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Limiting the Federal Pardon Power

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"[A] single courageous State may, if its citizens choose, serve as a laboratory . . . ."[1]

INTRODUCTION

In a Constitution filled with checks and balances among the branches of government, the executive pardon power "stands alone in its capaciousness,"[2] providing the President "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[3] The only recognized constitutional check on the pardon power is Congress's ability to impeach a President for "treasonous wrongdoing" connected with pardons.[4] Impeachment, however, can be

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1. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. Michael A. Genovese & Kristine Almquist, *The Pardon Power Under Clinton: Tested But Intact*, *in* THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY 75 (David Gray Alder & Michael A. Genovese eds., 2002).

3. U.S. CONST. art. II, § 2, cl. 1.

4. Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13, 18 (2002) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-10, at 721 (3d ed. 2000)). Professor Strasser has suggested that the Equal Protection Clause might also limit the President's pardon power; however, he acknowledges that "it is neither clear how such a problem would come to light nor clear what kinds of remedies might be imposed." Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 117 (2002). Due process might also limit pardon decisions: Justice O'Connor suggested that decisions based on coin-flipping, for

a weak check because "[t]he prospect of impeachment, of course, is little deterrent to a President who bestows pardons as he or she is walking out the door."[5] Thus, only the President's conscience, concern for historical judgment,[6] and political considerations[7]—public opinion and election strategy—provide a check on the remainder of the President's pardon decisions.

The President's pardon power actually encompasses five types of clemency power: the power to grant pardons, reprieves, commutations, and amnesty, and the power to remit fines and forfeitures.[8] The pardon power is the broadest power and allows the President to "release[ ] the offender from any punishment for her crime, [and] also vitiates moral guilt for the offense, so that in the eyes of the law she is as innocent as if she had never been charged or convicted."[9] The reprieve power is the most limited clemency power, allowing the President only to temporarily postpone punishment—so that the offender could see a newborn child or complete appeals, for example.[10] Between pardon power and reprieve power are the commutation, amnesty, and remission powers. The commutation power allows the President to reduce the required punishment, although it does not remove guilt.[11] Similarly, amnesty does not remove guilt, but instead means that an offense is "overlooked."[12] Amnesty is often granted to large groups, such as draft evaders.[13] Finally, the power to remit fines and forfeitures simply means what it says—the President can reduce the amounts owed the government.[14]

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example, might implicate due process. *Id.* at 130 (citing Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring)). For a discussion of Congress's attempts to regulate the pardon power, see generally Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225 (2003).

5. Sisk, *supra* note 4, at 18.

6. Sisk, *supra* note 4, at 19 ("At the Constitutional Convention of 1787, James Iredell of North Carolina said that he doubted a man honored by his countrymen with the office of the Presidency would apply the pardon power in a corrupt fashion and thereby suffer the 'damnation of his fame to all future ages.' But, alas, Iredell's sanguine faith was based on the now-disproved assumption that no President, even when departing office, ever would sacrifice a venerable reputation for the immediate gratification of granting immunity to friends and family . . . .").

7. *See* Genovese & Almquist, *supra* note 2, at 75.

8. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575–76 (1991). Because the pardon power is the broadest of the clemency powers, *id.* at 576, this paper focuses only on the pardon power. Note that the Supreme Court has interpreted the Pardon Clause to give the President all five clemency powers. *See* Schick v. Reed, 419 U.S. 256 (1974) (commutations); United States v. Klein, 80 U.S. 128 (1871) (amnesty); Ex parte Garland, 71 U.S. 333 (1866) (remission of fines and forfeitures).

9. Kobil, *supra* note 8, at 576.

10. *Id.* at 578.

11. *Id.* at 577.

12. *Id.* at 576.

13. *Id.* at 576–77.

14. The Laura, 114 U.S. 411, 413–14 (1885). Note, however, that the President cannot refund amounts already paid because Congress has power over the treasury. Knote v. United States, 95 U.S. 149, 154 (1877).

This Comment evaluates the wisdom of an unchecked presidential pardon power by comparing the federal pardon power with the pardon powers provided by various state constitutions. Part I reviews the foundations and history of executive pardon power, including arguments made for and against various forms of pardon power, ideas about the pardon power expressed during the founding period, controversial pardons granted throughout American history (including founding era pardons, Civil War era pardons, and modern pardons granted by Ford, Bush, and Clinton), and proposed constitutional amendments to the pardon power. Part II surveys state pardon powers, focusing closely on two recent state-level pardon controversies—Georgia inmate Genarlow Wilson's inability to receive a pardon despite widespread public outcry and the current constitutional amendment process underway in Kentucky, partially in response to Kentucky Governor Ernie Fletcher's blanket pardon of members of his administration for crimes they may have committed while in his administration. Part III will consider whether state pardon power provides an effective model for federal pardon power given the similarities and differences between state and federal governments. This Comment concludes that despite its flaws, the current federal pardon power provides for the most effective power with the least room for abuse.

I. FOUNDATIONS AND HISTORY OF THE FEDERAL EXECUTIVE PARDON POWER

Although pardon power has existed since ancient times,[15] scholars disagree about the proper rationales underlying the power.[16] A discussion of the philosophy underlying the pardon power is beyond the scope of this paper;[17] however, an understanding of the justifications for executive pardon power is necessary to determine whether the power is functioning properly.

Putting aside the question of *who* should have the pardon power, there are at least five justifications for the pardon power. The most obvious reason to allow pardons is to overturn the inevitable wrongful convictions of innocent persons.[18] Similarly, pardons can be used to fix situations in which the punishment is not proportional to the crime—when the offender legally deserves a certain sentence but mercy prevents us from feeling that the sentence is fair.[19] A third justification for pardons is that they can restore national unity, either by ending a conflict or by forgiving the losers.[20] Fourth,

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15. *See, e.g.*, *Luke* 23:14–25 (Pilate's pardon of Barabbas). *See generally* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977).

16. Strasser, *supra* note 4, at 89–100.

17. *See generally* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST (1989).

18. *Id.* at 132. *See also* Strasser, *supra* note 4, at 91 n.39 (citing Herrara v. Collins, 506 U.S. 390, 415 (1993), for the proposition that "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.").

19. *See* Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 12–13 (2005). Classical examples of "mercy pardons" are pardons for the thief who steals to eat or for the spouse who assists in the suicide of a terminally ill spouse. *See id.* at 20–21.

20. See *infra* Part I.B.2 (describing post-war clemency).

pardons can be useful crime-solving tools: a pardoned individual can no longer claim the Fifth Amendment privilege against self-incrimination and must provide the government with information.[21] Finally, pardons can be used as foreign policy tools to satisfy foreign leaders.[22]

This Part first shows how the Framers of the American Constitution used these justifications to give broad pardon power to the executive and then examines how that power has actually been used.

A. Establishing the Federal Executive Pardon Power

Pardons existed long before the Constitutional Convention, and the framers drew on English law tradition and experience when drafting the pardon power of the new Federal Constitution. In England, the king had possessed the pardon power since the seventh century.[23] In the beginning, the pardon power was unrestricted, but abuses (such as royal sales of pardons or use of pardons as bribery to join the military) led Parliament to limit the power by requiring the king to provide Parliament with the name of the convict to be pardoned and nature of the crime and by forbidding pardons in cases of impeachment.[24] The pardon power crossed the Atlantic Ocean vested in royal governors, whose powers were often unrestricted.[25] Over the years, the pardon power evolved throughout the colonies, and after the Revolutionary War, new state constitutions described different approaches to the pardon power,[26] influenced by recent experiences with what the framers thought to be a too-powerful monarch.[27]

These experiences permeated the debates at the Constitutional Convention. The New Jersey and Virginia plans did not provide for pardon power, which entered the debate through a proposed amendment similar to England's pardon power: to give the executive "power to grant pardons and reprieves, except in impeachments."[28] And this

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21. *See* Brown v. Walker, 161 U.S. 591, 599 (1896) ("[I]f the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offense, as if it had never been committed."). *But see* Burdick v. United States, 263 U.S. 79, 94 (1915) (providing that an individual could refuse a pardon to avoid losing Fifth Amendment immunity). Even if the individual may choose whether to accept the pardon, a pardon offer could be used as a bargaining chip for information.

22. *See* William Jefferson Clinton, *My Reasons for the Pardons*, N.Y. TIMES, Feb. 18, 2001, at WK13 ("I decided to grant the pardons . . . for the following legal and foreign policy reasons . . . many present and former high-ranking Israeli officials of both major political parties and leaders of Jewish communities in American and Europe urged the pardon of Mr. Rich . . . .").

23. *See* Genovese & Almquist, *supra* note 2, at 76.

24. *Id.* at 76–77.

25. *Id.* at 77–78. *See also* Duker, *supra* note 15, at 498 (describing broad types of pardon powers given to various colonial governors, which permitted pardons for any offense, even before conviction).

26. *See* Genovese & Almquist, *supra* note 2, at 78. Georgia's Constitution, for example, forbade the governor from issuing pardons. Similarly, New Hampshire's Constitution vested the pardon power solely in the legislature. Massachusetts's Constitution only authorized post-conviction pardons; New York's Constitution forbade pardons in cases of treason and murder. *Id.*

27. *Id.*

28. Duker, *supra* note 15, at 501 (citing 5 DEBATES ON THE ADOPTION OF THE FEDERAL

proposal ultimately went to the states for ratification, despite proposals to limit the pardon power by requiring Senate consent for pardons,[29] forbidding preconviction pardons,[30] or forbidding pardons for treason.[31]

Similar fears of executive abuse permeated the state ratifying conventions, from which came suggestions of removing the executive pardon power and only allowing pardons for treason with congressional consent.[32] These suggestions were unsuccessful, however, perhaps because of Alexander Hamilton's persuasive arguments for a broad pardon power. Hamilton argued that placing the pardon power with a single person would allow for greater accountability, efficiency, and energy in the exercise of the power.

> Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed . . . . As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his *sole fiat*, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind . . . .
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> The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason. This, it has been urged, ought to have depended upon the assent of one, or both, of the branches of the legislative body. I shall not deny that there are strong reasons to be assigned for requiring in this particular the concurrence of that body, or of a part of it . . . . But there are also strong objections to such a plan . . . . But the principal argument for reposing the power of pardoning in this case to the Chief Magistrate is this: 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 tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.[33]

And so the federal pardon power became part of the Constitution, limited only in cases of impeachment.

CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 380 (J. Elliot ed., 1845)).

29. *Id.* (citing 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 480).

30. *Id.* at 501–02 (This proposal was rejected because of the possibility that a preconviction pardon could be used to obtain testimony of accomplices.).

31. *Id.* at 502 (citing 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 549). Although some delegates feared that the President could abusively pardon acts of treason in which he was a participant, this proposal was rejected because of fears of wrongful treason convictions and reassurance that the President was unlikely to commit treason. *Id.* (citing the argument of James Iredell).

32. *Id.* at 504.

33. THE FEDERALIST No. 74, at 475–77 (Alexander Hamilton) (Robert Scigliano ed., 2000) (emphasis in original).

B. The Federal Executive Pardon Power Throughout United States History

Although the pardon power has been used steadily since its creation,[34] most criticism of presidential pardons focuses on pardons granted in the twentieth century. Use of the executive pardon power is actually quite frequent, despite public awareness of everyday pardons.[35] Ronald Reagan granted 393 pardons during his two terms of office; George Bush, 74 in one term; and Bill Clinton, 396 in two terms.[36] The vast majority of these pardons go through the Office of the Pardon Attorney and generate no controversy. However, the controversial pardons affect the public's perception of the pardon power, and a negative perception may justify pardon reform. This Part briefly outlines the historical use of the pardon power; looks closely at two pardon episodes that are particularly relevant to pardon reform because of their historical proximity, level of controversy, and potential for self-dealing; and notes constitutional reactions to controversial pardons.

1. Founding Era and Civil War Pardons

Early Presidents used the pardon power to pardon leaders of rebellions. George Washington pardoned leaders of the Whiskey Rebellion in 1795, and John Adams pardoned participants in a Pennsylvania insurrection.[37] Thomas Jefferson was the first to issue a controversial pardon when he pardoned Jeffersonian Republicans—political allies—convicted under the Alien and Sedition Act.[38] The pardon power remained largely unnotable, however, until the Civil War when it was used to "develop loyalty to the federal system," Presidents Lincoln and Johnson pardoned Confederate leaders and participants in the rebellion.[39]

2. Modern Pardons

In the twentieth century, Presidents continued to use executive clemency to establish closure following wars. President Truman granted amnesty to World War II draft dodgers, and President Carter granted amnesty to all who violated the Selective Service Act during the Vietnam War.[40] The twentieth century also brought pardons unrelated to war, such as Ronald Reagan's pardon of New York Yankees owner

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34. The number of presidential pardons has not consistently increased over time. When Presidents are listed by number of pardons granted, President Clinton is located near the middle of the list, which begins with Presidents Franklin D. Roosevelt, Wilson, Truman, and Coolidge and ends with Presidents George Bush, Zachary Taylor, Washington, Garfield, and Harrison. *See* Presidential Clemency Actions, 1789–2001, http://jurist.law.pitt.edu/pardonspres1.htm.

35. *See* Charles D. Berger, *The Effect of Presidential Pardons on Disclosure of Information: Is Our Cynicism Justified?*, 52 OKLA. L. REV. 163, 165 (1999).

36. United States Department of Justice, Presidential Clemency Actions by Administration (1945 to 2001), http://www.usdoj.gov/pardon/actions_administration.htm (noting Reagan received 2099 pardon petitions; Bush, 731; and Clinton, 2001).

37. 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, 207–08 (1999).

38. *Id.* at 208.

39. *Id.* at 209–10.

40. *Id.* at 211.

George Steinbrenner for illegal donations to the 1972 Nixon campaign[41] and Richard Nixon's pardon of Jimmy Hoffa's jury tampering conviction.[42]

Perhaps the most famous twentieth century pardon was the pardon granted to President Richard Nixon by President Gerald Ford for "all offenses against the United States which he . . . has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974"[43]—Nixon's entire presidency, including the Watergate affair. Ford supported this pardon with three reasons. First, he did not believe Nixon could be tried fairly for over a year; second, "the tranquility to which this nation [had] been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States"; and third, he believed that Nixon had already been punished enough by "relinquishing the highest elective office of the United States."[44] Although this pardon brought considerable controversy, little of the controversy suggested wrongdoing by President Ford.[45]

a. Cover-Up Pardons? President George H.W. Bush's Christmas Eve Pardons

Unlike President Ford's pardon of President Nixon, President George H.W. Bush issued pardons suggestive of personal wrongdoing. On Christmas Eve of 1992, President Bush pardoned six individuals involved with the Iran-Contra affair, including Secretary of Defense Caspar Weinberger.[46] The Iran-Contra scandal revolved around the illegal sales of arms to Iran and funding of the Contras in Nicaragua. Disclosure of the scandal led to the appointment of Lawrence Walsh as special prosecutor in 1986. On October 30, 1992, four days before the 1992 presidential election, [47] Walsh indicted Weinberger for perjury regarding the existence of Iran-Contra notes.[48] Although no formal action was taken against the President, investigation suggested that Bush may have known of the arms sales in exchange for the hostages[49] and may have failed to turn over relevant documents to the investigation.[50] Weinberger's trial was scheduled for January 5, 1993.[51] President Bush pardoned Weinberger ten days later.

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41. *Id.* at 212.

42. *Id.* at 211.

43. Proclamation No. 4311, 39 Fed. Reg. 32,601–02 (Sept. 10, 1974).

44. *Id.* at 32,601.

45. Berger, *supra* note 35, at 166–68 (describing controversy about whether information regarding Watergate would be made public).

46. James N. Jorgensen, Note, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 364 (1992). Five of the pardoned individuals had already been convicted; however, Weinberger had not yet been convicted. Berger, *supra* note 35, at 169. Because nearly all the post-pardon attention focused on the Weinberger pardon, this paper focuses on that pardon.

47. Robert L. Jackson & Ronald J. Ostrow, *Key Democrats Backed Pardon of Weinberger*, L.A. TIMES, Dec. 26, 1992, at A1.

48. *See* Lawrence E. Walsh, *Political Oversight, The Rule of Law, and Iran-Contra*, 42 CLEV. ST. L. REV. 587, 595 (1994) (describing facts surrounding Iran-Contra and pardons).

49. *See* David Johnston, *Prosecutor Shifts Attention to Bush on Iran Arms Deal*, N.Y. TIMES, Dec. 26, 1992, at 1.

50. Jackson & Ostrow, *supra* note 47.

51. David Johnston, *Bush Pardons 6 in Iran Affair, Averting a Weinberger Trial;*

President Bush issued a pardoning statement containing numerous justifications for the pardon. First, Bush explained that he, as had his predecessors, "acted because it was time for the country to move on"[52]—the Cold War was over, the hostages were free, and Nicaragua had democracy. Second, Bush justified the pardon because Weinberger was a "patriot" who deserved the pardon because of meritorious public service to his country.[53] Third, Bush invoked mercy, noting that Weinberger was seventy-five years old, ill, and preoccupied with caring for his wife, who had cancer.[54] Finally, Bush argued that the Weinberger trial was a "criminalization of policy differences" resulting from the "profoundly troubling development in the political and legal climate of our country."[55] Bush concluded that in such political matters, "the proper target is the president, not his subordinates; the proper forum is the voting booth, not the courtroom."[56]

Reactions to the pardons were mixed.[57] Those pleased with the pardons agreed with Bush's decision to end the political investigation[58] or agreed that the pardonees' public service justified the pardons.[59] Those displeased with the pardons, however, were more numerous and far more vocal. Congressmen spoke out and demanded hearings,[60] and one commentator wrote that Bush had "gambled with his place in history. He hope[d] to be remembered as the man who freed Kuwait and alleviated suffering in Somalia . . . . [B]y granting the pardons he will be recalled as the president who, in effect, pardoned himself from wrongdoing."[61]

A poll taken after the pardons showed that fifty-four percent of Americans disapproved of the pardons,[62] with forty-nine percent believing that Bush's decision had been made "to protect himself from legal difficulties or embarrassment resulting from his own role in Iran-contra."[63] In fact, legal difficulties did ensue as Special Prosecutor Walsh named Bush as a "subject" of investigation[64] and Bush hired a

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Prosecutor Assails "Cover-Up," N.Y. TIMES, Dec. 25, 1992, at A1.

52. *Text of President's Pardon Proclamation*, BOSTON GLOBE, Dec. 25, 1992, at 12.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *See* Walter Pincus, *Bush Pardons Weinberger in Iran-Contra Affair*, WASH. POST, Dec. 25, 1992, at A1.

58. *Id.* (describing then-Senate Minority Leader Bob Dole's reaction to the pardons).

59. *Id.* (describing former President Reagan's reaction to the pardons).

60. Robert Pear, *Congress Plans Inquiry on Pardons*, N.Y. TIMES, Dec. 26, 1992, at 6.

61. Jamie Dettmer, *Iran-Contra Pardons Put Bush's Place in History at Risk*, TIMES (London), Dec. 26, 1992. Interestingly, in deciding whether to grant the pardons, "Bush was receptive but worried about the political pounding he might take. 'He needed to be persuaded that it was legally respectable and that the fallout could be contained.'" Bob Cohn, *Anatomy of a Pardon: Why Weinberger Walked*, NEWSWEEK, Jan. 11, 1993, at 22 (quoting an unnamed senior White House official).

62. Adam Clymer, *Bush Criticizes Press Treatment of His Pardons*, N.Y. TIMES, Dec. 31, 1992, at A16.

63. *Id.* Only twenty-one percent of respondents believed that the pardons were to "put the Iran-Contra affair in the country's past"; fifteen percent believed that the pardons were "to protect people [the President] felt acted honorably and patriotically from unfair prosecution"; two percent believed that the pardons were "to get back at Iran-Contra prosecutor Lawrence Walsh for bringing charges against Weinberger right before the November election." *Id.*

64. *Iran-Contra Probe Focuses on Bush*, CHI. TRIB., Dec. 26, 1992, at 1.

private attorney.[65] "Walsh stated bluntly that [t]he Iran-Contra cover-up . . . has now been completed with the pardon of Caspar Weinberger, and that the pardon had a devastating effect on the development of further facets of the inquiry . . . ."[66]

b. Self-Interested Pardons? President Bill Clinton's Eleventh-Hour Pardons

Although then-President-elect Bill Clinton responded critically to news of George Bush's lame-duck pardon of Caspar Weinberger,[67] Clinton generated controversy of his own by granting 177 pardons on his last day in office,[68] several of which could be described as self-interested because Clinton family or donors lobbied for the pardons. Some of the lobbyists included a one-million-dollar donor to the Clinton library;[69] Clinton's half-brother, Roger Clinton, who was accused of accepting money in exchange for using his influence with the President;[70] and Hugh Rodham, Clinton's brother-in-law, who received $400,000 for working on clemency applications[71] and also worked on applications for people convicted of illegally contributing to Democratic campaigns.[72] The only pardon involving potential cover-up of Clinton wrongdoing went to Susan McDougal, Clinton's business partner who spent twenty-one months in prison for refusing to testify against Clinton regarding the Whitewater scandal.[73] The most controversial of the pardons, however, went to Marc Rich, a fugitive financier who was indicted in 1983 on charges of tax fraud and illegal oil trading with Iran.[74] Rich's pardon was supported by his former wife,[75] who had

65. Clymer, *supra* note 62.

66. Berger, *supra* note 35, at 169. There were also suggestions that Bush may have granted the pardons to avoid being called as a witness in the Weinberger trial. The day before the pardons, Weinberger's lawyers had told the judge that they were thinking of calling Presidents Bush and Reagan as defense witnesses. *Grand Jury May Hear Weinberger*, CHI. TRIB., Dec. 29, 1992, at 3.

67. Clinton responded to the pardons stating that "I am concerned by any action that sends a signal that if you work for the Government, you're beyond the law, or that not telling the truth to Congress under oath is somehow less serious than not telling the truth to some other body under oath." Johnston, *supra* note 51.

68. Dan Eggen, *All of Last-Day Pardons Subject to Probe; Justice Department Clears U.S. Prosecutor in N.Y. to Widen Scrutiny of Clinton*, WASH. POST, Mar. 13, 2001, at A22.

69. Greg B. Smith, *Clinton Library Fundraiser Helped Perjurer Get Pardon*, WASH. POST., Mar. 4, 2001, at A2.

70. Richard A. Serrano, *"Snookered" Out of Pardon, Convict Says*, L.A. TIMES, Jun. 22, 2001, at A1 (describing story of man who claimed to have paid Roger Clinton $235,000 in exchange for a pardon).

71. Marc Lacey & Don Van Natta, Jr., *Second Clinton In-Law Says He Helped to Obtain Pardon*, N.Y. TIMES, Mar. 1, 2001, at A1. Rodham later returned the money upon Clinton's demand. David Johnston, *Hollywood Friend Had Clinton's Ear for 2 Late Pardons*, N.Y. TIMES, Feb. 24, 2001, at 8.

72. Stephen Braun & Richard A. Serrano, *More Clemency Lobbying by Rodham Alleged*, L.A. TIMES, Feb. 26, 2001, at A13.

73. Marc Lacey, *Clinton Pardons Deutch but Not Milken or Hubbell*, N.Y. TIMES, Jan. 21, 2001, at A1.

74. Jonathan Peterson & Lisa Getter, *Clinton Pardons Raise Questions of Timing, Motive*, L.A. TIMES, Jan. 28, 2001, at A1.

75. Josh Getlin, *Clinton Pardons a Billionaire Fugitive, and Questions Abound*, L.A.

contributed $867,000 to the Democratic Party between 1993 and 2001, including $7,000 to Hillary Clinton's Senate campaign.[76]

The pardons created quite a fallout, both legally and politically. Legally, a grand jury investigated claims surrounding Roger Clinton,[77] Congress held hearings regarding the pardons,[78] and a New York U.S. Attorney was given authority to investigate each of the 177 last-day pardons.[79] Politically, the fallout was felt heavily by Clinton's wife, Senator Hillary Rodham Clinton, who felt the need to make statements regarding her lack of knowledge of her brother's lobbying efforts and the work of her Senate campaign treasurer in preparing pardon requests.[80] Editorials noted that the pardons had "left a blot on the former president's reputation that may prove difficult to erase."[81] And after nearly a month of criticism, on February 18, 2001, *The New York Times* published a statement by Clinton giving his reasons for the Marc Rich pardon.[82] Not surprisingly, Clinton cited previous controversial presidential pardons (including Bush's pardon of Weinberger) and justified his pardon for foreign policy reasons and because Marc Rich had already paid his fines and donated generously to Israeli charitable causes.[83] Clinton denied that there was any "quid pro quo."[84]

C. Recent Proposed Amendments to the Federal Executive Pardon Power

Given the recent attention to cover-up and self-interested pardons, it is unsurprising that numerous joint resolutions have been introduced in Congress proposing to amend the Pardon Clause. It is also not surprising that the most recent joint resolution was introduced in 2001, the last time a President had the opportunity to grant last-minute pardons. Given the trend of last-minute pardon controversies, amendment proposals may resume shortly—depending on whether and how President George W. Bush uses (or abuses) his pardon power during the remainder of his final term.

Three types of joint resolutions have been introduced.[85] The first would provide that "The President shall only have the power to grant a reprieve or a pardon for an offense

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TIMES, Jan. 24, 2001, at A1.

76. *Id.*

77. Serrano, *supra* note 70.

78. *See Controversial Pardon of International Fugitive Marc Rich: Hearing Before the H. Comm. on Gov't Reform*, 107th Cong. (2001); *President Clinton's Eleventh Hour Pardons: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2001).

79. Eggen, *supra* note 68.

80. Stephen J. Hedges & Naftali Bendavid, *Clinton Says Brother's Pardon Role "A Surprise,"* CHI. TRIB., Feb. 23, 2001, at 1.

81. Andrew Will, *Pardon for Rich Leaves Blot on Legacy of Clinton Presidency*, FIN. TIMES (London), Feb. 7, 2001, at 14.

82. Clinton, *supra* note 22.

83. *Id.*

84. *Id.*

85. A related proposal, the Pardon Attorney Reform and Integrity Act, H.R. 3626, 106th Cong. (2000), would reform the process by which the Office of the Pardon Attorney reviews pardon decisions. Although changes to the Office of the Pardon Attorney could affect pardon outcomes, these changes are beyond the scope of this paper because they would not change the executive's fundamental pardon power.

against the United States to an individual who has been convicted of such an offense."[86] The second would limit the pardon power during lame-duck periods:

> The power to grant reprieves and pardons for offenses against the United States shall not be exercised between October 1 of a year in which a Presidential election occurs and January 21 of the year following; except that after October 1 in said year a President may delay the execution of a sentence of death until January 25 of the year following .... All pardons and reprieves must be announced publicly at the time they are granted.[87]

The third, proposed by Senator Walter Mondale in 1974 after Ford's pardon of Nixon, provided that "No pardon granted to an individual by the President under Section 2 Article II shall be effective if Congress by resolution, two-thirds of the members of each House concurring therein; disapproves the granting of the pardon within 180 days of its issue."[88] These proposals were referred to the House Committee on the Judiciary, where they remain today.

II. STATES' EXPERIENCES WITH EXECUTIVE PARDON POWER

A. Survey of Executive Pardon Power at the State Level

State constitutions grant a wide array of pardon powers to their executives, ranging from no power to the same power as the President; however, executive pardon power across all fifty states has not been closely examined.[89] This Part engages in a systematic review of state executive pardon power by surveying each state's limitations on executive pardon power. Because this Comment is primarily concerned with the executive's residual pardon power (and not power exercised under a statutory regime), this Part focuses on constitutional provisions, looking at statutory provisions only when the state's constitution references "other law."

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86. H.R.J. Res. 30, 104th Cong. (1995); H.R.J. Res. 32, 103d Cong. (1993); H.R.J. Res. 118, 102d Cong. (1991); H.R.J. Res. 18, 101st Cong. (1989).

87. H.R.J. Res. 22, 107th Cong. (2001).

88. S.J. Res. 241, 93d Cong. (1974).

89. The last across-the-board study of state pardon power was in 1988. *See* NAT'L GOVERNORS' ASS'N CTR. FOR POL'Y RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988).

Each state has a constitutional provision addressing executive pardon power.[90] Interestingly, only North Dakota[91] and South Dakota[92] provide their executives with as broad a power as the Federal Constitution provides the President. In twelve states, the executive has no unilateral pardon power; either the legislature or a separate (though often governor-appointed) board of pardons exercises the pardon power.[93] In the remaining states, limitations on executive pardon power fall into three broad categories: (1) limitations on the types of pardons, (2) limitations involving other government bodies ("checks and balances"), and (3) limitations invoking the executive's political popularity. Table 1 shows the frequency with which these limitations appear. Note that a state's constitution may employ multiple limitations,

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90. ALA. CONST. art. V, § 124; ALASKA CONST. art. III, § 21; ARIZ. CONST. art. V, § 5; ARK. CONST. art. 6, § 18; CAL. CONST. art. V, § 8; COLO. CONST. art. IV, § 7; DEL. CONST. art. VII, § 1; FLA. CONST. art. IV, § 8; GA. CONST. art. IV, § 2; HAW. CONST. art. V, § 5; IDAHO CONST. art. IV, § 7; ILL. CONST. art. V, § 12; IND. CONST. art. 5, § 17; IOWA CONST. art. 4, § 16; KAN. CONST. art. 1, § 7; KY. CONST. § 77; LA. CONST. art. IV, § 5; ME. CONST. pt. 1, art. V, § 11; MD. CONST. art. II, § 20; MASS. CONST. pt. 2, ch. II, § I, art. VIII; MICH. CONST. ch. 1, art. V, § 14; MINN. CONST. art. V, § 7; MISS. CONST. art. 5, § 124; MO. CONST. art. IV, § 7; MONT. CONST. art. VI, § 12; NEB. CONST. art. IV, § 13; NEV. CONST. art. 5, § 13; N.H. CONST. pt. 2, art. 52; N.J. CONST. art. V, § 2, ¶ 1; N.M. CONST. art. 5, § 6; N.Y. CONST. art. IV, § 4; N.C. CONST. art. III, § 5; N.D. CONST. art. 5, § 7; OHIO CONST. art. III, § 11; OKLA. CONST. art. VI, § 10; OR. CONST. art. V, § 14; PA. CONST. art. IV, § 9; R.I. CONST. art. IX, § 13; S.C. CONST. art. IV, § 14; S.D. CONST. art. IV, § 3; TENN. CONST. art. III, § 6; TEX. CONST. art. IV, § 11; UTAH CONST. art. VII, § 12; VT. CONST. ch. 2, § 20; VA. CONST. art. V, § 12; WASH. CONST. art. III, § 9; W.VA. CONST. art. VII, § 11; WIS. CONST. art. V, § 6; WYO. CONST. art. 4, § 5. These provisions have not been previously compiled and were found by browsing the states' constitutions. Provisions limited to other acts of clemency—reprieves, parole, commutations, or remission of fines—were omitted as this Comment focuses on the pardon power. Connecticut is omitted from the list for this reason—its executive clemency power is limited to reprieves. CONN. CONST. art. IV, § 13.

91. N.D. CONST. art. V, § 7 ("The governor may grant reprieves, commutations, and pardons. The governor may delegate this power in a manner provided by law."). *But see* N.D. CENT. CODE § 12-55.1-04 (2007) (prohibiting preconviction pardons).

92. S.D. CONST. art. IV, § 3 ("The Governor may, except as to convictions on impeachment, grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures.").

93. *See* CONN. CONST. art. IV, § 13 (allowing only reprieves); GA. CONST. art. IV, § 2 (providing governor only with the power to appoint Board of Pardons); IDAHO CONST. art. IV, § 7 (giving governor power to grant reprieves, but allowing Board of Pardons to grant pardons); LA. CONST. art. IV, § 5 (requiring approval of governor-appointed Board of Pardons for all pardons); MINN. CONST. art. 5, § 7 (requiring approval of Board of Pardons, of which governor is a member); MONT. CONST. art. VI, § 12 (providing power "subject to procedures provided by law," which allows only pardons on cases forwarded by governor-appointed Board of Pardons); NEB. CONST. art. IV, § 13 (giving power to a Board of Parole and another board, on which the governor sits); OKLA. CONST. art. VI, § 10 (giving governor power only to grant pardons recommended by Board of Pardons); PA. CONST. art. IV, § 9 (giving governor power only upon majority—or unanimous, in capital and life imprisonment cases—vote of Board of Pardons); S.C. CONST. art. IV, § 14 (giving governor power to grant reprieves and commute death sentences); TEX. CONST. art. IV, § 1 (giving governor power to pardon only upon recommendation of Board of Pardons); UTAH CONST. art. VII, § 12 (giving pardon power to governor-appointed Board of Pardons). Alabama's Constitution, while allowing executive pardons for capital sentences, gives the pardon power to the legislature in all other cases. ALA. CONST. art. V, § 124.

and in various combinations. For example, some state constitutions prohibit pardons for impeachment and unconvicted individuals, while other state constitutions may prohibit pardons for impeachment and require notice of pardons in a newspaper.

TABLE 1. Limitations on state executive pardon power

Limitations on the types of pardons	
No unilateral impeachment pardons[94]	32
No unilateral preconviction pardons[95]	22
No unilateral treason pardons[96]	20
Limitations involving other government bodies	
Action with legislature broadens power[97]	15
Governor appoints or serves on Board of Pardons[98]	13
Governor may only pardon those recommended by Board of Pardons[99]	9
Supreme Court approval needed[100]	1
Limitations affecting the governor's political popularity	
Governor must provide list of pardoned individuals to legislature[101]	17

94. These states are Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. *See supra* note 91. Of the twelve states where the executive lacks unilateral pardon power, *see supra* note 94, nine forbid pardons for impeachment.

95. These states are Arizona, Arkansas, Colorado, Hawaii, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Missouri, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming. *See supra* note 91. Of the twelve states where the executive lacks unilateral pardon power, *see supra* note 94, eight forbid preconviction pardons.

96. These states are Arizona, Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Kentucky, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Vermont, Wisconsin, and Wyoming. Of the twelve states where the executive lacks unilateral pardon power, *see supra* note 94, three place limitations on treason pardons. This number includes states where the governor may pardon for treason only with the advice and consent of the legislature because in those states, he lacks *unilateral* pardon power for treason.

97. This includes states which require an advise and consent function and states in which the governor can recommend a pardon (most commonly for treason) for legislative approval. These states are Arkansas, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Nevada, New York, Ohio, Oregon, Rhode Island, Texas, Wisconsin, and Wyoming. *See supra* note 91.

98. This includes states where the Board's recommendation is necessary for all pardons and those states where the recommendation is nonbinding on the governor. These states are Connecticut, Delaware, Georgia, Idaho, Louisiana, Minnesota, Montana, Nebraska, Oklahoma, Pennsylvania, South Carolina, Utah, and Washington. IDAHO CODE ANN. § 20-240 (2007); *see supra* note 91. Interestingly, many of these states are the states that give the governor no unilateral pardon power. *See supra* note 94.

99. These states are Delaware, Kansas, Louisiana, Montana, Nebraska, Oklahoma, Pennsylvania, Texas, and Washington. *See supra* note 91.

100. California requires approval of at least four supreme court justices to pardon someone convicted of two felonies. CAL. CONST. art. 5, § 8.

101. These states are Arkansas, California, Colorado, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Nevada, New York, Ohio, Oregon, Virginia, West Virginia, Wisconsin, and Wyoming. *See supra* note 91.

Governor must provide reasons for pardons to legislature[102]	13
Governor must provide notice of pardons in newspaper[103]	2

B. Recent State-Level Pardon Controversies

While state limitations on the pardon power provide ideas for federal constitutional pardon reform, states' experiences with their pardon powers can demonstrate weaknesses of particular pardon schemes. This Part describes two such experiences: Georgia's experience with barely-existent executive pardon power and Kentucky's experience with a fairly permissive pardon power.

1. Too Narrow? Georgia and the Attempt to Free Genarlow Wilson

Genarlow Wilson was an outstanding student-athlete from Georgia who was recently serving a ten-year sentence without the possibility of parole for aggravated child assault. The offense: receiving oral sex from an initiating fifteen-year-old when he was seventeen.[104] After his release, he would presumably have to register as a sex offender and would be unable to live at home with his younger sister.[105] Even though Wilson is technically guilty (with the offense caught on videotape), many—including the jury[106]—felt that the penalty was far greater than the crime and that Wilson deserved mercy to spare his promising future. The case received much media attention.[107] Wilson was recently released from prison after the Georgia Supreme Court ruled that his sentence was cruel and unusual,[108] but his story presents a real-life example of the problems of a weak pardon power.

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102. These states are Arkansas, California, Colorado, Iowa, Kentucky, Maryland, Michigan, Ohio, Oregon, Virginia, West Virginia, Wisconsin, and Wyoming. *See supra* note 91.

103. These states are Maryland and Mississippi. *See supra* note 91.

104. Wright Thompson, Outrageous Injustice, E-Ticket: ESPN.COM Magazine, http://sports.espn.go.com/espn/eticket/story?page=wilson.

105. *Id.*

106. When the jury returned its guilty verdict, "[the forewoman] was crying . . . . Indeed, when the jurors found out there was a 10-year mandatory minimum sentence, several were incensed. The prosecution told them to write a letter . . . ." *Id.*

107. A Google search for "Genarlow Wilson" generated over 121,000 results. *See* http://www.google.com/search?hl=en&q=%22Genarlow+Wilson%22. *See e.g.*, Free Genarlow Wilson Now!, http://www.naacp.org/advocacy/genarlowwilson; Why Is Genarlow Wilson in Prison?, http://www.wilsonappeal.com/index.php (providing opportunity to sign online petition supporting Genarlow's release); Outrageous Injustice, http://sports.espn.go.com/espn/eticket/story?page=wilson; Genarlow Wilson, http://en.wikipedia.org/wiki/Genarlow_Wilson; Free Genarlow Wilson Now, http://www.nytimes.com/2006/12/21/opinion/21thu4.html?ex=1324357200&en=d3a8cf6d030c60b7&ei=5088&partner=rssnyt&emc=rss.

108. Humphrey v. Wilson, 652 S.E.2d 501 (Ga. 2007). *See also Wilson Released After Two Years Behind Bars for Teen Sex Conviction*, CNN.com, Oct. 27, 2007, http://www.cnn.com/2007/US/law/10/26/wilson.freed/index.html.

One block to his release was that in Georgia, the governor has no pardon power.[109] Instead, the governor appoints a Board of Pardons that is responsible for all pardoning decisions and can only pardon someone who has finished his or her sentence.[110] The legislature tried unsuccessfully to release Wilson. First, the legislature changed the law to include a "Romeo and Juliet" exception but failed to make the law retroactive, even though it was trying to address Wilson's situation.[111] Recently, a bill was introduced in the Georgia Senate to allow judges to "reconsider the cases of hundreds of young adults, including Mr. Wilson, who are serving long mandatory minimum sentences in prison for having consensual sex with teenage minors."[112] Because no current laws allowed for Wilson's release, Georgia courts reviewing his criminal appeals had no choice but to uphold the sentence of what the Georgia Supreme Court called "a promising young man."[113] Ultimately, on habeas corpus, the Georgia Supreme Court ruled that Wilson's sentence constituted cruel and unusual punishment because the ten-year sentence did not "further a legitimate penological goal."[114]

Arguably, Genarlow Wilson would have had an easier time obtaining a pardon—and his punishment would better match public sentiment—if the Georgia Constitution gave the governor some unilateral pardon power. Instead, Wilson and his attorney had to work with the Georgia Legislature and undertake several appeals and a habeas action in order to obtain Wilson's release.

2. Too Broad? Governor Fletcher's Blanket Administration Pardon

In 2005, Kentucky Governor Ernie Fletcher granted blanket pardons to current and former administration members charged with improper hirings based on political considerations.[115] These blanket pardons covered "any and all persons who have committed, or may be accused of committing, any offense up to and including the date hereof, relating in any way to the current merit system investigation."[116]

Despite the pardons, investigation into the hirings continued, resulting in several indictments for the pardoned offenses.[117] These indictments were appealed to the Kentucky Supreme Court, which upheld the pardons, nullifying the indictments and

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109. GA. CONST. art. 4, § 2.

110. *See* GA. CONST. art. 4, § 2, ¶ 2.

111. GA. CODE ANN. § 16-6-4(b)(2) (2007) (making child molestation a misdemeanor if the victim is between fourteen and sixteen and the perpetrator is eighteen or younger and no more than four years older than the victim). The law was amended in 2006.

112. Brenda Goodman, *Bill to Reopen Sex Cases Hits a Snag*, N.Y. TIMES, February 20, 2007, at A12.

113. Wilson v. State, 642 S.E.2d 1, 1 (2006).

114. Humphrey v. Wilson, 652 S.E.2d 501, 507 (Ga. 2007).

115. *Governor Gives Blanket Pardon to 9 Charged in Hiring Probe*, CHI. TRIB., Aug. 30, 2005, at 4.

116. Mark Pitsch & Tom Loftus, *Fletcher Pardons Nine in State Hiring Inquiry*, THE COURIER-JOURNAL (Louisville), Aug. 30, 2005, at A1.

117. Fletcher v. Graham, 192 S.W.3d 350, 355 (Ky. 2006). During the grand jury investigation, Governor Fletcher petitioned the trial court for a jury instruction preventing indictment of pardoned persons; however, the judge instructed the grand jurors that "the Governor's pardon had no bearing on their work whatsoever." *Id.*

public airing of the facts.[118] The Kentucky House of Representatives has recently responded by voting, 71–26, to amend Kentucky's Constitution to limit the pardon power by requiring an application process, formal acceptance of pardons, and that pardon recipients be convicted.[119] This amendment has passed to the Senate for consideration and could be on the ballot for ratification in 2008. Had such an amendment previously been in place, cover-up would have been less likely: Fletcher would not have been able to pardon his staff before an airing of the facts, and the application and acceptance processes would have exposed the pardons to greater public scrutiny.

C. Lessons from Pardons at the State Level

Looking at both the state constitution provisions and the Georgia and Kentucky experiences provides several conclusions about the pardon power in general. First, state constitutions overwhelmingly vest the pardon power with the state executive,[120] suggesting that the pardon power may be best exercised by a single person who can act alone—so citizens know who is making the decision—and efficiently.[121] Georgia's experience with Genarlow Wilson provides anecdotal evidence that leaving pardon decisions to a large body may result in less-than-satisfactory pardon availability. Second, however, state constitutions overwhelmingly place greater limitations on their executives than the Constitution places on the President.[122] Kentucky's experience with Governor Fletcher confirms that executives may not be as trustworthy as hoped: they will act to stop investigations into their own administrations. This suggests that perhaps the federal pardon power may be too broad.

State constitutions do address the concerns surrounding federal pardons—that pardons will be granted for cover-ups or in self-interest. States address these concerns by involving other branches of government, prohibiting preconviction pardons, and requiring disclosure of pardons and reasons. On the whole, state constitutions contemplate greater popular involvement in the pardon process, whether through involving a Board of Pardons, mandating disclosure of pardon information, or leaving some pardon decisions to the legislature. Given the attention at the federal level to lame-duck pardons, it is interesting that no state's constitution limits the pardon power at the end of an executive's term.

III. APPLYING THE STATES' EXPERIENCE TO THE FEDERAL PARDON POWER

Even though state and federal governments equally face the risks of cover-up and self-interested pardons, state and federal constitutions offer different protections

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118. *Id.* at 365 ("A gubernatorial pardon operates to cease any further legal proceeding concerning the pardoned conduct, including indictments.").

119. H. B. 3, 2007 Leg., Reg. Sess. (Ky. 2007). *See also* Ryan Alessi, *House OKs Constitutional Amendment: Measure Would Limit Governor's Power to Pardon*, LEXINGTON HERALD-LEADER, Feb. 16, 2007, at State and Regional News.

120. *See supra* Part II.A.

121. *See* THE FEDERALIST No. 74 (Alexander Hamilton) (arguing that the pardon power best suits the executive).

122. *See supra* Part II.A.

against these risks. This Part will examine whether different protections are justified given the different responsibilities of the two levels of government and will examine whether any of the states' strategies would improve the Constitution's pardon power.

A. Can State-Level Pardon Power Provide an Adequate Model for the Federal Executive Pardon Power?

As discussed previously, five justifications for the pardon power are to correct injustice, show mercy, restore unity, solve crimes, and execute foreign policy. State and federal governments have different responsibilities with respect to these justifications. These differences cut both for and against broader federal pardon power.

For several reasons, states should have broader pardon power than the federal government. First, some argue that defendants receive better justice in federal courts because federal courts are less political and are more technically capable of addressing constitutional criminal procedure questions.[123] If this is true, then state pardon power should be broader to account for the increased number of wrongful convictions at the state level. Second, because most criminal law is state law, more criminals will be convicted under state law, providing increased opportunities for injustice and for disproportionate sentencing that requires merciful intervention. Arguably, state pardon power should be more easily exercised to allow for quick correction of these mistakes. However, because the potential for wrongful conviction and disproportionate sentencing exists at both the state and federal levels, perhaps all constitutions should allow for unfettered pardoning to address these problems.

Other arguments suggest that the federal government should have broader pardon power. First, the federal government alone deals with foreign policy, so its executive needs a broad pardon power to be able to react quickly to foreign calls for pardons. Second, because the federal government alone declares war, it needs a broader pardon power to restore national unity, and state-like limitations on treason or preconviction pardons would hinder these pardons. On the other hand, states can face non-war situations that require a broad pardon power to restore unity. Indeed, Ernie Fletcher argued that preconviction pardons for his staff were necessary to stop a needless and overly-political investigation.[124] Third, the federal executive may be more trustworthy because the size of its constituency limits the danger of capture by special interest groups.[125] State executives, with smaller constituencies, could be more easily captured, resulting in increased danger of cover-up and self-interested pardons.

On balance, the federal government should probably have only slightly broader pardon power than states. Both state and federal governments have equally valid concerns regarding wrongful convictions, disproportionate punishments, the need for

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123. *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing for superiority of federal courts in adjudicating claims under the Federal Constitution). Assuming that constitutional protections for the accused improve the quality of justice, perhaps the quality of state criminal courts is inferior to federal courts.

124. *See supra* Part II.B.2.

125. *See* THE FEDERALIST, No. 10 (James Madison) ("[A]s each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried . . . .").

information to solve crime, and the need for unity. Only foreign policy reasons justify giving the federal executive a broader pardon power.

B. What Should the Federal Pardon Power Look Like?

Any changes to the federal pardon power needs to be narrowly tailored so as to disallow cover-up and self-interested pardons but to retain the broadest possible remaining power to allow for foreign policy, crime-solving pardons, national unity, justice, and grace. None of the state provisions or proposed federal amendments strike this balance perfectly; however, some of the provisions might provide a better limitation than the current Pardon Clause.

Many states limit the types of pardons by forbidding preconviction and treason pardons.[126] Disallowing pardons for these reasons could prevent some self-interested or cover-up pardons—President Bush could not have pardoned Weinberger under these provisions, and Governor Ernie Fletcher could not have pardoned his staff. But abuses of the pardon power have been smaller than feared, and preconviction pardons and pardons for treason are some of the most useful pardons in promoting national unity and foreign policy. Limiting the President's ability to issue preconviction pardons and pardons for treason would severely restrict his ability to promote national unity and foreign policy and would probably only prevent cover-up, but not self-interested, pardons.

Many states also limit the executive's pardon power by involving the legislature or a board of pardons, often appointed by the governor. An amendment requiring another body's approval for pardons could eliminate the most egregious of pardons but probably would not have prevented the Bush and Clinton pardons, which had some support.[127] The independent body might fail to provide an adequate check in situations where it was President-appointed or under the control of the same party as the President. The small protection against improper pardons given by another body likely would not justify bogging down the process for legitimate pardons, especially because pardons for national unity and foreign policy may need to be granted quickly.

Many states informally limit the executive's pardon power by requiring disclosure of pardons, and sometimes reasons for the pardons, to the citizens. This limitation would probably have no effect on cover-up or self-interested pardons granted at the federal level because disclosure of pardons (and resulting effects on impeachment and public opinion) are of less importance to lame-duck Presidents—Presidents Bush and Clinton granted these types of pardons likely knowing that they would be widely publicized.

Finally, a flat-out ban on lame-duck pardons, such as that proposed in 2001, could prevent self-interested and cover-up pardons,[128] although Presidents not worried about impeachment or public opinion could just move up the pardon date. Again, the small number of improper pardons prevented in the lame-duck period would not justify

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126. *See supra* Part II.A.

127. *See supra* Part I.B.

128. Sisk, *supra* note 4, at 22. ("Allowing the lamest of lame ducks to grant pardons creates the potential for abuse or even criminal corruption, heightens the tendency to act in haste without carefully weighing all factors, and enhances the temptation to act imprudently, with improper favoritism, or out of selfish spite.").

removing the President's power to issue legitimate pardons during the lame-duck period. Moreover, allowing unchecked pardons during the lame-duck period could free Presidents to make unpopular, though correct, pardon decisions.

Because none of the typical solutions to executive abuse of pardon power prevents all improper pardons *and* allows all legitimate pardons, some argue that nothing should be done.[129] Indeed, the fact that nothing has been done suggests that this might be the right answer. Perhaps the benefits of a broad pardon power outweigh the costs, even costs as high as cover-ups and cynicism and distrust toward the government.

CONCLUSION

Federal pardon power is necessary to allow for justice and mercy, restore national unity, solve crime, and promote foreign policy. Placing the pardon power solely with the President allows for efficient, accountable, and energetic issuance of pardons; however, it also allows for improper cover-up and self-interested pardons. The checks of impeachment, political fallout, and scarred reputation are not sufficient to completely eliminate improper pardons, but no current state constitutional provision or proposed constitutional amendment prevents improper pardons without unnecessarily stifling legitimate pardons. A more narrowly-tailored Pardon Clause would be impractical—imagine courts trying to interpret a Pardon Clause that allowed for pardons "except in cases of impeachment, cover-up, or self-interest." Perhaps the best solution is to leave the Pardon Clause the way it is, relying on the political and constitutional checks already present.

129. *See, e.g.*, Jerry Carannate, Note, *What To Do About the Executive Clemency Power in the Wake of the Clinton Presidency*, 47 N.Y.L. SCH. L. REV. 325, 326 (2003) ("[T]he answer as to what should Constitutionally be done in the wake of the Clinton Presidency is quite simple: absolutely nothing.").