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The Law and Politics of the Death Penalty: Abolition, Moratorium, or Reform?***

***231 Defending the Politics of Clemency**

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Typically, the process of carrying out a death sentence is viewed almost entirely through the lens of the judiciary. Academics and practitioners alike tend to focus on the courts when exploring the issue of capital punishment because it is there that one can find the most visible aspects of a death penalty case: the jury trials, the successive habeas petitions, the last minute appeals, etc. The result of such a predisposition, however, is that many now have only a partial image of the administration of capital defenses.

Often a last resort, appeals for executive clemency represent an equally important, but theoretically understudied, component of most capital cases. In the past quarter century more than forty-five prisoners have been removed from death row because of executive orders, while countless others have not been so successful. [\[FN1\]](#) What accounts for the difference between successful clemency petitions and unsuccessful ones? Doubtless, the facts surrounding individual defendants have something to do with a governor's decision to grant or reject clemency. Similarly, the perception of bias in the particular trial will have some bearing on the decision. But perhaps the single most prominent factor in determining whether clemency should be granted involves the *232 political. [\[FN2\]](#) Indeed, the decision-maker in the clemency process is in a distinct position and has a different perspective than a federal judge appointed for life or even a state-court judge with a shorter term. Invariably, the clemency process involves an elected official and her or his appointees who regularly take into account the potential reaction of the news media, political allies and adversaries, special interest groups, as well as the implications for a future political career, whenever he or she makes a decision. The reality is perhaps best captured in the recent words of one governmental official: "if I told you that politics were irrelevant [to the clemency decision], that would be like the fish telling you the water doesn't matter." [\[FN3\]](#)

This Article addresses the politics of clemency. Recognizing that one seeks clemency precisely because certain arguments failed to persuade judges to grant relief, the Article explores, in an unapologetically normative way, the political nature of the clemency process. In doing so, the following questions arise: should the dialogue change when one leaves behind the judicial arena and enters the political realm? To what extent have appeals for clemency been rejected because attorneys have failed to recognize the important distinction between the juridical and the political? And finally, to what extent should we

embrace the reality that politics, and perhaps not justice, lies at the cornerstone of the clemency decision?

At the outset, one thing should be made clear: this Article's central thesis is that clemency is, and should remain, a political process. Historically, the role of clemency has long been viewed as something more than a panacea for the defects of our judicial system. The administration of clemency has traditionally been seen as a political expression of mercy, an opportunity for prisoners to seek an alternative savior that is largely detached from America's courtrooms. It was fashioned at the birth of the nation as a component of our system of separated powers, and its *233 continued efficacy remains tied to its inherent subjectivity. Over the past decade, however, more and more professionals have eschewed that historical lesson and, instead, have sought to narrow the definition of clemency by modeling state and federal procedures after the basic principles of our judicial system. Particularly as the number of commutations has decreased in the post-Furman era, [FN4] individuals frustrated with the inadequacies of the courts have turned to the clemency process as an antidote, and the result has been an intensifying debate about the future of clemency itself. On the one side, individuals fed up with what they describe as the "failure" of the clemency process have proposed to reconfigure gubernatorial review of clemency petitions more or less in the image of an appeals court. [FN5] Proponents of this position argue that we should create non-partisan boards whose members serve life terms to consider appeals for clemency, or at a minimum mandate that governors "treat like cases alike." [FN6] The aim of this group is to mitigate the impact of politics on the decision-making process.

The other side of the debate, the side to which this Article adheres, defends roughly the opposite. Politics is a necessary component of the clemency decision, and should remain so. Consequently, this Article contends that the general assertion informing these proposals--an assertion resting on the idea that clemency ought to be as objective and nonpolitical as possible--not only violates the basic tenets of our system of separate powers, *234 but may also prove dangerous to the many death row inmates who will inevitably rely on clemency as their last and final hope.

Indeed, the judicial system imposes a level of rigidity by requiring adherence to precedent, evidentiary rules, and procedures on what issues may be addressed, at what stage of the proceedings and in which forum. At the habeas corpus stage of judicial proceedings in a capital case, an additional set of rigid procedures is imposed by the Antiterrorism and Effective Death Penalty Act. [FN7] All these procedures and rules are designed to provide fairness and uniformity in judicial proceedings, but they also have the effect of precluding juries and judges from departing from precedent, excluding evidence, and limiting the stage of the proceedings at which certain issues and evidence may be considered.

More importantly, formal procedures and standards tend to shield the decision-maker from personal responsibility and accountability for the ultimate decision of life or death. An appellate judge may determine that the trial in a case resulting in a death sentence was conducted in a manner consistent with binding precedent; or, that the trial court did not abuse its discretion, and did not commit clear error, by excluding certain evidence pursuant to the jurisdiction's evidentiary rules; or, that the Antiterrorism and Effective Death Penalty Act does not give the court jurisdiction to hear a habeas corpus petition. When the judge decides a death penalty case on any of these grounds, she or he never need justify, on the merits, the killing by the state of the petitioner sentenced to death. The judge, who is sworn to uphold the laws and constitution of her or his jurisdiction, has done her or his job by applying the jurisdiction's precedent and evidentiary and procedural rules.

In this respect, the clemency process is and should be more personal and more human. By the time a death row inmate reaches the clemency process she or he has already been through all the due process of trials, appeals, and collateral attacks on the sentence of death. Now is the time for personal responsibility. Now is the time for the governor or president to be given complete discretion to commute that sentence of death to one of life. When the clemency process gives the governor or the president such absolute discretion to decide whether to sign the death warrant, *235 it also imposes absolute responsibility for the ultimate decision. No procedural rules should shield the Executive from that responsibility. Rather, the system should make clear that the governor or the president is personally responsible, without any limitations, for making the final decision to kill another human being. Only then does the clemency process make our system complete by combining the rigidity of precedent, evidentiary and procedural rules in the judicial system, with personal and political responsibility for the ultimate decision of life or death.

I Defining Clemency

Executive clemency is an enigma. Its definition is simple enough: it “characterizes a judgment or action [of] a person with the power to exact punishment [when that person] declines to exact all or some of what he or she is entitled to exact.” [FN8] Put differently, clemency refers to the power of an executive to alter the outcome of a judicial decision by diminishing the impact of a defendant’s punishment--to change the specifics of a court’s judgment by remitting a criminal’s sentence or simply pardoning her or his offense. The Supreme Court has defined clemency as “an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.” [FN9] In the context of capital punishment, clemency often manifests itself in the grant of relief by a governor to a death row inmate. In such instances the capital sentence is most often replaced by a sentence of life imprisonment. The key to understanding clemency is to view it in terms of a reduction or suspension of the particulars of punishment.

Typically synonymous with concepts such as “mercy, leniency, kindness, and forgiveness,” executive clemency can take multiple forms and can be administered in a variety of different ways. [FN10] *236 Radelet and Zsembik identify three major types of executive clemency: “pardons (which invalidate both the guilt and the punishment of the defendant), reprieves (which temporarily postpone the execution), and commutations (which reduce the severity of the punishment).” [FN11] The most common, but certainly not exclusive, use of all three styles can be found in the arena of capital punishment. Indeed, governors (and now presidents) are regularly asked either to pardon death row inmates, or at a minimum commute their individual sentences.

A comparison across states can also be helpful in augmenting our understanding of clemency. Of the thirty-eight states that still practice capital punishment, twenty-three allow the governor to make clemency decisions unilaterally. [FN12] Nine states require the governor to grant clemency only after a recommendation from the board or advisory group, while three mandate that the governor participate only as a member of the state’s parole and pardons board. Finally, three states, Connecticut, Georgia and Idaho, remove the authority from the chief executive altogether and place it entirely under the care of the state’s clemency board.

Despite their procedural differences, what all of these states share in common is the idea that executive clemency represents an “escape valve” whereby officials unaffiliated with the judiciary can survey the landscape and make decisions based on factors beyond the law. Certainly all who reflect on the American legal system recognize that the most logical use of the clemency power occurs when an individual, wrongly convicted of a capital crime, can demonstrate either that the system failed or that they are innocent. But history reveals that clemency is granted for any number of reasons, and that is where formal definitions and statistics tell only a portion of the story.

As straightforward as the definition may appear, the administration of executive clemency is anything but, and the consequences of its often arbitrary nature have opponents of capital punishment growing increasingly concerned. “Standardless in procedure, discretionary in exercise, and unreviewable in result,” [\[FN13\]](#) the practice of clemency can be simultaneously encouraging *237 and elusive. On the one hand, clemency is tantalizingly humane. Individuals facing execution have been released from death row for no other reason than a governor personally opposes capital punishment or the circumstances of a particular case dictate it. Consider a few examples. In 1986 Toney Anaya, then outgoing governor of New Mexico, commuted the death sentences of all five persons on his state’s death row. His reason for doing so was based entirely on his personal belief that capital punishment is a morally abhorrent act. [\[FN14\]](#) Likewise, in at least five additional instances, governors have commuted the death sentences of women simply because they believed females should not be subjected to such harsh punishment. [\[FN15\]](#)

Two years after Governor Anaya emptied New Mexico’s death row, Freddie Davis’ death sentence was also commuted, but for dramatically different reasons. A native of Georgia, Davis was scheduled to die for the 1982 murder of Frances Coe. His companion in crime, Eddie Spraggins, received a life sentence after admitting to Coe’s murder; but curiously Davis, who refused to acknowledge guilt (claiming he was not in the house at the time of the murder), was sentenced to the electric chair. Eventually Davis’ commutation was granted, but not because the Georgia Board of Pardons and Paroles suddenly adopted Governor Anaya’s humanitarian predisposition; rather the Board extended clemency to Davis because “it felt that similar degrees of culpability warranted similar punishments” [\[FN16\]](#)--two different attitudes; one single outcome.

Lest we think all grants of clemency are as transparent as these, consider also the case of Charlie Alston. Alston’s story reveals the inherent unpredictability of the process. He was accused of killing Pamela Perry in a small North Carolina town over a decade ago, and yet he has maintained his innocence throughout his stay in prison. Shortly before he was scheduled to die this past January, Charlie Alston’s death sentence was commuted by Governor Mike Easley. Governor Easley, a pro-death *238 penalty conservative, was certainly not swayed by abolitionist impulses: this was only his second commutation. [\[FN17\]](#) Nor was he influenced by the argument that Alston’s sentence was somehow incompatible with similar cases statewide. In fact, the governor did not provide specific reasons for the commutation, preferring instead to release an ambiguous statement claiming that “the appropriate sentence for [this] defendant is life in prison without parole.” But unofficial reports suggest that the governor was primarily influenced by the state’s mishandling of critical DNA evidence. [\[FN18\]](#) More specifically, there is growing speculation that the firestorm of media attention surrounding the lost evidence contributed to the governor’s decision. Indeed, many insist that local, state, and national media outlets, uniformly critical of the state’s mistreatment of Alston’s case, pressured Governor Easley into

granting the reprieve. One commentator described the political pressure on Easley as so fierce, the governor was essentially “backed . . . into a corner.” [\[FN19\]](#)

The now famous story of Karla Faye Tucker further validates the claim that the clemency process is mostly unpredictable. [\[FN20\]](#) Convicted by a Texas jury of first degree murder, Tucker underwent a profound religious conversion while behind bars. By all accounts, she was a changed woman: she took full responsibility for her part in the crime, and she renounced all violence. Her story garnered worldwide attention from both religious leaders and celebrities. [\[FN21\]](#) Once her appeals through traditional judicial channels were exhausted, her attorneys turned to the Texas Pardons and Paroles Board to plead for her life. This, many thought, was an ideal case for clemency: Tucker was described as “a sweet and gentle lady [whose] speech and demeanor reflected sublime virtue.” [\[FN22\]](#) She had become a model prisoner. And yet to the surprise of many, her petition for executive clemency was rejected. The Pardons and Paroles Board voted to deny her petition and Governor Bush refused to grant a stay, stating publicly *239 that “in the evaluation of her case, he would only consider doubts about guilt and/or whether the trial had been fair.” [\[FN23\]](#) Less than twenty-four hours later, Karla Faye Tucker was dead.

Overall, the stories of the New Mexico five, Freddie Davis, and Charlie Alston are not isolated. Since 1976, the year the Supreme Court reinstated capital punishment, forty-two additional death row inmates have appealed to the chief executives of various states and have enjoyed similar outcomes. Sadly, though, Karla Faye Tucker’s story is far more common. The use of clemency has declined precipitously in the last twenty-five years to the point where only a small fraction of those facing execution are now released from death row. [\[FN24\]](#) Seven hundred fifty-nine inmates have been executed since 1976, while fewer than two percent of those on death row since that time have been released for humanitarian reasons. [\[FN25\]](#) Currently, there are approximately 3,711 capital prisoners in the United States. [\[FN26\]](#) If previous history is any indication of future trends, we can expect fewer than seventy-five to walk off of death row.

Altogether, the numbers and the stories that accompany them underscore the inherent unpredictability of executive clemency. Moreover, they also reveal its paradoxical nature. On the one hand, executive clemency is a component of the legal system: lawyers typically appear before representatives of the governor, petitions are submitted on behalf of the accused, and legal arguments are presented. But on the other hand, the process of deciding whether to grant clemency bears no significant relation to the judicial process. Unlike courts, governors (and clemency boards) are beholden to no particular rules, precedents, or institutions when reviewing clemency appeals; they stand alone in their deliberation. Indeed, Daniel Kobil recognizes this paradox with unique clarity. He writes: “The similarities between [particular] grants of clemency illustrate the enduring, paradoxical nature of clemency. Depending on one’s perspective on mercy and *240 capital punishment clemency continues to be seen as an instrument of justice or of injustice, a product of principle or of capriciousness.” [\[FN27\]](#)

II Clemency as an Extension of the Judicial Process

Witnessing the sharp decline in the incidence of clemency, many death penalty opponents are beginning to criticize the entire process as broken. They invariably claim that complacent courts now hide behind the myth of super due process and the “safety” of executive clemency, while governors cower under the pressure of public sentiment. Scholars note with thinly veiled criticism the passage by

Chief Justice Rehnquist in *Herrera v. Collins* [FN28] that “clemency has provided a ‘failsafe’ in our criminal justice system and is ‘exercised frequently’” [FN29] when suggesting that courts are out of touch with reality. Clemency, they assert, is neither a safeguard against miscarriages of justice nor a frequently used executive power. What is more, the character of this criticism has taken on a decidedly legalistic tone. Daniel Kobil, one of the leading clemency scholars, recently remarked that a denial of clemency to an individual who “may have been set up” and who “had a sad story to tell” represents a “malfunctioning of the justice system.” [FN30] In a recent article, Elizabeth Rapaport also framed the process of executive clemency in primarily judicial terms. She insists that “grants of clemency are vulnerable to the charge that the executive has failed to treat like cases alike and are at least morally unjust because equally worthy inmates have been denied.” [FN31]

The result of this frustration is a burgeoning reform movement. Aided in no small part by the position of two Supreme Court Justices, [FN32] a number of notable scholars are now endorsing various proposals that would align the clemency decision with more traditional principles of due process. [FN33] In fact, there are *241 two distinct strands emerging from the argument that the clemency process now requires greater objectivity. One strand suggests that like cases should be treated alike, that they should be reviewed, at least during the initial stages, by the governor in an impartial and nonpolitical way, much as the judiciary considers cases through a largely objective prism. The idea is that the current state of executive clemency, as a standardless, independent, unreviewable grant of mercy, seems incongruous with an understanding of fairness, modeled after our judicial system, that seeks to maximize the principle of impartiality. Governors are not acting dispassionately; their decisions are therefore hypocritical when they are not informed by, say, prior grants of clemency or by contemporary notions of mercy.

The argument from this set of scholars seems to be that resolving the incongruity between the politics of clemency and the objectivity of justice will result in a more transparent clemency system, and a more transparent system will force governors to commute death sentences with greater frequency. The tone of three leading authorities--Michael Korengold, Todd Noteboom and Sara Gurwitch--is typical. They argue:

Any attempt to reform and improve the clemency system must target and remove [the] controlling political element. By the nature of their offices, the governor and the pardon board are politically accountable. It is immaterial what procedural safeguards are put in place, if in the end these politically accountable actors must react to fluctuating public opinion. In an attempt to deal with the current state of capital punishment in the United States, a strong departure from the current clemency procedures must be implicated.

[FN34]

A second strand of the debate highlights the deregulation of the clemency process. As the leading spokespersons promoting this particular line of thinking, Victoria Palacios and Daniel Kobil want to minimize the political nature of clemency appeals by downplaying the role of elected officials in the decisionmaking process. Palacios contends that the Supreme Court has abdicated its responsibility to scrutinize death penalty appeals because of the perception that the clemency process will somehow catch any mistake in the administration of justice. [FN35] She insists *242 that the Court is relying far too much on the clemency process to perform a duty--the review of death sentences--that is more properly handled by the independent judiciary. Her argument follows a rational progression. She first asserts that death penalty convictions are often “unreliable” insofar as the system produces “wrongful convictions”

and the “maldistribution” of sentences. [FN36] Logically, therefore, she insists that the Court should properly examine these injustices. And yet, the Court has recently adopted a disturbing stance based on the principle that “super due process,” the underlying aspiration for all death penalty cases, will virtually “eliminate all error” and that mistakes that do escape the scrutiny of the lower courts will be fixed by the clemency process. Hence the Supreme Court can take, and has taken, a relaxed approach to death penalty appeals. After inspecting a real clemency petition, Palacios concludes that the reliability of the clemency process is dubious at best. It does not provide a safety net for those on death row. Her solution? “Revive” the clemency process by isolating it almost completely from the mechanisms of politics. [FN37] Establish citizen-boards that do not respond to political pressures in the same way elected officials do, and give those institutions the power to commute sentences. In short, create quasi-judicial bodies to carry out the difficult task of deciding who is worthy of clemency.

III Ohio Adult Parole Authority v. Woodard [FN38]

Both strands of the argument in favor of greater objectivity have been buoyed recently by the Supreme Court’s decision in Ohio Adult Parole Authority v. Woodard. Indeed, the case marks the first time the Court has squarely addressed the issue of whether the Due Process Clause of the Fourteenth Amendment applies to capital clemency proceedings. [FN39] Woodard, a convicted capital murderer, exhausted all of his available legal remedies and was thus entitled to a “thorough investigation” by the Ohio *243 Adult Parole Authority, as well as a clemency hearing prior to his scheduled execution. Pursuant to the Ohio constitution and statutory law, the Ohio Adult Parole Authority was further required to “advise the prisoner that he is entitled to a pre-hearing interview with one or more parole board members,” [FN40] but that the hearing and interview would be conducted without the assistance of counsel. In accordance with these stipulations, the state scheduled Woodard’s interview with a member of the board for September 9, 1994; his hearing before the entire parole board was scheduled for a week later.

Troubled by certain demands of the Ohio clemency statute, Woodard raised two constitutional challenges: one based on the Fourteenth Amendment Due Process Clause and a second that specifically implicated the Fifth Amendment’s protection against self-incrimination. [FN41] Woodard argued that because “there is a life interest in clemency broader in scope than the ‘original’ life interest adjudicated at trial and sentencing,” the clemency process must adhere to the general rules of due process. He insisted that the death sentence did not alter his right under the Fourteenth Amendment and that, if anything, his current status as a death row inmate only exacerbated his need for constitutional protection. For example, he insisted that an attorney be present during the clemency interview and the subsequent parole board hearing because, he claimed, the assistance of counsel during all parts of the trial and appeals process is mandated by the Due Process Clause. Similarly, Woodard maintained that the clemency proceedings jeopardized his freedom from self-incrimination; his only hope for commutation, he thought, lay in implicating himself.

A divided Court ultimately upheld parts of Woodard’s procedural argument, insisting that even though Connecticut Board of Pardons v. Dumschat, [FN42] the case in which the Court failed to recognize a liberty interest in executive clemency, governed the current proceeding, Dumschat could not be read so literally as to bar all due process challenges in death penalty cases. [FN43] Indeed, *244 Justices O’Connor and Stevens crafted separate concurring opinions that left open the possibility that a certain portion of the High Court (and perhaps a five-member majority) does view the clemency procedure as a seamless extension of the adjudicatory process. O’Connor remarks:

It is clear that “once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly.” I do not, however, agree with the suggestion in the principal opinion that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards. . . . Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the state arbitrarily denied a prisoner any access to its clemency process. [\[FN44\]](#)

Justice O’Connor’s opinion implies that any state willing to put people to death must also adhere to “minimal procedural safeguards” when considering clemency. [\[FN45\]](#) In other words, there is a standard (governed by the Due Process Clause) by which all state executives involved in the clemency process must adhere. Justice Stevens agrees. Concluding that only “the most basic” elements of fair procedure are required, Stevens responds to those who claim clemency is not subject to constitutional scrutiny by insisting there are “equally valid reasons for concluding that [clemency] proceedings are not entirely exempt from judicial review.” [\[FN46\]](#) He writes: “I think, for example, that no one would contend that a governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as *245 a standard for granting or denying clemency.” [\[FN47\]](#) What is more, he adopts much of Woodard’s primary argument that the accused’s interest in life is exacerbated by virtue of his particular sentence. Distinguishing Dumschat, he notes that the “interest in life at stake in this case warrants even greater protection than the interests in liberty [that are] at stake in [other] cases.” [\[FN48\]](#)

Together, the opinions of Justices O’Connor and Stevens in Woodard have emerged as a lightning rod for those advocating reform of the entire clemency system. Brian S. Clark notes that “the Supreme Court’s decision in *Ohio Adult Parole Authority v. Woodard* was long overdue,” and that states should presently adopt clemency procedures similar to those in Ohio. [\[FN49\]](#) Daniel Kobil is also visibly bolstered by the decision. The Woodard opinion is a component of what he refers to as a “tiny glimmer of hope” that, with modification, clemency can now reemerge as a more effective tool for abolitionists. [\[FN50\]](#) The Court has indicated that it will no longer ignore the most arbitrary and abusive procedural transgressions within the clemency scheme. Hence, Clarke, Kobil, Korengold and others assert that abolitionists should seize the opportunity to reform the system in accordance with contemporary notions of justice and fairness. Construct specific procedures (and institutions) that will negate or at least temper the subjectivity currently hampering clemency decisions and the result is a system that performs as it should, a system that protects the truly innocent and yet still has room for random acts of mercy. The clamor for greater impartiality in the clemency process logically emerges from this outlook.

***246 IV Defending the Politics of Clemency**

A. The Historical Argument

The process of executive clemency falls decidedly outside the judicial arena. Historically, the power to pardon has been utilized by leaders for two primary reasons: (1) as a grant of mercy, and (2) as a political measure aimed at gaining the favor of particular groups. [\[FN51\]](#) Its roots date back to the earliest civilizations. Greece, for example, practiced clemency during the Athenian Civil War; while

arguably the most notorious grant of clemency occurred when Pontius Pilate, a Roman leader, pardoned Barnabus and left Jesus to perish on the cross. [\[FN52\]](#)

For America, the origins of executive clemency extend to the period of its colonization. Indeed, the British Crown regularly embraced the power of clemency not only as a means to bestow mercy on worthy offenders, but also as a way to appease rival political factions. William Blackstone praised the clemency power in his famous Commentaries on the Laws of England, claiming that it empowered the sovereign to ignore the often rigid dictates of the common law. The design of legal institutions--inflexible, reactive, and obligated to follow the letter and not the spirit of the law--was such that judges could rarely impose flexible sentences even when mitigating circumstances dictated it.

Blackstone further recognized an important political usage for clemency. Indeed, the eighteenth-century legal philosopher insisted that the pardoning power could be an effective tool to help win the affection of the king's subjects. Referring to the monarch's authority to grant clemency, he remarked:

[It] is indeed one of the great advantages of monarchy in general above any other form of government: that there is a magistrate who has it in his power to extend mercy wherever he thinks it is deserved; holding a court of equity in his own breast to soften the rigor of the general law. . . . To him, therefore, the people look up as the fountain of nothing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection and personal loyalty which are the *247 sure establishment of a prince. [\[FN53\]](#)

Early American uses of clemency often mirrored the British experience. Americans, in general, were widely influenced by the principles of Blackstone and the practices of the British common law. As such, they embraced the notion that executive clemency could fulfill the twin functions of mercy and political expediency. At the founding, the act of clemency was already well established within colonial government and, consequently, at the moment the country gained independence the power of clemency was informally transferred to the newly formed federal and state governments. Once the ratification of the federal constitutional charter became a reality, clemency was then formally vested in the Executive Branch. Article II, Section 2 of the United States Constitution specifically notes that the president enjoys exclusive power to "grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."

Alexander Hamilton had occasion to expand on the grant of clemency to the president in Federalist No. 74, and his comments provide important insight into the thoughts of many of our nation's founders. [\[FN54\]](#) Like Blackstone before him, Hamilton initially acknowledges the limitations of the positive law, stating that the legal system does not recognize gradations in culpability and that judges and juries are sworn to uphold the letter of the law even when mitigating circumstances beg for different outcomes. [\[FN55\]](#) And yet, it is interesting to note that in Hamilton's estimation, the "principal argument for reposing the power of pardoning [] in the Chief Magistrate" was not to correct abuses of judicial power, but rather to ease the political tensions that often brought about revolt and insurrection. Consider his words: "in seasons of insurrection or rebellion, there are often critical moments when a well timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall." [\[FN56\]](#) Hamilton referred

to these moments as “golden opportunit[ies];” they were opportunities to use a constitutionally *248 mandated grant of power to achieve decidedly political aims. [\[FN57\]](#)

Shortly after the publication of Federalist No. 74, James Iredell echoed Hamilton’s principal point. [\[FN58\]](#) Standing before his fellow North Carolinians debating the fate of the United States Constitution, Iredell argued that there may be times when the power to pardon might “prevent a civil war.” [\[FN59\]](#) “Self-preservation,” he insisted, will lead some to carry on a rebellion long after cooler heads have prevailed or the chances of overthrowing the government have all but vanished. [\[FN60\]](#) Iredell insisted that what the pardoning power does is allow chief executives to mitigate the threat of rebellion by providing a political escape for rebels. Opposition forces, he maintained, can put down their weapons and walk peaceably away from their cause without fear of reprisal. But without the prospect of an executive grant of mercy, the rebels’ motivations for peace might be more tenuous. As Iredell describes it, their sentiments might likely be: “we may as well die in the field as at the gallows;” so let us not give up our foolish cause. [\[FN61\]](#) The political wing of the pardoning power, therefore, promotes regime stability.

When examined further, the debates surrounding the drafting and ratification of the American Constitution, and in particular the ones concerning treason, reveal some apprehension about vesting the entire pardoning power in the Executive Branch. [\[FN62\]](#) Interestingly, however, it is the legislature and not the judiciary that many founders thought should ultimately review presidential pardons regarding treason. There was of course widespread fear at the time that a single chief executive would resemble an abusive and tyrannical monarch, and the unilateral pardoning power contributed in some way to that anxiety. What is revealing, however, is that those who advocated legislative oversight were not altogether concerned about the broader issue of executive discretion. In fact, they recognized that politics should *249 play a role in decisions about clemency (Congress, after all, is also a political branch). Instead, what proponents of legislative oversight were worried about is the president’s capacity to abuse his powers. Hamilton, for example, recognized that treason was such a serious offense, “a crime leveled at the immediate being of society,” that “there seems a fitness in referring the expediency of an act of mercy against [a traitor] to the judgment of the Legislature.” [\[FN63\]](#) But he ultimately rejected the plan, insisting that “a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives, which may plead for and against the remission of the punishment, than any numerous body whatever.” [\[FN64\]](#) In other words, a single officer is better positioned to comprehend the political needs of the nation.

Similar debates were also taking place in the country’s statehouses. Eventually most state constitutions, which were often modeled after the federal text, also legally empowered the executive to grant reprieves and pardons. [\[FN65\]](#) Some states, like Georgia, allowed for a legislative override of the governor’s pardon, while others, like Massachusetts, vested the pardoning power entirely in the executive branch. Yet regardless of where the power rested or whether the legislature was ultimately granted oversight capacity, the principle of separated powers informed these discussions. The idea at both the federal and state levels was (and still remains) to empower a governmental body other than the judiciary with the authority to grant pardons and reprieves. Doubtless, part of the reason for doing so is to maintain some check on the judiciary, an institution that in Blackstone’s words often suffers from too much rigidity. But those who drafted America’s constitutions, both federal and state, understood that the tools at the disposal of executives are not objective; by design they are not quasi-judicial. That was precisely the point of housing the discretionary pardoning power in a purely political branch, so that

politics would contribute to the overall process. To try to reform the clemency process away from its political underpinnings and more in line with a judicial model is thus to ignore a critical historical lesson.

***250 B. The Practical Argument**

History also suggests that executive clemency at the state level was a fairly common practice. Governors routinely extended clemency to convicted offenders, and they did so without fear of political repercussions. Aside from a genuine concern that governors were often willing to sell pardons, the use and administration of clemency in the early period of American history appears to be rather unremarkable.

Clemency in the twentieth century has been anything but unremarkable. During the first half of the century, the frequent use of clemency continued. Some contend that as many as fifty percent of all convictions were commuted in one way or another prior to 1967. [FN66] During this period, there were several express rationales for the extension of clemency, specifically in the arena of capital punishment: doubts about the guilt of the accused; lack of unanimity on the part of the jury; sentencing disparities; police misconduct or a breach of fairness at the trial; the inmate's change of attitude during incarceration; and other mitigating circumstances such as mental or physical incapacity. Since *Furman v. Georgia*, [FN67] however, the reasons for granting clemency have narrowed a bit. [FN68] Of the forty-eight commutations granted since 1977, ten have been given because of concerns about equity: either the sentence of death was inappropriate for the actual crime, as in the case of Clifford Hallmen who was convicted of first degree murder even though there was no premeditation, or the sentence was disproportionate to that received by equally culpable codefendants. An additional sixteen sentences have been commuted because of doubts about the guilt of the defendant or concerns about the trial itself. Finally, eight inmates have been released from death row because of mental incapacity, including six at one time when Governor Richard Celeste of Ohio was leaving office.

It is difficult to know exactly how many of these commutations were influenced by political factors; no doubt many of them were. There are, however, a few tangible examples of death row inmates who have been released because of political pressures. [FN69] *251 Calvin Swann's successful appeal for clemency provides one of these examples. Swann, a severe schizophrenic, was sentenced to death by a Virginia jury for the 1992 murder of Conway Richter. After exhausting all of his legal options, Swann's attorneys turned to Governor James Gilmore III for help. Gilmore, who had a reputation for being tough on crime during his tenure as Virginia's Attorney General and now as its governor, [FN70] was one of the nation's strongest supporters of capital punishment. To make matters worse, there was no new evidence that might exonerate the defendant (in fact, Swann confessed to the crime) and the trial phase of the original capital case, while certainly not flawless, was conducted with reasonable fairness. [FN71] His attorneys could not convince the governor that judicial impropriety was wholly responsible for Swann's death sentence.

Swann's clemency petition, therefore, focused primarily on the defendant's mental illness. In painstaking detail, the petition lays out the history of Swann's schizophrenia and, more importantly, the various times in which the state failed to recognize its severity. Beginning in the mid-seventies Swann had repeatedly been committed to state mental health facilities, only to return to prison without the

proper medical supervision. Consequently, his condition had deteriorated to the point where he was delusional and basically incomprehensible.

On the one hand, Swann's legal representatives (including one of us) recognized that his appeal for clemency was far from ideal. No new evidence was available, there were no clear issues of equity, and the trial, while troubling in at least one respect, was not so fatally flawed as to call into question its outcome. But on the other hand, Swann's attorneys recognized that their client's mental incapacity aligned with one of Governor Gilmore's most important political priorities. Both in his gubernatorial campaign and while in office, Gilmore had repeatedly pledged to improve Virginia's mental health facilities. In his 1995 State of the Commonwealth Address, in fact, Gilmore referenced the inadequacies *252 of the state's mental health system and promised to protect "Virginia's most vulnerable citizens." [FN72] Swann's attorneys seized the opportunity to remind the governor of this political pledge.

In addition, while acting as the state's Attorney General, Governor Gilmore had lobbied successfully to get the Virginia state legislature to adopt a "life without parole" option, something that was not available at the time of Swann's sentence. Putting both political factors together was obviously the strategy. Indeed, painting the defendant as "vulnerable," Swann's advisors highlighted those political promises and achievements that were most beneficial to their client. The following passage from Swann's clemency petition is illustrative:

Now that the option of life without parole is available--thanks in large part to your efforts when you were Attorney General--justice and human decency cry out for a grant of clemency that would convert the death sentence to one of life without parole. This result is also supported by substantial medical evidence that Calvin is not a danger to society today if he receives basic medical treatment and supervision appropriate for his mental illness.

These are undeniably rare and pitiful circumstances that are unlikely to be seen again. You, [Governor Gilmore], have taken significant steps to address the deficiencies in the mental health system and the limited sentencing options of the past. You have publicly recognized that "the long deterioration of Virginia's system of mental health care didn't occur overnight, and it won't be fixed overnight. However, with strong leadership and commitment, we're beginning to bring about the kind of change that has been too long overdue." [FN73] And as Attorney General, you were a driving force to get the General Assembly to adopt life without parole as an option. [FN74]

Less than twenty-four hours after the clemency petition was presented, Governor Gilmore commuted Calvin Swann's death sentence.

Conclusion

Speculating on the motives of our political leaders is always a risky endeavor. Furthermore, generalizing from just one experience is equally irresponsible. Nonetheless, it seems clear that if *253 Governor Gilmore was influenced by the two political issues presented in the Swann case, other chief executives, in other situations, are probably as well. Indeed, if we conclude that Calvin Swann's life was saved by a primarily political argument, we can also conclude that others may also be spared by similar arguments. Which gets us back to the movement in favor of clemency reform. The call to reform

executive clemency across the country signals a growing concern among death penalty opponents that the clemency process, particularly in the post- Furman era, has failed. Politics has overtaken the decision-making process and the result has been a reluctance on the part of governors to extend clemency when there is no clear political payoff. Consequently, the abolitionist movement has shifted its position in favor of a more procedurally transparent clemency process.

And yet, before we hastily concede that clemency ought to follow the dictates of procedural due process, or that we should somehow downplay the protective capabilities of the process itself, we should stop to consider whether there may be a genuine cost to the lives of death row inmates by these fundamental changes. Before we attempt to realign the clemency process as some sort of extension of our judicial system, we need to consider the impact that a recalibration of the process may have for the success of future clemency appeals. There is little doubt that the political environment often prevents grants of executive clemency, and that the correlation between the public's staunch support of capital punishment and the increased pressure on political officials to adhere to the will of that public has resulted in a sharp decline in clemency over the last quarter century. But what is less recognized is the reality that political forces also save lives; that the principles of clemency as an unreviewable, largely unchecked power with only a tenuous resemblance to the judicial process have enabled inmates to walk off of death row.

But beyond mere speculation one thing is clear: executive clemency remains a component of our system of separated powers. Governors, parole boards and presidents are empowered with the authority to commute sentences precisely because they are not part of America's judicial system. They provide a check on the judiciary, to be sure; but that check will be tainted with politics so long as elected officials are responsible for discretionary decision making. And that is the way it should be. Opponents of capital punishment ought not to seek reform of the *254 clemency process in response to the defects that are all too prevalent within our judicial system. The answer to the imperfections of capital trials is to fix the trials themselves and not to rely on the clemency process as a remedy; for to strip the clemency process of its political roots is not only to disrupt the delicate balance that sustains America's governmental institutions, but also to risk that many future governors will claim helplessness. [FN75] In the end, we can certainly disagree about whether or not chief executives are equipped to reach a decision regarding mercy, but until laws are changed and constitutions amended, politics will, and more importantly should, remain a central component of the clemency process.

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[FNaa1]. John J.P. Howley is a partner in the New York office of Kaye Scholer, LLP. His pro bono work has included representing numerous death row inmates in habeas and clemency proceedings throughout the United States. He graduated magna cum laude from New York Law School and received a B.A. in Government and History from Skidmore College.

[FN1]. Radelet and Zsembik's seminal article on executive clemency in post- Furman capital cases distinguishes between commutations granted for judicial expediency and those granted for humanitarian reasons. For the sake of this paper, we will focus attention only on those in the latter category. Michael

L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. Rich. L. Rev. 289 (1993).

[FN2]. Politics has been defined in a number of ways, not all of which are flattering. Some political scientists have characterized it as a “competition between individuals and groups over the allocation of values and rewards.” *The American Political Dictionary* 94-95 (Jack C. Plano & Milton Greenberg eds., 9th ed. 1993). Others have defined it as “the art of the possible.” *Id.* In the end, however, the common denominator is that politics involves power and that decisions are based on influence rather than justice.

[FN3]. Comment by a southern governor’s counsel during a meeting with death row inmate’s lawyers to discuss the inmate’s clemency petition (as communicated to the author).

[FN4]. See Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 255 (1990). Elizabeth Rapaport notes that the number of clemencies granted in capital cases during the first sixty- seven years of the twentieth century is conservatively estimated at between 20% and 25%. Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women’s Capital Cases*, 4 Buff. Crim. L. R. 967, 980 (2001). Since 1976, however, “fewer than two in a hundred capital prisoners have obtained commutation or pardon.” *Id.* at 981.

[FN5]. Consider Daniel Kobil’s words: The administration of clemency in the United States “has been abused. It has been exercised in an arbitrary fashion, and in many respects it looks like a flawed vehicle for achieving justice.” Daniel T. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 Cap. U. L. Rev. 567, 567 (2000).

[FN6]. Daniel Kobil is perhaps the most outspoken proponent of a more objective clemency process. He has proposed that the clemency power be divided. Political decisions should remain with the executive, Kobil argues, but clemency decisions that seek to correct unjust sentences or that are disproportionate to similar crimes should be confiscated from political officials like the governor and given to nonpartisan commissions whose members serve life terms. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 Tex. L. Rev. 569 (1991).

[FN7]. 28 U.S.C. § § 2244-2266 (1994).

[FN8]. Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 Chi-Kent L. Rev. 1501, 1503 (2000). See also Carla Ann Hage Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 Law & Phil. 109 (1991).

[FN9]. *United States v. Wilson*, 32 U.S. 150, 160 (1833).

[FN10]. *Black’s Law Dictionary* defines a pardon as “[a]n executive action that mitigates or sets aside punishment for a crime. An act of grace from governing power which mitigates the punishment the law demands for the offense and restores the rights and privileges forfeited on account of the offense.” *Black’s Law Dictionary* 1113 (6th Edition 1990).

[FN11]. Radelet and Zsembik, *supra* note 1, at 289.

[FN12]. Fourteen states permit the governor to make the decision alone, while nine allow him or her to grant clemency after a non-binding recommendation from a clemency board or advisory group. Death Penalty Information Center, at <http://www.deathpenaltyinfo.org> (last visited July 30, 2002).

[FN13]. Deborah Leavy, Note, A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings, 90 Yale L. J. 889 (1981). See also Bedau, *supra* note 4, at 257.

[FN14]. Toney Anaya, Statement by Toney Anaya on Capital Punishment, 27 U. Rich. L. Rev. 177 (1993).

[FN15]. Governor Richard Celeste of Ohio granted clemency to four women in 1991 as he was leaving office; in addition, Governor James of Alabama commuted the death sentence of Judith Ann Neelley for the same reason. Rapaport, *supra* note 4.

[FN16]. See generally Radelet & Zsembik, *supra* note 1.

[FN17]. His first came in the case of Robert Bacon, Jr. in October, 2001. Death Penalty Information Center, *supra* note 12.

[FN18]. See generally Bob Burtman, A Troubling Sentence, The Nation, at <http://www.thenation.com> (Jan. 14, 2002).

[FN19]. *Id.*

[FN20]. See generally Allen L. Williamson, Clemency in Texas--A Question of Mercy?, 6 Tex. Wesleyan L. Rev. 131 (1999).

[FN21]. See Pat Robertson, The Importance of an "Escape Valve for Mercy," 28 Cap. U. L. Rev. 579 (2000).

[FN22]. *Id.* at 580.

[FN23]. Williamson, *supra* note 20, at 140.

[FN24]. See Michael A. G. Korengold, Todd A. Noteboom & Sara Gurwitch, And Justice For Few: The Collapse of the Capital Clemency System in the United States, 20 Hamline L. Rev. 349 (1996); see generally Bedau, *supra* note 4; Rapaport, *supra* note 4.

[FN25]. *Id.*

[FN26]. Deborah Fins, Esq., Death Row U.S.A.: A Quarterly Report by the Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc., at www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf (last visited July 30, 2002).

[FN27]. Kobil, *supra* note 5, at 569.

[FN28]. *Herrera v. Collins*, 506 U.S. 390 (1993).

[FN29]. Kobil, *supra* note 5, at 572 (quoting Rehnquist in *Herrera v. Collins*).

[FN30]. Kobil, *supra* note 5, at 567.

[FN31]. Rapaport, *supra* note 4, at 967 (emphasis added).

[FN32]. See *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

[FN33]. Leavy, *supra* note 13; Williamson, *supra* note 20; Brian S. Clarke, In Search of Clemency Procedures We Can Live With: What Process is Due in Capital Clemency Proceedings After *Ohio Adult Parole Authority v. Woodard?*, 11 *Cap. Def. J.* 5 (1998).

[FN34]. Korengold et al., *supra* note 24, at 368.

[FN35]. See Victoria J. Palacios, Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases, 49 *Vand. L. Rev.* 311 (1996).

[FN36]. *Id.* at 313.

[FN37]. *Id.* at 370-72.

[FN38]. Woodard, *supra* note 32.

[FN39]. The Court concluded that there is no constitutionally protected liberty interest in non-capital cases in *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981).

[FN40]. Woodard, *supra* note 32, at 289 (O'Connor, J. concurring in part and concurring in the judgment).

[FN41]. As incorporated through the Fourteenth Amendment.

[FN42]. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981).

[FN43]. Chief Justice Rehnquist delivered the opinion of the Court with respect to Sections I & III. Woodard, *supra* note 32, at 275. In rejecting Woodard's constitutional challenge, Rehnquist argues that "the process respondent seeks would be inconsistent with the heart of executive clemency, which is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." Woodard, *supra* note 32, at 280- 81. He further argues that:

[c]lemency proceedings are not part of the ... adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process. They are conducted by the executive branch,

independent of direct appeal and collateral relief proceedings. And they are usually discretionary, unlike the more structured and limited scope of judicial proceedings.

Id. at 283.

[FN44]. Woodard, *supra* note 32, at 288-89 (O'Connor, J., concurring in part and concurring in the judgment).

[FN45]. Id. at 289 (emphasis in original).

[FN46]. Id. at 292 (Stevens, J., concurring in part and dissenting in part).

[FN47]. Id. It is interesting to note that Justice Stevens does not include gender in his list of classifications that might violate the Due Process Clause.

[FN48]. Id. at 1256.

[FN49]. Clarke, *supra* note 33, at 20. Clarke continues by asserting:

For far too long, death row inmates in Virginia and elsewhere have been denied basic procedural safeguards in their final attempt to avoid the execution chamber. Hopefully, Woodard will force states to adopt procedures similar to those used in Ohio--procedures that adequately protect the rights of death row inmates.

Even if more "process" in clemency proceedings does not result in a single additional grant of clemency, the system as a whole will benefit. In our legal system "justice must satisfy the appearance of justice." By requiring states to guaranty inmates a hearing and an impartial decision maker in clemency proceedings, courts and legislatures will help ensure that the appearance of justice is satisfied and that only the worst of the worst are put to death. The Constitution requires it and justice demands it.

[FN50]. In fact, Kobil is optimistic that clemency "in the future may be a process that bubbles up from the people." Kobil, *supra* note 5, at 577.

[FN51]. See Williamson, *supra* note 20.

[FN52]. See Williamson, *supra* note 20; see also Kobil, *supra* note 6.

[FN53]. Korengold et al., *supra* note 24, at 354 n.61 (quoting William Blackstone, Commentaries 397-98).

[FN54]. The Federalist No. 74 (Alexander Hamilton).

[FN55]. Id. See also Joseph Story, Commentaries on the Constitution, § § 1488-98 (5th ed. 1905).

[FN56]. The Federalist, *supra* note 54.

[FN57]. Id.

[FN58]. James Iredell, North Carolina Ratifying Convention, July 28, 1788, in *The Founders' Constitution* 18 (Philip B. Kurland & Ralph Lerner eds., vol. 4 1987).

[FN59]. *Id.*

[FN60]. *Id.*

[FN61]. *Id.* at 18. George Washington actually invoked Article II, Section 2 to pardon a group of Pennsylvanians involved in an insurrection against the general government. George Washington, Proclamation of July 10, 1795, in *The Founders' Constitution* 20 (Philip B. Kurland & Ralph Lerner eds., vol. 4 1987).

[FN62]. See *Records of the Federal Convention*, in *The Founders' Constitution* 3-4 (Philip B. Kurland & Ralph Lerner eds., vol. 4 1987).

[FN63]. See *The Federalist*, *supra* note 54.

[FN64]. *Id.*

[FN65]. There was some concern about the abuse of executive power, so a few states required consent on the part of an executive board before a governor could grant clemency. See Korengold et al., *supra* note 24, at 355; Christen Jensen, *The Pardoning Power of the American States* 3 (1922).

[FN66]. See Bedau, *supra* note 4; Korengold et al., *supra* note 24.

[FN67]. *Furman v. Georgia*, 408 U.S. 238 (1972).

[FN68]. Death Penalty Information Center, *supra* note 12. See also Radelet & Zsembik, *supra* note 1.

[FN69]. One of the most recognized examples occurred when Governor Mel Carnahan of Missouri was pressured to commute the death sentence of Darrell Mease after Pope John Paul II personally asked the governor to do so. Death Penalty Information Center, *supra* note 12.

[FN70]. Governor Gilmore had denied more than two dozen clemency appeals prior to Swann's. *Id.*

[FN71]. Swann's attorneys did question the court's denial of a competency hearing. John J.P. Howley, Dean Garfield, and Lori B. Leskin, Calvin Eugene Swann, Petition for Clemency, May 7, 1999.

[FN72]. Governor James Gilmore III, State of the Commonwealth Address, January 8, 1995 (as cited in clemency petition).

[FN73]. Office of the Governor, News Release, Governor Gilmore Says Mental Health Progress Being Made (March 30, 1999).

[FN74]. John J.P. Howley, *supra* note 71.

[FN75]. If the clemency process is reformed and the discretion of the executive is either eliminated or minimized, we can imagine the possibility of even more governors adopting the attitude of George W. Bush when he refused to commute Karla Faye Tucker's death sentence. Death Penalty Information Center, *supra* note 12. His response to her clemency appeal was that unless there was doubt about the guilt of the accused or a clear mistake at the trial, his hands were tied. *Id.*