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Should the Power of Presidential Pardon be Revised?

by BUDD N. SHENKIN AND DAVID I. LEVINE*

Introduction

Although the Administration of President Donald J. Trump has not succeeded in provoking much awe, it has certainly provided more than its share of shock, including the way it has brandished the power of the presidential pardon.¹ President Trump has tested the limits of the power by hinting that he can pardon himself.² He violated the standard Department of Justice procedures of screening pardon candidates by taking nakedly

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1. U.S. CONST. art. II, § 2 (“[H]e shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”). The U.S. Supreme Court has held that, except for the express exclusion for impeachment, the President’s power to pardon federal offenses is “unlimited.” *Ex parte Garland*, 71 U.S. 333, 380 (1866). It is not subject to congressional control. *Id.* The context of *Garland* is discussed in JEFFREY P. CROUCH, *THE PRESIDENTIAL PARDON POWER* 41-42 (2009). Crouch also discusses and distinguishes the forms of clemency the President may invoke: full and conditional pardons, commutation, remit fines and forfeitures, reprieve, and amnesty. *Id.* at 20.

2. Carol D. Leonnig et al., *Trump Team Seeks to Control, Block Mueller’s Russia Investigation*, WASH. POST (July 21, 2017), https://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5_story.html (reporting that President Trump asked his advisers about his power to pardon himself among others). The position of the U.S. Justice Department’s Office of Legal Counsel is that the President may not pardon himself, but that proposition has never been tested. Mary C. Lawton, *Presidential or Legislative Pardon of the President: Memorandum Opinion for the Deputy Attorney General*, SUPPLEMENTAL OPINIONS OF THE OFFICE OF LEGAL COUNSEL (Aug. 5, 1974), https://www.justice.gov/sites/default/files/olc/opinions/1974/08/31/op-olc-supp-v001-p0370_0.pdf. See JEFFREY P. CROUCH, *supra* note 1, at 70-71 (addressing the self-pardon controversy); see also BRIAN C. KALT, *CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES* 39-60 (2012).

political steps to pardon Arizona Sheriff Joseph “Joe” Arpaio,³ who was convicted for felony contempt of court for failing to cease mistreatment of prisoners of color, and right-wing provocateur Dinesh D’Souza, who pled guilty to campaign finance violations.⁴ President Trump pardoned Conrad Black, a longtime friend and business partner, who was deported after serving a sentence for fraud, embezzlement, and obstruction of justice, but who had written a glowing book about Trump.⁵ In 2019, he flirted with pardoning war criminals on Memorial Day.⁶ He apparently offered to pardon aides and other federal employees who might break the law while fulfilling his quest to build a wall across the entire border with Mexico.⁷ Even more significantly, Trump has played a cagey game of self-protection by offering

3. DONALD J. TRUMP, EXECUTIVE GRANT OF CLEMENCY FOR JOSEPH M. ARPAIO, (Aug. 25, 2017), <https://www.justice.gov/pardon/file/993586/download>. See Julie Hirschfield Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html>; Tyler Brown, *The Court Can’t Even Handle Me Right Now: The Arpaio Pardon and Its Effect on the Scope of Presidential Pardons*, 46 PEPP. L. REV. 331 (2019).

4. DONALD J. TRUMP, EXECUTIVE GRANT OF CLEMENCY FOR DINESH D’SOUZA, (May 31, 2018), <https://www.justice.gov/pardon/page/file/1067776/download>. See Editorial, *Dinesh D’Souza? Really?*, N.Y. TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/opinion/dinesh-dsouza-trump-pardons.html>.

5. Donald J. Trump, Executive Grant of Clemency for Conrad Moffat Black (May 15, 2019) <https://www.justice.gov/pardon/page/file/1163776/download>. See Colby Itkowitz, *Trump Pardons Billionaire Friend Conrad Black, Who Wrote a Book About Him*, WASH. POST (May 15, 2019), https://www.washingtonpost.com/politics/trump-pardons-billionaire-friend-conrad-black-who-wrote-book-about-him/2019/05/15/b494b208-7771-11e9-bd25-c989555e7766_story.html. Black, Arpaio and D’Souza are members of a select group of just twenty-one people to whom Trump has granted clemency during his first thirty months in office. U.S. DEPT. OF JUSTICE, CLEMENCY STATISTICS OF DONALD J. TRUMP (Aug. 13, 2019), <https://www.justice.gov/pardon/clemency-statistics#DonaldJTrump>.

6. Editorial, *The President and His Power to Pardon*, N.Y. TIMES (May 19, 2019), <https://www.nytimes.com/2019/05/19/opinion/trump-pardon-conrad-black-patrick-nolan.html>. The Editorial Board of the *New York Times* deemed President Trump’s use of the pardon power “a new trend in presidential clemency: mercy for lawbreakers in the mold of disgraced politicians, media personalities and political allies who have flattered, defended or curried favor with the president.”

7. Editorial, *Trump has No Trouble Gutting the Law to Build His Wall*, WASH. POST (Aug. 29, 2019), https://beta.washingtonpost.com/opinions/trump-has-no-trouble-gutting-the-law-to-build-his-wall/2019/08/29/86e9af22-c9d1-11e9-a1fe-ca46e8d573c0_story.html. The Editorial Board of the *Washington Post* observed: “Mr. Trump has breezily suggested he would grant presidential pardons to those who run afoul of the law—a suggestion subsequently dismissed by a White House official, who assured The Post it was a joke. Hilarious.”

glimpses of pardons for witnesses who are “loyal” and not “rats” who cooperate with law enforcement.⁸

In the wake of this presidency, there will doubtless be a raft of reform measures. We believe that reform of the pardon power should be a top priority because this power goes to the very heart of a basic tenet of our government: everyone is equal before the law. Since that power sits squarely in the Constitution, and not merely in statutory law or custom, reform requires a constitutional amendment. Our specific proposal to provide a check on the pardon power is this: amend the United States Constitution to require that every presidential pardon have the co-signature of the Speaker of the House of Representatives to become effective.

Constitutional amendments are notoriously challenging. Nonetheless, as we discuss below, we believe that our proposed amendment has a good chance of passage, both because there is likely no strong constituency whose power would be compromised by this change, and because extreme circumstances might warrant this change. Picture the situation, for instance, if President Trump should decide to pardon his convicted campaign chair, Paul Manafort, his indicted advisor, Roger Stone,⁹ his children, other associates, and even himself; we believe that the Country’s outrage would make anything possible.

8. ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION (Mar. 2019), <https://games-cdn.washingtonpost.com/notes/prod/default/documents/f5fe536c-81bb-45be-86e5-a9fee9794664/note/a8d336ef-e98d-4a08-987d-b4c154b22700.pdf>. Special Counsel Robert Mueller’s report includes sections in Volume II regarding the President’s conduct towards Michael Flynn, Paul Manafort, Michael Cohen, and another person whose name is redacted. For example, with respect to Paul Manafort, the Report states: “[T]he evidence supports the inference that the President [Trump] intended Manafort to believe that he could receive a pardon, which would make cooperating with the Government as a means of obtaining a lesser sentence unnecessary.” *Id.* at 132-33. With respect to Cohen, who told Mueller’s investigators that he recalled discussing the possibility of a pardon with the President’s personal counsel, the Report states: “[T]he evidence . . . could support an inference that the President used inducements in the form of positive messages in an effort to get Cohen not to cooperate, and then turned to attacks and intimidation to deter the provision of information or undermine Cohen’s credibility once Cohen began cooperating.” *Id.* at 154. For examples of contemporaneous press accounts of President Trump’s efforts to influence witnesses with the possibility of pardons, see, e.g., Michael S. Schmidt et al., *Trump’s Lawyer Raised Prospect of Pardons for Flynn and Manafort*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/us/politics/trump-pardon-michael-flynn-paul-manafort-john-dowd.html>; Julie Hirschfield Davis & Eileen Sullivan, *Trump Praises Manafort, Saying, ‘Unlike Michael Cohen’ He ‘Refused to Break,’* N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/us/politics/trump-cohen-manafort.html>.

9. Andrew Blake, *Donald Trump Will ‘Definitely’ Pardon Roger Stone: Mueller Witness Randy Credico*, WASH. TIMES (Mar. 29, 2019) <https://www.washingtontimes.com/news/2019/mar/29/donald-trump-will-definitely-pardon-roger-stone-mu/>.

I. Origin and Course of the Presidential Pardon

Uses for the presidential pardon appear to have had two phases: one from the adoption of the Constitution in 1789 until the Watergate scandal, and the second from the Watergate scandal until now.¹⁰ During our country's conception, the Founding Fathers adopted the pardon power from the English Prerogative of Kings, and placed it in Article II, Section 2 of the United States Constitution.¹¹ Alexander Hamilton defended "the benign prerogative" in *The Federalist Papers* for its element of mercy in cases where the sometimes blunt instrument of the law may have perpetrated unduly harsh judgments.¹² He also envisioned the presidential pardon serving as a potential tool for civic welfare, for instance, enabling the government to forgive participants in rebellions, and thus offering a means of easing the offenders' reincorporation into civil society.¹³ Hamilton argued that the pardon power should continue to be vested in a single individual, hopefully one "of prudence and good sense,"¹⁴ rather than in a group.¹⁵ He wrote that, if it were up to the President alone, he would be more mindful of the case and his ability to aid someone in distress.¹⁶ When the Anti-Federalists worried that the President might use the pardon to prevent investigation into his own associates or himself,¹⁷ Hamilton responded that a President of high character would be restrained from misuse of the power by the prospect of peer obloquy following a mischievous decision;

10. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1211-12 (2010).

11. William Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977). See also Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 590 (1991) ("By choosing to repose the clemency power in the chief executive alone, the Framers of the Constitution aligned themselves with a vision of the power that was decidedly British in nature.").

12. "Humanity and good policy conspire to dictate that, the benign prerogative of pardoning should be as little as possible fettered or embarrassed." THE FEDERALIST NO. 74 at 362 (Alexander Hamilton) (Terence Ball ed., 2003). Hamilton also addresses the pardon power briefly in Federalist Paper 69. THE FEDERALIST NO. 69 at 336-37 (Alexander Hamilton).

13. THE FEDERALIST NO. 74, *supra* note 12, at 363.

14. *Id.*

15. Hamilton contended that since a group "might often encourage each other in an act of obduracy," one person "appears to be a more eligible dispenser of mercy of the government than a body of men." *Id.*

16. See Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 79-80 (2019) (quoting Hamilton).

17. See Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 596 (2005).

if that were not enough, he could be impeached.¹⁸ The view of Hamilton and other Federalists prevailed while the Constitution was being drafted; efforts to share the power with the Senate failed by a margin of 8-2 of the states voting.¹⁹

In practice, the presidential pardon has typically been used for mercy, but it has also been used for civic welfare. In 1795, George Washington used the pardon to expedite reconciliation after the quelling of the Whiskey Rebellion.²⁰ During the Civil War, Abraham Lincoln used it to bolster the morale of Union troops by pardoning Union Army deserters and others from harsh sentences, including the death penalty.²¹ Lincoln, and later, Andrew Johnson, granted pardons and amnesty to many ex-Confederates in an effort to preserve and rebuild the Union.²²

The most notable misuse of the pardon came from the personally honest but loyal-to-his-friends Ulysses S. Grant, who pardoned several colleagues

18. THE FEDERALIST NO. 69 at 336. See also JEFFREY CROUCH, *supra* note 1, at 18 (explaining Hamilton's position that, "[d]espite the wide reach of the clemency power . . . the protections were adequate because the president would always be subject to impeachment if he acted improperly, even if he pardoned treasonous executive branch allies"); see also Jeffrey Crouch, *Presidential Misuse of the Pardon Power*, 38 PRES. STUD. Q. 722, 723 (2008); Mark Osler, *Clemency as the Soul of the Constitution*, 34 J.L. & POL'Y 131, 154 (2019) (James Madison also asserted that impeachment would be a possible remedy for abuse of the power to pardon). Based on their days as feisty revolutionaries who had overthrown the King and Parliament, at least these Founders did not appreciate how difficult and exceptional impeachment would become in the decades to follow.

19. Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1673 (2001); Kobil, *supra* note 11, at 590-591. This view was also adopted by Chief Justice John Marshall in the first U.S. Supreme Court case to consider the presidential pardon power. Writing for the Court, Marshall said that, just like the British monarch, in issuing a pardon, the President bestowed "an act of grace. . . . It is the private, though official, act of the executive magistrate." *United States v. Wilson*, 32 U.S. 150, 160 (1833).

20. Carrie Hagen, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN.COM (Aug. 29, 2017), <https://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/>.

21. Love, *supra* note 10, at 1177-78. Lincoln may have been too kind-hearted at times. His own Attorney General believed that Lincoln was "unfit to be trusted with the pardoning power, partly because he was too susceptible to women's tears." *Id.* at 1178. "People joked that enterprising merchants in the District of Columbia rented weeping children and widow's weeds to the mothers of condemned soldiers before their audiences with the President." *Id.* at 1178 n.33.

22. JONATHAN T. DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861-1898 at 8 (1953). Some of Johnson's practices were subject to criticism. Some people thought that Johnson, and perhaps his son, were susceptible to the entreaties of certain "pardon brokeresses" with "questionable characters." *Id.* at 146-151. Johnson's political foes in Congress, the Radical Republicans, considered whether he had abused his power to grant pardons or amnesty. By the time the House of Representatives actually impeached Johnson in 1868, however, that alleged abuse was not expressly part of the articles of impeachment. *Id.* at 329-332, 350-52.

involved in the “Whiskey Ring.”²³ Other than Grant’s notorious weakness for his associates, there were few uses of pardons out of self-interest until the Watergate scandal in the 1970s,²⁴ when a marked change seemed to occur.²⁵ President Ford’s 1974 pardon preempted the legal prosecution of ex-President Nixon to prevent a return to what Ford had called “our long national nightmare.”²⁶ While this pardon was merciful to Nixon personally, and arguably served the civic purpose Ford claimed for it by allowing the nation to move on, it also served the political end of protecting the Republican Party and its members from continued public disgrace and perhaps other discoveries of wrongdoing. It had other, longer term repercussions as well. This short-circuiting of the legal process contributed to an impression that the President is above the law. Secondly, even though the pardon was widely unpopular and arguably led to Ford’s defeat in 1976, he emerged from the pardon without personal disgrace. The signal to future Presidents may have been: do what you would like with political pardons because you can get away with them.

The next great scandal of illegal acts by the executive branch was the Iran-Contra affair. Although President Ronald Reagan resisted pressure to pardon the Iran-Contra conspirators,²⁷ President George H. W. Bush exercised no such restraint. Having been defeated for reelection, but having not yet departed office, he issued Christmas Eve pardons to six Iran-Contra conspirators²⁸—all high officials, friends, and colleagues—sparing them shame and imprisonment, and sparing himself further investigation by the

23. CROUCH, *supra* note 1, at 88-89; Crouch, *supra* note 18, 38 PRES. STUD. Q. at 725-26.

24. CROUCH, *supra* note 1, at 89; Crouch, *supra* note 18, 38 PRES. STUD. Q. at 726; Love, *supra* note 10, at 1172-93.

25. See CROUCH, *supra* note 1, at 2, 53-65 (analyzing impact of Watergate on subsequent pardons).

26. See PRESIDENT GERALD R. FORD, REMARKS ON TAKING THE OATH OF OFFICE, 1974 PUB. PAPERS 1-3 (Aug. 9, 1974), <https://www.presidency.ucsb.edu/documents/remarks-taking-the-oath-office>; PRESIDENT GERALD R. FORD, PROCLAMATION 4311: GRANTING PARDON TO RICHARD NIXON, 1974 PUB. PAPERS 103-104 (Sept. 8, 1974), <https://www.presidency.ucsb.edu/documents/proclamation-4311-granting-pardon-richard-nixon>. The Nixon pardon is addressed in detail in CROUCH, *supra* note 1, at 66-85, 129-36.

27. CROUCH, *supra* note 1, at 94-95, 128-29.

28. GEORGE H. W. BUSH, PROCLAMATION 6518: GRANT OF EXECUTIVE CLEMENCY, 28 WEEKLY COMP. PRES. DOC. 2382 (Dec. 24, 1992), <https://www.presidency.ucsb.edu/documents/proclamation-6518-grant-executive-clemency>. For background on how these pardons came about and protected President Bush, see Noah Feldman, *Senators, Ask William Barr About His Pardon Strategy*, BLOOMBERG (Jan. 10, 2019, 4:30 AM), <https://www.bloomberg.com/opinion/articles/2019-01-10/attorney-general-william-barr-used-pardons-to-protect-president> (detailing how then-Attorney General Barr “gave Bush the cover he needed to issue the pardons”). The Iran-Contra pardons are assessed in CROUCH, *supra* note 2, at 95, 101-07, 136-39.

Independent Counsel into what he knew and when he knew it.²⁹ As with Ford, despite outrage in some quarters, Bush himself suffered no consequences beyond criticism in the press; when he died in 2018, there were only a few references to his shameful act of short-circuiting justice.³⁰

President Bill Clinton waited until his very last day in office in 2001 to short-circuit the established process for granting pardons. In that last-minute flurry, he issued more than 175 pardons, more than 60 of which had not been properly evaluated by the Justice Department's Office of Pardons.³¹ Among the unvetted pardons were those issued to two close associates, his brother, and a Whitewater figure. Most notoriously and sordidly, President Clinton also pardoned the fugitive arms dealer Marc Rich, former husband of Denise Rich, who was a close political supporter and an important donor to the Clinton Presidential Library.³²

29. According to his biographer, Bush acknowledged at the time in his personal diary that "the chief issue was the charge that he was letting [former Defense Secretary Caspar] Weinberger off the hook 'in order to cover my own ass.'" JON MEACHAM, *DESTINY AND POWER: THE AMERICAN ODYSSEY OF GEORGE HERBERT WALKER BUSH* 531 (2015).

30. Compare, e.g., Karen Tumulty, *George H.W. Bush, 41st President of the United States, Dies at 94*, WASH. POST (Nov. 30, 2018), https://www.washingtonpost.com/local/obituaries/geo rg e-hw-bush-41st-president-of-the-united-states-dies-at-94/2018/12/01/8e85a9ba-de75-11e6-ad42-f3375f271c9c_gallery.html (no mention of the pardons in obituary) with Adam Nagourney, *George Bush, Who Steered Nation in Tumultuous Times, Is Dead at 94*, N.Y. TIMES (Nov. 30, 2018), <https://www.nytimes.com/2018/11/30/us/politics/george-hw-bush-dies.html> (quoting Independent Counsel Lawrence E. Walsh in the aftermath of the 1992 pardons: "'The Iran-contra cover-up, which has continued for more than six years, has now been completed.'").

31. U.S. DEPT. OF JUSTICE, PARDONS GRANTED BY PRESIDENT WILLIAM J. CLINTON (1993-2001), <https://www.justice.gov/pardon/clinton-pardons#january202001>. See Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1136 (2010).

32. Albert W. Alschuler, *supra* note 31, at 1137-42. CROUCH, *supra* note 1, at 108-11 (Clinton previously pardoned members of the Puerto Rican terrorist organization "FALN" for reasons that were apparently based on electoral politics in New York State); Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAP. U. L. REV. 185, 204 (2003) (A former Pardon Attorney noted that, because President Clinton "regarded the pardon power as a personal one, he felt unconstrained by the rules and procedures that had guided and protected his predecessors. Apparently, no one on his own staff made any effort to dissuade him of this intensely narcissistic view of the pardon power throughout his two terms as President.").

A congressional committee subsequently investigated Clinton's record on pardons, and issued a scathing report.³³

George W. Bush partly resisted persistent appeals—especially from Vice-President Richard Cheney—to pardon Cheney's Chief of Staff, I. Lewis "Scooter" Libby. Libby was convicted of obstruction of justice and perjury in connection with the White House's vindictive outing of a deep-cover CIA agent, Valerie Plame Wilson.³⁴ Bush responded to the pressure by commuting Libby's sentence.³⁵ While Bush received some praise for allowing justice to be done to some extent, acute observers noted that commutation was also a self-protective act. By using a commutation instead of a pardon, Bush was merciful in sparing Libby prison. The commutation also enabled Libby to continue to invoke the Fifth Amendment in further inquiries, thus saving officials from revelation of their roles in the outing of CIA agent Valerie Plame.³⁶ In other words, as with his father's Iran-Contra pardons, the second President Bush granted mercy to an associate while protecting himself and other officials from further jeopardy.³⁷

Writing in 2010, Margaret Colgate Love, a former U.S. Pardon Attorney, observed: "Since 1980, however, presidential pardoning has fallen on hard times, its benign purposes frustrated by politicians' fear of making a mistake, and subverted by unfairness in the way pardons are granted."³⁸ She contended that, "as the official route to clemency has all but closed, the

33. COMM. ON GOV'T REFORM, JUSTICE UNDONE: CLEMENCY DECISIONS IN THE CLINTON WHITE HOUSE, H.R. REP. NO. 107-454, at 28-29 (2002) ("In his rush to grant pardons and commutations in the waning hours of his presidency, Clinton ignored almost every applicable standard governing the exercise of the clemency power."). See also CROUCH, *supra* note 1, at 111-17, 140-42 (describing circumstances of and reaction to Clinton's last-minute pardons). On a lighter note, inspired and appalled by what President Clinton did in 2001, the television show, *The West Wing*, addressed the pardon power, and how it feels to be inside the White House making those decisions, in the episode *The Benign Prerogative* (NBC television broadcast Jan. 14, 2004), https://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=the-west-wing&episode=s05e11. As one character scoffs, "Benign? It's a bag of lit dynamite." The episode refers to low-profile offenders who are pardoned as "packing peanuts"; they are "useful insulation for any cronies I may wanna spring." *Id.*

34. VALERIE PLAME WILSON, FAIR GAME: HOW A TOP CIA AGENT WAS BETRAYED BY HER OWN GOVERNMENT 295-96 (2007).

35. GEORGE W. BUSH, PROCLAMATION 8159: GRANT OF EXECUTIVE CLEMENCY, 43 WEEKLY COMP. PRES. DOC. 902 (July 2, 2007), <https://www.presidency.ucsb.edu/documents/proclamation-8159-grant-executive-clemency>. See also CROUCH, *supra* note 1, at 117-26, 142-45 (describing circumstances of and reaction to commutation for Libby).

36. WILSON, *supra* note 34, at 388.

37. President Trump exonerated Libby entirely in 2018. DONALD J. TRUMP, EXECUTIVE GRANT OF CLEMENCY (Apr. 13, 2018), <https://www.justice.gov/pardon/page/file/1052911/download>. See Peter Baker, *Trump Pardons Scooter Libby in a Case That Mirrors His Own*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/us/politics/trump-pardon-scooter-libby.html>.

38. Love, *supra* note 10, 100 J. CRIM. L. AND CRIMINOLOGY at 1169 (2010).

back-door route has opened wide.”³⁹ About Presidents Clinton and George W. Bush, she noted, “The two presidents are also at fault: in confirming popular beliefs about pardon’s irregularity and unfairness, they disserved both the institution of the presidency and their own legacies.”⁴⁰

Because the Administration of President Barack Obama left a demonstrably cleaner record, it is possible that Obama was not ever tempted to grant pardons with a personal agenda. Even if he had been tempted, that allure does not appear to be reflected in his record of issuing over 1900 commutations and pardons while in office.⁴¹

Because abuse of the presidential pardon power since the 1970s does appear to be at variance with the preceding 180 years, Trump’s political and personal weaponizing of pardons should then be viewed as an intensification of a worrisome trend. The days of presidential high character and self-abnegation expressing themselves in respect for the original purposes of the presidential power of the pardon seem to have been left far behind.

II. Adjusting the Power to Pardon

Once a malignant trend is in place, action to counter the trend is required. If scholars correctly posit that Hamilton’s theory worked well for the first 180 years, but then broke down after Watergate, what are we to do?

Soft measures could be taken. Congress could pass legislation, such as H.R. 5551, which was proposed by Representative Adam Schiff, mandating that the United States Department of Justice provide information to Congress on certain questionable pardons.⁴² The bill would ensure that the facts surrounding the pardon would be revealed, even if the damage from the pardon itself could not be undone. Others have suggested that presidents be required to give a reason for the pardon, again invoking the power of public exposure.⁴³ Alternatively, Congress could pass a resolution reaffirming the original intent of the pardon to serve the purposes of “act of grace” and “public welfare” only, with the implied threat of impeachment as the sanction for violating those norms. These soft measures might make presidents think twice before violating the original intent of the pardon

39. *Id.*

40. *Id.* at 1172.

41. U.S. DEPT. OF JUSTICE, CLEMENCY STATISTICS OF BARACK OBAMA (AUG. 13, 2019), <https://www.justice.gov/pardon/clemency-statistics#obama>. See Margaret Colgate Love, *Obama’s Clemency Legacy: An Assessment*, 29 FED. SENT. REP. 271 (2017).

42. H.R. 5551, 115th Cong., 2d Sess. (2018).

43. Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 281 (1993); Jeffrey P. Crouch, *The President and the Pardon Power: A Bibliographic Essay, 1989-2015*, 27 U. ST. THOMAS L. REV. 413, 418-19 (2016).

power, and they would serve to buttress the claims that Congress is a watchful and coequal branch of government.⁴⁴ None, however, would dissuade a determined executive of less than stellar character, or especially a lame duck president making midnight pardons on the eve of departure, from acting for personal or political benefit.⁴⁵

At the other end of the spectrum, the strongest measure of all would be to pass a constitutional amendment simply revoking the power to pardon. We view this as an unduly severe reaction to a generally valuable power that is only sometimes abused. Surely, Hamilton's judgment still holds that the pardon power is an important safety valve for mercy in the judicial process, and that national purposes can be furthered by judicious use of the power.⁴⁶

What intermediate measures might then be available to readjust the power to avoid misuse? Some have suggested that certain types of pardons be forbidden—pardoning one's self, family members, or close associates, or issuing a pardon preemptively, for instance.⁴⁷ Another suggestion has been to place a moratorium on pardons from October 1 of any presidential election year until after the next inauguration in January.⁴⁸ The trouble with singling out specifically incorrect practices, however, is that there are too many variables for them to be well-captured in a constitutional text.⁴⁹ There will always be other practices that are objectionable, and if they were not specifically named, the interpretative doctrine of *expressio unius est exclusio alterius* would suggest that they were allowed.⁵⁰

We think that the most effective approach to curbing abuses would be to adjust the procedure by which pardons are issued. Hamilton's logic in *The Federalist Papers* explained why the Framers lodged the pardon power

44. For more suggestions for reform, see CROUCH, *supra* note 1, at 146-149; KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 211-24 (1989).

45. See Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of A Presidential Term*, 67 MO. L. REV. 13, 27 (2002).

46. See MOORE, *supra* note 43, at 225 (rejecting the argument that the pardon system should be abolished someday because, "[m]uch of the progress in the legal system has been prompted by pardons").

47. *Id.* at 199-210 (addressing "improper uses of the pardon power"). Ignoring one or more of the Justice Department guidelines for clemency are other examples. COMM. ON GOV'T REFORM, *supra* note 33, at 29-30 (detailing standards).

48. Sisk, *supra* note 45, 67 MO. L. REV. at 26-27 (addressing why "[t]he door to executive clemency should close before the votes of the electorate are cast in a presidential election and reopen only on inauguration day").

49. See Kobil, *supra* note 11, at 592 (quoting James Iredell arguing for the President's pardon power at a state ratifying convention in 1788: "It is impossible for any general law to foresee and provide for all possible cases that may arise.").

50. "Expression of one thing is the exclusion of another." *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019).

in a single individual. In practice, the federal bureaucracy has regularized and broadened that individual procedure. There is an Office of the Pardon Attorney within the Department of Justice with well-established deliberative procedures for reviewing pardons, and criteria for recommending worthy candidates for pardons to the President.⁵¹ For the great majority of pardons in modern times, this is the procedure that has been followed. Since this procedure is normative rather than established by law, however, presidents have been able to evade it in precisely those cases that go beyond grace and national purpose.

One approach to reform would be to mandate that these procedures should be followed without exception. A similar proposal would be to create a Presidential Clemency Board to review and approve all presidential pardons.⁵² Another proposal would be to designate the Vice President as the head of a White House Clemency Office.⁵³ The problems with such approaches are: the cumbersomeness of the arrangements, the likelihood that the participants would not be sufficiently independent of the President, and the difficulty of opposing presidential will when the gulf between the prestige of a President and a functionary is so wide.

The basic idea of a second independent assent to a President's desire to issue a pardon, however, is tenable. We propose that this second entity needing to co-sign the pardon document not be a committee, nor a bureaucratic entity, nor a person appointed by the President, nor someone whose prestige pales in comparison to the President. We propose that the needed co-signature come from the highest constitutional officer elected independently from the President, who also happens to represent the coequal branch of government, Congress. That officer, next in the line of succession for the Presidency after the Vice President by statute, is the Speaker of the House of Representatives.⁵⁴

How would this have worked in cases of questionable use of the pardon power? Certainly, knowing that the Speaker's signature was required, the

51. See U.S. DEPT. OF JUSTICE, OFFICE OF PARDON ATTORNEY, <https://www.justice.gov/pardon>.

52. Kobil, *supra* note 11, at 622-24.

53. Paul J. Larkin, Jr., *A Proposal To Restructure the Clemency Process—The Vice President as Head of a White House Clemency Office*, 40 HARV. J.L. & PUB. POL'Y 237 (2017).

54. 3 U.S.C. § 19(a)(1) (2012). Under the Constitution, the House of Representative "shall chuse their Speaker." U.S. CONST. art. I, § 2, cl. 5. As such, the Speaker is more independent from the President than is the Vice President, who ran for office on the same ticket. U.S. CONST. amend. XII (1804). The theoretical issue of the validity of the order of succession mandated by Congress would not apply to this proposal. Implementation would take a constitutional amendment, obviating any questions. See BRIAN C. KALT, *supra* note 2, at 83-105 ("The Line of Succession Controversy").

President and his advisors would have reviewed the pardons more thoroughly and widely. Would Speaker Carl Albert have co-signed for the 1974 pardon of Richard Nixon,⁵⁵ Tom Foley for Iran-Contra in 1992,⁵⁶ Dennis Hastert for Marc Rich in 2001,⁵⁷ Paul Ryan for Joe Arpaio in 2017,⁵⁸ or Nancy Pelosi for Conrad Black and what may come?⁵⁹ While those counter-factuals are unknowable, it seems that the additional layer of approval would be protective, at least in the most controversial cases. When the President and the Speaker are members of the same party, the co-signature requirement may not be a strong check on presidential power. However, even in such a scenario, perspectives, interests, and characters differ. While the second signature requirement would not be foolproof, it will likely screen out many of the questionable pardons.

III. Objections and Unanticipated Consequences

We recognize that the controversial pardons are but a small percentage of all pardons issued by presidents. Therefore, arguably, the matter is not important enough to expend the effort to secure ratification of a constitutional amendment. Our response is that, while the number has been small, these are very important and visible pardons because they undermine the ideals of equal justice under law, and that no one is above the law. Democracies require that their citizenry regard government as legitimate and worthy of receiving the consent of the governed. Such very visible cases of misuse of power cast a long shadow on that legitimacy.

Our suggested remedy might suffer from a defect foreseen by Hamilton—the President could become less personally involved and caring. With another official's signature required, judgments of mercy could be subject to political trading of favors. Instead of elevating the power to pardon, involving another politician in the process might degrade it. Just as the odds of one of two elected officials being of high moral character are greater than of one, so are the odds of one of two being of low moral character similarly increased. Indeed, whereas Hamilton hoped the President would possess high moral character, adding another requirement might bring out the worst rather than the best in character, and the pardon might be just

55. U.S. HOUSE OF REP., HISTORY, ART & ARCHIVES: LIST OF SPEAKERS OF THE HOUSE, history.house.gov/People/Office/Speakers-List/ (Albert was Speaker from 1971 to 1977.).

56. *Id.* (Foley was Speaker from 1989 to 1995.).

57. *Id.* (Hastert was Speaker from 1999 to 2007.).

58. *Id.* (Ryan was Speaker from 2015 to 2019.).

59. *Id.* (Pelosi resumed serving as Speaker in 2019.).

another jewel to be stolen by manipulation and connections.⁶⁰ Change never guarantees improvement, and institutional processes can only do so much to alleviate the weight of poor character and a culture of lawless self-interest. Still, even though our era has cast doubt on the ability of politicians to cooperate in a noble cause of governing, we believe that requiring a second signature from a high elected official will increase the odds that nobility in the use of the pardon would return and remain.

Another objection to the proposal might be that eliminating the absolute discretion to pardon from presidential power would weaken the executive office. Having a tool with which to fight back might appear necessary to an embattled president.⁶¹ Indeed, that is the declared strategy of President Trump, who often proclaims that he is a “counter-puncher.”⁶² In modern times, however, and in ways certainly not envisioned by the Founders, we have seen substantial political power shift away from Congress to, what the historian Arthur Schlesinger once termed, “The Imperial Presidency.”⁶³ Nowadays, we are concerned not that Congress is too powerful, but that it is not powerful enough.⁶⁴ It should also be noted that that few states grant their governors the unfettered power that presidents now enjoy.⁶⁵ They often require a second person or body to agree with governors’ recommendations for pardons.⁶⁶ Being able to check a nefarious purpose of pardoning might be one way the People could help the Congress reassert the balance of power our Founders created.

Finally, although we typically think of unanticipated consequences as being unwelcome, unforeseen positive effects are also possible. For instance, some observers believe that granting pardons for merciful purposes

60. See THE FEDERALIST NO. 74, *supra* note 12, at 423 (“the secret sympathy of friends and favorers of the condemned . . . might frequently bestow impunity, where the terror of an example was necessary.”). See also JONATHAN T. DORRIS, *supra* note 22, 135-52 (addressing pardon seekers and brokers in the Andrew Johnson Administration).

61. See CROUCH, *supra* note 1, at 147 (“[p]residential sympathizers” argue that presidents “use the powers of their office to strike back” when attacked).

62. E.g., Marisa Schultz & Nikki Schwab, *Trump Threatens to Declassify ‘Devastating’ Documents About Democrats*, N.Y. POST (Nov. 28, 2018), <https://nypost.com/2018/11/28/trump-threatens-to-declassify-devastating-docs-about-democrats/>.

63. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (2004).

64. The President’s veto of Congress’ attempt to override his over-reach of emergency powers to secure money to pay for a border wall is a recent example. Emily Cochrane, *House Fails to Override Trump’s Veto, Preserving National Emergency Order*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/26/us/politics/national-emergency-vote.html>.

65. See Eckstein & Colby, *supra* note 16, 51 ARIZ. ST. L.J. at 104-05 (surveying methods 18 states use to curb unfettered gubernatorial power to pardon).

66. E.g., NEB. CONST. art. IV, § 13 (governor, secretary of state, and attorney general constitute the board of pardon); PA. CONST. art. IV, § 9(a) (governor issues pardons, but may not act without an affirmative recommendation from pardon board chaired by the lieutenant governor).

have been inhibited because of increased surveillance and suspicion.⁶⁷ Two signatures might inoculate both signatories from some criticism. In addition, the need to work together on pardons might open up additional avenues for executive-legislative cooperation.

IV. Practicality

It is very difficult to pass a constitutional amendment. Two-thirds of each house of Congress and three-quarters of the States must consent to an amendment.⁶⁸ However, some amendments do get passed.

There appear to be two types of successfully adopted amendments: major amendments and minor amendments. Major amendments have been successfully adopted after profound changes in society, as after the Civil War,⁶⁹ or after great movements changed opinions, as with women's suffrage.⁷⁰ Minor amendments have passed because they have not offended any significant entrenched interests. The right to vote at the age of eighteen,⁷¹ the limitation of presidents to two terms,⁷² and the limitations on Congress giving itself raises⁷³ are good examples. Since our proposed amendment would have prospective effect only, state and federal legislators would consider circumscribing the power of unknown future presidents, not the current occupant of the office. Thus, we think that our proposed amendment would fall into the latter category, where no significant interests would be offended.

The second requirement for passage is that there be sufficient support for the large effort required. There needs to be intensity. In normal times, there would not be the intensity of public support required to reform the power of the presidential pardon.⁷⁴ As we are constantly reminded, however, these are not normal times. Imagine the outrage that will emerge should Trump fulfill his threats to bestow pardons on those who do not cooperate with legitimate congressional inquiries, if he pardons his family members, his cabinet members, or himself. It would be difficult to imagine that

67. Love, *supra* note 10, 100 J. CRIM. L. & CRIMINOLOGY at 1204 ("Recent presidents allowed the power to fall into disuse apparently because they saw nothing to be gained by pardoning that was not outweighed by the possibility of making a politically damaging mistake.").

68. U.S. CONST. art. V.

69. U.S. CONST. amend. XIII (1865); U.S. CONST. amend. XIV (1868); U.S. CONST. amend. XV (1870).

70. U.S. CONST. amend. XIX (1920).

71. U.S. CONST. amend. XXVI (1971).

72. U.S. CONST. amend. XXII (1951).

73. U.S. CONST. amend. XXVII (1992).

74. See BRIAN C. KALT, *supra* note 2, at 60 ("Realistically, only a real scandal could motivate constitutional change [of the pardon power]").

insufficient demand to enact meaningful reforms of the pardoning power, including a constitutional amendment. The power of public outrage should never be underestimated.

V. Conclusion

The presidential pardon has been increasingly abused since Watergate. To maintain an effective democracy, equality before the law is fundamental. Constant vigilance and readjustment are necessary to maintain fairness in society. Preserving the pardon power is important for mercy in justice and for strategic national purposes. The soft measures of revealing all evidence for what has been pardoned, and openly declaring Congress' sense that we should return to the original intent of pardons, might help, and could serve as useful first steps. However, we suggest that a stronger measure, making a procedural adjustment to the pardon process, might soon be seen as necessary.

Americans rightly view the Constitution as a sacred document,⁷⁵ but not a perfect one conceived immaculately; we know that difficult practical decisions and compromise were part of the process. The Founders demonstrated that they knew it was imperfect when they included a means of amending the document.⁷⁶ Hamilton's reliance on the high character of the presidents, and their respect for the office, appear to have been fairly well-placed for nearly two centuries. In light of the past 40 years plus of experience, however, we the People need to reconsider the views of the Anti-Federalists, and grant a portion of the responsibility for the pardon power to the Speaker of the House of Representatives.

The "benign prerogative of pardoning"⁷⁷ is a huge responsibility; it should not be misused by the person in whom we have placed our trust. Adopting procedures to prevent the weaponization of the presidential power of the pardon for personal and political purposes is only prudent. We believe that our proposed constitutional amendment would do just that.

75. Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 984 (2008) quoting Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 169 (1987) ("Because the Constitution functions in part as the repository of our 'fundamental nature as a people'—because it gives voice to the deepest values of the nation—'there is a sense, after all, in which our constitution is sacred and demands our respectful acknowledgement.'").

76. U.S. CONST. art. V. See THE FEDERALIST NO. 49 at 245-46 (James Madison) (addressing both the need for a "constitutional road" for the people to act "for certain great and extraordinary occasions," but not doing so too often, which would "deprive the government of that veneration which time bestows").

77. THE FEDERALIST NO. 74, *supra* note 12, at 362 (Alexander Hamilton) (Terence Ball ed., 2003).

We hope it will be taken into consideration as the next inevitable wave of reform arises.