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ARTICLE

THE PRESIDENT AND THE PARDON POWER: A BIBLIOGRAPHIC ESSAY, 1989–2015

JEFFREY CROUCH*

INTRODUCTION

In 1989, political scientist Mark Rozell published a brief essay in the *Journal of Law & Politics* that focused on the president's pardon power. In the piece, Rozell effectively summarized the legal literature on federal executive clemency. The article has provided researchers with a number of individual source ideas, as well as a better overall sense of the clemency-specific topics that have been examined by legal scholars.

Since Rozell's bibliographic piece, federal executive clemency has received a fair amount of attention from legal scholars. In the last quarter century alone, it has been the primary focus of several special journal issues and academic symposia, and dozens of law review articles, comments, and notes. In 2012, political scientist P.S. Ruckman, Jr. published in this journal¹ a comprehensive analysis of what political scientists have written about clemency. Though valuable, detailed, and sorely needed, this new literature review did not include within its scope an update to the list of legal cases, law review articles, notes, and similar materials compiled by Rozell.

Plan for the Article

The purpose of this article is to review significant portions of the legal literature on clemency published between 1989 and 2015. In the pages that follow, I focus primarily on conferences/symposia/special issues within this time period that deal mostly with federal (and not state) executive clemency and its operation—including its scope, application, and limits. I also consider several law journal publications that cover these topics, but that are not necessarily part of a larger, clemency-focused event. It is difficult for

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1. P.S. Ruckman Jr., *The Study of Mercy: What Political Scientists Know (and Don't Know) About the Pardon Power*, 9 U. OF ST. THOMAS L.J. 783 (2012).

me to exclude any legal sources from this article, since just about all of them have been at least somewhat useful in my research. However, because of space constraints, I will focus my attention here mostly on the authors that covered an area of the clemency power mentioned above, or otherwise made a notable contribution. I generally omit or limit discussion of pieces that are primarily theoretical or philosophical, or that refer to clemency only in the context of a larger subject (death penalty cases, for instance).

Preview of Topics Discussed in this Article

I begin with a brief examination of the Nixon pardon from 1974, mostly because several of the pieces discussed below refer back to this well-known clemency decision. From there, I jump ahead to the 1990s and begin my examination of legal works on clemency published after Rozell's earlier bibliographic piece went to press.

The 1990s featured the Iran-Contra pardons by George H. W. Bush, and clemency scholars published work examining a number of issues related to the appropriate use of the clemency power. Here, I briefly review a number of these pieces, particularly those focused on (1) the Iran-Contra scandal itself; (2) a pardon granted in the context of an investigation; (3) whether it is possible for a president to "self-pardon"; (4) how clemency should be administered; (5) whether a deceased person might be eligible for presidential clemency; and (6) the effect of a pardon.

In the decade of the 2000s, President Bill Clinton granted clemency to a number of controversial figures, including members of the FALN (Fuerzas Armadas de Liberación Nacional) and Marc Rich. Thereafter, a number of scholars and informed observers weighed in on Clinton's clemency decisions in a number of legal publications. First, I discuss several contributions to a special double issue of *Federal Sentencing Reporter*. I review those contributions on the following topics: (1) international clemency; (2) "systematic" pardons; (3) pardon as a prerogative power; (4) whether the president should provide reasons to justify clemency grants; (5) clemency's role within the context of the Sentencing Reform Act of 1984; (6) inappropriate pardons granted for personal reasons; (7) legal practitioners' perspectives on Clinton's clemency actions; (8) who should review clemency applications; and (9) a number of helpful related documents related to these topics reproduced in the appendix to the double issue of *Federal Sentencing Reporter*. Second, I go through scholarly contributions to an issue of *Capital University Law Review*. In this article, I look at pieces published there on the following subjects: (1) ways to limit the clemency power; (2) the mass media and coverage of clemency; and (3) the bureaucracy that processes clemency applications.

George W. Bush followed Bill Clinton's uneven clemency legacy with one of his own, thanks largely to a decision to commute the prison sentence

of one of his administration's top-ranking staffers, I. Lewis "Scooter" Libby. This particularly volatile clemency decision was the main focus of a 2007 issue of *Federal Sentencing Reporter*, and led to a fresh examination of clemency-related topics. Articles from that issue examined here considered the following: (1) ways that clemency could be restored to its former place of respectability in the American justice system; (2) how the commutation application process might be revamped; and (3) documents relevant to the Libby situation.

Other issues addressed in law review pieces during this decade (and considered here) included: (1) whether we should amend the Constitution in order to avoid future presidential abuse of clemency; (2) whether it would make sense to implement other reforms designed to improve clemency; (3) if Congress does (or should) weigh in on clemency matters; (4) how "conditional" clemency works; and (5) a number of "nuts and bolts" regarding the operation of the clemency bureaucracy and the reasoning driving clemency decisions.

So far, the 2010s have not featured a clemency scandal reaching the magnitude of those in the 1990s and 2000s. Still, a variety of legal venues have featured important clemency scholarship. I begin my examination of legal clemency work from the decade of the 2010s with a 2012 issue of the *University of St. Thomas Law Journal*. I consider pieces from this issue on the following topics: (1) whether the president's commutation power remains relevant; (2) if courts have a role to play in clemency cases; and (3) whether states might be able to contribute ideas for reform of the federal clemency system. Scholars published pieces elsewhere during this decade on the following topics, all of which I examine in this article: (1) whether drug offenders should receive clemency; (2) a look back at the final Clinton "pardoning party"; (3) whether clemency is in its "twilight"; and, finally, (4) how to fix the clemency screening bureaucracy.

I conclude the article with a detailed References section that updates Rozell's master list of legal sources using his original categories, with one addition: websites.

I. GERALD FORD AND THE NIXON PARDON

President Gerald Ford stunned the world on September 8, 1974, with his announcement that he had decided to pardon his disgraced predecessor, Richard Nixon, for any crimes that Nixon may have committed while serving as President of the United States.² Legal scholars have rarely closely examined the Nixon pardon despite its status as probably the most famous

2. For a detailed account of this decision, see JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* 66–85 (2009).

clemency decision of the past 40 years.³ The few pre-1989 pieces concentrating solely on the Nixon pardon are outside the scope of this article, but there are a couple of more recent works that a clemency researcher should consider tracking down.⁴

One of the most fascinating pieces about the Nixon pardon is a first-person recollection by Benton Becker, the lawyer charged by President Gerald Ford to speak with Richard Nixon in person about a possible pardon.⁵ In this piece, Becker discusses his own impressions of the historic arrangement between Nixon and Ford that both secured a pardon for Nixon that covered any crimes he may have committed while president of the United States and also preserved the former chief executive's presidential records.

II. THE 1990S: GEORGE H.W. BUSH AND THE IRAN-CONTRA PARDONS

In his bibliographic essay, Rozell noted the possibility that President Ronald Reagan may offer clemency to John Poindexter and Oliver North, two administration officials that were in the news at the time because of the Iran-Contra scandal. President Reagan never pardoned Poindexter or North,⁶ but his vice president and successor in office, George H.W. Bush, pardoned Caspar Weinberger and five others involved in the scandal in 1992.⁷

Several authors seized upon the issues raised by the Iran-Contra pardons as an entry point into a discussion of the president's pardon power. Among the issues analyzed⁸ were: (1) the impact a pardon might have on an investigation; (2) whether a president could use clemency to excuse himself; (3) whether the clemency process should be more transparent to the public; (4) if the president may grant clemency to someone who is deceased; and (5) how completely a pardon can impact a criminal conviction.

3. See Mark J. Rozell, *The Presidential Pardon Power: A Bibliographic Essay*, 5 J. OF L. & POL. 459, 460 n.4 (1989). Political scientist Mark J. Rozell published a piece on the Nixon pardon in a social science journal entitled *President Ford's Pardon of Richard M. Nixon: Constitutional and Political Considerations*, 24 PRESIDENTIAL STUD. Q. 121 (1994).

4. For a commentary on the Nixon pardon and negotiations over his presidential records published within this time period, see Laura Kalman, *Gerald Ford, the Nixon Pardon, and the Rise of the Right*, 58 CLEV. ST. L. REV. 349 (2010).

5. Benton Becker, *The History of the Nixon Pardon*, Speech at the Cordell Hull Speakers Forum (Feb. 3, 2000), in 30 CUMB. L. REV. 31, 31-49 (1999-2000).

6. Rep. Henry Hyde and Sen. George Mitchell debated a North pardon in the pages of the American Bar Association Journal. See Henry Hyde & George Mitchell, *Pardoning Ollie North*, 75 A.B.A. J. 42 (1989).

7. For a detailed look at the Iran-Contra scandal and pardons, see CROUCH, *supra* note 2, at 101-07.

8. Not discussed here are Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CON. 413 (1999) and Julian H. Wright Jr., *Pardon in the Hebrew Bible and Modern Law*, 3 REGENT U. L. REV. 1 (1993). Wright published a shorter version of this article as Julian H. Wright Jr., *Modern Pardons: Lessons from the Hebrew Bible*, 114/115 LAW & JUST. CHRISTIAN L. REV. 109 (1992).

A. *Iran-Contra Pardons*

In an issue of the *Houston Law Review* published in 1992, Stephen Carter discussed Iran-Contra in a brief essay entitled “The Iran-Contra Pardon Mess,” and Harold Koh contributed an even shorter piece: “Begging Bush’s Pardon.”⁹

Others weighed in with lengthier analyses.¹⁰ Did Bush use the pardon power less as a means to show mercy to Weinberger and others, and more as a way to protect himself from legal exposure? Two articles appearing back-to-back in an issue of the *Oklahoma Law Review* examined: (1) whether a pardon could stop an investigator from obtaining information from her target, and (2) whether a president could “self-pardon.”

B. *Pardon Granted in Context of Investigation*

In the first article, Charles Berger analyzed whether a presidential pardon impeded the ability of investigators to obtain important information from the targets of their inquiry.¹¹ Looking at the Nixon and Iran-Contra pardons, he concluded that “[t]he failure [of investigators] to obtain information was the result of a lack of political will . . . not because of the pardon enabling the offender to remain silent with impunity.”¹² In the case of Nixon, Berger pointed out that investigators still had leverage over Richard Nixon despite President Ford’s pardon: clemency did not prevent Congress from impeaching Nixon in order to remove his post-presidential benefits package.¹³ Regarding Iran-Contra, Berger argued that Lawrence Walsh, the special prosecutor, “was simply wrong that President Bush blocked further investigation into the Iran-Contra affair by pardoning Caspar Weinberger.”¹⁴ To Berger, Walsh had other “alternatives to a criminal trial” that he chose not to use.¹⁵

9. Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 Hous. L. Rev. 883 (1992); Harold Hongju Koh, *Begging Bush’s Pardon*, 29 Hous. L. Rev. 889 (1992).

10. See Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL’Y REV. 361 (1993). A University of Richmond Law Review published in Winter 1993 collected a number of clemency pieces from an earlier symposium at the law school. Directly relevant here are two of those works: first, a note, James N. Jorgensen, *Federal Executive Clemency Power: The President’s Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345 (1993); and an article, Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281 (1993).

11. Charles D. Berger, *The Effect of Presidential Pardons on Disclosure of Information: Is our Cynicism Justified?*, 52 OKLA. L. REV. 163 (1999).

12. *Id.* at 192.

13. *Id.*

14. *Id.*

15. *Id.* at 193.

C. *Self-pardon*

Directly following Berger's article, Robert Nida and Rebecca Spiro analyze whether a president may "self-pardon."¹⁶ They point out that "only two chief executives have contemplated issuing a self-pardon": Nixon during Watergate and Bush in the context of Iran-Contra.¹⁷ They view the Iran-Contra pardons by George H.W. Bush as "a constructive self-pardon for his alleged conduct" and argue that although Nixon decided to let Gerald Ford decide his fate, Nixon believed that he had the ability to self-pardon.¹⁸ The authors agree with Nixon's interpretation, concluding that "[t]he textual, historical, structural, and precedential arguments set forth in this article indicate that the President of the United States has the power to issue pardons to any individual, including himself, except to overturn an impeachment."¹⁹ Brian Kalt disagrees with Nida and Spiro.²⁰ He argues that "[p]residents cannot pardon themselves"²¹ for a number of reasons, including the important fact that "[i]t clashes with other established provisions in the Constitution that prevent self-judging and self-dealing."²²

D. *Standards/Reasons for Clemency*

How should clemency be administered? According to Daniel Kobil, "clemency often operates as an arbitrary exception to our system of justice, rather than as a corrective."²³ He urges that "the remission of punishment must be administered in a principled, consistent fashion," and proposes "specific procedures and standards to govern the exercise of the clemency power."²⁴ Kobil's article is particularly useful to a clemency researcher for two reasons: first, it is weighty: Kobil skillfully covers a number of basic but crucial topics in Part II; second, it is timely—here, he argues for bifurcation of the clemency process between the president and a new, politically neutral "clemency commission."²⁵ Many scholars are currently calling for clemency reform,²⁶ and Kobil's piece offers one possible template for change. Echoing Kobil, philosopher Kathleen Dean Moore argues that

16. Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197 (1999).

17. *Id.* at 212.

18. *Id.* at 213–14.

19. *Id.* at 222.

20. Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996).

21. *Id.* at 809.

22. *Id.* at 802.

23. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 574 (1991).

24. *Id.* at 575.

25. *Id.* at 622.

26. See Douglas A. Berman, *Turning Hope-and-Change Talk Into Clemency Action for Non-violent Drug Offenders*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 59 (2010); Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for*

“presidents should make pardoning decisions on the basis of reasons and that those reasons should be made public”; she also contends “it is possible to specify in advance the general kinds of cases that call for pardons.”²⁷

E. Posthumous Pardons

Other pieces published in the 1990s do not necessarily spend much time on the Nixon or Iran-Contra pardons, but they are notable nevertheless. For example, in 2008, George W. Bush earned media attention by issuing what journalists labeled a “rare” posthumous pardon to Charles T. Winters.²⁸ In fact, there has apparently been just one additional posthumous pardon granted in American history: Henry Ossian Flipper became the first person to receive one just nine years earlier.²⁹ His attorneys published their legal brief supporting Flipper’s application as a law review article. Flipper, the first African-American to graduate from West Point, was court-martialed and discharged from the Army because of racial discrimination.³⁰

F. Effect of a Pardon

How far back in time may a pardon reach to excuse the actions of its recipient? Philip Houle argues that “a full and unconditional pardon blots out both the legal existence of a conviction or crime and any resulting guilt or infamy, subject to four well-defined common law exceptions or limits to the operation and effect of full pardons.”³¹ He contends that the Supreme Court “unequivocally adopted the forgive-and-forget rule” in *Ex Parte Garland*.³² This interpretation is contrary to a persuasive piece written by Professor Samuel Williston over seven decades ago in which he argued that even a “full and unconditional pardon does not blot out guilt or moral stain due to the ‘admission’ of guilt implied in the acceptance of a pardon and the four traditional exceptions or limits to the operation of full pardons at com-

Renewal, 82 U. CHI. L. REV. 1 (2015); Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse?*, 13 FED. SENT’G REP. 177 (2001); and possibly others.

27. Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 281 (1993). Moore cites Daniel T. Kobil’s *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1990–1991) as a source for the law-oriented version of her argument. She also refers the reader to her own book on the subject, KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989), for a longer, philosophy-oriented explanation.

28. Ariane DeVogue & Theresa Cook, *Presidential Pardon for ‘Unsung Hero,’ ABC NEWS* (Dec. 23, 2008), <http://abcnews.go.com/TheLaw/BushLegacy/story?id=6519124>.

29. Darryl W. Jackson, Jeffrey J. Smith, Edward J. Sisson & Helene T. Krasnoff, *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251, 1251 (1999).

30. *Id.* at 1252.

31. Philip P. Houle, *Forgive and Forget: Honoring Full and Unconditional Pardons*, 41 ME. L. REV. 273, 275 (1989).

32. *Id.* at 276; *Ex Parte Garland*, 71 U.S. 333 (1866).

mon law.”³³ Ashley Steiner also disagrees with Houle, contending that “courts should adopt the view . . . that a presidential pardon removes the punishment for an offense, but cannot erase the guilt for the underlying acts or the fact of conviction.”³⁴ She dismisses as dicta the language in *Ex Parte Garland* that seems to embrace Houle’s “forgive-and-forget” rule, and notes that subsequent courts “have understood *Garland* to stand for a much more limited principle.”³⁵ She concludes that “[a]n examination of constitutional principles and Supreme Court interpretation shows that the view of the *North* and *Abrams* majorities³⁶ is the more practical and just.”³⁷

III. THE 2000s

A. Bill Clinton and Clemency

George H.W. Bush’s successor, Bill Clinton, was president from 1993 to 2001. During his two terms in office, he granted a number of notable pardons and commutations. Among those clemency recipients are: Clinton’s half-brother, Roger Clinton, Whitewater figure Susan McDougal, and—perhaps most controversially—members of the FALN and Marc Rich.

1. The FALN

The FALN was a Puerto Rican nationalist terrorist organization. Sixteen of their members, whose offenses were for “weapons and conspiracy charges,” as well as “interference with interstate commerce,”³⁸ were offered conditional clemency by President Clinton in 1999 despite the fact that they were not considered strong candidates for presidential mercy by the law enforcement agencies responsible for prosecuting them.³⁹ Observers sus-

33. *Id.* at 274 n.5.

34. Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 EMORY L.J. 959, 962 (1997).

35. *Id.* at 969.

36. Interestingly enough, the *North* (Oliver North) and *Abrams* (Elliott Abrams) cases both stemmed from Iran-Contra. *In re North* had to do with Clair George’s attempt to recover moneys paid to his attorneys after he received a presidential pardon. George had been convicted of lying to Congress in connection with Iran-Contra. Another figure from the scandal, Abrams had claimed that, consistent with an expansive reading of *Garland*, his presidential pardon made matters as if he had never committed the crime in the first place. The courts disagreed with both George’s and Abrams’ claims. See App. C, *Effect of a Pardon on Bar Discipline*, 13 FED. SENT’G REP. 217 (2001).

37. Steiner, *supra* note 34, at 1003.

38. John M. Broder, *12 Imprisoned Puerto Ricans Accept Clemency Conditions*, N.Y. TIMES (Sept. 8, 1999), <http://www.nytimes.com/1999/09/08/us/12-imprisoned-puerto-ricans-accept-clemency-conditions.html?pagewanted=all>.

39. CROUCH, *supra* note 2, at 108–09. For a summary of the FALN commutations, see CROUCH, *supra* note 2, at 108–11.

pected, and evidence suggested, that Clinton had offered conditional clemency for largely political reasons.⁴⁰

2. *Marc Rich*

Marc Rich is one of the lucky 176 recipients of clemency in the dwindling hours of the Clinton presidency. Rich, a fugitive hiding in Switzerland to avoid prosecution for “widespread tax evasion, illegal dealings with Iran and other crimes,”⁴¹ was the beneficiary of a clemency campaign participated in by his ex-wife Denise, who had made large, recent donations to the Clinton presidential library.⁴²

B. *Federal Sentencing Reporter (2000–2001)*

The *Federal Sentencing Reporter* published its November/December 2000 and its January/February 2001 journals as one double issue in order to more comprehensively consider the clemency power and criminal sentences in the wake of Clinton’s last-minute decisions.⁴³ In over a dozen articles, scholars reflected on the following topics: (1) international clemency; (2) “systematic” pardons; (3) the pardon as a prerogative of the president; (4) whether the president should publicly release reasons for clemency decisions; (5) using clemency as a tool of mercy; (6) whether President Clinton might use clemency for personal reasons; (7) practitioners’ perspectives on several Clinton clemency decisions; (8) who should review applications for clemency; and (9) the appendices to the special issue of *Federal Sentencing Reporter*.⁴⁴ The issue ends with reprints of several important documents related to the Clinton clemency decisions.⁴⁵

Regular journal editors Daniel Freed and Steven Chanenson preview the special double issue and its topics and contributors.⁴⁶ Then, guest editor Margaret Love begins the issue with a look at the historical development of

40. *Id.* at 110–11.

41. Douglas Martin, *Marc Rich, Financier and Famous Fugitive, Dies at 78*, N.Y. TIMES (June 26, 2013), <http://www.nytimes.com/2013/06/27/business/marc-rich-pardoned-financier-dies-at-78.html>.

42. For a look at the Marc Rich clemency campaign, see *id.* at 112–17. For a discussion of the impact that lobbying laws (or the lack thereof) had on the Rich pardon campaign, see Kathryn L. Plemmons, “Lobbying Activities” and Presidential Pardons: Will Legislators’ Efforts to Amend the LDA Lead to Increasingly Hard-Lined Jurisprudence?, 18 BYU J. PUB. L. 131 (2003–2004).

43. Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT’G REP. 119, 120 (2001). Two pieces in this double issue, Elizabeth Rapaport’s *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT’G REP. 184 (2001) and Mary Price’s *The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. §3582(c)(1)(A)*, 13 FED. SENT’G REP. 188 (2001), are not mentioned here because they do not deal directly with federal executive clemency.

44. Freed & Chanenson, *supra* note 43.

45. *Id.* at 192–240.

46. *Id.* at 119–91.

the executive bureaucracy designed to assist the president with clemency decisions.⁴⁷ From there, she also introduces the other authors and briefly previews their main arguments.⁴⁸

1. *International Clemency*

David Tait writes the first of five articles here on the big picture of clemency. He focuses on “two apparently similar murder trials in France and Canada, illustrating two constitutional settings of pardon.”⁴⁹ Tait’s piece is generally outside the scope of the main concerns of this article. However, he does provide a useful—if compact—history of clemency, from the Code of Hammurabi through President Abraham Lincoln and beyond.⁵⁰

2. *“Systematic” Pardons*

Charles Shanor and Marc Miller follow Tait with an article aimed at “systematic” clemency. By “systematic,” the authors mean clemency “applied to a group of offenders selected through consistent criteria and processes, and for reasons that may reflect concerns of justice, equality, and wise policy, rather than mercy.”⁵¹ Shanor and Miller argue that “[a]t least a third of all United States presidents . . . have used systematic pardons,” and include a helpful chart that lists their examples.⁵² They track clemency’s decline through charts covering Presidents Nixon through Clinton, and also include a graphic that demonstrates how large the federal prison population has grown in recent years.⁵³

Perhaps the most important feature of the Shanor and Miller article is how it foreshadows recent clemency developments under President Barack Obama. The authors suggest (in an article published a decade and a half ago) that the president may wish to use clemency to bring typically harsh sentences for crack cocaine violations more in line with the usually more lenient sentences for powder cocaine.⁵⁴ Fast forward nearly a decade, and Shanor and Miller seem to predict President Obama’s activity on this issue: in 2010, Obama signed the Fair Sentencing Act and brought a 100 to 1 punishing disparity between the two types of cocaine offenses down to 18

47. Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT’G REP. 125, 125–27 (2001).

48. *Id.* at 128–30.

49. David Tait, *Pardons in Perspective: The Role of Forgiveness in Criminal Justice*, 13 FED. SENT’G REP. 134, 134 (2001).

50. *Id.* at 134–35.

51. Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT’G REP. 139, 139 (2001).

52. *Id.* at 139–40.

53. *Id.* at 140–41.

54. *Id.* at 139.

to 1.⁵⁵ More recently, he has been using sentence commutations to address disproportionate sentences handed out previously to minor, non-violent drug offenders.⁵⁶

3. *Pardon as Prerogative*

In his article, John Harrison discusses the ways in which pardons “have been and could be put,” and whether they have been called upon as a Lockean “prerogative” power.⁵⁷ This is a thoughtful discussion that touches upon several examples of recent controversial pardons (e.g., Nixon, Iran-Contra, Marc Rich).⁵⁸

4. *Providing Reasons for Clemency*

Daniel Kobil revisits the idea of a president explaining why he is pardoning someone in his article, “Should Clemency Decisions be Subject to a Reasons Requirement?”⁵⁹ He notes that “[t]oday, as President Clinton’s pardon of Marc Rich illustrates, detailed explanations for clemency have usually accompanied only the most controversial exercises of the power.”⁶⁰ Kobil goes on to discuss the Nixon and Iran-Contra pardons as well.⁶¹ After examining the positive and negative aspects of requiring a president to provide reasons for a clemency decision,⁶² Kobil concludes that “[u]pon reflection, I do not favor disparaging the clemency power by mandating a reasons requirement.”⁶³

5. *Clemency as a Tool of Mercy*

In an article that only briefly touches upon the president’s clemency power, John Steer, a U.S. Sentencing Commission official, and Paula Biderman, an attorney with the U.S. Parole Commission, discuss the power’s role within the larger context of the Sentencing Reform Act of 1984 (the “SRA”).⁶⁴ They observe that “because no guideline or statutory system can perfectly address all individual circumstances, the President’s

55. See Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372.

56. Sari Horwitz & Juliet Eilperin, *Obama Commutes Sentences of 46 Nonviolent Drug Offenders*, WASH. POST (July 13, 2015), https://www.washingtonpost.com/world/national-security/obama-commutes-sentences-of-46-non-violent-drugoffenders/2015/07/13/b533f61e-2974-11e5-a250-42bd812efc09_story.html.

57. John Harrison, *Pardon as Prerogative*, 13 FED. SENT’G REP. 147, 147 (2000).

58. *Id.* at 147–49.

59. Daniel T. Kobil, *Should Clemency Decisions Be Subject to A Reasons Requirement?*, 13 FED. SENT’G REP. 150 (2001).

60. *Id.* at 150.

61. *Id.* at 151.

62. *Id.* at 151–52.

63. *Id.* at 152.

64. John R. Steer & Paula K. Biderman, *Impact of the Federal Sentencing Guidelines on the President’s Power to Commute Sentences*, 13 FED. SENT’G REP. 154 (2001).

power to commute a sentence in exceptional, deserving cases continues to be an appropriate mechanism for advancing the idealistic principles of the SRA in a society that strives to temper the exercise of punishment with mercy when appropriate.”⁶⁵

6. *Inappropriate Pardons Granted for Personal Reasons*

Several contributors to this special issue of the *Federal Sentencing Reporter* zero in more closely on the Clinton pardons. Kathleen Dean Moore’s contribution here originally ran as an op-ed in the *Washington Post* a week before the end of Clinton’s presidency,⁶⁶ so it missed the Marc Rich and other “last minute” clemency decisions that came out as the president left the Oval Office for the last time. Moore notes that “[u]sing a pardon to pay for something given in return is corruption—pure and simple.”⁶⁷ Compared to the outright sale of a pardon, “[g]iving pardons to reward political loyalty or encourage campaign donations or express gratitude for personal favors differs only in degree.”⁶⁸ Of course, a media investigation after the Rich pardon granted on Clinton’s last day in office uncovered a behind-the-scenes campaign and the fact that Rich’s ex-wife had donated almost a half-million dollars to Clinton’s presidential library.⁶⁹

7. *Practitioners’ Perspectives on Clinton’s Clemency Actions*

Judge David Doty and former federal prosecutors Deborah Devaney and David Zlotnick provide fascinating behind-the-scenes perspectives on Clinton clemency decisions. Judge Doty writes about two offenders (Kim Willis and Carlos Vignali) he sentenced that later received clemency.⁷⁰ For various reasons, Judge Doty supported the Willis commutation, but did not know about, and disagreed with, the Vignali clemency decision.⁷¹ Devaney offers a detailed look at a pair of Clinton’s clemency decisions,⁷² but the FALN commutations are the most relevant of the two for our purposes. Regarding those controversial commutations, she argues that President Clinton “ignored the trial prosecutors,” who “knew nothing of what was going on” even while FALN supporters lobbied the president for their free-

65. *Id.* at 157.

66. Kathleen D. Moore, *Mr. President, Misusing This Power Is Unpardonable*, 13 FED. SENT’G REP. 159 (2001).

67. *Id.* at 159.

68. *Id.*

69. CROUCH, *supra* note 2, at 112–14.

70. David S. Doty, *Clemency: A View from the Bench of Two Commutations – Vignali and Willis*, 13 FED. SENT’G REP. 161 (2001).

71. *Id.* at 161–62.

72. See Deborah A. Devaney, *A Voice for Victims: What Prosecutors Can Add to the Process*, 13 FED. SENT’G REP. 163 (2001) (focusing on sentence commutations that Clinton offered to Democratic fundraiser Dorothy Rivers and to members of the FALN).

dom.⁷³ Finally, Zlotnick reminds us that some commutations granted by President Clinton were sound, and provides examples of how prosecutors can play a positive role in clemency decisions.⁷⁴

8. *Reviewing Clemency Applications*

One of the questions covered by two authors in this special issue remains a particularly important concern today: who should review clemency applications before they reach the president? Evan Schultz's article asks whether the "fox controls the henhouse" when it comes to clemency.⁷⁵ One aspect of his argument contains the observation that recent presidents—including Clinton—may have decided to bypass the Pardon Attorney's Office because "the pardoning process seems to have been captured by the very prosecutors who run our inevitably flawed criminal justice system."⁷⁶ To Schultz, "[t]he real solution is removal of the [clemency screening] process from [the] Justice [Department]."⁷⁷ Schultz's argument has company among a number of scholars who advocate major changes in the clemency screening process.⁷⁸ Brian Hoffstadt offers a review and critique of Schultz's article, with whom he both agrees and disagrees. One major point of departure between Schultz and Hoffstadt is that the latter suggests that "moving the process completely outside the Justice Department . . . may not be necessary."⁷⁹

9. *Original Documents Reproduced in Appendices*

Four helpful appendices that reprint documents related to topics discussed by the authors round out this special issue of *Federal Sentencing Reporter*.⁸⁰ The first appendix reproduces "rules of the pardon process," that is, the Justice Department's clemency regulations.⁸¹ This information is also available on the Pardon Attorney's Office website.⁸² In addition, it reproduces excerpts from the *U.S. Attorneys' Manual* as "Guidance for

73. *Id.* at 164.

74. David M. Zlotnick, *Federal Prosecutors and the Clemency Power*, 13 FED. SENT'G REP. 168 (2001).

75. Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse?* 13 FED. SENT'G REP. 177 (2001).

76. *Id.* at 178.

77. *Id.*

78. For another argument to remove the clemency screening process from the Department of Justice altogether, see Daniel Kobil, *Reviving Presidential Clemency in Cases of 'Unfortunate Guilt'*, 21 FED SENT'G REP. 160 (2008); see also Berman and Barkow & Osler, *supra* note 26.

79. Brian M. Hoffstadt, *Guarding the Integrity of the Clemency Power*, 13 FED. SENT'G REP. 180, 181 (2001).

80. I will discuss only Appendices A–C here, as they have wider implications than Appendix D, which looks solely at Bill Clinton-specific information.

81. App. A, *Justice Department Clemency Regulations*, 13 FED SENT'G REP. 193 (2001).

82. See *Rules Governing Petitions for Executive Clemency*, DEP'T OF JUST. (Jan. 13, 2015), <http://www.justice.gov/pardon/rules-governing-petitions-executive-clemency>.

United States Attorneys in Clemency Matters.”⁸³ The second appendix contains some of the foundational works of the body of clemency literature, including: Alexander Hamilton’s remarks on clemency from *Federalist No. 74*;⁸⁴ relevant excerpts from the multi-volume 1939 work *The Attorney General’s Survey of Release Procedures*;⁸⁵ selections from several *Annual Reports of the Pardon Attorney* (for 1960, 1963–65);⁸⁶ President Gerald Ford’s statement made upon signing the Nixon pardon—along with the language of the pardon proclamation itself;⁸⁷ and finally, George H.W. Bush’s pardon proclamation for the Iran-Contra defendants he pardoned.⁸⁸ The third appendix consists of: Assistant Attorney General Walter Dellinger’s memo on the effect of a pardon;⁸⁹ excerpts from *In re Elliott Abrams*, which looks at Abrams’ claim that his pardon should have a comprehensive impact, such as one could derive from a broad interpretation of *Garland*;⁹⁰ and an op-ed by Webb Hubbell about how his life changed following a felony conviction.⁹¹ The material in Appendix D is useful as a source for background information on several aspects of Bill Clinton’s pardoning decisions.⁹²

C. *Capital University Law Review* (2003)

Not too long after Bill Clinton’s controversial final acts of clemency, Capital University Law School hosted a symposium entitled “Forgiveness & the Law: Executive Clemency and the American System of Justice.”⁹³ The issues covered by participants in the symposium included: (1) whether the Constitution should be amended to impose additional restrictions on the

83. App. A, *Guidance for United States Attorneys in Clemency Matters*, 13 FED SENT’G REP. 195–97 (2001).

84. App. B, *Alexander Hamilton, The Federalist, No. 74*, 13 FED SENT’G REP. 198 (2001).

85. App. B, *The Attorney General’s Survey of Release Procedures*, 13 FED SENT’G REP. 199 (2001).

86. App. B, *Annual Reports of the Pardon Attorney (1960, 1963–65)*, 13 FED SENT’G REP. 205 (2001).

87. App. B, *President Gerald Ford’s Pardon of Richard Nixon*, 13 FED SENT’G REP. 207 (2001).

88. App. B, *President George Bush’s Pardon of the Iran-Contra Defendants*, 13 FED SENT’G REP. 209 (2001).

89. App. C, *Effects of a Pardon on Authority to Deport, Firearms Disability, and Remission of Restitution*, 13 FED SENT’G REP. 211 (2001).

90. App. C, *supra* note 36, at 217.

91. App. C, *Without Pardon: Collateral Consequences of a Felony Conviction*, 13 FED SENT’G REP. 223–24 (2001).

92. *See* App. D, *Clinton Era Cases and Comments* 13 FED SENT’G REP. 225–40 (2001).

93. *See* Richard F. Celeste, *Executive Clemency: One Executive’s Real Life Decisions*, 31 CAP. U. L. REV. 139, 139–42 (2003). Not included here, but nevertheless interesting, are pieces by the symposium’s organizer, Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 139, 219–42 (2003); Richard F. Celeste, *Executive Clemency: One Executive’s Real Life Decisions*, 31 CAP. U. L. REV. 139, 139–42 (2003); P.E. Digeser, *Justice, Forgiveness, Mercy, and Forgetting: The Complex Meaning of Executive Pardoning*, 31 CAP. U. L. REV. 139, 161–78 (2003).

clemency power; (2) the role of the media regarding clemency; and (3) the importance of the clemency screening process to the legitimacy of its output.

1. *Curbing Clemency*

In light of Clinton's "last minute" pardons, should the president's ability to grant clemency be limited? Mark Strasser reviews the various curbs already restraining clemency and concludes that, on balance, "it seems clear that there is no need for a constitutional amendment to curb presidential abuses of the pardon power, even if that does mean that we can reasonably expect more embarrassing commutations in the not-too-distant future."⁹⁴

2. *Clemency and Press Coverage*

George Lardner admits that, when it comes to the media and clemency coverage, they "sometimes do[] a lousy job."⁹⁵ Although the press can watch for clemency decisions, they are usually limited to "chasing it after the fact."⁹⁶ Lardner argues that "the secrecy of the clemency process is one of the main reasons for its shaky status."⁹⁷ As an example, he notes that "[e]ven the reasons the Attorney General had for recommending clemency, published each year for decades in annual reports starting in the 1880s, are now withheld on the grounds that disclosure might chill the deliberative process at the White House."⁹⁸ He concludes that "the role of the press" should be to continue to point out flaws in our criminal justice system.⁹⁹ Lardner has made his own recent contribution to fighting secrecy by winning a lawsuit that requires the Pardon Attorney's Office to disclose the names of applicants who were denied clemency.¹⁰⁰

3. *The Clemency Screening Process*

In her piece on the Clinton pardons, Margaret Love "focuses not so much on the merits of particular grants as on the process that produced

94. Mark Strasser, *Some Reflections on the President's Pardon Power*, 31 CAP. U. L. REV. 143, 159 (2003).

95. George Lardner, *The Role of the Press in the Clemency Process*, 31 CAP U. L. REV. 179, 179 (2003).

96. *Id.* at 180.

97. *Id.* at 181.

98. *Id.*

99. *Id.* at 184.

100. *See* Lardner v. Dep't of Just., 638 F. Supp. 2d 14 (D.D.C. 2009). Lardner is also co-authoring a history of clemency based on National Archives records. An interesting piece drawing upon old pardon archives is George Lardner Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT'G REP 212 (2003).

them.”¹⁰¹ She explores the commutations of Kim Willis and Carlos Vignali and looks at how differences in the processes that led to each impacted their public perception.¹⁰² She begins with a detailed look at the behind-the-scenes clemency process that had been in place for decades before Clinton took office, noting that the “seeds of the breakdown of the pardon advisory process” witnessed during Clinton’s term were actually sown during the Carter years.¹⁰³ What was the problem? “By the time President Clinton entered office in 1993, the pardon program at Justice had lost whatever independence and integrity it once enjoyed within the Department, and was functioning primarily to ratify the results achieved by prosecutors, not to provide any real possibility of revising them.”¹⁰⁴ In response, Clinton “felt unable to depend upon the Justice Department for pardon recommendations, and had decided to work around this problem by using his own White House staff.”¹⁰⁵ Using the Willis and Vignali cases as examples, Love argues that the “textbook” Willis commutation came after a normal bureaucratic process and was met with “a measure of public acceptance,” while the Vignali decision—facilitated by a paid advocate who turned out to be Hugh Rodham, the First Lady’s brother—did not.¹⁰⁶

D. George W. Bush and the I. Lewis “Scooter” Libby Commutation

A special counsel investigation into whether someone in the Bush administration leaked Valerie Plame’s secret identity as a CIA operative to a journalist led to the indictment of I. Lewis “Scooter” Libby for five felonies.¹⁰⁷ Libby, the vice president’s former chief of staff, was a trusted confidante of the president and vice president who chose not to testify on his own behalf, make a plea deal, or call the vice president to testify at trial.¹⁰⁸ Following his conviction and sentence to thirty months in prison, plus a large fine, Bush commuted Libby’s sentence to zero time in confinement in July 2007.¹⁰⁹ Bush only issued eleven commutations in his two terms as president.¹¹⁰

101. Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton’s Last Pardons*, 31 CAP. U. L. REV. 185, 186 (2003).

102. *Id.* at 186, 187.

103. *Id.* at 192.

104. *Id.* at 193.

105. *Id.* at 195.

106. *Id.* at 216.

107. CROUCH, *supra* note 2, at 117–20.

108. *Id.* at 120–21.

109. *Id.* at 122–23.

110. *Clemency Statistics*, DEP’T OF JUST., <http://www.justice.gov/pardon/clemency-statistics#w-bush> (last updated Nov. 5, 2015).

E. *Federal Sentencing Reporter* (2007)

Douglas Berman and Alyson White dedicated the October 2007 issue of *Federal Sentencing Reporter* to clemency-related issues.¹¹¹ As noted by the editors in their brief explanation of the Libby case, the purpose of the issue is to “seek [] to explore the *Libby* case through the lens of sentencing law and policy.”¹¹² Though an important and worthy goal, I will concentrate here less on the sentencing aspects and more on the articles that directly address clemency. The articles discussed below cover the following topics: (1) restoring clemency to its former important role in the criminal justice system; (2) improving the process for obtaining a sentence commutation; and (3) reproductions of important documents related to the Libby commutation.

1. *Restoring Clemency*

Margaret Love leads off with an overview of pardoning, raises a number of justifications for it, and notes several questions that a president should answer about how to use it. Overall, she “describes the historical use of the power, explains how pardon fell into disuse and disrepute late in the last century, and proposes that pardon can and should be restored to a useful and respectable role in our present-day justice system, and in our national politics.”¹¹³ She lists four justifications for why a president should try to restore the pardon power to a prominent place:

Federal criminal law has produced a great deal of injustice for which only pardon provides a remedy[;] Pardoning is the most immediate way for the president to communicate his law enforcement priorities to executive officials, including prosecutors[;] Pardon allows the president to advance his criminal justice agenda with Congress and the public[;] Pardon is susceptible to misuse, real and imagined, when it is not gainfully employed in the service of the justice system[.]¹¹⁴

111. Articles not considered here are Stephanos Bibas, *Rita v. United States Leaves More Open Than It Answers*, 20 FED. SENT’G REP. 28 (2007); Keith Heidmann, *Can I Get What Lewis Libby Got?*, 20 FED. SENT’G REP. 23 (2007); and Glenn Schmitt, Lou Reedt, & Kenneth Cohen, *USSC Staff Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive*, 20 FED. SENT’G REP. 65 (2007). Heidmann’s piece overlaps somewhat with Gill’s, in that much of it is a review of the clemency application process before it turns to a discussion of the *Rita* case. The article does offer a valuable chart comparing the pardon and commutation grants of presidents from Nixon through George W. Bush. This and related information is also available on the pardon attorney’s website. See *Office of the Pardon Attorney*, DEP’T OF JUST., <http://www.justice.gov/pardon> (last visited Nov. 8, 2015).

112. Douglas A. Berman & Alyson S. White, *Looking at the Libby Case from a Sentencing Perspective*, 20 FED. SENT’G REP. 1, 1 (2007).

113. Margaret Colgate Love, *Reinventing the President’s Pardon Power*, 20 FED. SENT’G REP. 5, 5 (2007).

114. *Id.* at 8–9.

She warns that “without either a clearly defined role or a reliable system for management, pardon is susceptible to abuse, real and imagined, as evidenced by the public response to the final Clinton grants and by President Bush’s Libby commutation.”¹¹⁵

2. *Improving the Commutation Process*

Molly Gill¹¹⁶ follows Love with a close look at the commutation application process.¹¹⁷ Citing a piece by pardon attorney staffer Samuel Morison,¹¹⁸ she reviews the logistics of the commutation application process.¹¹⁹ Then, she considers the drawn-out, frustrating road faced by commutation petitioners.¹²⁰ Finally, she offers specific steps that the president could take to improve the process, including: eliminating “conflicted and unnecessary middlemen, the deputy attorney general and the Office of the [White House] Counsel”; creating an “efficient, regularized commutation application process” from his first days in office; and “most importantly” working with the Office of the Pardon Attorney to “establish a timeline for disposing of applications in an efficient manner.”¹²¹

3. *Reproductions of Libby-related Documents*

The final pages of this issue contain reprints of documents related to the Libby case, including his attorneys’ sentencing memo,¹²² the sentencing memo filed by the special counsel prosecuting his case,¹²³ and President Bush’s public announcement of Libby’s commutation.¹²⁴ At a congressional hearing on clemency following the commutation, several experts testified, including Thomas Cochran, Victor Rita’s attorney,¹²⁵ and professor

115. *Id.* at 12.

116. Gill is a staff attorney for Families Against Mandatory Minimums. She also authored a brief letter published in June 2008 offering advice on clemency to presidential hopefuls John McCain (R-AZ) and Barack Obama (D-IL). See Molly M. Gill, *Clemency Today, Reform Tomorrow*, 20 FED. SENT’G REP. 318 (2008).

117. Molly M. Gill, *Into the Bottomless Black Box: The Prisoner’s Perspective on the Commutation Process*, 20 FED. SENT’G REP. 16 (2007).

118. Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1 (2005).

119. Gill, *supra* note 117, at 16–18.

120. *Id.* at 18–19.

121. *Id.* at 19–20.

122. Theodore V. Wells Jr., James L. Brochin, William H. Jeffress Jr., Alex J. Bourelly & John D. Cline, *Sentencing Memorandum on Behalf of I. Lewis Libby in US v. Libby*, CR. NO. 05-394 (RBW), 20 FED. SENT’G REP. 33–34 (2007).

123. Patrick J. Fitzgerald, *Government’s Sentencing Memorandum in U.S. v. Libby*, CR. NO. 05-394 (RBW), 20 FED. SENT’G REP. 44–48 (2007).

124. George W. Bush, *Statement by the President on Executive Clemency for Lewis Libby*, 20 FED. SENT’G REP. 49 (2007).

125. Thomas Cochran, *Statement of Thomas Cochran, Esq. before the U.S. House of Representatives Judiciary Committee on “The Use and Misuse of Presidential Clemency Power for Executive Branch Officials,”* 20 FED. SENT’G REP. 50–53 (2007) (Cochran’s testimony and

and sentencing expert Douglas Berman.¹²⁶ Judge Reggie Walton's ruling following Libby's commutation is also included.¹²⁷

F. Other Publications

Law students and scholars published a number of other important pieces on clemency during this decade outside of these special issues and conferences.¹²⁸ Among the issues addressed are: (1) whether to amend the Constitution to prevent future presidents from abusing the pardon power; (2) whether Congress has (or should have) a role to play in clemency matters; (3) how a conditional clemency grant operates; and (4) miscellaneous "nuts and bolts" about how the clemency bureaucracy and the philosophy behind pardoning operate.

1. Amend the Constitution to Address Clemency Abuse?

a. No:

Jerry Carannante's "What to Do About the Executive Clemency Power in the Wake of the Clinton Presidency" is another piece focusing on Bill Clinton and clemency.¹²⁹ Here, the author reviews the mechanics of clemency, its history, famous American clemency decisions and legal cases, and conducts an analysis of the Clinton pardons.¹³⁰ He argues that "the answer as to what should Constitutionally be done in the wake of the Clinton Presidency is quite simple: absolutely nothing."¹³¹ He reviews the arguments of the Framers of the Constitution and decides that, despite reformers' concerns, the best course of action is to trust their judgment.¹³² He warns, how-

Berman's testimony are switched in the Table of Contents for this issue of Federal Sentencing Reporter).

126. Douglas A. Berman, *Written Statement of Professor Douglas A. Berman before the U.S. House of Representatives Judiciary Committee on "The Use and Misuse of Presidential Clemency Power for Executive Branch Officials,"* 20 FED. SENT'G REP. 50, 54-60 (2007).

127. *United States v. I. Lewis Libby*, 495 F.Supp.2d 49 (D.D.C. 2007), 20 Fed. Sent'g Rep. 61-64 (2007).

128. Included in that number are CROUCH, *supra* note 2, and two books with chapters dedicated to the pardon power: BRIAN C. KALT, *CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES* (2012) (Kalt's book technically belongs in the following section dedicated to scholarship from the 2010s) and HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005). Among those pieces that are interesting yet fall outside the scope of this review essay are Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153 (2009) (state clemency); Jonathan Harris & Lothlórien Redmond, *Executive Clemency: The Lethal Absence of Hope*, 3 AM. U. CRIM. L. BR. 2 (2007) (state clemency/death penalty); William M. Landes & Richard A. Posner, *The Economics of Presidential Pardons and Commutations*, 38 J. LEGAL STUD. 61 (2009) (uses pardon data to test model); and Jaired Stallard, *Abuse of the Pardon Power: A Legal and Economic Perspective*, 1 DEPAUL BUS. & COM. L.J. 103 (2002).

129. Jerry Carannante, *What to Do About the Executive Clemency Power in the Wake of the Clinton Presidency*, 47 N.Y. L. SCH. L. REV. 325 (2003).

130. *Id.* at 326.

131. *Id.*

132. *Id.* at 342-47.

ever, that “the real danger is that the historical controversies over Nixon, Iran-Contra, etc., and the Clinton controversy will create an atrophy of the pardon power to the point that its inherent benefits to the general welfare will be lost even absent any reform.”¹³³

In a piece published in 2008, Kristen Fowler compares clemency practices set by state constitutions with the federal system of executive clemency, concluding that “despite its flaws, the current federal pardon power provides for the most effective power with the least room for abuse.”¹³⁴

b. Yes:

Paul Haase offers a contrary take to Carannante on the proper institutional response to the Clinton pardons.¹³⁵ First, he reviews Clinton’s controversial clemency decisions, the history of clemency, the language of the Constitution, federal regulations related to clemency, and a list of cases relevant to the topic.¹³⁶ He then turns to various limits on the pardon-power and reform proposals.¹³⁷ He concludes that major reform is needed, and that a “constitutional amendment modifying the 1974 proposed amendment,¹³⁸ while difficult to secure, is the best option for limiting the pardon power.”¹³⁹

With the final Clinton pardons in mind,¹⁴⁰ Gregory Sisk suggests a way to alter the clemency system to prevent similar future incidents: adopt Rep. Barney Frank’s suggested amendment that would alter the Constitution to prevent a president from using the clemency power between October 1 of a presidential election year and the following January 21.¹⁴¹

2. Other Reform Plans

Jonathan Menitove advocates reform in the shape of “a small, partisan Presidential Clemency Board to review and approve all presidential pardons.”¹⁴² Menitove reviews clemency’s history and sees “both strengths

133. *Id.* at 352.

134. Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 IND. L.J. 1651, 1653 (2008).

135. Paul J. Haase, “*Oh My Darling Clemency*”: *Existing or Possible Limitations on the Use of the Presidential Pardon Power*, 39 AM. CRIM. L. REV. 1287 (2002).

136. *Id.* at 1288–98.

137. *Id.* at 1299–1306.

138. Here, he refers to a constitutional amendment proposed in 1974 by then-Senator Walter Mondale that would have allowed Congress to disapprove a presidential pardon if a two-thirds vote of each chamber could be achieved within 180 days of the grant. Haase would modify that language to allow the Senate alone to disapprove of a pardon if a two-thirds vote of that chamber was reached within sixty days of the controversial clemency grant. *See id.* at 1304.

139. *Id.* at 1307.

140. Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13, 14–16 (2002).

141. *Id.* at 26–27.

142. Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL’Y REV. 447, 448 (2009).

and weaknesses in the current federal clemency apparatus.”¹⁴³ He identifies three goals that a reform proposal should try to achieve: the new system “must be sufficiently agile to respond to the public interest,” it has to “make the system more responsive to those federal offenders deserving of clemency,” and it “must take action to prevent any presidential abuse” of the clemency power.¹⁴⁴

Brian Hoffstadt’s lengthy and detailed piece on “normalizing” clemency contains a valuable list of the constitutional limits on the clemency power.¹⁴⁵ Overall, Hoffstadt concludes “[r]eform *is* necessary,” and he offers six ways it might be enacted, but he does not seem particularly optimistic about any of their chances for success.¹⁴⁶

3. Congress and Clemency

Brian Hoffstadt’s article on “normalizing” clemency also contains a helpful section analyzing whether Congress might have a type of clemency power of its own.¹⁴⁷ Todd Peterson also writes on this issue of potential congressional clemency power, asking “what role is left to Congress given the express grant of pardon authority to the President?”¹⁴⁸ He cycles through a helpful history of clemency, including notable legal cases,¹⁴⁹ before arranging the Nixon pardon, Iran-Contra pardons, FALN commutations, Marc Rich pardon, and others into categories based on why Peterson believes Congress might have a reason to interfere with the president’s clemency power.¹⁵⁰ The rest of the article is spent examining the various areas where Congress might try to interfere with the clemency power. These articles are must-read material on the question of congressional clemency.

Lauren Schorr “propose[s] a way to bring Congress into the exercise of the pardon power . . . [her] proposed reform: instead of acting according to regulations promulgated by the executive branch, the Office of the Pardon Attorney should act in accordance with Congressional legislation.”¹⁵¹ Following a review of the history of clemency and its functions in the separation of powers system,¹⁵² Schorr explains the clemency application process,¹⁵³ then delves deeper into the relationship between the president

143. *Id.* at 455.

144. *Id.* at 457.

145. Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 594–95 (2001).

146. *Id.* at 640.

147. *Id.* at 610–15.

148. Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1227 (2003).

149. *Id.* at 1228–35.

150. *Id.* at 1235–40.

151. Lauren Schorr, *Breaking into the Pardon Power: Congress and the Office of the Pardon Attorney*, 46 AM. CRIM. L. REV. 1535, 1536 (2009).

152. *Id.* at 1536–42.

153. *Id.* at 1542–45.

and Congress over clemency power.¹⁵⁴ Under her new regulatory scheme, the pardon attorney would need to be confirmed by the Senate,¹⁵⁵ and the Office of the Pardon Attorney would be subject to congressional oversight.¹⁵⁶

4. *Conditional Clemency*

Harold Krent uses the Clinton offer of conditional clemency to members of the FALN as a springboard for a helpful primer on conditional pardons—that is, where the president requires some sort of action (or non-action) by the intended recipient of clemency before the pardon takes effect.¹⁵⁷ In a nutshell, Krent argues that “in the conditional pardon context, courts should not second-guess the wisdom of conditions imposed as long as the offender consents.”¹⁵⁸ “But,” he notes,

judges should vigilantly review two aspects of presidential conditional pardons. First, they should ensure that presidents have not exercised authority indirectly through the pardon power that otherwise would be prohibited constitutionally, such as favoring one type of religious observance or lengthening punishment. Second . . . courts should oversee any presidential finding that an offender has violated a condition, thereby protecting individuals against arbitrary revocation.¹⁵⁹

Krent’s article is “one-stop shopping” for the major issues raised by a conditional pardon.

5. *Nuts and Bolts of Clemency Process*

In “Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty To Be Merciful,” Margaret Love covers the following topics: the history of pardoning; controversial pardons; the process for applying for clemency; the usual use of clemency by past presidents; and the gradual drop in clemency grants, along with reasons for that drop.¹⁶⁰ Especially notable here for the clemency researcher are two extended sections in which Love articulates the reasons why she believes the president has a duty to pardon.¹⁶¹ She concludes by offering “a number of simple ways in which the President can make his exercise of the pardon power more reliable and

154. *Id.* at 1545–48.

155. *Id.* at 1560.

156. *Id.* at 1561.

157. Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CAL. L. REV. 1665 (2001).

158. *Id.* at 1670.

159. *Id.*

160. Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty To Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1485–1500 (2000).

161. *Id.* at 1500–09.

respectable, and therefore less politically risky.”¹⁶² Those suggestions are: “1. Shore up the Attorney General’s Advisory Role, 2. Be Generous and Expect No Credit, 3. Act First, Explain Later, and 4. Make Considered Use of the Power in Light of Its Public Purposes.”¹⁶³

In “The Politics of Grace: On the Moral Justification of Executive Clemency,” former pardon attorney staff member Samuel Morison offers an in-depth (138-page) philosophical analysis of clemency. This piece is included here for Morison’s useful explanation of the administrative goings-on behind the scenes of the pardon process.¹⁶⁴

A piece by Mark Strasser offers helpful sections on two important topics.¹⁶⁵ First, Strasser discusses whether a pardon should be considered an “act of grace” or a decision made for the public welfare—an important topic, given the conflicting case law on these questions.¹⁶⁶ Second, he delves into the “self-pardon” question mentioned earlier with regard to pieces by Nida, Spiro, and Kalt, finding that “[c]urrently, it seems that the President could issue a self-pardon.”¹⁶⁷

III. THE 2010s

A. *Barack Obama and Drug Sentence Commutations*

As noted by the editorial board of the *New York Times* in February 2014, President Barack Obama had, to date, established “one of the least merciful administrations in modern history.”¹⁶⁸ However, in 2015, he raised the hopes of clemency advocates with both his statements¹⁶⁹ and his actions.¹⁷⁰

B. *University of St. Thomas Law Journal (2012)*

In 2012, the University of St. Thomas School of Law hosted a symposium focusing on federal commutations.¹⁷¹ Among the issues covered were:

162. *Id.* at 1509.

163. *Id.* at 1509–12.

164. Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 34–43 (2005). For a detailed analysis of clemency in the context of immigration, see Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253 (2010).

165. Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85 (2002).

166. *See id.* at 100–16.

167. *Id.* at 153.

168. Editorial Board, *Mercy in the Justice System*, N.Y. TIMES (Feb. 9, 2014), http://www.nytimes.com/2014/02/10/opinion/mercy-in-the-justice-system.html?_r=0.

169. *See* Ryan J. Reilly, *Obama: I’ll Use Clemency Power ‘More Aggressively’*, HUFFINGTON POST (Mar. 21, 2015), http://www.huffingtonpost.com/2015/03/21/obama-clemency-pardon_n_6911784.html.

170. *See* Horwitz & Eilperin, *supra* note 56.

171. *See* Robert L. Ehrlich, *Pardons and Commutations: Observations from the Front Lines*, 9 U. ST. THOMAS L.J. 669 (2013) (an article from this conference containing valuable first-hand

(1) the ongoing relevance of the power of the president to commute sentences; (2) whether it made sense for courts to review clemency grants; and (3) whether the federal pardon process could be improved by incorporating a version from one of the states.

1. *Relevance of the Power to Commute*

In “The President’s Power to Commute: Is It Still Relevant?,” I considered the relevance of the commutation power in the twenty-first century. Following a review of the literature on federal commutations,¹⁷² I argued that sentence commutations have been woefully neglected in recent years, and pointed to several examples of how commutations have served important goals throughout American history.¹⁷³ I concluded by noting how a commutation can allow someone to receive a clean slate in life, a fact that will keep the commutation power relevant indefinitely.¹⁷⁴

2. *Judicial Review of Clemency Decisions*

Daniel Kobil’s contribution to this special issue looks at “whether the courts should be asked to intervene in clemency matters.”¹⁷⁵ The piece considers both federal and state clemency court cases and finds that:

Judicial review can properly be used to enforce textual limitations on the clemency power . . . to limit the ability of executives to condition grants of clemency on the relinquishment of fundamental constitutional rights . . . [and sometimes] to review clemency practices that deprive applicants of equal protection or due process of law.¹⁷⁶

However, judicial review is not likely to “impel executives to actually use the power more often.”¹⁷⁷

3. *State Models for Improving Federal Clemency*

In this issue, Margaret Love examines several reform plans drawn from the states that could be models for a revamped clemency administrative apparatus.¹⁷⁸ Among those options are: the “independent board”

insights from a state governor); see also Mark Osler, *A Biblical Value in the Constitution: Mercy, Clemency, Faith and History*, 9 U. ST. THOMAS L.J. 769 (2012) (providing a fascinating look at the history of clemency from the perspective of Christianity).

172. Jeffrey Crouch, *The President’s Power to Commute: Is It Still Relevant?*, 9 U. ST. THOMAS L.J. 681, 682–83 (2013).

173. See *id.* at 685–90.

174. *Id.* at 697.

175. Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698, 699 (2012).

176. *Id.* at 729.

177. *Id.*

178. Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730 (2012).

model;¹⁷⁹ the “shared power” model;¹⁸⁰ and the “optional consultation” model.¹⁸¹ Ultimately, she advises greater “authority,”¹⁸² “accountability,”¹⁸³ and “transparency”¹⁸⁴ as part of the reform process.

C. *Other Publications*

A number of other publications have tackled various clemency-related issues during this half decade, including: two pieces on whether President Obama should grant clemency to nonviolent drug offenders; a case study of Bill Clinton’s final pardons; whether we are in the “twilight of the pardon power”; and what can be done to fix the clemency screening apparatus.

1. *Clemency for Drug Offenders*

In a 2010 article, Douglas Berman urged President Obama to “Turn[] Hope-and-Change Talk Into Clemency Action for Nonviolent Drug Offenders.”¹⁸⁵ Berman argues that “[i]n the one part of the criminal justice system that is in the President’s exclusive control—the power to grant clemency in the form of pardons, commutations, and reprieves—President Obama has so far failed to make good on his campaign themes of ‘hope’ and ‘change.’”¹⁸⁶ After a review of the history of clemency—and noting its rise and present fall¹⁸⁷—Berman laments that, after over a year in office, Obama has “not been moved by—or has lacked the personal interest and professional courage to try to find—a single case in the massive federal criminal justice system calling for some kind of clemency relief.”¹⁸⁸ Beyond a few acts of individual clemency, Berman urges Obama to “seriously consider creating some form of a ‘Clemency Commission’ headed by a ‘clemency czar.’”¹⁸⁹

Mark Osler and Matthew Fass revisit Shanor and Miller’s earlier piece on “systemic” pardons.¹⁹⁰ They suggest that a way to assist drug offenders who were not helped by the Fair Sentencing Act of 2010 would be to emulate “President Ford’s thorough and broad examination of more than 21,000 people who petitioned for clemency for offenses related to the draft during

179. *Id.* at 744–45.

180. *Id.* at 745–47.

181. *Id.* at 747–51.

182. *Id.* at 751–52.

183. *Id.* at 752–53.

184. Love, *supra* note 178, at 753–54.

185. Douglas A. Berman, *Turning Hope-and-Change Talk Into Clemency Action for Nonviolent Drug Offenders*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 59 (2010).

186. *Id.* at 64.

187. *Id.* at 65–69.

188. *Id.* at 71.

189. *Id.* at 72.

190. See Mark Osler & Matthew Fass, *The Ford Approach and Real Fairness for Crack Convicts*, 23 FED SENT’G REP. 228, 228–32 (2011).

the Vietnam War.¹⁹¹ They argue that such a program “would systemically and thoroughly address a national problem with troubling racial implications . . . [help reestablish] the exercise of the pardon power as a legitimate part of the President’s job [and finally,] make real the Obama administration’s commitment to offer something new in the field of criminal law.”¹⁹² Similar to Berman, Osler and Fass conclude that “[i]f there is a time and a place for hope and change, it is now.”¹⁹³

2. *Bill Clinton’s “Parting Pardon Party”*

Albert Alschuler takes a close look at Bill Clinton’s “last minute” clemency decisions, including the Marc Rich pardon, the Carlos Vignali commutation, and several others, and provides a helpful look at the context surrounding those decisions.¹⁹⁴ Alschuler admits that even his detailed analysis is only scratching the surface of Clinton’s final acts of clemency, noting that “[t]his article has reviewed fewer than one-quarter of President Clinton’s last-day grants of clemency.”¹⁹⁵ Still, that review is useful, as is a quick look at the recent history of the men and women who have served as pardon attorneys.¹⁹⁶

3. *Have We Reached the Pardon Power’s “Twilight”?*

Following an extremely detailed review of clemency’s past use and administration through 1980,¹⁹⁷ Margaret Love notes that “[a]fter 1980, presidential pardoning went into a decline” and “perhaps the most important negative influence on presidential pardoning was the hostility of federal prosecutors and a change in the administration of the pardon program at the Justice Department that allowed prosecutors to control clemency recommendations.”¹⁹⁸ Reviewing the clemency practices of Clinton and George W. Bush, Love argues that “it was [Bush’s] own early decision not to question or give direction to the Justice Department in pardon matters that led to what he described as a ‘massive injustice’ in the system, just as President Clinton’s similar neglect of his power had led to similar chaos and unfairness eight years before.”¹⁹⁹ Love urges that “President Obama ought not

191. *Id.* at 228.

192. *Id.* at 231.

193. *Id.*

194. See Albert W. Alschuler, *Bill Clinton’s Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1137–63 (2010).

195. *Id.* at 1163.

196. See *id.* at 1167.

197. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1172–93 (2010).

198. *Id.* at 1193–94.

199. *Id.* at 1203.

wait to use his power, if only to avoid embarrassment in a final summing up.”²⁰⁰

Rachel Barkow observes the “fall of the clemency power” and argues for its “resurrection as a critical mechanism for the President to assert control over the executive branch in criminal cases.”²⁰¹ She argues that clemency is “a mechanism for protecting liberty because it allows the President to correct his or her agents when they reach too far.”²⁰²

4. *Fixing the Clemency Screening Apparatus*

Paul Rosenzweig is disappointed by the current state of clemency, noting that the federal prison population sits around 200,000²⁰³ while “President Obama’s twenty-two pardons are but a miniscule fraction” of that number.²⁰⁴ To “reinvigorate the pardon power and return it to its original function,” Rosenzweig recommends the following:

Recreate a pardon-reviewing authority either outside of the Department of Justice, as part of the Executive Office of the President, or as a direct function of the Attorney General as the President’s personal representative; and [s]taff the new Pardon Office with a range of staff, including prosecutors, sociologists, psychologists, historians, and even defense attorneys.²⁰⁵

Rachel Barkow and Mark Osler argue that the current clemency bureaucratic apparatus requires replacement: “Embedding a single official (the pardon attorney) deep within the DOJ has proven to be a failure. Instead, review of clemency petitions should be entrusted to a commission that has a diverse, standing membership that includes key conservative representatives who are particularly sensitive to victim interests and public-safety concerns.”²⁰⁶ What is more, the new bureaucracy “should have representation from the DOJ and take the views of prosecutors seriously, [but] the commission itself should exist outside the Justice Department and its recommendations should go directly to the White House.”²⁰⁷

CONCLUSION

Since Mark Rozell’s bibliographic essay was published in 1989, the clemency power has received a fair amount of attention from legal scholars

200. *Id.* at 1204.

201. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 807 (2015).

202. *Id.* at 869.

203. Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593 (2012).

204. *Id.* at 603.

205. *Id.* at 610.

206. Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 5 (2015).

207. *Id.* at 5–6.

in traditional venues (e.g., law review articles, comments, and notes). Some scholars, including Margaret Love,²⁰⁸ Douglas Berman,²⁰⁹ Samuel Morrison,²¹⁰ and others,²¹¹ have also established websites and blogs containing helpful clemency research materials.

In just the last several years, some legal scholars and advocates have gone beyond the normal calls for reform and taken matters into their own hands. At the University of St. Thomas School of Law, Mark Osler operates the first legal clinic in the country focused on helping clemency applicants with their petitions for commutations.²¹² More recently, Catholic University's Columbus School of Law has started to offer a legal clinic course that allows law students to work on clemency cases,²¹³ and Rachel Barkow and Mark Osler have established a temporary Clemency Resource Center at NYU School of Law to work with Clemency Project 2014 and provide free legal aid to potential applicants for federal clemency.²¹⁴

Federal clemency may be hard to obtain in 2015, but there is an ever-growing number of valuable legal resources available to the clemency researcher who knows where—and how—to locate them.

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208. See Margaret C Love, LAW OFFICE OF MARGARET LOVE, <http://pardonlaw.com> (last visited July 27, 2015).

209. See Douglas A. Berman, SENTENCING LAW AND POLICY BLOG, <http://sentencing.typepad.com> (last visited July 27, 2015).

210. See Samuel T. Morrison, SAMUEL T. MORRISON, <http://www.pardonattorney.com> (last visited July 27, 2015).

211. Though not a legal scholar per se, P.S. Ruckman maintains Pardonpower.com, a required destination for clemency researchers. See P.S. Ruckman Jr., PARDON POWER BLOG, <http://www.pardonpower.com> (last visited July 27, 2015).

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