

NOTES

CLEMENCY, WAR POWERS, AND GUANTÁNAMO

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On his first day in office, President Obama called for the closure of the military prison at Guantánamo Bay, Cuba. Near the end of Obama's tenure, the prison remains open. This Note suggests a previously undiscussed path for the President to transfer most detainees from Guantánamo, despite congressional opposition, using a robust and exclusive executive tool: the pardon power. By granting conditional pardons to eligible Guantánamo detainees, the President could unilaterally move many to the mainland United States for continued, if limited, detention, and transfer others for repatriation elsewhere. In addressing the Guantánamo problem, this Note argues that pardons have been used and should be viewed as a crucial complement to presidential war powers. The Note concludes that granting clemency for Guantánamo detainees is not only legally defensible, but also consistent with constitutional structure, original understanding, and historical practice since the Founding.

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INTRODUCTION

On his first full day in office, President Barack Obama made it his goal to shutter the military prison at Guantánamo Bay, Cuba.¹ The task has proven far from simple. Near the end of President Obama's tenure, Guantánamo remains open, despite a slow but steady trickle of transfers and releases. Most of those detainees remaining are either unsusceptible to prosecution in civilian or military courts or otherwise deemed unfit for discharge on national security grounds.²

When asked at his 2015 year-end press conference about whether he believed he had the unilateral ability to close Guantánamo, President Obama demurred but explicitly left the question open: "We will wait until Congress has definitively said no before we say anything definitive about my executive authority here."³ That same day, the president commuted ninety-five federal prison sentences, the broadest use of his constitutional pardon power to that point.⁴

The Constitution grants the president "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."⁵ The pardon power⁶ is among the most explicit authorities given to the President. Save few limits, the president has largely unfettered discretion to mitigate criminal penalties at any time after an offense has occurred, even before a trial has taken place.⁷

The same constitutional sentence giving the President authority to reduce or eliminate most federal legal sanctions also identifies the president as the Commander in Chief of the military.⁸ Yet the presi-

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¹ See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) (ordering immediate review of detainees and ultimate closure of Guantánamo prison).

² See *The Guantánamo Docket*, N.Y. TIMES (last updated Aug. 15, 2016), <http://projects.nytimes.com/guantanamo> (detailing status of all detainees currently or formerly held at the U.S. military prison at Guantánamo Bay).

³ Julie Hirschfeld Davis & Peter Baker, In 'Fairness,' Obama Commutes Sentences for 95, Mostly Drug Offenders, N.Y. TIMES, Dec. 19, 2015, at A12.

⁴ See *id.* ("The set of commutations was the largest of Mr. Obama's presidency, and it more than doubled the number he has granted since taking office.")

⁵ U.S. CONST. art. II, § 2.

⁶ Although technically the umbrella term "clemency" covers a range of actions like pardons, commutations, and amnesties, see *infra* notes 51–56 and accompanying text, the term "pardon" is often used to cover the field as well. This Note will use "clemency" and "pardon" interchangeably, except where specified in the text.

⁷ See AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 189 (2006) ("Article II handed the president a far mightier pardon pen, authorizing him to single-handedly and conclusively pardon at any time after a crime occurred and thereby spare a man from even having to stand trial.")

⁸ U.S. CONST. art. II, § 2.

dent's military leadership has rarely been discussed in the context of the pardon power.⁹ Clemency authority met with little scrutiny overall at the Constitutional Convention, but the one extended debate the Framers did engage in over the power regarded the President's ability to pardon in certain cases of treason.¹⁰ The Convention resoundingly rejected limiting the executive's power in these circumstances,¹¹ which include "levying War" against the United States.¹² Presidents active in politics at the time of the Convention went on to use their pardon authority in instances of insurrection and rebellion.¹³ And future presidents, most notably Abraham Lincoln and Andrew Johnson, issued mass amnesties for wartime offenses against the Union.¹⁴

The bare text of Article II, Section 2 of the Constitution, the Framers' intent in light of their understanding of treason as a warlike act, and subsequent historical practice all suggest a greater connection than has been previously drawn between the president's war powers and the power to pardon. Some scholars have argued that presidents should use—and in some instances, have already used—the pardon power in a broader systematic fashion to reduce mass incarceration,¹⁵ and to assert presidential control over the administration of criminal

⁹ The connection between American statecraft and clemency has not gone entirely unnoticed. *See, e.g.*, Louise Mallinder, *Power, Pragmatism, and Prisoner Abuse: Amnesty and Accountability in the United States*, 14 OR. REV. INT'L L. 307, 336–45 (2012) (discussing grants of amnesty and pardon in the context of American empire building); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1173 (2010) (discussing pardons as an exercise in presidential statecraft). However, this Note goes further than previous sources to make an explicit argument that clemency should rightly be viewed as an extension of the executive commander-in-chief function, and applies this framework to the Guantánamo situation.

¹⁰ *See* MAX FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 563–64, 626–27 (1911) [hereinafter 2 FARRAND].

¹¹ *Id.* at 627.

¹² U.S. CONST. art. III, § 3.

¹³ *See, e.g.*, JOHN ADAMS, PROCLAMATION OF MAY 21, 1800, REGARDING THE INSURRECTION IN PENNSYLVANIA IN 1799, reprinted in THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/japroc04.asp (last visited Sept. 16, 2016) (pardoning offenses of the Fries Rebellion); GEORGE WASHINGTON, PROCLAMATION OF 10 JULY 1795, reprinted in 4 THE FOUNDERS' CONSTITUTION 20 (Philip B. Kurland & Ralph Lerner, eds., 1987) [hereinafter FOUNDERS' CONSTITUTION] (pardoning for offenses against the state in the Whiskey Rebellion).

¹⁴ *See, e.g.*, ABRAHAM LINCOLN, PROCLAMATION OF AMNESTY AND RECONSTRUCTION (Dec. 8, 1863), reprinted in AVALON PROJECT, http://avalon.law.yale.edu/19th_century/john_chap_01.asp (last visited Sept. 16, 2016) (issuing conditional pardons to those in rebellion against the United States in exchange for an oath of loyalty to the Union); ANDREW JOHNSON, PROCLAMATION 134—GRANTING AMNESTY TO PARTICIPANTS IN THE REBELLION, WITH CERTAIN EXCEPTIONS (May 29, 1865), <http://www.presidency.ucsb.edu/ws/index.php?pid=72392> (granting and extending same).

¹⁵ *See* Mark Osler & Matthew Fass, *The Ford Approach and Real Fairness for Crack Convicts*, 23 FED. SENT'G REP. 228 (2011) (detailing President Gerald Ford's clemency board for Vietnam draft dodgers); Charles Shanor & Marc Miller, *Pardon Us: Systemic*

law.¹⁶ A further extension and fuller picture of the theoretical underpinnings of the presidential pardon power should also include the president's capacity as Commander in Chief of the armed forces.

This theoretical framework applies in full force to the situation at Guantánamo. Congressional opposition has stymied attempts to shutter the military prison.¹⁷ Some former government officials and academics have suggested that President Obama has the constitutional power to sidestep Congress by closing Guantánamo through the war powers.¹⁸ But if the President indeed intends to take unilateral action concerning Guantánamo, this Note will argue that he could do so by standing on the far firmer constitutional ground of the pardon power. By granting conditional pardons to those detainees who committed "offenses against the United States,"¹⁹ President Obama could move many remaining detainees to the mainland United States for continued, if limited, detention, and transfer others for repatriation elsewhere, coming closer to doing what he promised on day one.

This Note will explore executive clemency as a crucial corollary to the presidential war powers. Part I will describe the history and reach of the pardon power, as defined by historical practice and controlling Supreme Court interpretation. Part II will explore the relationship between clemency and commander-in-chief powers, including (1) a discussion of Article II's text, (2) founding debates of pardon in light of the Framers' understanding of the crime of treason, and (3) examples of presidents who used their clemency authority to restore peace and assert national authority in the context of rebellion and war. Part III will introduce the Guantánamo problem and apply the legal framework of the pardon power to suggest methods by which the President could unilaterally transfer Guantánamo detainees from the naval base to domestic facilities or abroad.

Presidential Pardons, 13 FED. SENT'G REP. 139 (2001) (recounting the history of mass pardons or amnesties issued by former Presidents).

¹⁶ See Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 807–08 (2015).

¹⁷ See *infra* note 196 and accompanying text.

¹⁸ See Gregory B. Craig & Cliff Sloan, *The President Doesn't Need Congress's Permission to Close Guantánamo*, WASH. POST (Nov. 6, 2015), https://www.washingtonpost.com/opinions/the-president-doesnt-need-congresss-permission-to-close-guantanamo/2015/11/06/4cc9d2ac-83f5-11e5-a7ca-6ab6ec20f839_story.html (arguing that the president has the exclusive authority as Commander in Chief to "make tactical military decisions" and to determine "where to hold detainees"); see also Harold Hongju Koh, *After the NDAA Veto: Now What?*, JUST SECURITY (Oct. 23, 2015, 11:46 AM), <https://www.justsecurity.org/27028/ndaa-veto-what/> (suggesting that congressional appropriations restrictions on transferring Guantánamo detainees could be seen as unconstitutional infringements on, *inter alia*, presidential powers as Commander in Chief).

¹⁹ U.S. CONST. art. II, § 2.

I

THE PRESIDENTIAL PARDON POWER

A. *Historical Context of the Pardon Clause*

Article II of the Constitution sets out the powers of the chief executive. Among them is the ability to “grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”²⁰

Debate over the Pardon Clause was brief at the Constitutional Convention of 1787.²¹ The Committee of Detail included executive clemency in its first full draft of the constitutional text based on the agreements made to that point.²² Changes to the Pardon Clause were raised and quickly rejected at the Constitutional Convention.²³ The most notable of these would have removed from presidential prerogative the ability to pardon in cases of treason.²⁴ The Convention discarded that suggestion.²⁵ Roger Sherman, delegate from Connecticut, proposed to hem in the executive’s clemency power by requiring Senate approval for pardons and allowing reprieves only until the Senate next met.²⁶ This motion also failed.²⁷ Delegate Luther Martin of New Jersey suggested adding the words “after conviction” to the Pardon Clause.²⁸ Pennsylvania’s James Wilson countered that a pardon might be useful before conviction to encourage testimony against co-conspirators.²⁹ In the face of this argument, Martin withdrew his proposal before it received a vote.³⁰

Given the relatively low level of scrutiny the clemency power received at the Constitutional Convention, the question arises: What precisely did the Framers have in mind when they imbued the executive with this expansive authority? Alexander Hamilton, describing the bundle of enumerated executive powers in Article II, wrote that in most respects “the power of the President will resemble equally that

²⁰ *Id.*

²¹ However, I argue that the most expansive part of that debate, concerning the application of pardons in cases of treason, should play a significant role in how we view the president’s clemency authority today. See *infra* Section II.B.

²² 2 FARRAND, *supra* note 10, at 185.

²³ *E.g.*, *id.* at 411 (rejecting addition of the words “but his pardon shall not be pleadable in bar”); *id.* at 419 (rejecting a role for the Senate in approving pardons).

²⁴ *Id.* at 626–27.

²⁵ *Id.* Discussed in greater detail in Part II.

²⁶ *Id.* at 419 (suggesting presidential authority “to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate”).

²⁷ *Id.* Only Connecticut voted in favor, while eight states were opposed. *Id.*

²⁸ *Id.* at 422.

²⁹ *Id.* at 626–27.

³⁰ *Id.* at 422.

of the king of Great Britain and of the governor of New York.”³¹ In the first Supreme Court case to explore the bounds of the pardon power, *United States v. Wilson*, Chief Justice John Marshall reinforced the view that pardon authority should be interpreted in light of the powers of the British monarch.³² Future decisions of the Supreme Court hewed to this line, continually returning to the British version of clemency for guidance on its application in America.³³

While the English clemency power traces its roots all the way back to the Saxon rulers of the sixth and seventh centuries, its formal structure solidified in the early 1500s when an Act of Parliament reposed “the whole and sole power and authority” of pardon in the king.³⁴ William Blackstone, in his *Commentaries*, characterized the king’s pardon as the “power to extend mercy, wherever he thinks it is deserved.”³⁵ Pardons also served an institutional goal, consolidating the king’s authority by “endear[ing] the sovereign to his subjects.”³⁶

Importantly, pardons did not have to be full; they could be conditioned “upon what terms [the king] pleases.”³⁷ The conditions could be either precedent or subsequent, and the validity of the pardon would rest on their fulfillment.³⁸ One condition Blackstone noted as an example was that of transportation: The king would issue the pardon if the offender removed to a foreign land, typically the colonies in America.³⁹ However, the king’s prerogative to pardon was not unlimited. Certain acts of Parliament restricted the pardon power’s use in private lawsuits and in cases of common nuisance that had not been redressed.⁴⁰ In a move that would later translate to the American Constitution, the king’s pardon could not be pleaded in impeachment proceedings, although a pardon could issue once an

³¹ THE FEDERALIST NO. 69 (Alexander Hamilton).

³² 32 U.S. 150, 160 (1833) (“As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon . . .”).

³³ See *Ex parte Wells*, 59 U.S. 307, 311 (1855) (“[W]hen the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies.”); *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925) (“The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.”).

³⁴ W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 9–10 (1941).

³⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES 397–402 (1769), reprinted in FOUNDERS’ CONSTITUTION, *supra* note 13, at 14.

³⁶ *Id.* at 15.

³⁷ *Id.* at 16.

³⁸ *Id.*

³⁹ See *id.* (describing a conditional pardon).

⁴⁰ *Id.* at 15.

impeachment resulted in conviction.⁴¹ As for the impact a pardon would have on an offender, Blackstone wrote that it was “to make the offender a new man; . . . not so much to restore his former, as to give him a new, credit and capacity.”⁴²

When it came time to decide whether the presidency under the new Constitution would include the pardon power, the delegates in 1787 “handed the president a far mightier pardon pen” than most state governors enjoyed at the time.⁴³ Indeed, the transition from a colonial structure to self-government marked a general rejection of monarchical rule in America, and the newborn states were typically loath to extend the powers of the British king to their elected governors.⁴⁴ Instead of following these states in restricting the President’s power, the Framers adopted a final text of Article II that allowed the President to “single-handedly and conclusively” pardon offenses at any point after commission, even before trial.⁴⁵

Defenders of the draft Constitution championed the Article II pardon power on several grounds during ratification debates in the states. A common note was on the need to include an element of mercy in the penal structure. Hamilton remarked on the tendency of the criminal law to err on the side of harshness. “[W]ithout an easy access to exceptions in favor of unfortunate guilt,” he wrote, “justice would wear a countenance too sanguinary and cruel.”⁴⁶ James Iredell, who gave a detailed exposition on the pardon power to the North Carolina ratifying convention, said that a criminal system must allow for “peculiar circumstances” in an individual’s case that “may entitle him to mercy.”⁴⁷ Both Hamilton and Iredell argued that clemency could best be given from a single person, the President, rather than allowing input from legislatures, which could render mercy rare to nonexis-

⁴¹ *Id.*

⁴² *Id.* at 16.

⁴³ AMAR, *supra* note 7, at 189.

⁴⁴ See AMAR, *supra* note 7, at 560 n.28 (describing the more limited executive clemency authority of the colonies); HUMBERT, *supra* note 34, at 13 (“When the colonists determined to rid themselves forever of control by the King, they, in drafting their own constitutions, naturally withheld powers from the governors and displayed more confidence in the legislators by concentrating in them broad authority.”).

⁴⁵ AMAR, *supra* note 7, at 189.

⁴⁶ THE FEDERALIST NO. 74 (Alexander Hamilton).

⁴⁷ JAMES IREDELL, NORTH CAROLINA RATIFYING CONVENTION (July 28, 1788), reprinted in FOUNDERS’ CONSTITUTION, *supra* note 13, at 17.

tent.⁴⁸ They trumpeted the limitation on pardons in cases of impeachment as a safeguard against abuse.⁴⁹

B. *Contours of the Pardon Power*

While the Framers had a keen understanding of the age-old tradition of pardons, the substantive bounds of the Pardon Clause have been delineated since the Founding by a combination of presidential practice and Supreme Court interpretation. The section that follows discusses, first, threshold issues defining the varieties of clemency and those eligible to receive its benefits; second, the practice of placing conditions on grants of clemency; and third, the doctrine as to whether clemency grantees must consent before clemency takes effect.

1. *Threshold Issues*

Executive clemency in fact involves a number of actions a President can take to affect criminal or legal sanctions. As is clear from the text of Article II, the President can grant both pardons and reprieves.⁵⁰ A full pardon is the most complete form of relief for someone who breaks the law.⁵¹ A reprieve, by contrast, is the most restricted type of clemency, resulting only in a delay of sentence until a later time.⁵² Beyond the constitutional text, the Supreme Court has also recognized that commutations, amnesties, and remissions all fall under the Pardon Clause. Commutations, unlike pardons, leave intact the judgment of guilt but impose a lesser sentence than that levied by the courts.⁵³ Amnesties are typically issued on a broader scale, usually before conviction.⁵⁴ They blot out the existence of the crime as if it had never been committed, but their effect is practically indistinguish-

⁴⁸ See *id.* at 17–18 (asking if any better officer than the president should have the power, since he had “received such strong proofs of his possessing the highest confidence of the people”); THE FEDERALIST No. 74 (Alexander Hamilton) (noting that one man would be better suited to dispense mercy than a body of men in the legislature).

⁴⁹ See IREDELL, *supra* note 47, at 18 (describing the burden that must be met to exercise the impeachment power).

⁵⁰ U.S. CONST. art. II, § 2.

⁵¹ JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 20 (2009).

⁵² *Id.* Blackstone also noted that reprieves were sometimes employed in the case of a pregnant woman sentenced to death, to give her time to give birth before execution. *Ex parte* United States, 242 U.S. 27, 44 (1916).

⁵³ See *Schick v. Reed*, 419 U.S. 256, 260 (1974) (noting that the power to commute sentences derives from Article II, Section 2 of the Constitution); see also Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 577 (1991) (describing commutations as preserving the moral guilt and original conviction of a sentence, but shortening the sentence typically to render time served or make an offender eligible for parole).

⁵⁴ Kobil, *supra* note 53.

able from a pardon.⁵⁵ Finally, the President can use the pardon power to remit fines and forfeitures to the United States.⁵⁶

Clemency can issue to the benefit of noncitizens. The Supreme Court decided this particular question in *Carlisle v. United States*.⁵⁷ Claimants, subjects of Britain who were domiciled in the United States, brought an action for the proceeds of cotton, which had been seized for their aid of the Confederacy during the Civil War. The claimants argued that the general amnesty granted to those in rebellion against the Union should have applied to them. The Supreme Court agreed, clarifying that aliens could be pardoned as well.⁵⁸ Lower federal courts have held to this line in the twentieth century.⁵⁹

The most elemental threshold requirement for a President to issue any form of clemency is given in the text of Article II itself: The pardon must be “for offenses against the United States.”⁶⁰ Thus, the power is limited to federal crimes of all sorts, but does not extend to state crimes, or to civil offenses in which the federal government is not a party.⁶¹ The Supreme Court has also found that pardonable offenses included not only criminal sanctions stemming from acts of Congress, but also offenses emanating from the judiciary.⁶² The Court, through Chief Justice William Taft, announced this contour to the “offenses” requirement in *Ex parte Grossman*, which found it within the President’s clemency power to commute a sentence for criminal contempt of court.⁶³ “[T]he term ‘offenses’ is used in the Constitution in a more comprehensive sense than are the terms ‘crimes’ and ‘criminal prosecutions.’”⁶⁴

⁵⁵ *Id.*

⁵⁶ *Id.*; see also *The Laura*, 114 U.S. 411, 413–14 (1885) (“[T]he President, under the general, unqualified grant of power to pardon offences against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress.”).

⁵⁷ 83 U.S. 147 (1872).

⁵⁸ See *id.* at 155 (explaining that the claimants “were amenable to the laws of the United States,” and thus, could be pardoned).

⁵⁹ See, e.g., *Vitale v. Hunter*, 206 F.2d 826, 828 (10th Cir. 1953) (upholding commutation with condition that alien face deportation).

⁶⁰ U.S. CONST. art. II, § 2.

⁶¹ HUBBERT, *supra* note 34, at 54.

⁶² See *Ex parte Grossman*, 267 U.S. 87, 116 (1925) (holding that contempt of court is a pardonable offense).

⁶³ *Id.* at 116–17. The Court in dicta distinguished between criminal contempt, which was punitive and thus pardonable, and civil contempt, which was remedial and not pardonable. This tracks Blackstone’s distinction that pardons could not issue for private (i.e., civil) matters. BLACKSTONE, *supra* note 35, at 15.

⁶⁴ *Ex parte Grossman*, 267 U.S. at 117.

Indeed, while a pardon may only be granted after the commission of an eligible offense,⁶⁵ there is no necessity of conviction, or even of indictment. President Gerald Ford, in one of the most notable uses of the power in United States history, ordered “a full, free, and absolute pardon” for any offenses the recently resigned President Richard Nixon had “committed or may have committed or taken part in” during his term of office, all before any judicial proceedings had commenced.⁶⁶ Early executive branch officials recognized that clemency could issue before conviction.⁶⁷ The debate at the Constitutional Convention that proposed and then dropped the words “after conviction” in the Pardon Clause bears out this interpretation.⁶⁸

2. *Conditions*

The Supreme Court has consistently held that Presidents can attach conditions to grants of clemency. Chief Justice John Marshall asserted in 1833 that “[a] pardon may be conditional.”⁶⁹ Just over twenty years later, the Court directly faced the validity of conditional pardons in *Ex parte Wells*.⁷⁰ After William Wells was convicted of murder, President Millard Fillmore commuted his sentence of death “upon condition that he be imprisoned during his natural life.”⁷¹ Wells accepted the pardon but later challenged the condition, arguing in a *habeas corpus* petition that the condition was void and the pardon absolute, allowing Wells to go free. The Court soundly rejected Wells’s claim, drawing upon a long history of the use of conditional pardons by British monarchs and presidents of the United States.⁷² Conditions attached could precede or follow the grant of clemency; an offender’s failure to perform the conditions would render the pardon void and justify reimposition of punishment.⁷³ The Supreme Court broadened the understanding of conditional pardons in *Schick v.*

⁶⁵ See AMAR, *supra* note 7, at 560 n.29 (“Article II did not give presidents general power to pardon crimes before they had occurred—a power of ‘dispensing with’ and ‘suspending’ laws that the English Parliament had pointedly denied the English Crown in the 1689 Bill of Rights.”).

⁶⁶ Proclamation No. 4311, 39 Fed. Reg. 32,601, 32,601–02 (Sept. 10, 1974).

⁶⁷ See Pardons Before Conviction, 2 Op. Att’y Gen. 275 (1829) (advising that, while not necessarily prudent, “[i]t is not denied, however, that cases may exist” in which pardon before conviction “would be proper”).

⁶⁸ 2 FARRAND, *supra* note 10, at 422.

⁶⁹ United States v. Wilson, 32 U.S. 150, 161 (1833).

⁷⁰ 59 U.S. 307 (1855).

⁷¹ *Id.* at 308.

⁷² *Id.* at 310–14.

⁷³ *Id.* at 311–12. Note that this reading of the scope of pardon conditions traces almost exactly Blackstone’s description of the operation of conditions attached to the British king’s pardons. BLACKSTONE, *supra* note 35, at 16.

Reed, holding that the President could specify conditions for lesser punishments that were not authorized by Congress, so long as they did not violate other provisions of the Constitution.⁷⁴

The range of possible pardon conditions is vast. President James Madison granted pardons to some on condition that they join the Navy.⁷⁵ Abraham Lincoln and Andrew Johnson each issued amnesties to those in rebellion during the Civil War on condition that they swear an oath of loyalty to the Union.⁷⁶ Warren Harding pardoned socialist organizer Eugene Debs on condition that Debs come to the capital city to meet with him.⁷⁷ Conditions have also included admonishments to follow the law,⁷⁸ not to associate with people of “evil” character,⁷⁹ and to refrain from drinking alcohol.⁸⁰ The U.S. District Court for the District of Columbia upheld the condition attached to labor leader Jimmy Hoffa’s commutation that he refrain from any organized labor activities for a period of years.⁸¹ Transportation or banishment of aliens was a common condition as well, and has been consistently upheld by federal courts.⁸²

Conditions are not unlimited, however. The Supreme Court’s most recent overview of the Pardon Clause, in *Schick*, clarified that although clemency is an enumerated power fully within executive control, conditions cannot themselves violate other constitutional provi-

⁷⁴ 419 U.S. 256, 264 (1974). The case arose from the conditional commutation of Maurice Schick, who had been convicted of murder while a master sergeant in the Army stationed in Japan. President Eisenhower, upon Schick’s petition, commuted his sentence from the death penalty to life imprisonment, on condition that he never become eligible for parole. Even though the only analogous punishment enacted by Congress allowed for parole in all life sentences, the Court upheld the condition and rejected Schick’s petition for resentencing with parole eligibility. *Id.* at 257–59.

⁷⁵ Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1677 (2001).

⁷⁶ See LINCOLN, *supra* note 14; JOHNSON, *supra* note 14 (describing how Presidents Lincoln and Johnson issued pardons during Reconstruction).

⁷⁷ Krent, *supra* note 75, at 1676.

⁷⁸ *E.g.*, Lupo v. Zerbst, 92 F.2d 362, 363 (5th Cir. 1937) (noting that petitioner’s sentence was “commuted to expire at once on condition that he be law-abiding and not connected with any unlawful undertaking during the period of his present sentence”).

⁷⁹ *Id.* at 364.

⁸⁰ See Krent, *supra* note 75, at 1665 (listing various pardon conditions, including refraining from alcohol).

⁸¹ Hoffa v. Saxbe, 378 F. Supp. 1221, 1225 (D.D.C. 1974).

⁸² See, *e.g.*, Vitale v. Hunter, 206 F.2d 826, 828 (10th Cir. 1953) (“The condition in the commutation [that the defendant not return to the United States] was well within the power of the sovereign”); Kavalin v. White, 44 F.2d 49, 51 (10th Cir. 1930) (“The condition that the person pardoned shall depart from and remain without the state is not illegal.”); see also Schick v. Reed, 419 U.S. 256, 261 (1974) (“[I]t was common [in eighteenth-century Britain] for a pardon or commutation to be granted on condition that the felon be transported to another place, and indeed our own Colonies were the recipients of numerous subjects of ‘banishment.’”).

sions.⁸³ The Court subsequently found that Schick's conditional commutation, which denied eligibility for parole, did "not offend the Constitution."⁸⁴ The Court also found that "[o]f course, the President may not aggravate punishment," restricting the pardon power only to reductions, not increases, in penal sanctions.⁸⁵ Other proposed limits have been presented in dissenting opinions⁸⁶ and among scholars,⁸⁷ although they have yet to sway a majority of the Supreme Court. Despite the limitations announced by the Court, it remains true that "[n]o federal court has ever held any condition invalid."⁸⁸

3. *Consenting to Pardon*

Precedents differ on whether a clemency grantee must consent to a pardon or its conditions for them to take effect. The earliest pardon case, *United States v. Wilson*, unmistakably found consent to be a key element of a pardon's enforcement.⁸⁹ In the twentieth century, the Supreme Court upheld the right to decline a presidential pardon in *Burdick v. United States*.⁹⁰ However, the Court appeared to reverse course little more than a decade later in *Biddle v. Perovich*.⁹¹ Declining to extend *Burdick*, Justice Oliver Wendell Holmes reasoned, "[j]ust as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what

⁸³ *Schick*, 419 U.S. at 267 ("[A pardon's] limitations, if any, must be found in the Constitution itself.").

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See, e.g., id.* at 274 (Marshall, J., dissenting) ("In commuting a sentence under Art. II the Chief Executive is not imbued with the constitutional power to create unauthorized punishments."); *Ex parte Wells*, 59 U.S. 307, 319 (1855) (McLean, J., dissenting) ("The power of commutation overrides the law and the judgments of courts. It substitutes a new, and, it may be, an undefined punishment for that which the law prescribes a specific penalty. . . . I cannot consent to the enlargement of executive power, acting upon the rights of individuals, which is not restrained and guided by positive law.").

⁸⁷ *See, e.g., Krent, supra* note 75, at 1666 (suggesting judicial checks on clemency conditions that "shock[] society's conscience" or "violate[] constitutional restraints on the president's authority").

⁸⁸ *Id.* at 1679.

⁸⁹ 32 U.S. 150, 161 (1833) ("A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered, and if it be rejected, we have discovered no power in a court to force it on him.").

⁹⁰ 236 U.S. 79 (1915). George Burdick, an editor for the *New York Tribune*, had refused to testify about articles connected to illegal activity. *Id.* at 85. The Court followed *Wilson* to hold that "it was Burdick's right to refuse [the pardon]." *Id.* at 94.

⁹¹ 274 U.S. 480 (1927) (Holmes, J.). Perovich, whose death sentence for murder had been commuted to life imprisonment by President Taft, challenged the grant of clemency on the grounds that "it cannot be done without the convict's consent." *Id.* at 485-86.

shall be done. . . . [T]he convict's consent is not required."⁹² One noted study of the pardon power concluded that the split between *Burdick* and *Perovich* could be synthesized in that *full pardons* still required acceptance, but *commutations* did not.⁹³ Analyzing the precedents to date in 1955, then-Attorney General Herbert Brownell, Jr., recognized that the question of assent was a muddled one, but came down on *Perovich*'s side to recommend that the President could constitutionally attach a no-parole provision to a commutation from death to life without obtaining the commuttee's consent.⁹⁴

The divided arguments around consent have their bases in different theoretical justifications for the purposes of pardon.⁹⁵ From earliest articulation in the Supreme Court, Chief Justice Marshall, who found consent to be essential to clemency, described the pardon power as an "act of grace It is the private, though official act of the executive magistrate."⁹⁶ The Court seemed to adopt Marshall's rationale explicitly in *Burdick*.⁹⁷ Yet the Court took a decidedly public-facing turn in the twentieth century. Justice Holmes pointedly wrote in *Perovich*:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.⁹⁸

Thus, because the President deemed the commutation to be in the public interest, an individual's consent takes a back seat to the fundamentally public purpose of pardoning.

C. *Limits on the Pardon Power*

Despite the undoubtedly broad reach of the President's pardon power, there are limitations, some of which have already been mentioned. Presidents cannot pardon in cases of impeachment.⁹⁹ An "offense[] against the United States" must also have been committed; the President cannot preemptively pardon before a crime has

⁹² *Id.* at 486–87.

⁹³ HUBBERT, *supra* note 34, at 69.

⁹⁴ Pardonng Power of the President, 41 Op. Att'y Gen. 251, 258 (1955).

⁹⁵ See generally CROUCH, *supra* note 51, at 28–31 (discussing competing theoretical justifications for pardons); HUBBERT, *supra* note 34, at 22–23 (same).

⁹⁶ *United States v. Wilson*, 32 U.S. 150, 160 (1833).

⁹⁷ *Burdick v. United States*, 236 U.S. 79, 88–91 (1915) (quoting extensively from *Wilson* and concluding that its holding and reasoning required that a presidential pardon be accepted to take legal effect).

⁹⁸ *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

⁹⁹ U.S. CONST. art. II, § 2 (allowing pardon "except in cases of impeachment").

occurred.¹⁰⁰ Clemency is a one-way ratchet that can diminish punishment but does not allow sentences to be increased.¹⁰¹ Pardons also cannot return relinquished offices or reach forfeited property vested in others.¹⁰² The Supreme Court extended this limitation in *Knote v. United States* to money vested in the United States treasury, holding that funds can only be removed from the treasury by an act of Congress.¹⁰³

Politics also form an important limit on the pardon power. Extreme abuse of the pardon authority could be grounds for impeachment, the check the Supreme Court has preferred over hemming in the substantive scope of the Pardon Clause.¹⁰⁴ Future presidents may enforce pardon conditions erratically or fail to do so at all.¹⁰⁵ Politics can also largely explain the overall decline in the use of clemency in the latter half of the twentieth century. As Professor Rachel Barkow has noted, “[a]n elected official—including a President or governor thinking about clemency—quickly realizes that there is little to gain from pursuing any action perceived as soft on crime.”¹⁰⁶

Yet for all these limitations, the power to pardon is decidedly broad, giving the executive exclusive and nearly unfettered prerogative over its use, especially in the face of contrary congressional action. An early case, *Ex parte Garland*, demonstrated this principle.¹⁰⁷ The petitioner, A.H. Garland, had been a member of the Confederate Senate at the time of the South’s surrender to the Union.¹⁰⁸ He received a full pardon in July 1865, but had been barred

¹⁰⁰ *Id.* (allowing pardon only for “offenses against the United States”); see also *supra* note 65 and accompanying text.

¹⁰¹ See *Schick v. Reed*, 419 U.S. 256, 267 (1974) (“Of course, the President may not aggravate punishment; the sentence imposed by statute is therefore relevant to a limited extent.”).

¹⁰² *Ex parte Garland*, 71 U.S. 333, 381 (1866) (“[A pardon] does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.”).

¹⁰³ 95 U.S. 149, 154 (1877). *Knote*, the recipient of a Civil War pardon, sued to claim proceeds from the sale of property that had been confiscated for his cooperation with the Confederacy. *Id.* at 152. The Court rejected his claim because the funds had vested in the treasury, and the pardon power “cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress.” *Id.* at 154.

¹⁰⁴ Indeed, this important check is probably a key reason why the Framers exempted cases of impeachment from the president’s prerogative in the Pardon Clause of Article II. See *Ex parte Grossman*, 267 U.S. 87, 121 (1925) (“Exceptional cases . . . would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.”).

¹⁰⁵ See *Krent*, *supra* note 75, at 1702 (noting that presidential “successors may decline to enforce the conditions imposed or may enforce them in unanticipated ways”).

¹⁰⁶ Barkow, *supra* note 16, at 820.

¹⁰⁷ 71 U.S. 333 (1866).

¹⁰⁸ *Id.* at 375.

from practicing law due to an oath that Congress enacted as a prerequisite to appearing before the federal courts.¹⁰⁹ The oath would have had him state that he had never supported, aided, or served in office in the Confederacy.¹¹⁰ Obviously unable to swear to those claims, Garland sued to set aside the congressional requirement for bar admission.¹¹¹ The Supreme Court found the oath to be an improper legislative encroachment on the plenary pardon powers of the executive. “This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.”¹¹² *Garland* established that the legislative branch could not directly or indirectly encroach on the executive’s ability to grant clemency. The oath, while not explicitly prohibiting clemency, prescribed a punishment (exclusion from the bar) for offenses the pardon meant to forgive. The Court wrote:

If such exclusion can be effected by the exaction of an expurgatory oath covering the offence, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency.¹¹³

The Court expanded on the theme of Congress’s lack of authority over the pardon power in another post-Civil War case, *United States v. Klein*.¹¹⁴ Congress passed a proviso that no pardon received by former Confederates could be admissible in the Court of Claims for property seized during the war. The proviso further stated that acceptance of a pardon for participation in the rebellion would be conclusive evidence of treasonous conduct.¹¹⁵ Beyond finding that Congress’s action impermissibly interfered with the judiciary’s power, the Court held the proviso invalid for “impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.”¹¹⁶ The Constitution, according to the Court, would not allow Congress to “deny to pardons granted by the President the effect which this court had adjudged them to have.”¹¹⁷

¹⁰⁹ *Id.* at 375–76.

¹¹⁰ *Id.* at 376.

¹¹¹ *Id.*

¹¹² *Id.* at 380.

¹¹³ *Id.* at 381.

¹¹⁴ 80 U.S. 128 (1871).

¹¹⁵ *Id.* at 133.

¹¹⁶ *Id.* at 147.

¹¹⁷ *Id.* at 145. More recently, the Supreme Court reiterated, “[T]he history of the English pardoning power, . . . of the language of that clause itself, and of the unbroken

In short, Congress has no ability to curtail or control, directly or indirectly, the President's proper exercise of authority under the Pardon Clause. It is important to note, of course, that the effects of a pardon are not unlimited, as in *Knote*, when the Supreme Court would not allow proceeds of forfeited property vested in the treasury to be returned by virtue of a pardon without an act of Congress.¹¹⁸ But, as one scholar concluded, "*Knote* does not hold, however, that the President's power to issue a pardon could be constrained by Congress through the use of appropriations limitations."¹¹⁹ The substantive pardon power is within the President's sole control.

II

PRESIDENTIAL PARDONS IN THE CONTEXT OF WAR

Clemency is often thought of in an exclusively criminal context.¹²⁰ It is seen as a way to lessen the harshness of the criminal law. More broadly, as Professor Barkow has recently argued, executive clemency is a clear textual commitment of authority that could be used by presidents as a mechanism to control the executive branch's prosecutorial function.¹²¹ Other scholars have also looked to the pardon power not as an ancillary tool to mete out mercy in particularly egregious and rare cases, but as a strong executive function that has and should be used in a larger systematic capacity.¹²²

This Part argues that beyond the criminal law, clemency can and should be viewed as a crucial complement to the President's war-making and national security functions. This claim might appear counterintuitive, as the object of war is often to cause violence and turmoil, while clemency can only be used to reduce the overall harshness of repercussions for individual wrongdoing. On closer look, how-

practice since 1790 compels the conclusion that the power flows from the Constitution alone, . . . and that it cannot be modified, abridged, or diminished by the Congress." Schick v. Reed, 419 U.S. 256, 266 (1974).

¹¹⁸ *Knote v. United States*, 95 U.S. 149, 154 (1877).

¹¹⁹ Todd David Peterson, *Congressional Power over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1250 (2003).

¹²⁰ See, e.g., Barkow, *supra* note 16, at 807 ("[T]he Constitution contemplates explicit presidential decisional authority when it comes to grants of mercy in *criminal cases*." (emphasis added)).

¹²¹ *Id.* at 832 ("The clemency power is a key mechanism for the President to control executive power and the agents of that power, namely, federal prosecutors.").

¹²² Charles Shanor and Marc Miller, for example, concluded that one-third of past presidents had used systematic pardons to address a range of issues on a class-wide basis. Shanor & Miller, *supra* note 15, at 139. Mark Osler and Matthew Fass expanded on Shanor and Miller's thesis with a closer look at President Gerald Ford's clemency board, which processed tens of thousands of clemency applications for Vietnam draft dodging in the span of one year. Osler & Fass, *supra* note 15, at 229.

ever, strong evidence suggests that the pardon power was meant in part to give the President a tool to restore peace and act strategically in warlike contexts. As this Part will show, the text of Article II, the debates of the Framers, and the practice of presidents since the Founding provide compelling examples of why and how the pardon power could be called into service as a tool of the Commander in Chief.¹²³

A. Text of Article II

The first clue that the President's pardon and war powers are connected comes from the text of Article II of the Constitution. The same sentence that names the President as "Commander in Chief" of the armed forces also grants that officer "Power to grant Reprieves and Pardons."¹²⁴ The two powers were listed together from the first draft of the Constitution presented to the Constitutional Convention by the Committee of Detail,¹²⁵ and remained so through the final draft and ratification. Structurally speaking, the Framers spoke of the two powers in the same breath.

A reason for placing both powers together may lie in the particular advantages the Framers saw in a single executive.¹²⁶ Alexander Hamilton dealt with the President's duties as Commander in Chief and his powers of clemency in the same installments of *The Federalist*.¹²⁷ *Federalist No. 74* focused on those unique roles that would be strengthened by the discretion of a single person—waging war and dispensing forgiveness.¹²⁸ As will be developed in Parts II.B

¹²³ It is not the project of this Note to comment on the substantive scope of presidential war powers as manifested in the Commander-in-Chief Clause, the Executive Vesting Clause, or other constitutional grants of explicit executive military or national security authority. Rather, the argument here flows from the substantive pardon power as it has been exercised to advance military and national security aims.

¹²⁴ U.S. CONST. art. II, § 2. Between these two enumerated qualities of the president's power in Article II, Section 2 is the Opinions Clause, giving the executive the right to receive written opinions from the heads of executive departments on subjects relating to their official duties. *Id.*

¹²⁵ See 2 FARRAND, *supra* note 10, at 185 ("He shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment. He shall be commander in chief of the Army and Navy of the United States, and of the Militia of the Several States.")

¹²⁶ See AMAR, *supra* note 7, at 189 (noting the unique abilities of a single president).

¹²⁷ See THE FEDERALIST NOS. 69, 74 (Alexander Hamilton) (titled "The Real Character of the Executive" and "The Command of the Military and Naval Forces, and the Pardoning Power of the Executive").

¹²⁸ THE FEDERALIST NO. 74 (Alexander Hamilton) (observing that waging war "most peculiarly demands those qualities which distinguish the exercise of power by a single hand," and, referring to clemency, that "one man appears to be a more eligible dispenser of the mercy of government, than a body of men").

and II.C, the Founding debates and actual practice since then support the structural intuition that military and clemency powers are rightly linked together.

B. Framers' Debates on Pardon for Treason

Although the Pardon Clause received relatively little attention overall at the Constitutional Convention,¹²⁹ the most extensive discussion it did attract was over the President's power to grant clemency in cases of treason.¹³⁰ Certain delegates to the Convention wanted to remove the President's power to pardon for treason, but the idea faltered when put to a vote.¹³¹ While the reasons for this are somewhat speculative, it is clear that the Framers were well versed in the longstanding British law of treason, which has a provenance nearly as far-reaching as the king's pardoning power.¹³² Treason is the only term defined in the text of the Constitution,¹³³ "consist[ing] only in levying War against the [United States], or in adhering to their Enemies, giving them Aid and Comfort."¹³⁴ The Framers understood the dangers of treason as a warlike act against the nation. Thus, the debate on whether or not to allow the President to pardon in cases of treason is integrally tied to the President's capacity as Commander in Chief.

The initial suggestion in the Constitutional Convention that the President should *not* have power to pardon treason came from Alexander Hamilton. Presenting his own (and otherwise ill-fated) plan for a new form of government on June 18, 1787, Hamilton proposed allowing the executive "to have the power of pardoning all offences except Treason; which he shall not pardon without the approbation of the Senate."¹³⁵ While the Committee of Detail did not adopt

¹²⁹ See *supra* notes 21–30 and accompanying text.

¹³⁰ E.g., 2 FARRAND, *supra* note 10, at 626–27 (debate and vote on treason exception to pardons).

¹³¹ *Id.*

¹³² Compare Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 869 (2006) (noting that "no provision in the Constitution is as rooted in English legal history as the Treason Clause," and that phrases in the Treason Clause "come directly from the treason statute of 25 Edward III, enacted in 1351"), with HUMBERT, *supra* note 34, at 9–10 (tracing the king's power to pardon as far back as 560 AD).

¹³³ Jon Roland, *Hurst's Law of Treason*, 35 UWLA L. REV. 297, 297 (2003).

¹³⁴ U.S. CONST. art. III, § 3.

¹³⁵ MAX FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292 (1911); see also LESLIE ODOM, JR. ET AL., *Non-Stop*, in HAMILTON: AN AMERICAN MUSICAL (Atl. Recording Co. 2015) (suggesting that Hamilton proposed "his own plan for a new form of government" at the Constitutional Convention).

this suggestion in its first full draft of the Constitution,¹³⁶ the seed had been planted.

Delegate from Virginia Edmund Randolph took up the cause on September 10. Among his litany of objections to the proposed governmental framework, one rested “on the . . . unqualified power of the President to pardon treasons.”¹³⁷ Five days later, Randolph proposed to “except cases of treason” from the Committee of Style’s draft of the Pardon Clause in Article II, Section 2.¹³⁸ Randolph argued that allowing the President to pardon treason would be trusting the executive too much: “The President may himself be guilty. The Traytors may be his own instruments.”¹³⁹ But not everyone was convinced. Pennsylvania’s James Wilson thought the (unpardonable) threat of impeaching the President served as a sufficient check on abuse of his clemency authority.¹⁴⁰ Furthermore, he believed that “[p]ardon is necessary for cases of treason, and is best placed in the hands of the Executive.”¹⁴¹ Gouverneur Morris of Pennsylvania and Rufus King of Massachusetts feared that depriving the President of clemency authority would leave pardons to the legislature. “A Legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment,” asserted King.¹⁴² But as a compromise measure, King suggested making clemency a shared power, initiated by the President but “requiring the concurrence of the Senate in Acts of Pardon.”¹⁴³ James Madison landed on a similar proposal.¹⁴⁴ Despite movement toward shared authority, Randolph’s distaste for expanding senatorial power outweighed his concerns over pardons, leading him to oppose the compromise measure on his own proposal that would have split authority between the executive and the Senate.¹⁴⁵ With debate limited as it was, the delegates voted and soundly defeated Randolph’s proposal. Only his home state of Virginia and one other—Georgia—voted to restrict the President’s

¹³⁶ See 2 FARRAND, *supra* note 10, at 185 (disallowing pardons for impeachment, but not for treason, in the draft Pardon Clause).

¹³⁷ *Id.* at 564.

¹³⁸ *Id.* at 626.

¹³⁹ *Id.*

¹⁴⁰ *Id.* (“If he be himself a party to the guilt he can be impeached and prosecuted.”).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 627.

¹⁴⁴ *Id.* Madison’s rationale, however, was a mirror image of King’s. While admitting that legislatures contain deficiencies, Madison felt that “the pardon of treasons was so peculiarly improper for the President” that he would rather “acquiesce in the transfer” of the power to the legislature “than leave it altogether in the hands” of the executive. *Id.*

¹⁴⁵ *Id.* (“Mr. Randolph could not admit the Senate into a share of the power.”). George Mason of Virginia agreed: “The Senate has already too much power.” *Id.*

pardon power in cases of treason.¹⁴⁶ Eight other states voted the motion down.¹⁴⁷

As the battle to establish a new government moved to the ratification phase, Alexander Hamilton defended the constitutional drafters' decision to allow the President to pardon for treason.¹⁴⁸ He expanded on the virtues of a President with the ability to employ clemency during times when the homeland was under threat: "It is not to be doubted, that a single man of prudence and good sense, is better fitted, in delicate conjunctures [like treason], to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatever."¹⁴⁹ The President alone, Hamilton wrote, should wield the pardon pen, precisely as a means to protect the Union in a dire threat:

[T]he principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: in seasons of insurrection and rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.¹⁵⁰

Professor Akhil Amar has identified several aspects of this passage that set out key qualities of the presidency. First, Amar notes, the executive is ever watchful over the security of the nation. Second, the President alone is meant to be a fast actor, precisely the opposite of the slower and deliberative legislative and judicial branches. Finally, the executive plays a "special role in handling crises that might threaten the national tranquility or even the national existence."¹⁵¹ Hamilton elucidated these qualities to justify the President's sole power to pardon; they are also all central to the President's duty as Commander in Chief.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* The states were New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, and South Carolina. Connecticut's vote was recorded as divided. *Id.*

¹⁴⁸ THE FEDERALIST NO. 74 (Alexander Hamilton). Shortly after Hamilton published *The Federalist No. 74*, Gilbert Livingston proposed at the New York ratifying convention to amend the draft Constitution to limit the President's clemency ability, allowing pardon in cases of treason only with the consent of Congress, or a grant of reprieve until Congress could next meet. GILBERT LIVINGSTON, PROPOSED AMENDMENT (July 4, 1788), *reprinted in* FOUNDERS' CONSTITUTION, *supra* note 13, at 17. This amendment provides ample evidence that the President's pardon power over treason was a live issue in the New York debate that Hamilton had sought to influence.

¹⁴⁹ THE FEDERALIST NO. 74 (Alexander Hamilton).

¹⁵⁰ *Id.*

¹⁵¹ AMAR, *supra* note 7, at 189.

James Iredell struck much the same note in his exposition on the clemency power at the North Carolina ratifying convention. He defended the inclusion of treason within the President's pardon prerogative as a way to stop an insurrection from taking hold. If those seduced into rebellion were given the chance for mercy, they might lay down arms rather than continue to fight out of desperation.¹⁵² "Thus, at a critical moment, the President might, perhaps, prevent a civil war."¹⁵³ Iredell even pointed to a real-life example, Shays' Rebellion, which had recently threatened the peace in Massachusetts. The rebels, sensing defeat, had fallen back. "Government, by a wise exercise of lenity, after having shown its power, generally granted a pardon; and the whole party were dispersed."¹⁵⁴

But Iredell also identified another use of the pardon in the context of war: a strategic tool to advance national security interests. Iredell imagined a wartime scenario in which America's intelligence capacity was limited. In that situation, he believed the President could enlist the help of a spy who would pretend to forsake the Union and join the enemy as a double agent. After he "secretly informs the President of the enemy's designs," the spy, by this act, would find "the country saved from destruction."¹⁵⁵ Afterward, the President could justly pardon the spy, even though the populace may revile him for his perceived treachery.¹⁵⁶ Pardons would serve not only as an instrument of mercy, but as a chit available to the executive in prosecuting war.

C. *Presidential Pardons in Warlike Circumstances*

Debates over the necessity of pardoning in warlike situations, such as insurrection, did not remain theoretical for long. Early presidents who had been active civic participants at the time of the Constitution's enactment soon found themselves employing the powers of the newly enacted Pardon Clause in just the circumstances contemplated during ratification. Future presidents established clemency in actual practice as a key corollary to the duty to protect the country.

George Washington, as in so many things, was the first. Congress had put in place a federal excise tax on distilled spirits.¹⁵⁷ A resulting

¹⁵² IREDELL, *supra* note 47, at 18.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (admitting that the people would "not know [that the spy] had rendered them [sic] any service").

¹⁵⁷ Larson, *supra* note 132, at 903. See also THOMAS P. SLAUGHTER, *WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 95–105 (1986) (charting the development and passage of an excise tax on distilled spirits).

insurrection in western Pennsylvania required Washington to bring in federal troops and suppress an armed band of tax resisters.¹⁵⁸ This incident, known to history as the “Whiskey Rebellion,” tested the early capability of the national government to assert its authority over states that had each been accustomed to a greater measure of autonomy before the Constitution.¹⁵⁹ Finally putting an end to the episode, Washington issued a proclamation on July 10, 1795, pardoning the two men who were eventually convicted of treason for their actions.¹⁶⁰ What began in hostility ended in peace, as Washington tracked the blueprint Hamilton had spelled out earlier and extended mercy to restore national authority.¹⁶¹

John Adams followed Washington in using clemency to advance national security goals in yet another insurrection. The Fries Rebellion of 1799 also found its origins in a hated new tax, this time on property.¹⁶² When federal officials entered multiple counties in Pennsylvania to assess the amount due, they faced harassment and protest.¹⁶³ A federal marshal who arrested several of the protestors soon found himself confronted by an armed mob 140-strong, helmed by John Fries, who freed the incarcerated men without violence.¹⁶⁴ Adams’s administration responded by sending 500 troops into the Pennsylvania counties to suppress the revolt.¹⁶⁵ While most of the ninety-one people arrested garnered only short-term jail time or fines, Fries and two others were sentenced to death for treason.¹⁶⁶ But as preparations were underway for the execution, Adams, against the advice of his cabinet,¹⁶⁷ pardoned all those involved in the uprising.¹⁶⁸ Adams’s explicit reasons for the pardon in his proclamation announcing the move were integrally tied up in the reestablishment of federal authority and the futility of pursuing punishment for the rebellion any further.¹⁶⁹ Because the prerequisite conditions of peace and

¹⁵⁸ Larson, *supra* note 132, at 903.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 904; FOUNDER’S CONSTITUTION, *supra* note 13, at 20.

¹⁶¹ See AMAR, *supra* note 7, at 189 (“President Washington would closely follow [Hamilton’s script] in dissolving the Whiskey Rebellion of 1794.”).

¹⁶² Jeffrey S. Dimmig, *Palatine Liberty: Pennsylvania German Opposition to the Direct Tax of 1798*, 45 AM. J. LEGAL HIST. 371, 373 (2001).

¹⁶³ Larson, *supra* note 132, at 905.

¹⁶⁴ Dimmig, *supra* note 162, at 373.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See Larson, *supra* note 132, at 907.

¹⁶⁸ ADAMS, *supra* note 13; see also Dimmig, *supra* note 162, at 373.

¹⁶⁹ See ADAMS, *supra* note 13 (noting that the “insurrection against the just authority of the United States” had been “speedily suppressed;” “peace, order, and submission to the laws of the United States were restored;” and those “misinformed in the counties have returned to a proper sense of their duty”).

restored order had obtained, it had “become unnecessary for the public good that any future prosecutions” commence against the rebels.¹⁷⁰

Washington and Adams employed their constitutional powers under the Pardon Clause in precisely the ways conceived of by those who defended the presidential prerogative to use clemency as a tool in treason and armed conflict to quell disturbances and restore national authority. Other presidents followed suit. James Buchanan, for example, deployed the pardon when Mormon settlers in Utah were tried for treason, offering mercy in exchange for loyalty to the laws and forces of the United States.¹⁷¹

But perhaps the most extensive use of clemency in wartime came during the Civil War and its aftermath. Abraham Lincoln issued widespread amnesties as a tool to restore peace and bring the seceded states back into the Union.¹⁷² The first such proclamation came on December 8, 1863.¹⁷³ Lincoln recognized that some Confederates wished “to resume their allegiance to the United States, and to reinaugurate loyal State Governments”¹⁷⁴ Given that circumstance, the President issued a full pardon to those in rebellion, including restoration of property (excepting slaves), “upon the condition that every such person shall take and subscribe an oath” of loyalty to the Union.¹⁷⁵ This proclamation applied to all except higher-ranking officers of the Confederate military and civilian government, and those who had left government or military posts in the Union to join the Confederacy.¹⁷⁶ That same day, Lincoln sent a message to Congress announcing the proclamation and seeking to reassure legislators that he had acted within his authority: “The Constitution authorizes the Executive to grant or withhold the pardon at his own absolute discretion, and this includes the power to grant on terms, as

¹⁷⁰ *Id.*

¹⁷¹ See JAMES BUCHANAN, PROCLAMATION—REBELLION IN THE TERRITORY OF UTAH (Apr. 6, 1858), <http://www.presidency.ucsb.edu/ws/?pid=68308>; 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, 209 & n.84 (1999).

¹⁷² See LINCOLN, *supra* note 14 (asserting that Lincoln’s proclamation of amnesty was intended to serve as “a mode in and by which the National authority and loyal State governments, may be re-established within said States”); Kobil, *supra* note 53, at 593–94 (citing Lincoln and Johnson’s amnesties as a “use of clemency to restore tranquility to the nation”). For a detailed treatment of pardons during and after the Civil War, see JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON (1953).

¹⁷³ LINCOLN, *supra* note 14.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

is fully established by judicial and other authorities.”¹⁷⁷ The Supreme Court later endorsed the amnesty, acknowledging that the condition of swearing the loyalty oath had “the purpose of restoring peace and establishing the national authority.”¹⁷⁸

President Andrew Johnson continued Lincoln’s policy of granting far-reaching amnesties to bring order to the Union in the wake of the bloodiest period in American history. Johnson reiterated Lincoln’s original proclamation shortly after the latter’s assassination, albeit with fewer restrictions, on May 29, 1865.¹⁷⁹ This amnesty included the same condition of acceptance—an oath of loyalty.¹⁸⁰ Johnson promulgated another such mass pardon two years later, on September 7, 1867, to all but three groups of Confederate offenders.¹⁸¹ Ultimately, on Christmas Day 1868, Johnson granted “a full pardon and amnesty . . . without exception, unconditionally and without reservation, to all who had participated in the rebellion, with restoration of rights of property as before. No oath was required.”¹⁸² The Supreme Court found each of these amnesties valid.¹⁸³ The final, unconditional grant of clemency effectively ended still-festering legal uncertainty and tension for members of the former Confederacy. Johnson’s pardons helped sew the final stitches to reknit the Union back together.

War-related clemency was not merely a relic of nineteenth century America; such practice has extended into the modern day, particularly in postwar circumstances. Theodore Roosevelt pardoned individuals for participating in the Philippine rebellion in 1902.¹⁸⁴ Harding pardoned jailed offenders of World War I laws that criminalized sedition and espionage.¹⁸⁵ Calvin Coolidge pardoned army and

¹⁷⁷ ABRAHAM LINCOLN, ANNUAL MESSAGE TO CONGRESS (Dec. 8, 1863), *reprinted in* AVALON PROJECT, http://avalon.law.yale.edu/19th_century/john_chap_01.asp (last visited Sept. 16, 2016).

¹⁷⁸ *United States v. Klein*, 80 U.S. 128, 141 (1871).

¹⁷⁹ *See id.* (exempting only certain persons included in fourteen cases); *see also* JOHNSON, *supra* note 14 (containing President Johnson’s order of amnesty).

¹⁸⁰ *See Klein*, 80 U.S. at 141 (“All who embraced this offer were required to take and subscribe an oath of like tenor with that required by the first proclamation.”).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 141–42. The Court also found valid the restoration of property rights, which, for most of the time in question, had been congressionally authorized. Although Congress later repealed the restoration-of-property provision, the Court found that the seized assets had never vested in the Treasury, and thus the pardon had the power to release them back to their original owners. *Id.* at 142.

¹⁸⁴ THEODORE ROOSEVELT, PROCLAMATION 483—GRANTING PARDON AND AMNESTY TO PARTICIPANTS IN INSURRECTION IN THE PHILIPPINES (July 4, 1902), *reprinted in* AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=69569>; Shanor & Miller, *supra* note 15, at 140.

¹⁸⁵ Shanor & Miller, *supra* note 15, at 140.

navy deserters after Armistice Day, November 11, 1918.¹⁸⁶ Harry Truman established an Amnesty Board in the aftermath of World War II to review individual violations of the Selective Training and Service Act of 1940 and to recommend worthy cases for clemency.¹⁸⁷ Gerald Ford, winding down the massively unpopular Vietnam War, established a clemency board to review cases individually and elevate meritorious claims for pardon or commutation.¹⁸⁸ The board eventually recommended more than 14,500 cases to the President's desk.¹⁸⁹ Jimmy Carter likewise issued systematic clemency for draft dodgers who violated the Vietnam-era Selective Service Act.¹⁹⁰ The tradition of national-security clemency has continued to the present day, as President Obama granted clemency to seven Iranians on American soil in exchange for American prisoners held in Iran.¹⁹¹

In essence, American presidents have honed the pardon power as a tool to shore up national security and address warlike situations since the Founding. They have called upon clemency as a crucial instrument for enhancing and complementing their role as Commander in Chief. This view of the pardon, often overlooked, should be seen as central to the Pardon Clause's function within Article II and the Constitution generally.

III

GUANTÁNAMO DETAINEES AND PRESIDENTIAL CLEMENCY

The clemency authority may again aid the President's commander-in-chief role by helping to fulfill an early and top priority of the Obama administration: emptying cells at the Guantánamo Bay Naval Base in Cuba.¹⁹² Indefinite wartime detention persists despite moral,¹⁹³ fiscal,¹⁹⁴ and national security¹⁹⁵ rationales all supporting a

¹⁸⁶ *Id.*

¹⁸⁷ See Nida & Spiro, *supra* note 171, at 211 & n.104 (noting Truman's pardons and citing Truman's Order establishing the Amnesty Board, Exec. Order No. 9814, 11 Fed. Reg. 14,645 (Dec. 25, 1946)).

¹⁸⁸ Exec. Order No. 11,803, 39 Fed. Reg. 33,297 (Sept. 17, 1974) (Ford's Order establishing the Clemency Board); see also Osler & Fass, *supra* note 15, at 229 (discussing Ford's approach to the application review process).

¹⁸⁹ Osler & Fass, *supra* note 15, at 229.

¹⁹⁰ Exec. Order No. 11,967, 42 Fed. Reg. 4393 (Jan. 24, 1977).

¹⁹¹ See Josh Gerstein, *Obama Grants Clemency to Seven in Iran Deal*, POLITICO (Jan. 16, 2016, 3:38 PM), <http://www.politico.com/blogs/under-the-radar/2016/01/iran-deal-obama-grants-clemency-to-seven-217879> (discussing Obama's use of clemency powers to advance international negotiations).

¹⁹² See Exec. Order No. 13,492, *supra* note 1, at 4898 (calling for Guantánamo review and closure).

¹⁹³ See, e.g., *President Obama's Address to Congress*, N.Y. TIMES (Feb. 24, 2009), <http://www.nytimes.com/2009/02/24/us/politics/24obama-text.html> ("To overcome extremism, we must also be vigilant in upholding the values our troops defend . . . [T]hat is why I have

call for its end. Congress has made matters even more difficult by enacting significant barriers to the transfer of detainees and closing the base. The National Defense Authorization Act for Fiscal Year 2016 (NDAA) prohibited the use of any funds to transfer or release detainees into the United States, to build out or update any domestic facilities to house them, to transfer detainees to certain other countries, to realign forces at the military prison, or to close it entirely.¹⁹⁶

These restrictions notwithstanding, noted professionals and scholars have suggested that the President has the executive authority to close Guantánamo unilaterally. Obama's first White House Counsel Gregory Craig and former special envoy for Guantánamo closure Cliff Sloan co-wrote a high-profile op-ed claiming that Obama has power under Article II to "determine the facilities in which military detainees are held."¹⁹⁷ Professor Harold Koh, former Dean of Yale Law School and top State Department lawyer, has suggested that congressional appropriations have unconstitutionally infringed on the President's Article II powers, thus rendering the NDAA restrictions invalid.¹⁹⁸ Even the President himself has left open the question of whether he has the authority to act alone on Guantánamo.¹⁹⁹

But to date, a crucial, robust, and exclusive presidential tool has been left out of the discussion. Should President Obama fail to persuade Congress to lift the NDAA restrictions, and thus decide to take unilateral executive action, he would stand on much surer constitu-

ordered the closing of the detention center at Guantánamo Bay and will seek swift and certain justice for captured terrorists . . .").

¹⁹⁴ See, e.g., Press Briefing, President Barack Obama, Press Conference by the President (Dec. 18, 2015, 2:06 PM), <https://www.whitehouse.gov/the-press-office/2015/12/18/press-conference-president-121815> ("I think we can make a very strong argument that it doesn't make sense for us to be spending an extra \$100 million, \$200 million, \$300 million, \$500 million, a billion dollars, to have a secure setting for 50, 60, 70 people.").

¹⁹⁵ See, e.g., Press Release, President Barack Obama, Statement by the President (Nov. 25, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/25/statement-president> [hereinafter Signing Statement] ("As I have said before, the continued operation of [the Guantánamo detention] facility weakens our national security by draining resources, damaging our relationships with key allies and partners, and emboldening violent extremists.").

¹⁹⁶ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726, §§ 1031–33, 1036 (2015). The NDAA also reenacted procedures that force the Secretary of Defense to certify any detainee transfers to foreign countries and to notify Congress at least thirty days before any transfer takes place. *Id.* § 1034.

¹⁹⁷ Craig & Sloan, *supra* note 18.

¹⁹⁸ Koh, *supra* note 18. The argument proceeded along the lines of *United States v. Lovett*, 328 U.S. 303 (1946), in which congressional use of appropriations power unconstitutionally acted as a bill of attainder.

¹⁹⁹ See Davis & Baker, *supra* note 3 ("We will wait until Congress has definitively said no [to closing Guantánamo] before we say anything definitive about my executive authority here.").

tional ground by using conditional pardons than by merely invoking presidential war powers. Such clemency grants could be structured as pardons conditioned on transfer abroad or serving a fixed term of years in the United States, followed by release to detainees' home countries or transfer to other secure locations. This Part will briefly profile the detainees remaining at Guantánamo. Then, it will present the argument for deploying executive clemency to empty most, if not all, cells at Guantánamo, signaling an end to this enduring symbol of the war on terror.

A. *Detainees Remaining at Guantánamo*

As of this writing, sixty-one detainees remain at Guantánamo Bay.²⁰⁰ Of those, there are twenty-eight Yemenis, six Saudis, six Pakistanis, five Afghans, and sixteen from various other nations, including those with dual citizenship.²⁰¹ Those left comprise a small fraction of the approximately 780 who were detained in the years after the September 11, 2001, al-Qaeda terror attacks.²⁰²

The remaining detainees are classified under various categories. When President Obama first signed the order to close Guantánamo, he also initiated the Guantánamo Review Task Force to examine each prisoner's case and determine the best way forward.²⁰³ The Task Force had four choices for future disposition: release, prosecution, transfer to a foreign country, and continued indefinite law-of-war detention.²⁰⁴ Of those slotted into the fourth category, law-of-war detention, some were deemed "too dangerous to transfer but not feasible for prosecu-

²⁰⁰ See *The Guantánamo Docket*, *supra* note 2 (detailing the profiles of all Guantánamo detainees, past and present).

²⁰¹ See *id.* (listing detainees currently held by citizenship).

²⁰² See *id.* (showing roughly 780 people sent to Guantánamo Bay since 2002).

²⁰³ See CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY* 103 (2015); see also GUANTANAMO REVIEW TASK FORCE, *FINAL REPORT* (2010), <https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf> (relating the process and decisions reached for the 240 detainees subject to review). The Task Force comprised representatives of the Departments of Justice, State, Defense, and Homeland Security, the Office of the Director of National Intelligence, and the Joint Chiefs of Staff. *Id.*

²⁰⁴ SAVAGE, *supra* note 203, at 103. The Supreme Court upheld this last category in 2004, finding that Congress authorized such detention in its 2001 Authorization for Use of Military Force (AUMF). *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004). "Enemy combatants" could be held until the hostilities authorized by Congress had ended, however long that may be. *Id.* at 521 ("The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'" (internal citation omitted)).

tion.”²⁰⁵ Others, all from Yemen, were placed in “conditional” detention because of “the current security environment in that country.”²⁰⁶

The majority of remaining detainees have been held under the Task Force’s fourth category: indefinite law-of-war detention. There are twenty detainees held in confinement who are listed for transfer if security conditions improve, most of whom are Yemeni.²⁰⁷ Another thirty-one also fall into the law-of-war classification, but have either been recommended for prosecution in military commissions or deemed by the Executive Branch to be too dangerous to release.²⁰⁸ Seven detainees have been charged in the military commissions system and are undergoing prosecution.²⁰⁹ Three others have been convicted in that system.²¹⁰

B. Detainees Eligible for Clemency

To apply the framework of executive clemency to the last detainees at Guantánamo Bay, certain threshold issues must be satisfied. As this analysis will show, many—but not all—detainees will be eligible to receive clemency.

As a general matter, all detainees are foreign citizens. Supreme Court precedent has established that noncitizens can benefit from clemency.²¹¹ Beyond that, detainees’ eligibility to receive clemency will depend on whether they committed a cognizable crime.²¹² The Pardon Clause only grants the President authority to alleviate “offenses against the United States.”²¹³ Therefore, the President would have to articulate the crime that each detainee had committed and for which they would be pardoned. For the ten detainees who

²⁰⁵ GUANTANAMO REVIEW TASK FORCE, *supra* note 203, at ii.

²⁰⁶ *Id.* The Yemenis were, however, eligible for transfer to other countries. *See id.* (stating that, while not approved for repatriation until the memorandum on transfers to Yemen is lifted, the thirty Yemenis may go to third countries). The unstable conditions in Yemen provided one of the largest early challenges to closing Guantánamo, as many of those Yemenis left in detention posed little to no risk and represented some of the weakest cases for prosecution. SAVAGE, *supra* note 203, at 104.

²⁰⁷ *See The Guantánamo Docket, supra* note 2 (listing the current detainees held in law-of-war detention recommended for transfer).

²⁰⁸ *See id.* (listing the current detainees held in indefinite law-of-war detention not recommended for transfer). The Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574, enacted the most current procedures for trying detainees in military commissions.

²⁰⁹ *See The Guantánamo Docket, supra* note 2 (listing current detainees charged).

²¹⁰ *See id.* (listing current detainees convicted).

²¹¹ *See Carlisle v. United States*, 83 U.S. 147, 154 (1872) (holding that clemency can apply to noncitizens); *supra* notes 57–59 and accompanying text (discussing *Carlisle*).

²¹² *See supra* notes 60–64 and accompanying text (discussing the requirement that one must have committed an offense to be eligible for clemency).

²¹³ U.S. CONST. art. II, § 2.

either have been convicted or are currently undergoing prosecution, this requirement does not present a problem. They could be pardoned for the crimes for which they were found guilty or are alleged to have committed.²¹⁴ Even those who have been recommended for prosecution, and there are several,²¹⁵ could probably receive clemency for the crimes in their prosecution recommendations, thus satisfying this requirement.

The “offenses” matter is not so straightforward for other detainees, however. Several detainees have been named too dangerous to release but unfit for prosecution. These detainees, who are in indefinite law-of-war detention, can be divided into two main groups. First, there are those who have committed cognizable crimes, but who cannot be prosecuted under normal court rules because the evidence against them was obtained via torture.²¹⁶ The number of this category is not publicly known, and may be quite small.²¹⁷ The second group involves those for whom no credible evidence of a crime exists.²¹⁸

This second group belies an important implication of the threshold “offenses” analysis: Not all detainees at Guantánamo may qualify for clemency. Of the detainees who are slated for continued incarceration, those against whom the government could not name a specific crime committed will likely be ineligible to receive a presidential pardon.²¹⁹ For the short term, detainees who cannot benefit from

²¹⁴ There is no requirement of a conviction—only commission of a crime is necessary. *See supra* notes 65–68 and accompanying text (describing the long recognition that conviction was not necessary to pardon, including President Ford’s pardon of President Nixon for crimes he had “committed or may have committed” before an indictment issued).

²¹⁵ *See The Guantánamo Docket, supra* note 2 (listing detainees recommended for prosecution).

²¹⁶ *See SAVAGE, supra* note 203, at 106 (noting that the evidence against some detainees would be tainted because they had been tortured).

²¹⁷ Torture has been revealed as the basis for failure to prosecute at least one confirmed case of a Guantánamo detainee. *See* Bob Woodward, *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, WASH. POST (Jan. 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html> (“His treatment met the legal definition of torture. And that’s why I did not refer the case for prosecution.” (internal quotation marks omitted)). The detainee, Mohammad al Qahtani, remains imprisoned in Cuba despite having been recommended for prosecution by the Guantánamo Review Task Force in 2010. *The Guantánamo Docket, supra* note 2 (detainee profile of Mohammad al Qahtani).

²¹⁸ The original Task Force review found many detainees lacking links to a specific terrorist plan or criminal act. *SAVAGE, supra* note 203, at 106.

²¹⁹ It is possible that pardons could still issue, as President Ford pardoned Richard Nixon for crimes that he “may have committed or taken part in” before indictment. *See supra* note 66 and accompanying text. However, the Nixon pardon did not require removing anyone from detention. Given the high stakes and close scrutiny such a move

clemency may have to remain in Guantánamo pending congressional authorization of alternative funding.²²⁰

Nevertheless, some of these detainees could arguably be pardoned under certain crimes that would bring them within the ambit of executive clemency. The government has repeatedly attempted to prosecute detainees for the crime of “providing material support to terrorists.”²²¹ Congress added this catchall terrorism crime to the first version of the Military Commissions Act in 2006, and kept it in the 2009 reenactment.²²² The charge has run into difficulties, however. In 2014, the D.C. Circuit, sitting en banc, found that the Military Commissions Act’s material support offenses violated the Constitution’s prohibition on *ex post facto* laws as applied in that case (where the alleged wrongdoing occurred well before the law’s passage in 2006).²²³ So, for any detainee who might be pardoned for the offense of providing material support, their alleged conduct must have taken place after Congress passed the law in 2006.

A more fruitful alternative to satisfy the “offenses” requirement would be the crime of conspiracy, which is included in the material support law but has other analogues enacted long before the start of the war on terror.²²⁴ The government has run into problems prosecuting this crime as well, but not because the crime itself is not cognizable. Rather, the D.C. Circuit recently prevented the government from prosecuting conspiracy *in military commissions*.²²⁵ But this holding does not halt the argument for clemency. One concurring judge in that case even noted that the government could instead try those cases in civilian courts, for “[f]ederal courts hand down

would receive, the Guantánamo context would probably require naming the pardonable offense with particularity.

²²⁰ But, as will be shown in Section III.E, *infra*, this distinction may create a situation in which it is politically untenable for Congress to maintain restrictions on closing the prison.

²²¹ See 18 U.S.C. § 2339A (making it an offense to provide material support to terrorists); see also *id.* § 2339B (making it an offense to provide material support or resources to designated foreign terrorist organizations).

²²² See SAVAGE, *supra* note 203, at 496 (noting that Congress kept “material support” in the 2009 revision of the Military Commissions Act).

²²³ See *Al Bahlul v. United States*, 767 F.3d 1, 29 (D.C. Cir. 2014) (en banc) (“We therefore think it was a plain *ex post facto* violation . . .”).

²²⁴ See 18 U.S.C. §§ 2339A–2339B (each including an *actus reus* of conspiracy).

²²⁵ *Al Bahlul v. United States*, 792 F.3d 1, 3 (D.C. Cir. 2015) (vacating conviction of inchoate conspiracy). Traditionally, military courts have jurisdiction only over internationally recognized laws of war, of which conspiracy is not one. See *id.* at 22 (“For more than seventy years the Supreme Court has adhered to the definition of the law of war articulated in *Quirin*, [317 U.S. 1 (1942)], which the government concedes does not prohibit conspiracy.”). Since there was insufficient historical practice to show that military commissions could hear *domestic* crimes—which include conspiracy—the D.C. Circuit held that charging for conspiracy in military court violated Article III separation of powers. *Id.*

thousands of conspiracy convictions each year, on everything from gun-running to financial fraud to, most important here, terrorism.”²²⁶ Important for clemency is not which court has jurisdiction, but whether a crime has occurred. All of those detainees who *could* be tried in civilian courts for conspiracy, even if they have *not*, would fulfill the “offenses” requirement.

For some prisoners, the problem for clemency eligibility may not be naming the offense, but the method by which the President determines they committed a pardonable crime. The most incriminating evidence against some detainees most likely came from torture.²²⁷ Indeed, tainted evidence has kept some cases out of both civilian and military court.²²⁸ Despite these difficulties, the President theoretically could use evidence obtained from illegal interrogations to determine that a detainee had committed a particular crime, making the detainee eligible for clemency. But would using that evidence be justified? The answer to this moral quandary is largely beyond the scope of this Note, but a few considerations should be mentioned. The President would almost certainly attach strict conditions to control the pardoned detainee, perhaps even exposing that person to many more years of confinement and resettlement in a country other than his original home.²²⁹ If a detainee who had been tortured, or who faced incriminating evidence against him stemming from the torture of another, found these conditions truly merciful (better than hopeless, indefinite imprisonment), then use of torture-tainted evidence might be justified. But if the detainee rejected these conditions, or if the President sought to use clemency merely to confine him someplace other than Guantánamo for a long time, using evidence originating in torture could seem unethical, even if its use were strictly legal.²³⁰

C. Structure of Pardons Granted

Given a pool of pardon-eligible detainees, the delicate question remains of how the President would structure a grant of clemency.

²²⁶ *Id.* at 27 (Tatel, J., concurring).

²²⁷ See *supra* notes 216–17 and accompanying text (describing such a group of detainees).

²²⁸ See SAVAGE, *supra* note 203, at 106 (noting the inability to prosecute some detainees with torture-tainted evidence against them).

²²⁹ For more on this part of the argument, see *infra* Section III.C.

²³⁰ The use of torture-tainted evidence created a great internal debate when the Obama administration instituted a parole-like board at Guantánamo in 2013. See SAVAGE, *supra* note 203, at 508–10. Perhaps the best course would be that which the Obama administration reportedly decided to pursue with the parole board: “[I]f tainted evidence would help a detainee, it should remain” as part of the clemency consideration. *Id.* at 510.

There are multiple options for the type of clemency he might issue.²³¹ While several of them are off the table,²³² the most viable route would be through conditional pardons. The appropriate conditions would depend on the classification of the detainee in question. For those recommended for transfer, the best condition of pardon may be transfer to a designated country, either the detainee's home country or another, along with any other conditions aligning with the Department of Defense's usual security protocol for transfers. For those too dangerous to release, the President could offer pardon on condition of serving a fixed term of years in a facility within the United States, perhaps to be followed by a condition of transfer to another country at the President's discretion.²³³

Certain limits would, of course, apply. The President "may not aggravate punishment" with a grant of clemency,²³⁴ but compared to the total indeterminacy of their current detention, a condition of, say, ten years' imprisonment could well be seen as less severe than detainees' present situation, which, for example, prevents detainees from being airlifted to an advanced hospital in the case of a medical emergency.²³⁵ The President may not violate other constitutional provisions through conditional pardons.²³⁶ However, the Supreme Court has long recognized that pardon grantees may waive certain bene-

²³¹ See *supra* notes 50–56 and accompanying text.

²³² Commutations reduce sentences already given, but they probably cannot lessen sentences that were never ordered, even when dealing with law-of-war prisoners detained indefinitely. See HUMBERT, *supra* note 34, at 27 ("The essential fact [of commutation] is that [the president] puts in the place of the punishment imposed by the Court a less severe one."). An amnesty would be inappropriate since the case of each Guantánamo detainee is unique and would require individual review and identification of their specific crime. There are no fines to remit. A reprieve could delay prosecution for those not yet charged, but this may not be desirable; not all detainees have proven prosecutable, so there might not be anything to reprieve. See *supra* notes 216–18 and accompanying text (noting problems prosecuting certain detainees).

²³³ More on the implications of these conditions on Congress's appropriations ban can be found *infra* Section III.D.

²³⁴ See *Schick v. Reed*, 419 U.S. 256, 267 (1974) (explaining that, while statutorily-imposed sentences may have limited relevance, the Constitution does not limit the president's power to attach conditions to commutation of any sentence).

²³⁵ See SAVAGE, *supra* note 203, at 525 (noting that "the congressional ban on bringing any Guantánamo detainee onto domestic soil made no exception for a medical crisis"). Note also what this proposal does *not* include: a condition of indefinite detention elsewhere. Since pardons are not allowed to increase punishment, it would be best to decrease the treatment detainees currently receive from indefinite confinement to a fixed term of years. See *supra* note 234 and accompanying text.

²³⁶ See *Schick*, 419 U.S. at 266–67 (concluding that the president is permitted to attach any condition that is not itself constitutionally objectionable).

fits.²³⁷ A recent review of pardon conditions argues that clemency grantees “generally should be able to barter away constitutional rights.”²³⁸ Further, it remains the case that a condition has never been struck from a grant of pardon.²³⁹ The odds of successfully attaching a wide array of conditions are therefore high; defeating one of them would be an unprecedented event in American jurisprudence.

The conditions the executive would attach to any pardon of a Guantánamo detainee could conform to the President’s policy priorities, and the range of acceptable conditions is undeniably broad.²⁴⁰ The condition of transportation has a particularly stellar pedigree.²⁴¹ But conditions could do more than just deal with moving detainees out of Guantánamo. They could address claims of high recidivism from released Guantánamo prisoners,²⁴² such as a prohibition on associating with known terrorists or traveling to certain countries.²⁴³ The President would have the duty to enforce violated conditions, which may entitle the President to re-detain the pardoned person in the United States indefinitely.²⁴⁴ This may prove quite difficult,²⁴⁵ especially if enforcement required finding individuals in far-flung corners of the world; but the possibility of enforcing broken conditions might reassure the public that tight security measures were still in place even after pardons were granted.

A difficulty might remain if the President has to obtain consent from each clemency grantee at Guantánamo before the conditional

²³⁷ *E.g.*, *United States v. Wilson*, 32 U.S. 150, 161 (1833) (“A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment.”).

²³⁸ Krent, *supra* note 75, at 1693.

²³⁹ *See supra* note 88 and accompanying text (describing that no federal court has ever held any condition invalid).

²⁴⁰ *See supra* notes 75–82 and accompanying text (describing the vast range of acceptable conditions).

²⁴¹ *See supra* note 82 and accompanying text (noting the history of a condition of banishment and removal from Britain to colonial America).

²⁴² *See SAVAGE, supra* note 203, at 550–51 (outlining the dispute over the Guantánamo recidivism rate in congressional hearings, ranging from six percent to thirty percent).

²⁴³ Such conditions have been upheld in domestic pardon cases. *See, e.g.*, *Lupo v. Zerbst*, 92 F.2d 362, 363 (5th Cir. 1937) (commutation conditioned on abiding all laws for period of present sentence).

²⁴⁴ *See Krent, supra* note 75, at 1677 (“If conditions were attached to pardons, then presidents were duty bound to ensure that their terms were enforced.”).

²⁴⁵ Attorney General William Wirt sensed this difficulty early in the republic. “There is, however, great danger lest a conditional pardon should operate as an absolute one, from the difficulty of enforcing the condition, or in case of a breach of it, resorting to the original sentence of condemnation; which difficulty arises from the limited powers of the national government.” 1 Pardons, Op. Att’y Gen. 341, 342 (1820).

pardons took effect.²⁴⁶ Then again, two possibilities suggest that this difficulty would not amount to much. First, it is possible that current detainees would agree to a fixed term of confinement, in the United States or elsewhere. Certainty about the length of their detention might prompt detainees to take the deal. Second, even if no consent is obtained, it is not clear in the law that consent is necessary. Earlier precedents indicate that consent is required.²⁴⁷ However, more recent precedent suggests otherwise.²⁴⁸ Even if we were to accept a distinction made by the scholar W.H. Humbert that full pardons required consent, but commutations did not, we would still be in a gray area, as the present scenario includes a conditional pardon.²⁴⁹ In adopting the rationale of *Biddle v. Perovich*, though, a strong case could be made that consent is not necessary.²⁵⁰ This precedent has been interpreted in similar fashion before.²⁵¹ Obtaining consent from all eligible detainees would not then prove a barrier to effectuating clemency.

D. Impact on Congressional Appropriations

In his statement accompanying the signing of the National Defense Authorization Act of 2016, President Obama asserted, “Under certain circumstances, the provisions in this bill concerning detainee transfers would violate constitutional separation of powers principles.”²⁵² If Obama used his pardon pen to remove detainees from Guantánamo, the NDAA would probably do just as the signing statement portended, at least as applied to the clemency recipients.

Clemency would largely allow the President to bypass the funding restrictions as an indirect infringement on the executive’s constitutional prerogative to pardon.²⁵³ Congress cannot impinge the broad

²⁴⁶ See *supra* notes 89–94 and accompanying text (describing conflicting precedents on the necessity of consent from clemency grantees).

²⁴⁷ See, e.g., *United States v. Wilson*, 32 U.S. 150, 161 (1833) (“A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance.”); *Burdick v. United States*, 236 U.S. 79, 94 (1915) (same).

²⁴⁸ See *Biddle v. Perovich*, 274 U.S. 480, 485 (1927) (finding acceptance of conditional pardon should be presumed “in the absence of prompt and unequivocal rejection”).

²⁴⁹ See HUMBERT, *supra* note 34, at 69 (analyzing and attempting to synthesize the conflict in precedents regarding consent).

²⁵⁰ *Perovich*, 274 U.S. at 486–87 (“Just as the original punishment would be imposed without regard to the prisoner’s consent . . . , the public welfare, not his consent, determines what shall be done.”).

²⁵¹ E.g., *Pardoning Power of the President*, 41 Op. Att’y Gen. 251, 258 (1955) (reasoning that “*Perovich* logically compels the conclusion” that the president can attach conditions without securing consent).

²⁵² Signing Statement, *supra* note 195.

²⁵³ See *supra* notes 107–19 and accompanying text.

presidential power to grant pardons.²⁵⁴ This means that Congress can neither directly bar the President from issuing pardons, nor, as is relevant in the NDAA context, stop a presidential pardon through indirect means. It would be especially clear that the NDAA unconstitutionally infringed on the presidential pardon power if the Guantánamo funding prohibitions were considered as *adding punishment* to the prisoners' detention.²⁵⁵ "It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency."²⁵⁶ Conditional pardons could alleviate the harsh conditions at Guantánamo prescribed by the NDAA, and allow the President to read the restrictions out of the statute for clemency grantees.

However, the President would almost certainly have to locate other, already-appropriated funds to carry out clemency. The Supreme Court has limited the pardon power just enough to remove from the President's grasp the ability to release funds from the treasury without congressional authorization.²⁵⁷ It would probably be possible to find money in general Department of Defense funds. Still, such a burden may induce caution before using clemency to help close Guantánamo.²⁵⁸ Finally, for those detainees who cannot get the benefit of clemency, discussed in Section III.B, the NDAA limitations would remain in full force.

²⁵⁴ See, e.g., *Schick v. Reed*, 419 U.S. 256, 266 (1974) ("[T]he power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."); *Ex parte Garland*, 71 U.S. 333, 380 (1866) ("This power of the president is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.").

²⁵⁵ Indeed, human rights groups have lambasted the NDAA restrictions for promoting inhumane treatment of detainees. See Letter from Coalition of 14 Human Rights Organizations to Congressional Representatives (Sept. 30, 2015), https://www.hrw.org/sites/default/files/supporting_resources/9-30-15_coalition_letter_urgng_no_vote_on_ndaa_conference_bill.pdf. See also *supra* note 235 and accompanying text (noting that NDAA restrictions "made no exception for a medical crisis").

²⁵⁶ *Garland*, 71 U.S. at 381.

²⁵⁷ *Knote v. United States*, 95 U.S. 149, 154 (1877) ("The Constitution places [a] restriction on the pardoning power" whereby it cannot reach the treasury without an act of Congress.).

²⁵⁸ This is especially true since proceeding without clear appropriations could put those called into service to implement the clemency conditions, plus the president himself, at risk of violating the Anti-Deficiency Act, 31 U.S.C. § 1341 (making it illegal to "make or authorize an expenditure or obligation exceeding an amount available in an appropriation").

E. Political Considerations

Beyond the legislative branch hurdle, the President would also have to contend with the political consequences of using clemency at Guantánamo, perhaps the greatest challenge to invoking the pardon power in this context.²⁵⁹ In the current administration, the lame-duck period may present the best opportunity to act. The President would still be imbued with constitutional authority while freed of political pressures usually attendant to the presidency. Indeed, this time period has been floated as a potential window for President Obama to act on Guantánamo.²⁶⁰ Should he go forward, it is possible that the next President might object and try to repopulate the prison. But it is just as likely that the new President would consider the matter concluded.²⁶¹

What about those detainees who prove beyond the reach of executive clemency, those with too little hard evidence of having committed an offense against the United States? If the President succeeded in moving all conditionally pardoned detainees out of the prison, the only people left would be those with the weakest rationale behind their detention. Presumably, this group would comprise some of the lower-level individuals who got caught up in the fog of war and whose release was justified long ago. Even if there were individuals perceived to be more dangerous in this remaining group, the fact remains that they have been held for more than a decade without any cognizable connection to a specific crime. With a concentration of the least justifiable inmates as the only remaining inhabitants of Guantánamo, the political rationalization of their continued detention could quickly become untenable. This circumstance would flip the script on the political strategy envisioned by the Obama administration,²⁶² but would come to the same end. The “optimistic scenario was

²⁵⁹ This Note makes no attempt to assess all, or even many, of the political aspects of granting clemency at Guantánamo; the goal here is a more modest legal analysis. Rather, I address political considerations to acknowledge head-on the obvious challenges to using this presidential tool in a polarized political environment, and to offer preliminary thoughts.

²⁶⁰ *E.g.*, SAVAGE, *supra* note 203, at 552 (“It seemed conceivable that Obama might eventually—say, sometime after the November 2016 election and before the January 2017 inauguration of his successor—command the Pentagon to bring all the remaining detainees to a military prison inside the United States *despite the ban.*”).

²⁶¹ Indeed, this is what President Obama himself thought would have happened if he had moved more swiftly upon taking office and closed the prison. “I think I would have closed Guantánamo on the first day,” said Obama. “I think in that first couple of weeks we could have done it quicker.” SAVAGE, *supra* note 203, at 130.

²⁶² The administration’s plan has been to move the lowest-level detainees out of the prison, leaving only a small number of high-value but non-prosecutable people at the base. *Id.* at 529.

that the spectacle of such astronomical waste, along with the smaller psychological burden of dealing with merely a two-digit inmate population, would persuade Congress to relent and lift the ban on bringing the remaining detainees to a domestic-soil prison.”²⁶³ The clemency strategy could produce much the same result.

Although the politics are daunting (imagine “Guantánamo” and “pardon” in the same headline), if the President has the will, this Note has endeavored to show that there is a legally defensible way to move many, if not all, detainees from Cuba. And that way is grounded not in the ill-defined interstices of the commander-in-chief power, as some have suggested, but in the much more solidly supported and robustly developed constitutional prerogative of pardon.

CONCLUSION

Should President Obama grant clemency to substantially diminish the population at Guantánamo, the move is bound to be viewed as novel. But the President can lean on the long history of predecessors who used this uniquely honed tool of the executive in situations much like the one America finds itself in at this juncture in the war on terror.²⁶⁴ This Note has sought to show that the longstanding and well-developed parameters of clemency should rightly be seen as complementing and enhancing the President’s role as Commander in Chief of the armed forces. When called upon to establish peace, quell hostilities, and return the nation to a sense of tranquility, the pardon power has been used time and again to heal wounds and close bloody chapters of our past. Those detained at Guantánamo have undergone an ordeal unknown in domestic American criminal law: indefinite lock-up without certain prospects for release, charges, or timely prosecution. Applying clemency to diminish this potent symbol of America’s “forever war”²⁶⁵ would be a fitting way for the President to close out this chapter as well.

²⁶³ *Id.*

²⁶⁴ See *supra* Section II.C (analyzing the history of presidential pardons in warlike contexts).

²⁶⁵ Harold Hongju Koh, *How to End the Forever War?*, Remarks at the Oxford Union 2, 9–11 (May 7, 2013), <https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf> (listing Guantánamo closure as one of three main priorities for ending the “forever war”).