost on me, until I examined the clemency record of Woodrow Wilson. Wilson was “an ardent advocate of temperance” but felt the *Volstead Act* (also known as the National Prohibition Act) was “the wrong way of doing the right thing.” In his mind, the government could not “regulate the morals

and habits of a great cosmopolitan people by placing unreasonable restrictions upon their liberty and freedom.”<sup>15</sup> This attitude was clearly reflected in Wilson’s first term clemency policy. On average, 20% of the pardons granted in each year of the first term were for offenses were related to alcohol.

**FIGURE 1**

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 CLEMENCY IN WOODROW WILSON’S FIRST TERM

	Year 1	Year 2	Year 3	Year 4
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<i>Total Pardons</i>	221	179	195	284
Alcohol-related	33	44	46	48
Drug-related	2	2	8	61

SOURCE: *Annual Report of the Attorney General*

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When the *Volstead Act* came to Wilson’s desk, in the second year of his second term, Wilson exercised the veto power. In a rare occurrence, Congress overrode Wilson’s veto. After the override, Wilson and his advisors actually considered sending a special message to Congress asking for a repeal of the law. He eventually decided, however, to clarify his party’s position on the issue of prohibition and express his opinion in other ways. Consider Wilson’s second term clemency activity, keeping in mind that the *Volstead Act* emerges in the second year.

**FIGURE 2**

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 CLEMENCY IN WOODROW WILSON’S SECOND TERM

	Year 1	Year 2	Year 3	Year 4
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<i>Total Pardons</i>	234	324	420	623
Alcohol-related	53	63	99	143
Drug-related	9	5	15	27

SOURCE: *Annual Report of the Attorney General*

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In the aftermath of the *Volstead Act*, Wilson increased the number of pardons for alcohol-related offenses. On average, 22% of the pardons granted in each year of the second term were for offenses were related to alcohol. In the third year of the second term one out of every four of Wilson’s pardons were for such offenses. As he left office, Wilson (as if to make a point?) set a personal record for alcohol-related pardons.<sup>16</sup>

<sup>15</sup> Joseph P. Tumulty. 1921. *Woodrow Wilson as I Knew Him*. Doubleday, Page and Company: New York.

<sup>16</sup> It is also quite interesting to note the trends in drug-related offenses throughout Wilson’s two terms. There are very few such pardons in the first term, but the number increases throughout the term and rises dramatically in the fourth year. As the second term begins, the bottom falls out and the trends of the first term are repeated.

The checks and balances theme was actually well-advertised during the Clinton administration. Clinton told a reporter for *Rolling Stone* magazine that the sentences in “many [drug] cases” of were “far too long for non-violent offenders.” The President also expressed his view that it was “unconscionable” to punish crack cocaine offenders more harshly than powder cocaine offenders. In December 2000, *USA Today* speculated Clinton’s views might translate into “hundreds” of pardons at the end of the term.<sup>17</sup>

### *Clemency and Salient Events in American Politics*

The clemency power has also been related to (if not a critical feature) of many major events in our nation’s political history (Ruckman 1997). It simply represents the side of events most likely to be overlooked in our lectures. The irony is that presidential pardons can be an excellent tool for helping undergraduates actually remember these events and, as a consequence, our nation’s historical development.

George Washington granted pardons to participants in the so-called Whiskey Rebellion and John Adams (although sharply critical of Washington) did likewise for participants in Fries’ Rebellion.

The presidential election of 1801 (the first competitive and truly “controversial” election in our nation’s history) featured several clemency controversies. Thomas Jefferson publicly promised to pardon those convicted under the Alien-Sedition Acts, if elected. Opposition newspapers loudly accused President Adams of granting conditional pardons to silence his critics and unconditional pardons to enhance his chances for re-election.

Jefferson won the election and kept his promise. Of course, one of his pardons went to Thomas Callender, who then turned on Jefferson and spread the Sally Hemmings story. Jefferson went on to use the pardoning power in an effort to manipulate witnesses in the Aaron Burr conspiracy trial and his enthusiasm for Burr’s conviction resulted in the first presidential subpoena (Kobil 1991, Ruckman 1994, Ruckman, *forthcoming*).

The clemency power was used to procure the much-needed assistance of pirates in the War of 1812 (Ruckman, *forthcoming*) and Abraham Lincoln used the power to discourage southern resistance in the War Between the States. Lincoln’s assassination was routinely attributed to the fact that he denied clemency to one John Yates Beall (a friend of John Wilkes Booth). Presidential amnesties were major events in the aftermath of the War and the first rumblings of Andrew Johnson’s impeachment were heard in quarters where he was suspected (if not outright accused) of abusing the pardoning power (Ruckman and Kincaid 1999). In the closing days of his administration, Johnson pardoned several people convicted as conspirators in Lincoln’s assassination.

The clemency power also played a part in Ulysses S. Grant’s Whiskey Ring scandal, the presidential election of 1976 (where presidential candidates had various views on how to treat Vietnam draft evasion), the Iran-Contra Scandal and the Whitewater scandal.

In addition, clemency decisions can be easily linked to the three-day Washington Riots of 1848, the Oregon Land Frauds scandal, the economic Panic of 1907 (leading directly to the creation of the Federal Reserve), the Watergate affair, and the political

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<sup>17</sup> Dennis Cauchon, “Clinton Examines Clemency Cases.” *USA Today*, December 21, 2000.

movements of socialists, anti-war activists, “black power” advocates, and female suffragettes (Ruckman, *Forthcoming*).

### *Clemency and the Development of the Legal System*

The clemency power also deserves our attention because of the important role it has played in the development of the legal system. Scholars routinely note the clemency power has played a major role in the development of criminal law’s recognition of an insanity defense, self-defense, compulsion and the more lenient treatment of juvenile offenders. Where the law once made no distinctions, the clemency power frequently served as the more discerning eyes of the justice system. The modern day – hardcore – law-and-order type might very well be surprised to see the justifications offered for pardons granted in the 1700 and 1800’s. Attorney Generals and presidents frequently justified decisions on the basis of “circumstances” of birth and youth, the lack of “opportunity” to develop a finely tuned “moral sense,” the “influence” individuals have on each other, “temporary” lapses in insanity, and other “extenuating” circumstances.

Clemency has also been the topic of numerous classic decisions by the United States’ Supreme Court. Given the minimal language of the *Constitution*, the Court has had to “declare” the right of presidents to remit fines and forfeitures,<sup>18</sup> pardon criminal contempt of courts,<sup>19</sup> award conditional pardons,<sup>20</sup> and commute sentences<sup>21</sup> – even against the wishes of the individual(s) involved.<sup>22</sup> The Court has also placed the exercise of the power beyond “legislative control” (see further discussion below).<sup>23</sup>

Many of these cases (and others) have raised interesting questions of constitutional law, some of which have yet to be clearly answered. When presented well, these questions can create excellent discussion in the undergraduate classroom. Students just about always agree, for example, that Gerald Chapman<sup>24</sup> should not have been allowed to refuse executive clemency. They begin serious reconsideration of their position, however, when they hear the case of George Burdick.<sup>25</sup>

Students are also usually intrigued by the ramifications of pardons granted before conviction and the possibility that a president might, one day, pardon himself.

Once students agree to the fact that the president should not be able to “commute” a sentence from 10 years to 15 years (not an actual reduction, but an *increase* in the severity of the sentence), they are usually interested in Vuco Perovich’s argument that the president had treated him more harshly by “commuting” his death sentence (against his will) to a sentence of life imprisonment.<sup>26</sup> Maurice Schick also complained when his death sentence was commuted to life in prison without any possibility of parole.<sup>27</sup>

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<sup>18</sup> *The Laura*, 114 U.S. 411 (1885); *Osborn v. United States*, 91 U.S. 474 (1875); *Illinois Central Railroad v. Bosworth*, 133 U.S. 92 (1890).

<sup>19</sup> *Ex Parte Grossman*, 267 U.S. 87 (1925).

<sup>20</sup> *Ex Parte Wells*, 59 U.S. (18 How.).

<sup>21</sup> *Armstrong v. United States*, 80 U.S. (13 Wall) 128 (1871).

<sup>22</sup> *Chapman v. Scott*, 10 F.2<sup>nd</sup> (D. Conn. 1925); *Biddle v. Perovich*, 274 U.S. 480 (1927).

<sup>23</sup> *Ex Parte Garland*, 71 U.S. (4 Wall) 333 (1866).

<sup>24</sup> *Chapman v. Scott*, 10 F.2<sup>nd</sup> (D. Conn. 1925);

<sup>25</sup> *Burdick v. United States*, 236 U.S. 79 (1915).

<sup>26</sup> *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

<sup>27</sup> *Schick v. Reed*, 419 U.S. 256 (1974)

## CLEMENCY 101: THE BASICS

The term “clemency” is an umbrella concept which covers considerable territory. Indeed, it refers to numerous manifestations of mercy in the criminal justice system which might originate in any of the three branches of government.

A “pardon” is, for example, one form of clemency. A “commutation” (or reduction in the severity) of a sentence is, likewise, another form of clemency. In some instances pardons and commutations come with “conditions.” As a result, the “conditional pardon” and “conditional commutation” are forms of clemency. If there is a desire to grant clemency to a large number of offenders, or to an entire class of persons, who are potentially in violation of the law, another form of clemency might be utilized. The “amnesty” (or “general pardon”) is granted to individuals *en bloc*, before conviction, and can also feature “conditions” (see **Figure 3**, attached). The word “clemency” is also broad enough to include the “remission” of fines and forfeitures or the delay of executions by the granting of “respite” (Adler 1989; Buchanan 1978; Duker 1977; Kobil 1991; 1993).

Media presentations and informal discussions frequently avoid the term “clemency” and instead use the word “pardon” as the umbrella concept. Thus, it is common to find writers who note Jimmy Carter “pardoned” Patricia Hearst when, in fact, Carter granted a conditional commutation of sentence to Hearst. Historians frequently speak of “pardons” issued during the administrations of Abraham Lincoln and Andrew Johnson when “amnesties” would, technically, be the more correct language.

The explanation for our inversion of the language is most likely due to the fact that “pardon” is the only word explicitly mentioned in the United States’ *Constitution*. All of the other forms of clemency have been interpreted as emanating from that word.

### *The Colonial Period and the Articles of Confederation*

A 1939 report of “release procedures” in the United States notes “the first settlers [on this continent] did not want to reestablish the tyrannical power they had just fled in Europe.” This attitude was clearly reflected in colonial statutes regarding the exercise of clemency. The first Virginia Charter (1606) contained no pardoning power and the second (1609) granted the power to the Governor and a Council. A third Charter (1616) removed the power completely. The pardoning power was shared by the Lord Proprietor, a Council, and proprietors in the 1665 Charter of the Carolinas. New York and New Jersey allowed the Governor and a Council to grant pardons after a transcript of trials was sent to proprietors. The Governor shared the pardoning power with company officers in the Massachusetts Bay colony. Connecticut placed the power in the hands of the General Assembly, the Governor and six assistants (Ruckman, *forthcoming*). Moore (1989) notes “many colonists agreed” that “there could be no executive pardoning power in a democracy, where a crime is an offense against the people, not an affront to the King.”

As the economic success of the colonies became a critical ingredient in the power of the King, colonial Governors (as agents of the King) began to claim and assert the clemency power for themselves. That is to say, the march toward unrestricted clemency

powers in the hands of King-like representatives of the King became part of the list of general complaints which brought on the American Revolution.

After the Revolution, power generally shifted to the legislative branch and the pardoning power was either completely taken away from governors or shared with a small decision making body. Significantly, the *Articles of Confederation* contained no provision for executive clemency at the national level (Duker 1977; Humbert 1941; Kobil 1991).

### *The Philadelphia Convention*

When delegates eventually sat down in Philadelphia to “amend” the *Articles*, they were almost immediately confronted with the so-called Virginia Plan. Its creators were dissatisfied with the *Articles*, but obviously not concerned by the absence of clemency powers at the national level. Like the *Articles*, the Virginia plan did not contain a provision for executive clemency.

Eventually, the smaller states responded with a plan of their own. On June 15, the so-called New Jersey plan was placed on the table. The New Jersey plan was the kind of plan the Convention was advertised to consider. But, like the *Articles* and the up-start Virginia plan, the New Jersey plan contained no provision for the pardoning power.<sup>28</sup>

The Virginia and New Jersey plans outlined sharp, serious divisions among the delegates, but a compromise with respect to the legislative branch saved the day. Following the Great Compromise, a draft of the Convention’s work was submitted to the Committee on Detail. This “first draft” of the *Constitution*, like the *Articles of Confederation*, the Virginia plan and the New Jersey plan did not contain a provision for the pardoning power (Duker 1977; Humbert 1941; Kobil 1991).

In relative privacy of the Committee on Detail, the pardoning power was scrawled into the margins by John Rutledge of South Carolina (Humbert 1941). A biographer once noted Rutledge came to Philadelphia “with long experience in governing and a strong aversion to democracy.” The penciled-in pardoning power was, however, just one of many dubious distinctions in the life of John Rutledge.<sup>29</sup> The work of the Committee was reported back to the floor of the Convention on August 6, but Rutledge’s insertion was not discussed until the end of the August 25 session.

The Philadelphia delegates were clearly concerned with the legislative Article, which eventually made up over half of the *Constitution*. Much has been said of the fact that all efforts to limit the pardoning power at the Constitutional Convention were rebuffed. While certainly an intriguing “spin,” this observation conceals so much more than it reveals. No one at the Constitutional Convention stood and argued at length for the dire necessity of the pardoning power. The power was hardly discussed at all.

As a result, any rigorous assessment of federal executive clemency at the Constitutional Convention would recognize two distinct qualities of discussion and

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<sup>28</sup> See 1 *The Records of the Federal Convention of 1787*, at 20-23 (M. Farrand ed. 1911).

<sup>29</sup> Rutledge went on to serve the shortest term for any Justice in the history of the United States’ Supreme Court (one month) and, on a second nomination, became the first nominee ever to be rejected by the Senate. He was the only nominee to the Chief Justice position to be rejected by the Senate and the first to go insane.

debate. First, the discussions of the pardoning power were rather brief. This was, in part, due to the fact the primary concerns focused on the legislature and, in part, due to the fact that the Convention was coming to an end. Second, discussions of the pardoning power featured no eulogies as to the necessity and benefits of clemency. What little discussion there was consistently ran in the same direction. It focused on fears and concerns and the need to limit or restrict the power (Kobil 1991).

### *After the Convention*

Humbert (1941) notes “comparatively little discussion” of the pardoning power from the time the delegates left Philadelphia to the time the *Constitution* went into effect. Alexander Hamilton (who suggested the idea of having a King in America at the Philadelphia Convention) did take the trouble to pre-empt criticisms and concerns with a defense of the power in *Federalist 74*. Hamilton argued that “humanity” and “good policy” required the “prerogative” to pardon in order that the criminal codes not appear “too sanguine and cruel.” He also suggested that, in “seasons of insurrection,” a well-timed pardon could keep the nation from collapsing. In Hamilton’s mind, the pardoning power was best placed in the hands of “one man” who was “as little as possible fettered” in the use of that power.

Hamilton’s defense is perhaps thoughtful, especially given the strong sense that the new government offered by the *Constitution* (and the policies it would allow Hamilton to institute) might not be wildly popular. But his faith in the substance of the argument is perhaps best assessed by the fact that he was utterly merciless towards those participating in the so-called Whiskey Rebellion and Fries’ Rebellion. Hamilton argued against clemency in both instances and bitterly criticized the decisions of presidents Washington and Adams afterward.

Kobil (1991) notes Hamilton’s “British clemency model” was “not the model prevailing in most states.” Duker’s classic 1977 article on clemency is less rosy in its summary of the Convention:

With little discussion, and arguments not strong enough to meet the test of time, the Philadelphia Convention, with the concurrence of the state ratifying conventions, incorporated into the *Constitution*, by nondefinitive language, the presidential power to pardon.

### *The Pardoning Power in the United States’ Supreme Court*

Article II, Section 2 states that the President “shall have the power to pardon offenses against the United States except in cases of impeachment.” Interestingly, the Supreme Court’s clemency decisions have featured two distinct and contradictory views of the nature of the pardoning power. I will first briefly summarize the two cases which highlight the Court’s contrasting approaches, then discuss the strengths and weaknesses of each.

The first of the Court’s general approaches to the clemency power emerges in the 1833 case, *U.S. v. Wilson*.<sup>30</sup> Wilson and a partner were sentenced to hang for robbing the

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<sup>30</sup> 32 U.S. (7 Pet.) 150 (1833).

mail and putting the life of a driver “in jeopardy.” The partner was executed on schedule, but President Jackson was convinced to exercise clemency. Jackson’s commutation, like so many other things in the case, was a bit unusual. Instead of commuting the death sentence to life in prison, Jackson basically commuted Wilson’s sentence to “anything but death.” The commutation thus allowed for a prison sentence (which would have to then be determined by the trial court) and further trials and convictions.

As Wilson was about to be sentenced in an additional case, the trial court was curious about what impact the President’s pardon had (or should have) in its decision-making. But Wilson and his lawyer made no mention of the pardon at any point in the second trial and, when asked, refused to seek any benefit from it. The judges remained uncertain as to whether they should simply pretend there was no pardon or proceed to sentence Wilson with the pardon in mind.

Chief Justice John Marshall wrote the opinion for the United States’ Supreme Court and crafted a view of clemency which appears to be the standard to this day. Marshall’s opinion suggested “the principles respecting the operation and effect of a pardon” and “the rules” for how pardons could be used could be found by looking into the “books” of “the executive of that nation whose language is our language.” That is, Marshall took the position that the words of the *Constitution* should be interpreted in light of the practices of the King of England. Marshall’s view has certainly spread throughout the Court’s clemency cases.

In *Ex Parte Garland*,<sup>31</sup> the clemency power is described as “unlimited” (except in cases of impeachment) and extending to “every offense known to law.” *Garland* also notes the president’s power to pardon “cannot be fettered by any legislative restrictions” and can be exercised “at any time” after the commission of an offense, “either before legal proceedings are taken, or during their pendency, or after conviction and judgement.” Similarly, in *Schick v. Reed*,<sup>32</sup> the Court observes the pardoning power “cannot be modified, abridged, or diminished by Congress.”

The second of the Court’s broad views of the clemency power flows from the 1927 case, *Biddle v. Perovich*.<sup>33</sup> Vuco Perovich was sentenced to death in 1905, but delayed his sentence through a series of appeals and respites. In 1909, President Taft finally commuted his sentence to life in prison. In the 1920’s, however, Perovich was released from prison after a U.S. District Court judge ruled Taft’s commutation was “without [Perovich’s] consent and without legal authority.” The case was certified to the United States’ Supreme Court.

Justice Holmes delivered the opinion for the unanimous Court and seemed to all but ignore the fact that *Wilson* had ever been decided. Holmes wrote that a pardon was no longer “a private act of grace from an individual happening to possess power.” Instead, Holmes asserted the power was “part of a Constitutional scheme” and a “determination” that “the public welfare will be better served by inflicting less than what the judgement fixed.” Holmes then took the position that any commutation granted by a president has to be “within the scope and words of the *Constitution*.”

The first approach to the pardoning power (asserted in *Wilson*) generally attempts to interpret the words of the *Constitution* in light of the actions of the King of England.

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<sup>31</sup> 71 U.S. (4 Wall) 333 (1866).

<sup>32</sup> 419 U.S. 256 (1974).

<sup>33</sup> 274 U.S. 480 (1927).

This approach is, of course, highly problematic as we specifically fought a revolution in order to live under a constitutional republic (complete with separation of powers and checks and balances).

The second problem with the President-as-King approach is the fact that the history of clemency is a history of “abuse” (Adler 1989; Cowlishaw 1975; Moore 1993). The King regularly sold pardons and allowed payments for those who could not afford the lump sum. James II sold pardons for 16,000 pounds sterling, but modestly kept only half of the fee for himself. The other half was divided between two favorite mistresses. Conditional pardons were used to populate colonies and increase troops. General pardons were also customary exercises as a prelude to army building and the conduct of war (Kobil 1991). Edward III extended clemency in honor of his own 50<sup>th</sup> birthday. It is difficult to imagine the Founding Fathers considered the King a good role model.

The President-as-King model is also problematic because it assumes a static relationship between the King and Parliament and ignores the clear, historical development of the clemency power. Even a casual glance into the past indicates these are critical errors. In the earliest times, the crown had many competitors in the exercise of clemency; including the church, the great earls, the feudal courts and Parliament (Ringold 1966; Ruckman 1997). The fourteenth century featured numerous abuses of the power which led, in turn, to a series of Parliamentary attempts to limit the King’s use of clemency. Henry VIII is generally credited, however, with “seizing” the power for the crown in 1535.<sup>34</sup>

But further abuses in the 1600 and 1700’s led to further complaints and successful attempts by Parliament to limit the power.<sup>35</sup> As a result, any notion that the King could exercise the power “without limitation” is patently false - at least for the more recent periods of history (Kobil 1991; Ruckman 1993; Ruckman, *forthcoming*). A Court wishing to free the president of any restraint in the exercise of pardons can focus on the period before 1600. A Court wishing to align the president with England at the time of the Revolution, the colonies and the states has the opportunity to pay attention to distinct trends in the exercise of clemency in the period after 1600.

The second general approach of the Court attempts to interpret the words of the *Constitution* in terms of their plain meaning and the system of government created by the document itself. This approach thus has – built in – standards which are more current and, arguably, more relevant. But, of course, it is not without complication.

First, the words of the *Constitution* may be clear in meaning (in the case of the pardoning power), but there are obviously very few of them. The document cannot be reasonably interpreted as a specific blueprint for the exercise of clemency.

There might also be some concern about the central role that the Supreme Court would play in federal executive clemency if it took upon itself the chore of interpreting the president’s power in light of the context of the *Constitution* and our system of government. The Court, of course, engages in such exercises routinely in matters related

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<sup>34</sup> Kobil (1993) notes this was also the same year that Sir Thomas More was executed “making it clear that Henry III would tolerate no opposition.” Henry actually employed the clemency power by commuting More’s sentence from disembowelment to hanging.

<sup>35</sup> Duker (1977) notes the pardoning power was given “much attention” between 1679 and 1700. The power was limited by the Habeas Corpus Act (1679), the removal of a clause from the Declaration of Rights in 1689 and the Act of Settlement (1700). Kobil (1993) notes Parliament also gained the power to pardon via legislative acts in 1721.

to the First and Fourteenth Amendments and various phrases in the Bill of Rights – and not without controversy.

I would contend, however, that the brevity of the *Constitution* almost guaranteed the prominence of the Supreme Court in the interpretation of the pardoning power. The issue is not so much *whether* the Court will be an important player in the interpretation of the power as *how* it will choose to play its part. In the case of the pardoning power, the Court appears to have generally abdicated its role as referee and granted presidents the power of a King. But, as well all know, the Court can give and take away. In my view, it is much more desirable for the Court to take the time, energy, and effort to interpret the pardoning power in the context of the *Constitution* and our system of government. Unfortunately, this will never be as easy as simply declaring the president King, pretending the King of England operated without restrictions, and acting as though the Founding Fathers set things up this way after much care and deliberation.

#### *Notable Acts of Executive Clemency*

While it is certainly not my purpose here to outline the history of presidential pardons, it must be emphasized that “notable” acts of clemency have been a feature of presidential administrations from George Washington to Bill Clinton. Every generation of Americans has seen its “outrageous” and seemingly “unforgettable” presidential pardon(s) and each generation has successfully forgotten the stun, shock, celebration and resentment of previous generations. In my forthcoming book, *Pardon Me, Mr. President*, I am careful to describe these exercises in forgetfulness in terms of “notable” acts of clemency - as opposed to “controversial” acts of clemency. From the standpoint of a political scientist, the distinction is an important one to make.

It is clear that some of the great public “controversies” surrounding presidential pardons have been sparked, fueled, and driven by partisan politics, or simple animosity toward the president. In these circumstances, critics of the president may very well have enjoyed an initial advantage in the court of public opinion. Presidents, after all, gave the pardons to “criminals.” When presidents (for whatever reason) provide no explanation(s) for their clemency decisions, or provide explanations which appear odd, incomplete, or notably unconvincing, partisan and personal critics can gain critical momentum in the national news media and the court of public opinion with relatively little effort.

These episodes provide critics with a means to vent frustration, disappointment, and anger. But the effort to stir “controversy” over presidential pardons has often - at the same time - highlighted an important fact about the world of politics. In politics, “controversy” is in the eye of the beholder. Furthermore, in the world of politics “controversy” is imagined, peddled, stirred, directed and, in some circumstances, the clear sign of desperation among those without power or the force of argument.

Andrew Johnson’s energetic use of the clemency power annoyed many and fueled the first presidential impeachment. When the same Andrew Johnson left the White House, and openly regretted that he had not pardoned a few thousand more people, he was repeatedly cheered, crowd after crowd. John Adams is often given high marks for his pardon of participants in Fries’ Rebellion, but Adams’ cabinet strongly (and unanimously) opposed the pardons and Alexander Hamilton considered them downright foolish. President Carter’s amnesty for Vietnam draft evasion was certainly welcomed by

thousands (perhaps millions) of Americans. But millions of Americans (including many Veterans) saw the amnesty as an insult to principles of law, the war effort and the memory of our dead.

Were the decisions of Johnson, Adams and Carter “controversial?” If all one needs for “controversy” is one angry person and an ounce of disagreement, the answer is certainly “yes.” But if “controversy” is more intelligently thought of as something that requires deep (and perhaps widespread) division which is the by-product of a reasonable and fair perception of misapplication of rules, dishonesty, or indifference to justice, then the answer is not so clear. It will certainly depend on who one is talking to.

The clearly subjective nature of “controversy” is further exacerbated by the fact that, in the world of political discourse, “controversy” is routinely peddled, stirred, and manipulated. Indeed, a wildly popular (though usually mindless) way to criticize, or minimize, a political opponent is to attach the word “controversial” to their name, or their views of public policy. The ploy is, of course, based on the unstated premise that many people do not like controversy, or that controversy is generally thought of as “bad.” If someone, is “controversial,” then there must be something wrong with them!

As a result, a list of “controversial” acts of clemency would itself be “controversial.” The selection process for such a list would be hopelessly subjective. The presence of “controversy” would be difficult to determine systematically - with any degree of rigor - and the judgments about “controversial” acts would always be open to the charge of partisanship, or bias. In the minds of many, Gerald Ford’s pardon of Richard Nixon was as bad as it gets. In the minds of others, the pardon made perfect sense. That is politics.

So, having completely abandoned any attempt at gathering together a list of “controversial” pardons, *Pardon Me. Mr. President* focuses on what I call “notable” acts of federal executive clemency. I categorize acts of clemency as “notable” on the basis of the fame or prominence of individuals who were pardoned,<sup>36</sup> the degree of public attention generated by a president’s decision and the level of public debate,<sup>37</sup> and the impact that clemency actions have had on the interpretation of the *Constitution*.<sup>38</sup>

At this point in my writing, I have identified almost two hundred such pardons.

But I think the simplest way to impress upon undergraduate students our amazing ability to simply forget the unforgettable, is to provide (or even discuss) a list of “notable” acts of clemency. Perhaps, considering recent events,<sup>39</sup> the impression can be made more dramatically than ever.

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<sup>36</sup> In some instances individuals have become famous *because of* a presidential pardon.

<sup>37</sup> Pardons have generated news coverage, editorials, commentary, public debate, public relations campaigns, formal protests, formal investigations and calls for investigation. In some instances, coverage, commentary, debate, protests and public relations campaigns appear *before* presidents have even granted clemency.

<sup>38</sup> A distinct advantage of the emphasis on “notable” pardons is the ability to focus on pardons which are interesting and noteworthy, but generally void of anything like “controversy.” Clinton’s pardons of Preston King, Freddie Meeks and Henry Flipper are examples of such pardons.

<sup>39</sup> At the time of the writing of this paper, the United States is at “war” with “terrorists” in Afghanistan. The “war” is the direct result of a “terrorist” act committed a little over one month ago. Two commercial airline jets were high jacked and flown directly into the Twin Towers of the World Trade Center. Thousands of lives were lost as the Towers collapsed.

Most students are probably aware of the current national concerns about anthrax and may also be aware of the recent closing of the House of Representatives.<sup>40</sup> There is, however, a very good chance that they are not aware that a bomb went off in the Capitol in 1983. There is also a good chance that they are not aware that, in 1954, three individuals sprayed bullets from the visitor's gallery of the House of Representatives and hit five members of Congress. The individuals who were caught, found responsible (and punished) for these acts (and another individual who attempted to assassinate President Truman) all received presidential pardons.

Fame can be limited, and fleeting, but undergraduate students are also usually surprised to learn that George Steinbrenner (owner of baseball's New York Yankees) once received a presidential pardon.

I have found the following presidential pardons useful in impressing listeners of our ability to forget presidential pardons, even when they are connected with famous persons, salient events in American politics, or seemingly unforgettable crimes.

#### FIGURE 4

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#### SELECTED "NOTABLE" ACTS OF CLEMENCY

Roger Clinton	President Clinton's brother
Rick Hendrick	Famous racecar driver
Armand Hammer	Former President of Occidental Petroleum Company
George Steinbrenner	Professional baseball owner, <i>New York Yankees</i>
Junior Johnson	Famous racecar driver
Charles Harrison	a.k.a. "Tex," coach, former player <i>Harlem Globetrotters</i>
Lolita Lebron	Sprayed bullets in the House of Representatives
Rafael Miranda	Sprayed bullets in the House of Representatives
Andres Cordero	Sprayed bullets in the House of Representatives
Peter Yarrow	Singer for pop group "Peter, Paul and Mary"
G. Gordon Liddy	Conspicuous Watergate figure
Jimmy Hoffa	Former Teamsters President
David Beck	Former Teamsters President
Iva Toguri	a.k.a. "Tokyo Rose"
Rudolph Abel	Soviet spy traded for U-2 pilot Gary Powers
Oscar Collazo	Attempted to assassinate President Truman
James P. Thomas	Chair, House Un-American Activities Committee
Frederick Cook	Claimed (against Peary) he discovered the North Pole
Francis Townsend	Leader of the Townsend Old-Age Pension Movement
Marcus Garvey	Internationally known black leader
Kate O'Hare	First female to run for U.S. Senate, prominent socialist
Eugene Debs	Socialist, presidential candidate
Robert Stroud	a.k.a. the "Birdman of Alcatraz"
William Van Schaik	Capt. of <i>General Slocum</i> (burned in NY, killing 1,000)

SOURCE: P.S. Ruckman, Jr., *Pardon Me, Mr. President* (forthcoming).

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<sup>40</sup> Members of the House and Senate apparently made a joint agreement to shut down, but members of the Senate later decided to stay.

## CLINTON'S CLEMENCY CAPER IN CONTEXT

Armed with my own original data set (1789-1933) and data generously shared by the Office of the Pardon Attorney (U.S. Department of Justice) and Richard Posner's research team at the University of Chicago (1933-2001), I will now attempt to place President Clinton's clemency record in a clear, accurate historical context. This context was largely unavailable until now (see comments above). While there are several dimensions of Clinton's clemency record that one might focus on, this paper will concentrate on four that are most appropriate for the undergraduate classroom. Undergraduates are more likely to be interested in these topics because they have received the most media attention 1) Clinton's sparing use of clemency 2) Clinton's "last-minute" pardons 3) the pardon of a "fugitive from justice" and 4) clemency and the politics of personal, or "inside," influence.

### *Clinton: the Unforgiving President*

While Clinton's timing and style may have been noteworthy, his overall clemency record actually has a distinct "normal" or "as expected" feel about it. The overall number of presidential pardons steadily decreased across the administrations of Johnson, Nixon, Nixon/Ford, Carter and Reagan (Ruckman 1997). If not anyone else, those in search of clemency were getting the message. Clemency applications steadily declined as well. In full step with the trend, George Bush granted fewer pardons (77) than any full-term president since the 74 pardons granted in Thomas Jefferson's second term.

Clinton was, of course, the first Democrat to wield the pardoning power in some time. As he entered office, the number of clemency applications increased to their highest level in almost thirty years (Ruckman 1997).<sup>41</sup> But Clinton became the first president since George Washington to pardon no one in two full years of a term. The 56 total pardons granted in Clinton's first term represented the lowest number for an administration since the 45 pardons granted in Thomas Jefferson's first term. There were a lot of disappointed applicants, but Clinton's first term was, again, quite consistent with a forty-year trend.

Early on, Clinton's second term was noticeably different from the first. As the second year ended, Clinton had already granted more pardons (59) than he had in the entire first term. More importantly, the number of pardons steadily increased across the second term and going into the fourth year.

Indeed, the fourth year of Clinton's second term (which accounts for 77% of all of Clintons pardons) contained almost every clue one could need to suspect that "last-minute" clemency grants were a distinct possibility. On March 15, 2000, Clinton granted clemency to 18 individuals.<sup>42</sup> On July 7, he granted clemency to 22 individuals.<sup>43</sup> On

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<sup>41</sup> There were 666 applications in fiscal year 1993 (up from 379 in fiscal year 1992 and 318 in 1991) and 808 in fiscal year 1994. The 1994 figure was the highest since 1967, when there were 863 applications for clemency (Ruckman, *Forthcoming*).

<sup>42</sup> 17 pardons and 1 commutation of sentence.

<sup>43</sup> 17 pardons and 5 commutations of sentence. Josh Gernstein, "Presidential Clemency." *ABC News.com*. July 9, 2000.

November 21, he granted clemency to 13 individuals.<sup>44</sup> Three days before Christmas, Clinton granted clemency to 62 individuals.<sup>45</sup> The surprising last day was thus long in the making – if one was simply paying attention.

Even with a “last-minute” clemency splurge (140 pardons and 36 commutations of sentence), Clinton’s overall numbers (465 pardons) can be fairly described as lower than Carter’s (509 pardons), comparable to Reagan’s (397 pardons) and consistent with long-standing trends in the exercise of clemency.

*Clinton: the “Last-Minute” Deliveryman*

The “last-minute” nature of President Clinton’s clemency activity drew considerable attention in and of itself. Waiting until the end of a term to grant pardons might seem odious to critics, since there may not be time to hold a president “responsible” for his actions (or at least cause some amount of grief or regret). But, of course, the freedom from public criticism and/or partisan retaliation might be just the very thing a president needs to make the fair decision in a tough case.

The development of rules and guidelines for clemency in the Department of Justice and the Office of the Pardon Attorney may also have the unintended consequence of encouraging presidents to consider (and grant) more pardons at the end of the term. If an applicant has not met the DOJ’s recommended five-year waiting period, for example, and it is only the first year of the president’s term, the president may feel more comfortable insisting that the applicant wait. That way, the president does not violate the DOJ’s recommendation, the applicant can wait for the recommended period (or a larger portion of it) and the president can always reconsider the case later. At the end of the term, there is no “later.”

Margaret Colgate Love, a somewhat outspoken critic of Clinton’s clemency behavior (and former U.S. Pardon Attorney), told a congressional subcommittee that, between 1900 and 1980, there had been “no particular increase” in the number of clemency grants “at the end of an administration.”<sup>46</sup> Two weeks earlier, Love had appeared on the McNeil Lehrer *New Hour* and suggested the “huge number” of pardons granted by Clinton was the “first time” so many pardons had occurred “at the very end of the term.” Love added that “usually” Presidents pardon “evenly across their term” or “evenly across the year.”<sup>47</sup> The *Washington Post* likewise reported “no previous president” had “issued such a large number of unfiltered pardons at the last possible moment” and Clinton’s predecessors “generally granted pardons steadily throughout their terms.”<sup>48</sup>

All of the available evidence suggests presidents have not pardoned “evenly” across the term and pardons are often granted more frequently as the term advances.

<sup>44</sup> 12 pardons and 1 commutation of sentence.

<sup>45</sup> 59 pardons and 3 commutations of sentence. “Clinton Grants Clemency to 62.” *USA Today*, December 23, 2000; “Clinton Grants Pardons to 59.” *Miami Herald*, December 23, 2000.

<sup>46</sup> Margaret Colgate Love. *Statement at Hearing on Presidential Pardons*, Senate Judiciary Committee, February 28, 2001.

<sup>47</sup> Margaret Colgate Love. *NewsHour with Jim Lehrer*. “Pardon Probe.” February 14, 2001

<sup>48</sup> Peter Slevin and George Lardner, Jr. “Rush of Pardons Unusual in Scope, Lack of Scrutiny.” *Washington Post*, March 10, 2001.

On his last day in office, George Washington pardoned almost as many people as he had in the previous eight years of his administration combined (Ruckman 1994). My own analysis of clemency from 1789 to 1995 reveals twenty administrations have featured the greatest amount of clemency activity in the fourth year of the term.<sup>49</sup> These administrations all fell within the time period 1789 to 1933 – the only years for which one could calculate such figures at the time the paper was written (Ruckman 1995a).

Data recently collected by researchers at the University of Chicago indicate, however, that modern presidents have continued to carry on the “last-minute” tradition. Eisenhower (first and second terms), Johnson (succession term), Carter, Reagan (second term), and Bush all pardoned more people in the fourth year of their terms than in the first three (Ruckman, *Forthcoming*).

In more than a few instances, fourth year “surges” in pardons have been quite significant. Consider the distribution of pardons through each year of the following presidencies:

**FIGURE 5**

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 PARDONS PER YEAR OF TERM – SELECTED PRESIDENCIES

<b>President</b>	<b>Year 1</b>	<b>Year 2</b>	<b>Year 3</b>	<b>Year 4</b>
Adams	0	3	5	13
Madison (2 <sup>nd</sup> )	15	16	21	31
Monroe (1 <sup>st</sup> )	5	24	36	67
Buchanan	21	19	37	73
Grant (1 <sup>st</sup> )	107	169	125	217
Arthur	54	76	47	160
Wilson (2 <sup>nd</sup> )	234	324	420	623
Coolidge (1 <sup>st</sup> )	272	197	245	452
Eisenhower (1 <sup>st</sup> )	21	74	130	291
Eisenhower (2 <sup>nd</sup> )	43	168	104	202
Reagan (2 <sup>nd</sup> )	33	25	30	59
Bush	10	0	29	38

SOURCE: P.S. Ruckman, Jr., *Pardon Me, Mr. President* (forthcoming)

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Despite these long-standing patterns, the fourth year of the term may not be of so much interest to some as clemency decisions made in the final days, or hours, of an administration.<sup>50</sup> In my earlier research, I was able to examine the number of pardons granted in the last days of presidencies in the period 1789 to 1933. I chose, somewhat arbitrarily, the first three days of the month of March as my “last-minute” period and discovered a fair amount of increase in pardoning in final days of the administrations of

<sup>49</sup> John Adams, Thomas Jefferson (first term), James Madison (first and second terms), James Monroe (first term) Andrew Jackson (second term), Martin Van Buren, James K. Polk, James Buchanan, Ulysses S. Grant (first and second terms), Chester Arthur, and Grover Cleveland (second term).

<sup>50</sup> It was occasionally reported that President Clinton granted his “last-minute” pardons on January 19, but waited to make them official on January 20.

Johnson, Hayes, Wilson, Grant and Coolidge. None of these presidents, however, granted more than 30 pardons.

As a result, even with George Washington's eventful last day in office, it appears as though Clinton may very well have set the record for the highest number of pardons granted on the last day of a term.

*Clinton: the Fugitive's Dream Come True*

Of course, one of the more controversial "last-minute" pardons was granted to Marc Rich. In 1983, Rich fled the United States and raced to Switzerland. He left behind a fifty-one count indictment and accusations of evading forty-eight million dollars in taxes. There were many ways to criticize the Rich pardon, but one of the more popular criticisms focused on the fact that Rich was a "fugitive from justice."

In preparation for my forthcoming book, I scanned the *Annual Report of the Attorney General* over a twenty-five year period (1907 to 1932) with the specific goal of finding pardons that were given to "fugitives from justice." Even though my approach was somewhat casual (essentially a lot of fast eyeballing of very, very small print), I found a dozen such instances.<sup>51</sup> A "one every other year" estimate for the period must certainly be low, or conservative, as I may very well have overlooked some relevant cases and, in some instances, the *Report* may simply not have mentioned the "fugitive" status of clemency recipients.

Of the twelve fugitives I quickly identified, eight had escaped from prison and four fled either before their crimes were detected or during the appellate process (and they were presumably out on bond). George Hulme was fugitive for 21 years, L. Preast for 30 years and William Kirby Robinson for 32 years.

The only hint of controversy in any of these cases appears in that of J.T. Woodson. Woodson was charged with using the mails to defraud and sentenced to eighteen months in prison. But he escaped from prison and remained a fugitive from justice for two years. He was then recaptured and served out his sentence. Theodore Roosevelt refused to grant Woodson a pardon because of the nature of his offense and his objectionable escape. Woodrow Wilson, however, granted a pardon.

One case actually had a moderate Marc Rich feel to it. In 1907, Robert Hicks was sentenced to ten months in prison and fined one thousand dollars (a pretty hefty amount given the great financial panic of that year). Hicks appealed his case and was released on bond. He then fled to Europe. Hicks remained a fugitive from justice for over a dozen years and the government made no serious effort to retrieve him. Meanwhile, Hicks gave his "services" for "the benefit of humanity." But, he never turned himself in. He was caught again. Hicks' supporters eventually petitioned the president for a pardon. Woodrow Wilson commuted Hicks' sentence a little over a month later and Calvin Coolidge granted Hicks a full pardon twelve years later (Ruckman, *forthcoming*).

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<sup>51</sup> Charles Anderson (May 8, 1907), George Hulme (September 14, 1910), Harold B. Faxon (February 27, 1913), Robert E. Hicks (commutation on July 14, 1915 and full pardon on June 6, 1927), J.T. Wilson (April 30, 1917), John Adam Schmidt (March 23, 1918), Bernard Goldman (May 27, 1927), Rudol Caylor (April 4, 1928), Albert Grant Ferguson (October 29, 1928), Elmer D. Smith (October 23, 1928), L. Preast (December 24, 1929), William Kirby Robinson (November 21, 1932).

Interestingly, a common theme among the Attorney General's comments regarding fugitives is dramatic change in their lives and good works. One fugitive led an "exemplary" life. Another lived an "upright, honorable life" since the commission of his crime. Another lived an "exemplary" life and "raised and educated" a family "of promising children." He also "won the esteem of the best citizens" in his community. One fugitive had lived a "commendable, industrious life" and another "conducted himself in an upright manner" (Ruckman, *forthcoming*).

So, if Marc Rich lives an honorable, upright life, wins the esteem of the best citizens in his community and conducts himself in a commendable, upright manner ... for a considerable period of time ... why not pardon him?

It is far too early to generalize about the frequency of pardons for fugitives throughout history but, if the period I have sampled is at all representative, it is safe to say that such pardons are neither "normal" nor "extraordinary." They are rather like finding a dime on the sidewalk. It does not happen every day, but it is not worth reporting to the *Times* either.

### *Clinton: the "Contact" Approach to Clemency*

*USA Today* noted several of the applications for Clinton's "last-minute" pardons were supported by a "Who's Who of America's rich, famous and influential" including: rock star Don Henley, historian Arthur Schelsinger, Jr., veteran newscaster Walter Cronkite, Lady Bird Johnson, the Rev. Jesse Jackson and former presidents Carter and Ford.<sup>52</sup> Democratic congressmen Earl Hilliard (AL), Charles Rangel (NY), Dale E. Kildee (MI), Patrick Kennedy (RI), Xavier Becerra (CA), Danny Davis (IL) and Maxine Waters (CA) supported clemency applications, as did Republicans Orrin Hatch (UT), Jim Ramstad (MN) and Fred Thompson (TN).<sup>53</sup> *MSNBC* also focused on the efforts of Henley and noted the co-founder of "the Eagles" donated \$180,000 in soft money to Democratic political committees in 1996, \$2,000 to Hillary Clinton's Senate campaign and \$2000 to Al Gore.<sup>54</sup> The *New York Times* linked clemency decisions to the "influence" of television producer Harry Thomason, Democratic fund-raiser Terry McAuliffe, Hugh Rodham (the First Lady's brother), Jack Quinn (former White House Counsel), the president and editor of the *Las Vegas Sun*, and a former roommate and classmate of the President at Oxford University and Yale Law School.<sup>55</sup>

The implicit assumption of much of this reporting (and the critics who ran with it) was that Clinton's clemency decision making was, in part, unduly influenced by fame, wealth and influence. One needed the right "contacts" to get a pardon from this guy. It's not what you know, but who you know, etc. The more subtle implication was that this was all somehow new, or particular to President Clinton. Interestingly, these assumptions cannot be easily matched against empirical evidence. The discipline of political science is a long, long way from caring about (much less systematically researching) what types of people support clemency applications and the impact of their support.

<sup>52</sup> "Celebrities Asked Clinton to Grant Pardons." *USA Today*, March 9, 2001.

<sup>53</sup> "Congressmen, Senators Weighed in On Pardons." *USA Today*, March 9, 2001.

<sup>54</sup> Jim Popkin, "Rock Star Lobbied for Bookie." *MSNBC.com*, March 6, 2001.

<sup>55</sup> Don Van Natta, Jr. and Marc Lacey, "Access Proved Vital in Last-Minute Race for Clinton Pardons." *New York Times*, February 25, 2001.

But, consider the examples of presidents Ford and Carter. Having a former president support a clemency application must certainly be a “plus,” but it is by no means “new.” Franklin Pierce supported the clemency application of Virgil McCormick in 1862 and James Buchanan recommended the pardon of James and John McLune to Andrew Johnson in 1867. Harry Truman vigorously lobbied for the pardon of his former personal secretary, Matthew J. Connelly, during the Kennedy administration. Andrew Johnson and James Garfield were supporting clemency applications before they were even elected (Ruckman, *forthcoming*).

Senators and Representatives are also cited with some frequency in the clemency warrants of presidents from 1789 to 1893 and the *Annual Report of the Attorney General* from 1885 to 1932. In some instances, numerous members of Congress support the same clemency application. Eighty-five members of the House and six members of the Senate supported clemency for John Y. Beall, but Lincoln refused to stop his hanging. Forty members of the 39<sup>th</sup> Congress supported clemency for R.M. Lee and Andrew Johnson granted clemency in 1865. Seventy-six Senators supported the clemency application of John D. Hart and William McKinley granted clemency in 1898.

The phrase “respectable citizens” or “influential citizens” appears in literally thousands of warrants and explanations for clemency decisions appearing in the *Annual Report*. Consider what we know about the 358 individual pardons granted by Abraham Lincoln. The clemency warrants for these pardons cite the influence of “high respectable citizens” 140 times. “Honorable citizens” are cited in an additional 48 instances. Lincoln’s pardons reference Senators (15 warrants), Representatives (14 warrants), Governors (12 warrants), former Governors (2 warrants), state legislators (5 warrants), mayors (5 warrants), and former mayors (2 warrants). Lincoln’s clemency decisions were evidently swayed by fame and influence. The *Washington Post* was simply not there to spot all of the “back-channel lobbying.”

## CONCLUSION

This paper was certainly not written with the intention of justifying, or rationalizing, President Clinton’s “last-minute” clemency bonanza. But it was written to document that – at the end of his administration - the clear, accurate historical context that was necessary to make fair, intelligent judgments about his “last-minute” pardons and overall clemency record was simply not available – to anyone.

Without clear, accurate historical context, any congressional “investigation” of Clinton’s pardons was certainly doomed to be “all thunder and no lightning.” With radical improvements in public accessibility to data regarding the exercise of clemency, however, this necessary context is rapidly developing. This paper represents a first attempt to compare Clinton’s actions against what we should have known for many years, and now do know.

It is a shame that the historical context for federal executive clemency has been so slow in developing, especially given the steady stream of “notable” pardons which have decorated our nation’s history. Political scientists have occasionally played “journalists” and generated lists of “controversial” pardons for their textbooks, but have given little or no effort to systematic exploration of clemency. Ford’s “most famous” pardon of Richard Nixon, the prominence of the issue of amnesty in the 1976 election, the Iran-Contra

pardons, and Bob Dole's presidential debate haranguing of President Clinton over Whitewater pardons have not generated a single page of analysis in our "top" journals. When President Clinton left office, the media could count on little insight from political scientists on the topic of pardons because – on this topic - we have simply chosen to be irrelevant.

This paper suggests that it would be a good idea to begin the process of making the discipline more relevant in the classroom, if not anywhere else.

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### FIGURE 3

#### PRESIDENTIAL AMNESTIES

<i>President</i>	<i>Date</i>	<i>Year</i>	<i>Recipients or Benefactors</i>
Washington	July 10	1795	Whiskey Insurrectionists
Adams	May 21	1800	Pennsylvania Insurrectionists (Fries Rebellion)
Jefferson	October 15	1807	Military deserters (if surrendered in 4 months)
Madison	February 7	1812	Military deserters (if surrendered in 4 months)
Madison	October 8	1812	Military deserters (if surrendered in 4 months)
Madison	June 14	1814	Military deserters (if surrendered in 4 months)
Madison	February 6	1815	Pirates participating in War of 1812
Jackson	June 12	1830	Military deserters discharged, those confined released
Lincoln	February 14	1862	Political prisoners paroled
Lincoln	March 10	1863	Military deserters restored with only forfeiture of pay
Lincoln	December 8	1863	“Rebellion” participants (with exceptions) subject to oath
Lincoln	February 26	1864	Military deserters sentences mitigated, restored to duty
Lincoln	March 26	1864	Clarification of December 8, 1863, amnesty
Lincoln	March 11	1865	Military deserters (if returned to post in 60 days)
Johnson	May 29	1865	Certain rebels of Confederate States
Johnson	May 4	1866	clarification of previous amnesty ???
Johnson	July 3	1866	Military deserters restored with only forfeiture of pay
Johnson	September 7	1867	Confederates (excepting certain officers) subject to oath
Johnson	July 4	1868	Confederates (except those indicted for treason or felony)
Johnson	December 25	1868	Confederates (universal and unconditional)
Harrison	January 4	1893	Mormons practicing polygamy
Cleveland	September 25	1894	Mormons practicing polygamy
T. Roosevelt	July 4	1902	Philippine insurrectionists, subject to oath
Wilson	June 14	1917	5,000 persons under suspended sentences
Wilson	August 21	1917	Clarification, reaffirmation of June 14 amnesty
Coolidge	December 15	1923	Espionage Act ???
Coolidge	March 5	1924	Over 100 military deserters. Restoration of citizenship.
F. Roosevelt	December 23	1933	Over 1,500 who violated Espionage or Draft laws.
Truman	December 24	1945	Thousands of ex-convicts serving at least 1 year in war
Truman	December 23	1947	1,523 draft evaders (recommended by Amnesty Board)
Truman	December 24	1952	Convicts serving armed forces at least 1 year since 1950
Truman	December 24	1952	Military deserters convicted between 1945 and 1950
Ford	September 16	1974	Vietnam draft evaders. Conditioned on public service
Carter	January 21	1977	Vietnam draft evaders. Unconditional pardon

SOURCE: P.S. Ruckman, Jr. *Pardon Me, Mr. President* (forthcoming).