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THE REPRIEVE POWER: MAY THE UNIFORM CODE OF MILITARY JUSTICE LIMIT EXECUTIVE CLEMENCY?

*Captain Nino C. Monea**

Abstract

Article 57 of the Uniform Code of Military Justice states the President “may commute, remit, or suspend the sentence, or any part thereof, as the President sees fit. That part of the sentence providing for death may not be suspended.” This seemingly contradicts Article 2 of the United States Constitution, which states that the President “shall have the power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” This Article looks at whether the power to “reprieve” offenses includes the power to suspend sentences, including military sentences, and concludes that it does. The historical definition of “reprieve,” historical practice of presidents, state court interpretations of similar language, and legislative history of Article 57 all indicate that the President may suspend sentences and Congress may not stop him. For practical reasons, challenging Article 57 would be difficult, but a court would likely declare it unconstitutional if a challenge was ever brought.

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I. INTRODUCTION

The Constitution states that the President of the United States “shall have the power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”¹ In essence, a *reprieve* is the temporary suspension of a sentence, and a *pardon* is a permanent reduction or elimination of a punishment. Together, the reprieve power and pardon power make up the President’s clemency powers.²

Executive clemency goes back a ways. The Bible is replete with references to God’s infinite power to forgive,³ but earthly rulers were not always so lucky. Roman kings could not pardon, as that was a power reserved for the community alone.⁴ By the time of eighth-century England,⁵ however, the clemency power was firmly entrenched with the executive.⁶ Blackstone called it the “most amicable prerogative of the crown.”⁷ Emerich de Vattel in *The Law of*

¹ U.S. CONST. art. II, § 2, cl. 1.

² *Herrera v. Collins*, 506 U.S. 390, 411 n.12 (1993).

³ *See, e.g.*, 2 *Chronicles* 30:18–20; *Jeremiah* 5:1; *Jeremiah* 33:8.

⁴ ANDREW STEPHENSON, *A HISTORY OF ROMAN LAW* 75 (1912). Later, Roman emperors gained pardon power. *Id.* at 488.

⁵ *Herrera*, 506 U.S. at 412.

⁶ *See* 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 112 (1922).

⁷ Kings of Spain and France also had pardon powers. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 374 (1867).

Nations called it “one of the attributes of sovereignty.”⁸ Sir Edward Coke called it the power upon which “the law of England grounded.”⁹

In the United States, it is more than a private act of benevolence, clemency is “a part of the Constitutional scheme.”¹⁰ It represents a determination that the public will is best served by a reduction in harshness.¹¹ In this way, it acts as the “fail safe” of our criminal justice system.¹²

Mercy, as has been said, “is twice blest: It blesseth him that gives and him that takes.”¹³ For the recipient of the pardon, it is easy to see why. A pardon not only saves the recipient from the punishment, it rips out the crime root and stem. Through a pardon, the offender is made “a new man,” and he is acquitted “of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon.”¹⁴

But so, too, does the grantor benefit. By operation of the “sceptre of mercy,” the pardon power “endear[s] the sovereign to his subjects.”¹⁵ Montesquieu said that “[m]atters of grace are of excellent use in moderate governments.”¹⁶ Wise governments may use mercy to produce “admirable effects” while despotic ones withhold the privilege.¹⁷ Coke said, “Mercy and truth preserve the king, and by clemency is his throne strengthened.”¹⁸ In America, a light touch was applied to leaders of an early revolt to help preserve the fragile government.¹⁹

In the military, it is a different matter. Or, at least, Congress would like to have it that way. The Uniform Code of Military Justice (“the Uniform Code”) purports to curb the President’s power of mercy. If a court-martial sentences a defendant to death, Article 57 states the President “may commute, remit, or

⁸ EMERICH DE Vattel, *THE LAW OF NATIONS* 82 (Philadelphia, T. & J.W. Johnson & Co. 1758).

⁹ 3 EDUARDO COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 233 (London, W. Clarke 1809).

¹⁰ *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

¹¹ *Id.*

¹² *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

¹³ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

¹⁴ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *402.

¹⁵ 2 WILLIAM BLACKSTONE, *COMMENTARIES* *397–98.

¹⁶ 1 *THE COMPLETE WORKS OF M. DE MONTESQUIEU* 118 (n.p. 1777).

¹⁷ *Id.*

¹⁸ 3 COKE, *supra* note 9, at 233.

¹⁹ JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 284 (John M. Gould ed., 14th ed. 1826) (noting that the “unprovoked and wanton” Shay’s Rebellion did not result in “inflicting a single capital punishment” on any of the perpetrators, which contributed to the “firm establishment of” the American government).

suspend the sentence, or any part thereof, as the President sees fit. That part of the sentence providing for death may not be suspended.”²⁰

On its face, the limitation is bizarre. As the Commander-in-Chief of the military, the President has broad authority to deploy military assets—often without Congressional approval. In over 220 uses of military force in American history, only five have been Congressionally sanctioned wars.²¹ The total number of unauthorized uses of presidential force would doubtless be higher if the figure included shows of military force meant to intimidate.²² When military force is applied, there is a certainty of death, not only for soldiers, but for civilians too. And of course, the President has authority over the nuclear codes—the authority, in other words, to end all life on earth. How can he have such awesome power to inflict death, yet lack the power to forestall death?²³

There may be some policy rationale for it all. If a death sentence were suspended, it could hang over the head of the accused like the sword of Damocles. Some might call that a fate worse than death. Perhaps Congress wanted to stop the President from suspending all death sentences *en masse*, as several state governors have recently done.²⁴ Or maybe Congress just wanted to speed up a death row process that is marked by long delays and late-game commutations.

Legal analysis does not end with whether it is good policy, however. A statute cannot limit a power bestowed by the Constitution. So far, this question has gone unlitigated. Defendants have brought challenges against Article 57 under a theory that it violated the Ex Post Facto Clause,²⁵ Article 55 of the Uniform Code,²⁶ and the Eighth Amendment.²⁷ None have raised the issue of the clemency power.

This should shock no one. In order to challenge Article 57 for an improper encroachment upon the President’s clemency power, a fairly unlikely

²⁰ 10 U.S.C.A. § 857(a)(3) (West 2020). Federal law also prohibits court-martial convening authorities from suspending a sentence of death. *Id.* § 860a(b).

²¹ Gary D. Solis, *Military Commissions and Terrorists*, in *EVOLVING MILITARY JUSTICE* 195, 198 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002). The five declarations of war were for the War of 1812, the 1847 Mexican-American War, the 1898 Spanish-American War, World War I (1917), and World War II (1941). *Id.*

²² LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 259 (5th ed. 2007).

²³ Ordinarily, the president has greater power to show mercy than vengeance. See LOUIS FISHER, *MILITARY TRIBUNALS & PRESIDENTIAL POWER* 38–39 (2005).

²⁴ Maeve Reston, *California Governor Signs Executive Order Stopping State’s Death Penalty for Now*, CNN (Mar. 13, 2019, 6:38 PM), <https://www.cnn.com/2019/03/12/politics/gavin-newsom-california-death-penalty/index.html>.

²⁵ *United States v. Hughes*, 48 M.J. 700, 723–24 (A.F. Ct. Crim. App. 1998); *United States v. Jackson*, 45 M.J. 656, 660 (A.F. Ct. Crim. App. 1997).

²⁶ *United States v. Smith*, 47 M.J. 630, 632 (A. Ct. Crim. App. 1997).

²⁷ *United States v. Fields*, 74 M.J. 619, 623 (A.F. Ct. Crim. App. 2015).

scenario would have to play out. First, the President might offer a reprieve to a death row inmate, only for the inmate to try to reject it. This may sound farfetched, but it has happened at least once in the last few years.²⁸ Maybe the inmate would prefer a swift execution to a drawn out reprieve.²⁹ Alternatively, the President might tell the inmate that he would give a reprieve, but then refused because of Article 57, and the inmate challenged the decision. Finally, the President might offer a condemned prisoner a reprieve, only to have Congress try to block him. Whether Congress, or a member of Congress, would have standing to sue is dicey.³⁰ At present, there are four men on death row in the military justice system, any one of whom could potentially have his death sentence suspended.³¹

This topic is worth exploring even if one believes that it would be unwise to suspend a death sentence. If Article 57 is constitutionally void, the only option policymakers would have to guarantee no inmate has a suspended death penalty would be to abolish the military death penalty altogether.

As this Article will go on to show, the Uniform Code unconstitutionally infringes upon the President's clemency powers. Part I examines the reprieve power. A reprieve means to delay the execution of a sentence, usually but not always a death sentence, and usually but not always for a set period of time. Because the plain language of the Constitution expressly assigns the President the power to suspend death sentences, Congress may not rob him of that power. To buttress the point, this Part examines the broader concept of executive clemency. Writings on the pardon power suggest that the President has near-absolute power and discretion when it comes to grants of mercy.

Part II looks to history—both legislative and practical. When drafting the Constitution, the Framers intended the President's clemency power to be stronger than the Crown's and stronger than the states'. When drafting the Uniform Code, Congress essentially admitted that it was probably violating the Constitution in passing Article 57. Article 57 also stands in stark contrast to 200

²⁸ See *Haugen v. Kitzhaber*, 306 P.3d 592 (Or. 2013).

²⁹ As Socrates said before quaffing a goblet of hemlock, "But now it is time to go, I to die and you to live. Which of us goes to a better thing is unclear to everyone except to the god." PLATO'S APOLOGY OF SOCRATES 49 (Thomas G. West trans., Cornell University Press 1979).

³⁰ See *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 877 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981) (declaring that a congressional plaintiff lacks standing unless the injury was such that their colleagues could not redress it); *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977) (holding that a representative did not have standing to sue in a challenge to certain activities of the Central Intelligence Agency). *But see* *Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) (finding that a congressional plaintiff had standing to challenge a tax statute); *Kennedy v. Sampson*, 511 F.2d 430, 433 (D.C. Cir. 1974) (stating a senator could have standing if an executive action "nullified" his vote).

³¹ Kyle Rempfer, *What Death Row Executions May Mean for These Four Soldiers at Leavenworth*, ARMY TIMES (July 30, 2019), <https://www.armytimes.com/news/your-army/2019/07/30/what-death-row-executions-may-mean-for-these-four-soldiers-at-leavenworth/>.

years of precedent. All the way back in 1775, commanders-in-chief had unchecked clemency authority in the military, and presidents were not shy about exercising it.

Part III considers the two strongest counterarguments: (1) allowing the President to suspend a death sentence could violate the Eighth Amendment if it left the penalty hanging over the defendant for an indefinite period, and (2) Congress has supremacy over the military, which gives it the power to limit reprieves in this context. Neither argument holds up under scrutiny.

Part IV concludes. It offers a simple legislative tweak to Article 57 to remove the constitutional deficiency.

II. OPERATION OF THE CLEMENCY POWER

A. *The Reprieve Power Allows the President To Suspend a Sentence*

The Constitution gives the President two powers of mercy: the power to pardon and the power to reprieve. The President's reprieve power is a "seldom discussed and poorly understood form of clemency."³² Understood or not, it is one of the few powers explicitly given to the President. Joseph Chitty's renowned treatise on criminal law (1819) tells us, "The term reprieve is derived from *reprendre*, to keep back, and signifies the withdrawing of the sentence for an interval of time, and operates in delay of execution."³³ The delay could be for a definite or indefinite time.³⁴

At common law, there were three types of pardon power:³⁵ (1) *es mandato regis*, discretionary grant of mercy "from the mere pleasure of the crown," (2) *ex arbitrio judicis*, those "at, in or upon the discretion of the judge," and (3) *ex necessitate legis*, those "from or by necessity of law," those granted by operation of law when carrying out an execution would be inhumane.³⁶ The Uniform Code targets the first type, discretionary executive reprieves.

A modern definition of "reprieve" is "to delay the punishment of (someone, such as a condemned prisoner)."³⁷ The 1979 edition of Black's Law Dictionary said a reprieve "does no more than stay the execution of a sentence

³² Timothy Kane, Jesse Abrams-Morley & Eric Motylinski, *Preserving "The Character of Mercy": Commonwealth v. Williams and the 300-Year History of the Reprieve Power in Pennsylvania*, 23 WIDENER L. REV. 95, 97 (2017).

³³ 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 757 (New York, Banks, Gould & Co. 1866).

³⁴ *Id.*

³⁵ *Commonwealth v. Williams*, 129 A.3d 1199, 1212 (Pa. 2015).

³⁶ For example, postponing the execution of a pregnant woman until after she has given birth. CHITTY, *supra* note 33, at 758.

³⁷ *Reprieve*, MERRIAM-WEBSTER.COM, <http://merriam-webster.com/dictionary/reprieve> (last visited Sept. 25, 2020).

for a time, and is ordinarily an act of clemency extended to a prisoner to afford him an opportunity to procure some amelioration of the sentence imposed.”³⁸ Modern writers use the word “reprieve” to describe suspended death sentences.³⁹ Looking at older definitions, we see the term has held steady over time. Early definitions include the following:

- (1768): “Respite after sentence of death.”⁴⁰
- (1775): “a Warrant for the suspending the Execution of a Malefactor.”⁴¹
- (1828): “A temporary suspension of the execution of a sentence, especially of a sentence of death.”⁴²
- (1913): “The temporary suspension of the execution of a capital offender.”⁴³

Most definitions use “reprieve” as synonymous with “suspension of sentence,” though some authorities quibble on this point.⁴⁴ In the main, however, these definitions explicitly mention that reprieve means suspending a sentence. Indeed, many talk about a *death* sentence. Some commentators argue that a reprieve applies *only* to capital cases.⁴⁵ The accepted definition of reprieve at the time of the Constitution’s inception, and a good while before and after, would have allowed a death sentence to be suspended. Presidents often suspended death sentences.⁴⁶

³⁸ *Williams*, 129 A.3d at 1208.

³⁹ *E.g.*, Bob Egelko & Alexei Koseff, *California Governor Will Suspend Death Penalty with Executive Order*, GOVERNING (Mar. 13, 2019), <https://www.governing.com/topics/public-justice-safety/tns-california-death-penalty-reprieves.html>; Reston, *supra* note 24.

⁴⁰ SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768). The same definition is found in JOHNSON & WALKER’S DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1828).

⁴¹ NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1775).

⁴² *Reprieve*, WEBSTER’S DICTIONARY (1928). This definition was still in use in 1884. *Butler v. State*, 97 Ind. 373, 376 (1884).

⁴³ *Reprieve*, WEBSTER’S DICTIONARY (1913).

⁴⁴ *Snodgrass v. State*, 150 S.W. 162, 165 (1912); *In re Buchanan*, 40 N.E. 883, 886 (1895) (“[A] reprieve postpones the execution of the sentence to a day certain, whereas a suspension is for an indefinite time.”). *But see Clifford v. Heller*, 42 A. 155, 159 (N.J. 1899) (stating a “reprieve was simply a suspension of the sentence”).

⁴⁵ *Butler v. State*, 97 Ind. 373, 376 (1884) (citing 1 JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE § 1299 (Boston, Little, Brown, & Co. 1880)); CHITTY, *supra* note 33, at 522.

⁴⁶ [Untitled], ABINGDON VIRGINIAN, May 30, 1873, at 2 (stating that President Grant suspended a death sentence for one week).

Though extremely rare to be actually carried out today,⁴⁷ the death penalty was once common. In colonial America, it was death to steal grapes, kill a chicken, strike one's parents, trade with Indians, or deny the "true God."⁴⁸ That was still more generous than England, which had over 200 capital crimes, including stealing, cutting down a tree, and robbing a rabbit warren.⁴⁹ English law also mandated that the execution take place only two days after the judgment.⁵⁰ It got so bad that in Pennsylvania, reformers started arguing for an end to mandatory death sentences as a means to *deter* crime, since skittish juries were unwilling to convict criminals for minor offenses when they knew the consequence would be death.⁵¹

The ubiquity of death sentences in England led to the misconception that reprieves *only* apply in capital cases. Since there were so many capital offenses in England, and they could be appealed to the king for mercy, the sovereign was kept so busy dealing with reprieves for capital cases that he delegated the power to grant reprieves in lesser cases to the courts. This led to the theory that the executive could *only* pardon in capital cases, but in truth, the king always reserved the authority to reprieve in any case.⁵²

Usage of the term "reprieve" in legal practice was entirely consonant with dictionary definitions. Sir William Blackstone defined "reprieve" as "the withdrawing of a sentence for an interval of time, whereby the *execution is suspended* . . . [these] arbitrary reprieves may be granted or taken off."⁵³ He also recounts historic examples of death sentences being suspended through reprieves: pregnant women could have an execution stayed until they gave birth.⁵⁴ John Norton Pomeroy, a dean of NYU Law School, explained in 1868 the reprieve power meant being able to suspend any sentence.⁵⁵ In 1909, William Smithers and George Thorn wrote, "A reprieve is the suspension, postponement or delay of a sentence and is commonly understood to mean only a temporary

⁴⁷ Executions have been declining just about everywhere. Only 2% of counties in the U.S. are responsible for a majority of all executions. Michael J. Zydney Mannheimer, *The Coming Federalism Battle in the War over the Death Penalty*, 70 ARK. L. REV. 309, 330 (2017).

⁴⁸ *Introduction to the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty> (last visited Oct. 11, 2019).

⁴⁹ *Id.*

⁵⁰ Brief of Plaintiff-Respondent at 80, *Haugen v. Kitzhaber*, 306 P.3d 592 (Or. 2013) (No. S060761).

⁵¹ Morgan Baskin, *The Death Penalty in America: A Lethal History*, PAC. STANDARD (Apr. 27, 2018), <https://psmag.com/magazine/the-death-penalty-in-america-a-lethal-history>.

⁵² *State ex rel. Stafford v. Hawk*, 34 S.E. 918, 918 (W. Va. 1900).

⁵³ 2 WILLIAM BLACKSTONE, COMMENTARIES *394 (emphasis added).

⁵⁴ *Id.*

⁵⁵ JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 455 (New York, Hurd & Houghton 1876).

respite.”⁵⁶ Writing on the Pennsylvania governor’s pardon power (which is weaker than the President’s), they said, “there is no limitation upon the number or nature of reprieves he may grant.”⁵⁷

Courts have accepted definitions of “reprieve” along the same lines. The Ohio Supreme Court defined a reprieve as “the temporary suspension by the Governor of the execution of a sentence” and said the common law meaning of the term was “not materially different.”⁵⁸ The Oregon Supreme Court consulted various sources to define “reprieve” as “[a] temporary suspension of the execution of a sentence, especially of a sentence of death, or the order or warrant for such suspension” or “the withdrawing of a sentence for an interval of time whereby the execution is suspended.”⁵⁹ Nearly a century later, the same court recanvassed the literature to conclude “most definitions merely note that a reprieve is temporary and delays execution of the recipient’s sentence.”⁶⁰ In *Clifford v. Heller*,⁶¹ the New Jersey Supreme Court said, “the term ‘reprieve,’ as used both in the constitution and in the statute, is merely the postponement of the sentence for a time.” “A reprieve does no more than stay the execution of a sentence for a time,” said the Supreme Court of Errors of Connecticut.⁶²

By the principles set down by military courts, the matter should end here. “It is a fundamental tenet of statutory construction to construe a statute in accordance with its plain meaning.”⁶³ When the meaning of a statute is plain, it “will control unless it is ambiguous or leads to an absurd result.”⁶⁴ Military courts “do not resort to legislative history to cloud a statutory text that is clear,”⁶⁵ though they might consult history to confirm.⁶⁶

The meaning of reprieve here is plain as plain can be. It not only *includes* suspension of a death sentence, it is arguably *solely for* suspension of a death

⁵⁶ WILLIAM SMITHERS, TREATISE ON EXECUTIVE CLEMENCY IN PENNSYLVANIA 67–68 (1909) (citing various dictionaries).

⁵⁷ *Id.* at 78.

⁵⁸ State *ex rel.* Gordon v. Zangerle, 26 N.E.2d 190, 194 (Ohio 1940).

⁵⁹ *Ex parte* Dormitzer, 249 P. 639, 640 (Or. 1926); *see also* Fehl v. Martin, 64 P.2d 631, 632 (Or. 1937) (“[A] ‘reprieve’ is the withdrawing of a sentence for an interval of time, which operates in delay of execution.”); State v. Finch, 103 P. 505, 511 (Or. 1909) (“[A] reprieve is a respite from a sentence of death.”).

⁶⁰ Haugen v. Kitzhaber, 306 P.3d 592, 598 (Or. 2013).

⁶¹ Clifford v. Heller, 42 A. 155, 159 (N.J. 1899).

⁶² Palka v. Walker, 198 A. 265, 267 (Conn. 1938).

⁶³ Loving v. United States, 62 M.J. 235, 240 (C.A.A.F. 2005).

⁶⁴ United States v. Williams, 75 M.J. 663, 666 (A. Ct. Crim. App. 2016) (citing United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007)); *accord* United States v. Finch, 73 M.J. 144, 149 n.6 (C.A.A.F. 2014); United States v. Schell, 72 M.J. 339, 343 (C.A.A.F. 2013).

⁶⁵ United States v. Wilson, 73 M.J. 529, 531 (A.F. Ct. Crim. App. 2014) (quoting Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994)).

⁶⁶ *Id.* (quoting Darby v. Cisneros, 509 U.S. 137, 147 (1993)).

penalty. Article 57 of the Uniform Code flatly contradicts the plain meaning of the Constitution.

Various courts analyzing the reprieve power have found it to be vast. Military courts have expounded on the President's authority to grant reprieves and pardons to servicemembers.⁶⁷ Clemency powers in the military, like everywhere else, are only useful if the person wielding them has discretion over when to use them.⁶⁸

State courts have acknowledged the strength and reach of the reprieve power many times. Two men in Pennsylvania were sentenced to death. Several years after the state supreme court certified execution warrants for the condemned, the governor of Pennsylvania failed to issue the warrants.⁶⁹ Under the death penalty law, once the supreme court certified an execution, it was sent to the governor for careful study, with the length of the study period within his reasonable discretion, after which the governor "shall issue a warrant."⁷⁰ In the case, the court concluded that there was no rational basis for the governor to sit on the cases for about half a decade, and thus, the law's command that he "shall" issue an execution warrant had to be carried out.⁷¹ In response, the governor argued that the reprieve power allows him to indefinitely defer an execution by not acting on it.⁷²

The court said that the governor lacked a "silent reprieve" power. An act of clemency contemplates an act, not a failure to act. Thus, to exercise the reprieve power, the governor would need to proactively issue a reprieve.⁷³ Though this conclusion went against the governor, it did not deny that he had the power to delay executions—merely that he had to be upfront about it.⁷⁴ Indeed, the Pennsylvania Supreme Court said, "If any governor desires to relieve a defendant from the prospect of execution of sentence, that executive should do so, presumably for an expressed reason and for a defined time period."⁷⁵

In another Pennsylvania case, there was a question of whether the governor exceeded his reprieve power when he granted a temporary stay of execution to a death row inmate. After years of litigation, Terrance Williams had his death warrant approved by then-Governor Tom Corbett on January 13, 2015,

⁶⁷ Schick v. Reed, 483 F.2d 1266, 1268 (D.C. Cir. 1973).

⁶⁸ *Ex parte* Grossman, 267 U.S. 87, 121 (1925).

⁶⁹ Morganelli v. Casey, 646 A.2d 744, 745 (Pa. Commw. Ct. 1994).

⁷⁰ *Id.*

⁷¹ *Id.* at 746.

⁷² *Id.*

⁷³ *Id.* at 747.

⁷⁴ See also Morganelli *ex rel.* Commonwealth v. Casey, 641 A.2d 674, 678 (Pa. Commw. Ct. 1994).

⁷⁵ Morganelli v. Casey, 646 A.2d 744, 747 (Pa. Commw. Ct. 1994).

scheduling the execution March 4.⁷⁶ But on February 13, Tom Wolf assumed the governorship and granted a reprieve for the execution, promising to do the same for all future executions due to shortcomings with the death penalty.⁷⁷ The district attorney sued in a bid to end Williams' life, arguing that the governor could not negate an entire criminal penalty—death—due to his views that such punishment was flawed.⁷⁸

The state supreme court noted that there was no direct textual limitation on the reprieve power. It looked to historical definitions to declare that *reprieve* was commonly understood to mean “the suspension, postponement or delay of a sentence” or “a temporary respite.”⁷⁹ Reprieves, while temporary, were “unburdened by specific restrictions as to duration or scope.”⁸⁰ The power, therefore, “encompassed any temporary postponement of sentence.”⁸¹ Any restraint on the governor's power would need to be imposed by the constitution.⁸²

Interpreting the Pennsylvania Constitution—which has similar language about executive reprieve power—the state attorney general concluded “the Governor has exclusive authority and unfettered discretion to grant a reprieve after imposition of sentence and on a case by case basis.”⁸³ This analysis comported with the historical practice of governors of the Keystone State, who issued reprieves freely, broadly, and without explanation.⁸⁴

In Oregon, Gary Haugen was convicted and sentenced to death for aggravated murder. He decided not to appeal. An execution date was set. But the governor issued a reprieve to suspend the sentence during his term as governor. Haugen tried to reject the reprieve, but to no avail. He challenged the involuntary reprieve as invalid, and a lower court agreed.⁸⁵ Upon review in the state's supreme court, the reprieve was held to be valid and effective.

Other Oregon cases came to similar conclusions. Though there was some dispute about the exact extent of the reprieve power, that the executive “had the power to reprieve or suspend sentence in any case of necessity, there cannot be the least doubt.”⁸⁶ A separate case from 1958 said that if no restrictions were

⁷⁶ Commonwealth v. Williams, 129 A.3d 1199, 1202 (Pa. 2015).

⁷⁷ *Id.*

⁷⁸ *Id.* at 1203.

⁷⁹ *Id.* at 1214.

⁸⁰ *Id.* at 1215.

⁸¹ *Id.*

⁸² *Id.* at 1216.

⁸³ Brief of Respondent at 13, Commonwealth v. Williams, 129 A.3d 1199 (Pa. 2015) (No.14 EM 2015) (internal quotations omitted).

⁸⁴ *Id.* at 36–40.

⁸⁵ Haugen v. Kitzhaber, 306 P.3d 592, 594 (Or. 2013).

⁸⁶ *Ex parte* Dormitzer, 249 P. 639, 640 (Or. 1926) (quoting *State ex rel. Stafford v. Hawk*, 34 S.E. 918, 918 (W. Va. 1900)).

placed on clemency “the constitution [] confers unlimited power on the Governor to grant reprieves.”⁸⁷ That same court later rejected an argument that reprieves need to have a definite termination date or specified purpose.⁸⁸ This was because governors and presidents had long “granted reprieves for a wide range of reasons, including political, personal or private reasons, and that nothing suggested that a reprieve had to be granted for one particular reason.”⁸⁹

In *State ex rel. Stafford v. Hawk*,⁹⁰ the Governor of West Virginia granted a reprieve of a prison sentence to allow the defendant time to file an appeal to the West Virginia Supreme Court of Appeals. The governor’s reprieve was challenged on the basis that he could only grant reprieves in capital cases, despite the fact that the state constitution simply provided he could “grant reprieves and pardons after convictions.”⁹¹

After canvassing relevant English history, the court concluded that the governor “is clothed with the king’s prerogative in this respect, except wherein it is plainly limited by the Constitution. Hence he has the power to reprieve in all cases of felony where necessity requires his intervention.”⁹² His decisions were not reviewable by the courts.⁹³

The Ohio Supreme Court said the reprieve power “is intrusted to the governor for merciful and beneficent purposes, and no construction should be put upon this constitutional provision that will prevent him from freely using the power of reprieve for the purposes intended.”⁹⁴ There are other state cases vindicating the use of a reprieve to delay a death sentence.⁹⁵ But the thrust of the caselaw is apparent: the reprieve power is sweeping and brooks few restrictions.

B. *The Clemency Power Is Not Subject to Legislative, or even Judicial, Control*

Through the Uniform Code of Military Justice, Congress purports to limit the President’s power to grant reprieves. This it cannot do. One of the foundational principles of our government is the separation of powers. As Montesquieu said, there are three branches of government, and if the one branch

⁸⁷ *Eacret v. Holmes*, 333 P.2d 741, 744 (Or. 1958).

⁸⁸ *Haugen*, 306 P.3d at 592.

⁸⁹ *Id.*

⁹⁰ 34 S.E. 918 (W. Va. 1900).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Sterling v. Drake*, 29 Ohio St. 457, 465 (1876).

⁹⁵ *E.g.*, *State v. Green*, 55 P.2d 1324, 1327 (Utah 1936); *Mallory v. Chapman*, 122 S.E. 884, 886 (Ga. 1924).

usurps power from the others, “there can be no liberty.”⁹⁶ Adhering to this conception of government, the Framers set out a distinct branch of government in each of the first three articles of the Constitution and equipped each branch with unique powers.⁹⁷

Though not a pardon case, *Marbury v. Madison* recognized the President’s authority to exercise his discretionary powers without interference by Congress.⁹⁸ The Court said that in the execution of discretionary powers, the President “is accountable only to his country in his political character, and to his own conscience.”⁹⁹ This principle still holds true today in the Court.¹⁰⁰

President Abraham Lincoln made his views on this question clear, saying in his 1863 State of the Union message, “the Constitution authorizes the Executive to grant or withhold pardon at his own absolute discretion.”¹⁰¹ Courts agree. Writing on the pardon power in *Ex parte Garland*, the Court said, “[t]his power of the President is not subject to legislative control.”¹⁰² The legislature can neither limit the effect nor reach of a pardon.¹⁰³ “The benign prerogative of mercy” of the President “cannot be fettered by any legislative restrictions.”¹⁰⁴ The passage or repeal of a law relating to pardons has no effect on the operation of executive clemency.¹⁰⁵ This is because “[t]o the executive alone is intrusted the power of pardon; and it is granted without limit.”¹⁰⁶ More recently, the Court of Appeals for the D.C. Circuit summarized, “[t]he courts have stated many times that Congress cannot control or regulate the action of the President in granting pardons or commutations.”¹⁰⁷

⁹⁶ 1 THE COMPLETE WORKS OF M. DE MONTESQUIEU, *supra* note 16, at 198–99.

⁹⁷ *United States v. Klein*, 80 U.S. 128, 147 (1871) (“It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others.”).

⁹⁸ 5 U.S. (1 Cranch) 137, 165–66 (1803).

⁹⁹ *Id.*; *cf.* Att’y Gen. *ex rel.* *Taylor v. Brown*, 1 Wis. 513, 522 (1853) (“Especially is this the case, where the [power] is committed to the discretion of the chief executive officer . . . it is to be by him exercised, and no other branch of the government can control its exercise.” (emphasis omitted)).

¹⁰⁰ *Loving v. United States*, 517 U.S. 748, 757 (1996) (“[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.”).

¹⁰¹ *Klein*, 80 U.S. at 140.

¹⁰² 71 U.S. (4 Wall) 333, 380 (1866).

¹⁰³ *Id.*

¹⁰⁴ *Id.*; *see also* *Yelvington v. Presidential Pardon & Parole Att’ys*, 211 F.2d 642, 644 (D.C. Cir. 1954).

¹⁰⁵ *See Klein*, 80 U.S. at 142.

¹⁰⁶ *Id.* at 147; *Brown v. Walker*, 161 U.S. 591, 638 (1896) (“Congress cannot grant a pardon. That is an act of grace which can only be performed by the president.”).

¹⁰⁷ *Schick v. Reed*, 483 F.2d 1266, 1268 (D.C. Cir. 1973).

Commentators reach the same conclusion. Pomeroy argued that Congress could not limit the President's authority in this realm.¹⁰⁸ Justice Story said, "No law can abridge the constitutional powers of the executive department, or interrupt its right to interpose by pardon in such cases."¹⁰⁹ Modern scholars agree that nothing in the clemency clause, nor any other part of the Constitution, suggests that this power is tempered or shared by other branches.¹¹⁰

The states adopted these principles just as zealously. Indiana's Supreme Court declared, "the law is well settled that constitutional restraints are overstepped where one department of government attempts to exercise powers exclusively delegated to another."¹¹¹ More specifically, the same court wrote that "the power of granting reprieves is as clearly and exclusively vested in the Governor as that of granting pardons."¹¹² As a result, neither courts nor the legislature could issue reprieves, either directly or indirectly.¹¹³ The Indiana Supreme Court even admitted it "cannot grant reprieves for any purpose; that power belonging exclusively to the Governor."¹¹⁴

The Supreme Court of Wisconsin said that the branches must be distinct, and when a power is lodged with the executive branch, it "is altogether free from the interference of the other branches of the government."¹¹⁵ This is especially true when the power "is committed to the discretion of the chief executive officer, either by the constitution or by the laws."¹¹⁶ Writing on executive clemency, the Supreme Judicial Court of Massachusetts declared, "The duty of making the preliminary determination rests primarily upon the Governor alone."¹¹⁷ The Supreme Court of North Carolina has noted "the undeniable textual commitment of clemency to the Executive Branch of government."¹¹⁸

Even though the modern Ohio constitution authorizes the legislature to impose some limitations on clemency powers, the legislature "may not interfere

¹⁰⁸ POMEROY, *supra* note 55, at 462.

¹⁰⁹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1498 (1833).

¹¹⁰ Mary Margaret Giannini, *Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims' Rights with Procedural Justice Principles*, 13 OHIO STATE J. CRIM. L. 89, 106 (2015); P.E. Digeser, *Justice, Forgiveness, Mercy, and Forgetting: The Complex Meaning of Executive Pardoning*, 31 CAP. UNIV. L. REV. 161, 161 (2003) ("With the exception of an explicit prohibition against using the power in impeachment cases, the President possesses an enormous amount of discretion in the use of this authority.").

¹¹¹ *Butler v. State*, 97 Ind. 373, 377 (1884) (internal citations omitted).

¹¹² *Id.* at 376.

¹¹³ *Id.* at 378.

¹¹⁴ *Diamond v. State*, 144 N.E. 250, 250 (Ind. 1924).

¹¹⁵ *Att'y Gen. ex rel. Taylor v. Brown*, 1 Wis. 513, 522 (1853).

¹¹⁶ *Id.* (emphasis omitted).

¹¹⁷ *Juggins v. Exec. Council to Governor*, 154 N.E. 72, 73 (Mass. 1926).

¹¹⁸ *Bacon v. Lee*, 549 S.E.2d 840, 853 (N.C. 2001).

with the discretion of the Governor in exercising the clemency power.”¹¹⁹ Examining the text of the Ohio Constitution, the supreme court of the Buckeye State concluded that because the power to grant reprieves was “unfettered,” any law attempting to limit the reprieves would be a “violation of the Constitution.”¹²⁰ Any laws to the contrary were thus invalidated.¹²¹ Nor is the Governor of Ohio’s discretion subject to judicial review.¹²²

State courts have not been shy about shooting down laws that attempted to usurp the pardon power. When the Missouri legislature passed a law granting clemency to all violators of the dram-shop laws if they paid a fine, the state high court struck down the law.¹²³ It said that the branches “have prescribed limits, which they cannot transcend.”¹²⁴ No single branch, it concluded, should exercise “any powers properly belonging to either of the others, except in the instances expressly directed or permitted by the constitution.”¹²⁵ So the legislative pardon was invalidated.¹²⁶

Alabama’s legislature was less ambitious, but it suffered the same fate. Rather than trying to nullify an entire law, it simply tried to remit fines for several people.¹²⁷ Yet the state supreme court said that no branch could exercise a power of another branch.¹²⁸ The power to pardon or remit fines was “confided by the fundamental law to the executive branch of the government alone, this power is virtually denied to any other department, and cannot, therefore, be exercised by the Legislature.”¹²⁹ And so the law was struck down.¹³⁰

Courts, too, lack the power to stop executive clemency. The clemency power is itself a check on the judiciary, which may impose overly harsh punishments.¹³¹ For this reason, “[s]eldom, if ever, has this power of executive

¹¹⁹ *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 373 (Ohio 1994) (citing *State v. Morris*, 378 N.E.2d 708, 714 (Ohio 1978)).

¹²⁰ *Id.* at 377.

¹²¹ *Id.*

¹²² *Id.* at 373 (first citing *State ex rel. Whiteman v. Chase*, 5 Ohio St. 528, 535 (1856); and then citing *Knapp v. Thomas*, 39 Ohio St. 377, 391 (1883)).

¹²³ *State v. Sloss*, 25 Mo. 291 (1857).

¹²⁴ *Id.* at 293.

¹²⁵ *Id.* at 294.

¹²⁶ *Id.* at 294–95.

¹²⁷ *Haley v. Clark*, 26 Ala. 439, 439–40 (1855).

¹²⁸ *Id.* at 442.

¹²⁹ *Id.*

¹³⁰ *Id.* at 443.

¹³¹ *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (“Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.”); ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS* 293 (Clyde N. Wilson ed., 1999).

clemency been subjected to review by the courts.”¹³² In *Marbury v. Madison*,¹³³ the Court said bluntly that constitutional questions “submitted to the executive, can never be made in this court.”¹³⁴ In Mississippi, the governor granted hundreds of pardons—and one suspension of a sentence—without the statutorily required 30-day notice requirement.¹³⁵ Though the state supreme court noted he did not comply with that procedural requirement, it refused to invalidate pardons on that basis.¹³⁶ Oregon’s supreme court has said, “it is not within judicial competency to control, interfere with, or even to advise the Governor [sic] when exercising his power to grant reprieves.”¹³⁷ And the Pennsylvania Supreme Court has said that when wielding his reprieve power, the governor “is supreme and no man, governmental department or tribunal can review his action or require his reasons to be given.”¹³⁸

C. The Pardon Power Is Incredibly Broad and Flexible, Which Sheds Light on the Strength of the Reprieve Power

Both the pardon power and the reprieve power are mentioned in the same constitutional breath, without limitation, save for impeachments.¹³⁹ Both go to the same essential point: the executive is the fount of mercy. In some ways, the reprieve has been seen as the more basic of the two. When Pennsylvania was granted its royal charter in 1681, the Crown limited the colonists’ power to issue pardons for serious crimes, but still allowed them to grant reprieves.¹⁴⁰ Today, some state constitutions limit the ability of people to apply for pardons, but not reprieves.¹⁴¹ Reprieves, unlike pardons, cannot be rejected.¹⁴²

Between the two powers, however, far more analysis exists for pardons than reprieves. For these reasons, it is worth exploring how robust the President’s

¹³² *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950); *Schick v. Reed*, 483 F.2d 1266, 1270 (D.C. Cir. 1973) (noting that a pardon or commutation “may not be reviewed by a court”).

¹³³ 5 U.S. (1 Cranch) 137 (1803).

¹³⁴ *Id.* at 170.

¹³⁵ *In re Hooker*, 87 So. 3d 401, 403 (Miss. 2012).

¹³⁶ *Id.* at 414.

¹³⁷ *Eacret v. Holmes*, 333 P.2d 741, 743 (Or. 1958).

¹³⁸ Brief of Respondent, *supra* note 83, at *13 (internal citations omitted).

¹³⁹ *See Solesbee v. Balkcom*, 339 U.S. 9, 11–12 (1950) (“The power to reprieve has usually sprung from the same source as the power to pardon.”).

¹⁴⁰ *Kane et al.*, *supra* note 32, at 95–96.

¹⁴¹ N.C. CONST. art. III, § 5, cl. 6; OHIO CONST. art. III, § 11.

¹⁴² *Compare Haugen v. Kitzhaber*, 306 P.3d 592, 598 (Or. 2013) (“[N]one of the definitions that the parties identify requires a reprieve to be accepted by the recipient to be effective.”), with *United States v. Wilson*, 32 U.S. (1 Pet.) 150, 150 (1833) (A pardon “may . . . 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.”).

pardon power is. It reinforces the point that the President is given great discretion for clemency decisions, free from congressional intrusion. Furthermore, some courts have accepted the idea that “[t]he power to pardon necessarily includes the power to reprieve or suspend the sentence until the matter can be inquired into and determined.”¹⁴³

While a “reprieve” is a suspension of a sentence, usually a death sentence, a “pardon” is far more malleable. A modern definition for “pardon” is “the excusing of an offense without exacting a penalty.”¹⁴⁴ Looking at older definitions, we see the word “pardon” has changed but little. Older definitions are essentially the same.¹⁴⁵

The pardon power was always understood to be incredibly broad. In the founding era, the limitation on the President’s pardon power was thought to be impeachment, not any direct restriction on the power to grant mercy.¹⁴⁶ And impeachment was common. While the impeachment procedure had fallen into disuse in England, the colonies embraced it as a means to oust wrongdoers from office.¹⁴⁷ This would help explain why there was less need to impose harsh textual limitations on the pardon power.

Debate at the Constitutional Convention underscores this point. George Mason fretted at the Virginia ratifying convention that the President “may frequently pardon crimes which were advised by himself . . . may he not stop inquiry and prevent detection?”¹⁴⁸ James Madison rejoined, “There is one security” against Mason’s fears: if there was any reason to believe the President was corruptly using the pardon to shield wrongdoers, “the House of Representatives can impeach him.”¹⁴⁹

Before the Constitution was written, the great thinkers of the era were in agreement that the pardon power was sweeping. Blackstone wrote, “in cases

¹⁴³ *In re Buchanan*, 40 N.E. 883, 886 (N.Y. 1895) (“[T]he power to reprieve a prisoner under sentence was included in the power to pardon.”); *Ex parte Dormitzer*, 119 Or. 336, 390 (1926) (quoting *State ex rel. Stafford v. Hawk*, 34 S.E. 918 (W. Va. 1900)); cf. STEPHEN V. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 154 (1863) (explaining that Attorney General John J. Crittenden in 1851 said that the power to pardon included the power to pardon conditionally or to commute to a milder sentence).

¹⁴⁴ *Pardon*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/pardon> (last visited Oct. 11, 2020).

¹⁴⁵ JOHNSON, *supra* note 40 (a “warrant of forgiveness, or exemption from punishment”); JOHNSON & WALKER, *supra* note 40 (same); BAILEY, *supra* note 41 (“the forgiving a Felony or Offense committed against the King.”); *Pardon*, WEBSTER’S DICTIONARY (1828) (“release from penalty; remission of punishment; absolution.”); *Pardon*, WEBSTER’S DICTIONARY (1913) (“To forgive; to remit; as an offense or crime.”).

¹⁴⁶ CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* 39 (2017).

¹⁴⁷ *Id.*

¹⁴⁸ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 497 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES].

¹⁴⁹ *Id.* at 498.

where the letter [of the law] induces any apparent hardship, the crown has the power to pardon."¹⁵⁰ The pardon power, he added, "is and ought to be absolute; that is, so far absolute that there is no legal authority that can either delay or resist him."¹⁵¹ In addition to a blanket pardon, partial grants of clemency were allowed because "the king may extend his mercy upon what terms he pleases."¹⁵² Sir Edward Coke took a similar view. "A pardon is a work of mercy, whereby the king . . . forgiveth any crime, offence, punishment, execution, right, title, debt or duty temporall or ecclesiasticall."¹⁵³ The king, moreover, in cases of treason, "may pardon the whole execution, he may pardon any part, or all, saving part."¹⁵⁴

From the early days of the Republic, courts exalted the pardon power. In *United States v. Wilson*,¹⁵⁵ (1833) Chief Justice John Marshall set wide boundaries for the pardon power, with a unanimous Court behind him. The Constitution made a general grant of the pardon power to the President, a power that long preceded the office of the presidency.¹⁵⁶ A pardon was an "act of grace" that may be outright or conditional.¹⁵⁷ If the latter, "the condition may be more objectionable than the punishment inflicted by the judgment."¹⁵⁸ Since the *Wilson* decision, the Court has "consistently reiterated and reinforced this interpretation of the pardon power and executive clemency as being a discretionary act."¹⁵⁹

Three decades later, Justice Field went even farther in *Ex parte Garland* (1866)¹⁶⁰: "The power thus conferred is unlimited, with the [impeachment] exception stated."¹⁶¹ It extends to all offenses and may be used at any time.¹⁶² Though there was a dissent, it did not question the President's unrestricted power to pardon—merely the effect of a pardon.¹⁶³

By 1927, the Court had elevated executive clemency from a private act of mercy to part of the operation of government.¹⁶⁴ Rejecting the notion that

¹⁵⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES *92.

¹⁵¹ *Id.* at *244.

¹⁵² 2 WILLIAM BLACKSTONE, COMMENTARIES *317.

¹⁵³ COKE, *supra* note 9, at 233.

¹⁵⁴ *Id.* at 52.

¹⁵⁵ 32 U.S. (1 Pet.) 150, 160 (1833).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 160–61.

¹⁵⁸ *Id.* at 161.

¹⁵⁹ Jonathan Harris & Lothlorien Redmond, *Executive Clemency: The Lethal Absence of Hope*, 3 CRIM. L. BRIEF 2, 2 (2007).

¹⁶⁰ 71 U.S. (4 Wall.) 333 (1866).

¹⁶¹ *Id.* at 380.

¹⁶² *Id.*

¹⁶³ *Id.* at 396–97 (Miller, J., dissenting).

¹⁶⁴ *Biddle v. Perovich*, 274 U.S. 480, 486–87 (1927).

clemency could be rejected by the defendant, Justice Oliver Wendell Holmes said, “Just 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 shall be done.”¹⁶⁵

In *Lee v. Murphy* (1872),¹⁶⁶ the Supreme Court of Virginia offers a good canvass of state court decisions on the topic. The pardon power was modeled after the king of England, and the king “has the right to prescribe the terms and limitations under which he will exercise it.”¹⁶⁷ Courts in New York, South Carolina, Arkansas, New Jersey, and Maryland all ruled the same way; no state is known to have ruled to the contrary.¹⁶⁸

The West Virginia Supreme Court of Appeals said, “The power to pardon necessarily includes the power to reprieve or suspend the sentence until the matter can be inquired into and determined.”¹⁶⁹ The Ohio Supreme Court said that a reprieve “suspended the execution of the sentence for a specified interval of time.”¹⁷⁰ In the case of *Commonwealth v. Williams*,¹⁷¹ a party maintained—without any apparent contradiction from the other side—that “no court in the nation’s history has invalidated an executive reprieve.”¹⁷²

Military scholars uniformly noted the breadth of the pardon power. The Digest of Opinions by the Army’s Judge Advocate General from the Civil War said that the President has “almost unlimited discretionary power vested in him” to decrease the severity of sentences.¹⁷³ After noting that an officer could not pardon or mitigate a death sentence, Captain Stephen V. Benet wrote, “these can only be pardoned or mitigated by the President of the United States.”¹⁷⁴

Civilians sang the same tune. St. George Tucker wrote the first extended, systematic commentary on the Constitution in 1803. In it, he wrote, “the power of pardoning is left entirely to the dictates of [the President’s] own bosom,” and saw the pardon power as a check on an overzealous judiciary.¹⁷⁵ James Kent declared in 1826, “The power of pardon vested in the president is without limit, except in the case of impeachments.”¹⁷⁶ Joseph Story’s 1833 Commentaries made clear that the power to pardon included the power to reduce any portion of

¹⁶⁵ *Id.* at 488.

¹⁶⁶ *Lee v. Murphy*, 63 Va. (22 Gratt.) 789 (1872).

¹⁶⁷ *Id.* at 791.

¹⁶⁸ *Id.* at 793.

¹⁶⁹ *State ex rel. Stafford v. Hawk*, 34 S.E. 918, 918 (W. Va. 1900).

¹⁷⁰ *Sterling v. Drake*, 29 Ohio St. 457, 464 (1876).

¹⁷¹ 129 A.3d 1199 (Pa. 2015).

¹⁷² *Id.* at 1210.

¹⁷³ DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 180 (1866).

¹⁷⁴ BENET, *supra* note 143, at 153.

¹⁷⁵ TUCKER, *supra* note 131, at 268.

¹⁷⁶ KENT, *supra* note 19, at 127.

a punishment. The power to pardon was “general and unqualified” and “[t]he power of remission of fines, penalties, and forfeitures is also included in it.”¹⁷⁷ “The general grant of power to the President,” wrote Pomeroy, “would seem to cover the whole case, and to leave no room for legislative action.”¹⁷⁸ In modern times, “legal scholars take an almost absolutist view of the pardon power.”¹⁷⁹

III. HISTORY OF THE CLEMENCY POWER

A. *The Framers Intended the President’s Pardon Power To Be Stronger than Anything that Had Come Before*

At the Constitutional Convention, the Founders did not “devote extended debate to [the pardon power’s] meaning.”¹⁸⁰ They made two things plain: it should be broad, and it should be in the executive’s ambit. When Alexander Hamilton laid out his view of government, he argued the Senate should have to approve pardons, much like treaties or appointments.¹⁸¹ Roger Sherman put forth a similar plan.¹⁸² Luther Martin proposed to limit the pardon power to post-conviction, instead of allowing the President to preemptively absolve guilt.¹⁸³ Edmund Randolph—the first Attorney General—bemoaned the unqualified nature of the pardon power and said treason should be excepted from it, with the support of Gouverneur Morris.¹⁸⁴ Every one of these efforts to limit the pardon power or involve Congress in it failed. The final document exempted impeachments and naught else.¹⁸⁵

Like so much else in the Constitution the pardon power is best understood by looking to England for context. When the Constitution uses language “familiar to the common law of England, which it has not attempted to define or limit,” one should go to English law to discover the “full meaning of the terms employed.”¹⁸⁶ This is particularly apt for the pardon power since the Supreme Court has said, “we adopt [England’s] principles respecting the operation and effect of a pardon, and look into their books for the rules

¹⁷⁷ 3 STORY, *supra* note 109, § 1498.

¹⁷⁸ POMEROY, *supra* note 55, at 465.

¹⁷⁹ Lauren Schorr, *Breaking into the Pardon Power: Congress and the Office of the Pardon Attorney*, 46 AM. CRIM. L. REV. 1535, 1536 (2009).

¹⁸⁰ Schick v. Reed, 419 U.S. 256, 260 (1974).

¹⁸¹ JAMES MADISON’S NOTES OF THE CONSTITUTIONAL CONVENTION (June 18, 1787), https://avalon.law.yale.edu/subject_menus/debcont.asp.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ U.S. CONST. art. 2, § 2, cl. 1.

¹⁸⁶ POMEROY, *supra* note 55, at 457.

prescribing the manner in which it is to be used by the person who would avail himself of it.”¹⁸⁷

The pardon power the Framers adopted was not a legal default; the scope and executive nature of the pardon power was a conscious choice that went against the grain of the time. It was stronger than anything present before.

Blackstone wrote, “in the exertion of lawful prerogative, the king is and ought to be absolute He may . . . pardon what offences he pleases.”¹⁸⁸ Though true in general, Parliament was able to lay down many restrictions on the pardon power. The king could not pardon the imprisonment of a man out of the realm, private acts, a common nuisance while it remained unredressed, a criminal act after the information had been brought, a conviction upheld on appeal, or impeachments.¹⁸⁹ Coke also noted that Parliament passed laws restricting the power to grant pardons.¹⁹⁰ From these restrictions, the Founding Fathers adopted the bar to pardoning impeachments and scrapped the rest.

In this way, the Framers were not only bolder than the laws of England, but the laws of the states. States defined the contours of the reprieve power differently. The Province of Eastern New Jersey only allowed reprieves to be granted for a month.¹⁹¹ Massachusetts allowed reprieves to last “until the next quarter or General Court.”¹⁹² Pennsylvania allowed them to last for up to a year.¹⁹³ It was rare for any explanation to be given.¹⁹⁴

When colonies became states, they “drastically curtailed the powers of their suspect executives.”¹⁹⁵ For the “original States were reluctant to vest the clemency power in the executive” and instead chose to empower their legislatures.¹⁹⁶ Delaware, Maryland, Virginia, and North Carolina all authorized the legislature to delimit the pardon power.¹⁹⁷ South Carolina’s legislature could limit the governor’s power to remit fines and forfeitures.¹⁹⁸ Pennsylvania prevented the governor from pardoning treason or murder until the end of legislative sessions.¹⁹⁹ Connecticut only allowed the governor to pardon up until

¹⁸⁷ United States v. Wilson, 32 U.S. (1 Pet.) 150, 150 (1833).

¹⁸⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES *244.

¹⁸⁹ *Id.* at *398–99, *316.

¹⁹⁰ COKE, *supra* note 9, at 235.

¹⁹¹ Kane et al., *supra* note 32, at 99.

¹⁹² *Id.*

¹⁹³ *See id.* at 95.

¹⁹⁴ *Id.* at 99.

¹⁹⁵ Haugen v. Kitzhaber, 306 P.3d 592, 603 (Or. 2013) (internal citations omitted).

¹⁹⁶ Herrera v. Collins, 506 U.S. 390, 414 (1993).

¹⁹⁷ DEL. CONST. art. 7 (1776); MD. CONST. art. 33 (1776); N.C. CONST. art. 19 (1776); VA. CONST. (1776).

¹⁹⁸ S.C. CONST. art. 2, § 7 (1790).

¹⁹⁹ PA. CONST. § 20 (1776).

the end of the legislative session,²⁰⁰ and Rhode Island only allowed the governor to grant reprieves up until the end of the legislative session.²⁰¹ New Jersey, Massachusetts, and New Hampshire forced the executive to work with a council to dole out pardons.²⁰² Georgia explicitly barred the governor from most acts of mercy, reserving the power to the legislature.²⁰³ New York prevented the executive from pardoning treason or murder, though he could suspend execution of the sentence.²⁰⁴

No state gave the governor the sort of *carte blanche* authority the federal Constitution gives the President.²⁰⁵ To this day, many states impose various limitations on the pardon power,²⁰⁶ though every state that authorizes the death penalty has at least some form of executive clemency.²⁰⁷ Against this legal backdrop, the simplest interpretation is that the Founders wanted the presidential pardon power to be stronger than anything that had come before. Madison warned against vesting the pardon power in the legislature: because the body was governed by popular passion, it “might, in the moment of vengeance, forget humanity.”²⁰⁸ His view carried the day.

This break from precedent did not go unnoticed. When the Constitution went to the states for ratification, many delegations argued the pardon power went too far. In Pennsylvania, a chief objection to the charter was that the President had the sole power to pardon an offense.²⁰⁹ In New York, one delegate said that the President should not be able to grant reprieves for treason until Congress weighed in.²¹⁰ One of Virginia’s delegates warned that the British crown had unchecked pardon power, and the power had “much greater force in America.”²¹¹ George Mason declared the President ought not to have pardon power, as it would give him authority to let off cronies who committed crimes at

²⁰⁰ CONN. CONST. art. 4, § 10 (1818).

²⁰¹ R.I. CONST. art. 7, § 4 (1843).

²⁰² N.H. CONST. art. 52 (1784); N.J. CONST. art. 9 (1776); MASS. CONST. ch. 2, § 1, art. 8 (1780).

²⁰³ GA. CONST. art. 19 (1777).

²⁰⁴ N.Y. CONST. art. 18 (1777).

²⁰⁵ Today, only 14 states give the governor unfettered pardon power. Harris & Redmond, *supra* note 159, at 8.

²⁰⁶ See, e.g., IOWA CONST. art. 4, § 16 (authorizing the legislature to regulate reprieves and requiring the Governor to report to the Legislative Assembly about reprieves); NEV. CONST. art. 5, § 13 (imposing a time limit for granting reprieves); OKLA. CONST. art. 6, § 10 (authorizing the legislature to regulate reprieves); TEX. CONST. art. 4, § 11(b) (requiring the governor to work with a Board of Pardons).

²⁰⁷ *Herrera v. Collins*, 506 U.S. 390, 414 (1993). And all 50 states have some sort of clemency procedure. *Bacon v. Lee*, 549 S.E.2d 840, 846 (N.C. 2001).

²⁰⁸ 3 ELLIOT’S DEBATES, *supra* note 148, at 498.

²⁰⁹ 2 ELLIOT’S DEBATES, *supra* note 148, at 538 (statement of Mr. M’Kean).

²¹⁰ *Id.* at 408 (statement of Mr. G. Livingston).

²¹¹ 3 ELLIOT’S DEBATES, *supra* note 148, at 17 (statement of Mr. Nicholas).

his behest.²¹² And in North Carolina, one delegate complained the pardon power was “too unlimited, in my opinion.”²¹³ Once again, the document carried over all of these objections. And when the Bill of Rights was later passed to patch up some of the Constitution’s shortcomings, limiting the pardon power did not make the shortlist.

Both sides of the debate over the Constitution agreed the pardon power was almost unlimited. Writing the Federalist Papers, Alexander Hamilton took the same expansive view that “the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”²¹⁴ He also specifically said that the power should be firmly in the hands of the *executive*, not the legislature, as “a single man of prudence and good sense is better fitted . . . than any numerous body” to dispense mercy.²¹⁵

Opponents of the Constitution agreed that pardon power was broad. *Too* broad, in their view. George Clinton warned against “the *unrestrained* power of granting pardons for treason, which may be used to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt.”²¹⁶ Other Antifederalists held the same view.²¹⁷

If anything, the pardoning power grew in potency over time. It was formerly understood that the President could pardon an offense that caused an officer to be dismissed, but not automatically reinstate the officer. With the advent of the Civil War, the President in practice could restore officers to service, and “this practice appears to be now generally recognized and acquiesced in as the law of the service.”²¹⁸ Officers restored to office by this manner were also entitled to pay for the period they were expelled.²¹⁹

*B. Executive Clemency—Without Limitations on the Reprieve Power—
Has Always Been a Part of the Military Justice System*

Military law has long given commanders the authority to pardon, mitigate, remit, and *suspend* sentences, including death sentences. Abraham

²¹² *Id.* at 497.

²¹³ 4 ELLIOT’S DEBATES, *supra* note 148, at 204 (statement of Mr. Lenoir).

²¹⁴ THE FEDERALIST NO. 74 (Alexander Hamilton).

²¹⁵ *Id.* Hamilton apparently evolved from this view at the constitutional convention where he said Congress should be involved in pardons. See JAMES MADISON’S NOTES OF THE CONSTITUTIONAL CONVENTION (June 18, 1787), <https://www.nhccs.org/dfc-0618.txt> (Hamilton proposed that the executive would “have the power of pardoning all offences except Treason; which he shall not pardon without the approbation of the Senate.”).

²¹⁶ THE ANTIFEDERALIST NO. 67 (George Clinton) (emphasis added).

²¹⁷ THE ANTIFEDERALIST NO. 70.

²¹⁸ DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 180 (1866)’

²¹⁹ *Id.*

Lincoln suspended roughly 500 death sentences during the Civil War.²²⁰ President Andrew Johnson continued the practice after the war.²²¹

To this day, federal law grants broad discretion to any military officer who imposes punishment to mitigate or suspend any part of it.²²² Commanders frequently took advantage of this power. When Sely Lewis was convicted of being a spy and sentenced to death by hanging in 1862, his sentence was suspended by General William Tecumseh Sherman “until the pleasure of the President be made known.”²²³ How could servicemembers have the power to suspend a death sentence—even temporarily—when the commander in chief is categorically barred from doing so?

Similarly, around the time that the Uniform Code was adopted, a number of states gave various officials the power to suspend death sentences for a whole host of reasons. State supreme courts could suspend a death sentence in Nebraska or Mississippi.²²⁴ Sheriffs in Utah and Kentucky could do the same under certain conditions.²²⁵ It is strange to think that the President may lack a power that can be exercised by so many lesser officials.

This is particularly true given that the President once had *carte blanche* authority. When the 1775 Articles of War were drafted, they contained a pardon power—and one without any congressional limitation. Article 67 read: “the general, or commander in chief for the time being, shall have *full power* of *pardoning, or mitigating* any of the punishments ordered to be inflicted, for any of the offences mentioned in the foregoing articles.”²²⁶ The Articles also permitted commanders to mitigate punishments.²²⁷ The slightly tweaked 1776 Articles of War kept this language.²²⁸

When Congress got around to creating the Articles for the Government of the Navy in 1799, it also added pardons. Article 50 stated, “The commander

²²⁰ Royce Brier, *Officers & Army Discipline*, SANTA MARIA TIMES, Mar. 6, 1969, at 24.

²²¹ *Reprieve of a Convict at the Point of Execution*, DAILY MILWAUKEE NEWS, May 15, 1865, at 2; [Untitled], WILMINGTON DAILY DISPATCH, May 4, 1866, at 4.

²²² 10 U.S.C.A. § 815(d) (West 2020).

²²³ U.S. Adjutant Gen.’s Off., *General Orders, No. 170: War Department, Adjutant General’s Office, Washington, October 28, 1862*, U.S. NAT’L LIBR. MED., <https://collections.nlm.nih.gov/catalog/nlm:nlmuid-101654259-bk> (last visited Sept. 22, 2020).

²²⁴ *Billiot v. Epps*, 671 F. Supp. 2d 840, 841 (S.D. Miss. 2009); *Otey v. State*, 485 N.W.2d 153, 164 (Neb. 1992).

²²⁵ *Barrett v. Commonwealth ex rel. McGregor*, 259 S.W. 25, 27 (Ky. 1923); *State ex rel. Johnson v. Alexander*, 49 P.2d 408, 411 (Utah 1935).

²²⁶ ARTICLES OF WAR, art. 67 (1775) (emphasis added).

²²⁷ *Id.*

²²⁸ ARTICLES OF WAR, § 18, art. 2 (1776).

in chief of the fleet, for the time being, shall have power to pardon and remit any sentence of death, in consequence of any of the aforementioned articles."²²⁹

In the 1806 Articles of War, officers with the power to convene a general court-martial could suspend a death sentence until the President had the opportunity to review the case.²³⁰ It did not attempt to circumscribe the President's authority to pardon or suspend a death sentence.²³¹ Seventy years later, language about the President was omitted, so the Articles were silent about who could commute a death sentence.²³²

The 1920 Articles of War said that the power to execute a sentence included the power to "mitigate or remit the whole or any part of the sentence,"²³³ without imposing any limitation. A separate provision authorized any sentencing authority competent to issue a death sentence to suspend that sentence until the President approved, but said nothing about whether the President—or anyone else—could suspend it indefinitely.²³⁴

When the Uniform Code of Military Justice ("UCMJ") was created in 1950, Article 71 said the President "shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence as approved by him, except a death sentence." Though slightly different from the modern language, the effect is the same.

It would seem Congress was aware of the suspect nature of its actions. During the congressional floor debates on the 1950 UCMJ, the illegality of the anti-suspension provision was raised. It was asked, "is this not an attempt to control legislatively the pardoning power of the President?" and "[i]f something else is intended by the proposed wording, then [the language] should be changed to convey this intention."²³⁵ Because no clarifying language was added, one can only surmise that Congress *was* attempting to crib the pardon authority.

Ordinarily, one would expect Congress to try to avoid overstepping its constitutional boundaries. When enacting a parole statute in 1910, Congress

²²⁹ ARTICLES FOR GOV'T OF NAVY, art. 50 (1799), <https://www.navycs.com/public-law/naval-gov-1799pg5.html>.

²³⁰ ARTICLES OF WAR, art. 89 (1806).

²³¹ Even the Confederate Articles of War allowed court-martial convening authorities to "pardon or mitigate any punishment" ordered by court-martial, as well as suspend death sentences. It made no pretense of limiting the Confederate president's power. CONFEDERATE ARTICLES OF WAR, art. 89 (1861), <https://archive.org/details/articlesofwarfor00conf/page/17/mode/2up>. The Confederate Constitution also gave the president the power to "grant reprieves and pardons for offenses" in language mirroring the federal Constitution. CONFEDERATE CONST. of 1861, art. 2, § 2, cl. 1.

²³² ARTICLES OF WAR, art. 112 (1874); *see also* ARTICLES OF WAR, art. 43 (1878).

²³³ ARTICLES OF WAR, art. 50 (1920).

²³⁴ *Id.* art. 51.

²³⁵ 95 CONG. REC. 6,169 (1949).

declared nothing in the act “shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case.”²³⁶ This language was later used by a court to justify upholding the law.²³⁷

Congress was blasé about the prospect of acting unconstitutionally. In the event that the language evinced an unconstitutional intent to limit the President’s power, Congress cited a Civil War-era opinion of Attorney General Jeremiah S. Black. He wrote (on a different topic) that the President could refuse to enforce a law that was unconstitutional. If a law was unconstitutional, he argued, the President could treat it “as if the paper on which it is written were blank.”²³⁸ In so doing, Congress admitted it was probably violating the Constitution, but did not care, since the President could ignore its legislative bleating.²³⁹ Still, Congress passed the law, and the President signed it.

Congress had good reason to doubt its own actions, for clemency was always a part of military justice. If anything, it would have been even more important at the dawn of the military than today. The Founders were less interested in the rights of servicemembers than the enforcement of discipline when they created the Articles of War.²⁴⁰ Washington believed that discipline was “the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all.”²⁴¹ The British model was seen as harsh but effective, and it was copied.²⁴² At his behest, Congress increased the number of allowable lashes from 39 to 100.²⁴³ Procedural due process was close to nonexistent.²⁴⁴

²³⁶ 18 U.S.C. §723 (repealed 1948); *see also* Green v. Gordon, 246 P.2d 38, 39 (Cal. 1952) (“[T]he general statutory regulations relating to parole . . . did not amount to an attempt to interfere with the governor’s power . . .”); *Ex parte* Collie, 240 P.2d 275, 276 (Cal. 1952) (same).

²³⁷ Schick v. Reed, 483 F.2d 1266, 1268 (D.C. Cir. 1973).

²³⁸ Memorial of Captain Meigs, 9 Op. Atty. Gen. 462, 469 (1860).

²³⁹ This was in keeping with the general tenor of Congressional debate over the Uniform Code. As one commentator wrote, debate in the House was “short, surprisingly superficial, and characterized more by excessive amounts of self-congratulations among the leadership of the committee than by any systematic exegesis of key provisions in the code.” JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA 1775–1980* 135 (rev. & abr. ed. 2001).

²⁴⁰ *Id.* at 1. As Army Chief of Staff Omar Bradley would later say, military justice needs to concern itself not only with the rights of the accused, but the sometimes-countervailing rights of the accused’s comrades and country, which presumably suffer when due process protections belabor the proceedings. *Id.* at 110.

²⁴¹ FISHER, *supra* note 23, at 5.

²⁴² LURIE, *supra* note 239, at 1–2.

²⁴³ John S. Cooke, *Manual for Courts-Martial 20X*, in *EVOLVING MILITARY JUSTICE* 173, 176 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002). This was still far gentler than the British model, where, in the early 1700s, a deserter could receive as many as *three thousand* lashes. THOMAS P. LOWRY, *TARNISHED EAGLES* 4 (1997).

²⁴⁴ Procedurally, Army courts-martial had “no legal standard, so there could be no legal error,” and Navy justice was a “blind lottery” where outcomes were based on whim, not law. CHRIS BRAY,

C. *Historical Practice Shows that Presidents Dispersed Clemency Widely and with Few Scruples*

Consistent with the wide latitude presidents are given to issue pardons, they have often felt empowered to issue them freely and idiosyncratically. In a 45-year span between 1885 and 1930, presidents issued more than 10,000 grants of clemency.²⁴⁵ President Bill Clinton issued 177 pardons the morning of the last day of his office—so haphazardly that the Pardon Attorney had stayed up all night working on the effort and did not even know who some of the grantees were or how to reach them.²⁴⁶

Presidents also felt unrestrained when it came to clemency for military offenders. Starting with George Washington, presidents granted pardons for treason when many others counseled vengeance. Washington pardoned the leaders of the Whiskey Rebellion, a violent anti-tax movement, after they were convicted of treason.²⁴⁷ During John Adams' presidency, Pennsylvania farmers led another insurrection against federal tax collection.²⁴⁸ Adams pardoned the leadership over the unanimous objection of his cabinet.²⁴⁹

Thomas Jefferson inaugurated the trend of pardoning draft dodgers, followed up by James Madison.²⁵⁰ After the Mexican-American War, President James K. Polk announced that “deserters from the army, at large, may peaceably return to their homes without being subject to punishment or trial on account of such desertion.”²⁵¹ Abraham Lincoln and Andrew Johnson pardoned Confederate rebels, and Lincoln pardoned hundreds of soldiers, including 62 deserters in one day.²⁵² Gerald Ford and Jimmy Carter both pardoned Vietnam draft dodgers.²⁵³

Pardons for soldiers were not only sweeping; they could often be arbitrary. Over the course of the Second World War, 40,000 Americans deserted;

COURT-MARTIAL, HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND xiii, 40 (2016).

²⁴⁵ Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1185 (2010).

²⁴⁶ *Id.* at 1198.

²⁴⁷ Kenneth T. Walsh, *A History of Presidential Pardons*, U.S. NEWS & WORLD REP. (June 8, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-06-08/the-most-prominent-presidential-pardons-in-history>. Washington also favored leniency in response to Shay's Rebellion, a revolt by impoverished farmers who suffered foreclosure after ruinous tax increases. RON CHERNOW, WASHINGTON: A LIFE 518 (2010).

²⁴⁸ DAVID McCULLOUGH, JOHN ADAMS 540 (2001).

²⁴⁹ *Id.*

²⁵⁰ Love, *supra* note 245, at 1173 n.16.

²⁵¹ BENET, *supra* note 143, at 103–04.

²⁵² Love, *supra* note 245, at 1170, 1173 n.16, 1177.

²⁵³ *Id.* at 1173 n.16.

only 49 had their sentences approved.²⁵⁴ But in the winter of 1944, a major German offensive in World War II pushed the Allies back on their heels, leading to a raft of desertions.²⁵⁵ This also meant General Dwight D. Eisenhower needed to make an example of someone in order to staunch the desertions. There were several other potential candidates to receive execution for the crime of desertion—each of whom had displayed cowardice on the battlefield—and only one execution needed to be carried out to send the message.²⁵⁶ From this sorry bunch, Eisenhower was reported to have said, “pick somebody, pick me a loser, go back and pick me a loser.”²⁵⁷

Marine Corps Private William Barnsman was sentenced to death, and the question arose in 1820 about whether the President could convert his death sentence into a year of labor under confinement. Attorney General William Wirt asserted that the President’s power to mitigate included the ability to transform a harsh punishment into a milder one.²⁵⁸ To hold otherwise would mean that the only thing a President could do for an inmate on death row would be a complete pardon.²⁵⁹ This would disable the President from acting in a situation where a death row inmate deserved some degree of mercy, but not to get off scot-free.²⁶⁰

By a similar token, an officer in the Navy was facing dismissal in 1845. Attorney General John Y. Mason held the President’s power to mitigate was held to include the power to change the punishment from dismissal to suspension without pay.²⁶¹

IV. COUNTERARGUMENTS

Mighty as it is, the pardon power is not without its limits. The weight of the evidence tends in favor of finding Article 57 to be unconstitutional, but there are at least two counterarguments. First, suspending a death sentence might violate the Constitution if done with the purpose of stringing out a stay on death row. Second, Congress holds the reigns to the military and can thus limit pardons through its authority to regulate the military. Both fall short of saving Article 57, however.

A. Courts Have Rejected the Argument that a Lengthy Stay of Executive

²⁵⁴ Chris Walsh, *The Execution of Private Slovik, 40 Years Later*, L.A. REV. BOOKS (Apr. 14, 2014), <https://lareviewofbooks.org/article/execution-private-slovik-40-years-later/#1>.

²⁵⁵ Guido Calabresi, *Scapegoats*, 14 QUINNIPIAC L. REV. 83, 84 (1994).

²⁵⁶ 14 OFF. OF THE JUDGE ADVOC. GEN., HOLDINGS & OPINIONS 1944–1945 185–97 (1945); 17 OFF. OF THE JUDGE ADVOC. GEN., HOLDINGS & OPINIONS 1945 219–28 (1945).

²⁵⁷ Calabresi, *supra* note 255, at 84.

²⁵⁸ BENET, *supra* note 143, at 155.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 156.

Violates the Eighth Amendment, Despite the Fact that It Could Be a Great Hardship to Inmates

First, a suspended death sentence might be so cruel that it violates the Constitution. Though *Lee v. Murphy* set out an expansive view of the pardon power, it did impose a limitation. The terms of a pardon could not be “impossible, immoral, or illegal.”²⁶² That line was in reference to an earlier Virginia case: *Commonwealth v. Fowler*.²⁶³ In *Fowler*, the defendant was pardoned of a felony on the condition that he complete three years of manual labor for the state—essentially cosigning the defendant to three years as a slave.²⁶⁴ The court said the governor could not condition a pardon, but gave no further explanation.²⁶⁵ In *Lee*, the court speculated that the *Fowler* Court had invalidated the pardon because such a harsh, arbitrary punishment was “unknown to our system” and “might have been perverted to purposes of the grossest injustice and tyranny.”²⁶⁶

If the *Lee* Court has the right of it, a pardon may not be designed to inflict a worse punishment than the sentence itself.²⁶⁷ Arguably, suspending a death sentence is worse than swiftly imposing the death sentence. One could say that if the manner of a pardon or reprieve was designed to make a punishment *worse*, it might violate another provision of the Constitution, such as the Eighth Amendment’s prohibition on cruel and unusual punishment. The Amendment “prohibits all punishment, physical and mental, which is totally without penological justification.”²⁶⁸

But the Supreme Court has not held that the death penalty itself is unconstitutional despite the fact that many on death row must remain in limbo for years²⁶⁹—a fate similar to one who has a death sentence suspended. Death penalty cases proceed so slowly that *execution* is only the third leading cause of death for death-row inmates in California, after natural causes and suicide.²⁷⁰ Despite these facts, “no court has ever concluded that that uncertainty alone

²⁶² *Lee v. Murphy*, 63 Va. (22 Gratt.) 789, 802 (1872).

²⁶³ 8 Va. (4 Call) 35 (1785).

²⁶⁴ *Id.* at 36.

²⁶⁵ *Id.* at 37.

²⁶⁶ *Lee*, 63 Va. (22 Gratt.) at 796.

²⁶⁷ *Cf. Green v. Gordon*, 246 P.2d 38, 39 (Ca. 1952) (“It is, of course, a possibility that in some types of cases the terms of a commutation may be more objectionable to the prisoner than the punishment fixed by his sentence.”).

²⁶⁸ *Farmer v. Brennan*, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring) (internal citation omitted); *see also Graham v. Florida*, 560 U.S. 48, 71 (2010) (“A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”).

²⁶⁹ *Glossip v. Gross*, 76 U.S. 873, 923–24 (2015) (Breyer, J., dissenting).

²⁷⁰ *Zydney Mannheimer*, *supra* note 47, at 329.

amounts to an Eighth Amendment violation.”²⁷¹ The argument that a reprieve violates the Eighth Amendment because it creates uncertainty over when the sentence will be carried has also been expressly rejected.²⁷²

And the United States Supreme Court has all but contradicted the holding of *Lee* in dicta. In *Gregg v. Georgia*, the Court said an attempt to prohibit executive clemency “would be totally alien to our notions of criminal justice. Moreover, it would be unconstitutional.”²⁷³ Though non-binding, the Court was not using guarded language when it spoke.

In the modern-day, suspending a death sentence is not automatically seen as ghastly. The governor of California recently suspended the death sentences for over 700 inmates.²⁷⁴ Ohio’s governor did the same thing for 144 inmates.²⁷⁵ Pennsylvania, Colorado, and Oregon have also suspended all death sentences.²⁷⁶ These actions were reported as gestures of humanity, not cruelty.

Historically, it probably would not be considered cruel or unusual in the military for a suspended death sentence to be imposed.²⁷⁷ Under the Lieber Code issued during the Civil War, there were procedures for paroling captured enemies. Prisoners of war could be released from confinement in exchange for a pledge of “good faith and honor” to do or not do certain acts.²⁷⁸ Breaking the terms of the parole was punishable by death. Belligerents were advised to keep accurate lists of parolees to effectuate this purpose.²⁷⁹

²⁷¹ Brief for Appellant at 8–9, *Haugen v. Kitzhaber*, 2013 OR S. Ct. Briefs LEXIS 103 (Mar. 1, 2013) (No. SC S060761) (first citing *McKenzie v. Day*, 57 F.3d 1493 (9th Cir. 1995) (en banc); and then *Richmond v. Lewis*, 948 F.2d 1473, 1491–92 (9th Cir. 1991), *rev’d on other grounds*, 506 U.S. 40 (1992), *vacated*, 986 F.2d 1583 (9th Cir. 1993)).

²⁷² *Haugen v. Kitzhaber*, 306 P.3d 592, 610 (Or. 2013).

²⁷³ 428 U.S. 153, 199 n.50 (1976).

²⁷⁴ *Egelko & Koseff*, *supra* note 39.

²⁷⁵ David Von Drehle, *The Death Penalty Makes a Mockery of Our Justice System. Abolish It.*, WASH. POST (Mar. 15, 2019), https://www.washingtonpost.com/opinions/the-death-penalty-makes-a-mockery-of-our-justice-system-abolish-it/2019/03/15/fccbcf66-4670-11e9-aaf8-4512a6fe3439_story.html.

²⁷⁶ *Reston*, *supra* note 24.

²⁷⁷ For many years, the military justice system allowed practices that we would consider revolting today, both in terms of procedure and substance. Disobedient or inept soldiers could be bucked and gagged for hours; forced to ride wooden horses for hours until it wore away the skin on their legs and left their pants soaked with blood; branded HD on their foreheads for “habitual drunk;” strung up by their thumbs to trees for rendering sloppy salutes. BRAY, *supra* note 244, at 84. As late as World War II, a court-martial could be convened a mere five days after the commission of an offense—five days to complete the investigation, referral of charges, and defense preparation. Colonel French L. Maclean, *The Seventh Annual George S. Prugh Lecture in Military Legal History*, 219 MIL. L. REV. 262, 270 (2014).

²⁷⁸ LIEBER CODE art. 120 (1898).

²⁷⁹ *Id.* art. 124.

Parole for captured soldiers was thus akin to a suspended death sentence, since violating the conditions of release was a capital offense. Of course, the Eighth Amendment must be interpreted in light of the “evolving standards of decency,”²⁸⁰ not simply how it was understood when first written. So a party challenging a suspended death sentence would at least have a plausible argument.

But courts have been hesitant to extend Eighth Amendment protections to servicemembers. The Eighth Amendment prohibits three things: (1) “Excessive bail,” (2) “excessive fines” and (3) “cruel and unusual punishments.”²⁸¹ Military courts have never held that the excessive bail prohibition applies to courts-martial and have not invalidated any manual provision based upon it.²⁸² Similarly, military courts have entertained challenges based on excessive fines, but never invalidated a provision of the Manual for Courts-Martial because of it.²⁸³ As for cruel and unusual punishments, Article 55 of the Uniform Code of Military Justice already prohibits that.²⁸⁴

B. Congress May Have Supremacy Over the Military, but this Does Not Allow It to Intrude Upon the Pardon Power

The second argument, that Congress can limit the pardon power through its authority to regulate the military, comes from the venerable Thomas Cooley. In his fabled treatise on constitutional law, he agreed with the general sentiment that “[i]f the complete power to pardon is conferred upon the executive, it may be doubted if the legislature can impose restrictions under the name of rules or regulations.”²⁸⁵ But he went on to say, “when the governor is made commander-in-chief of the military forces of the State, his authority must be exercised under such rules as the legislature may prescribe, because the military forces are themselves under the control of the legislature, and military law is prescribed by that department.”²⁸⁶

Proponents of this argument could find support from history. The prerevolutionary writings of the Founders reveal a common complaint that the military power of the executive was too great. The Massachusetts House of

²⁸⁰ *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

²⁸¹ U.S. CONST. amend. VIII.

²⁸² Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 83, 113 (1999).

²⁸³ *Id.*

²⁸⁴ If anything, the military version looks likely stronger than the Eighth Amendment because it bans cruel *or* unusual punishment, rather than cruel *and* unusual punishment. Article 55 also explicitly forbids “punishment by flogging, or by branding, marking, or tattooing on the body.” *Id.*

²⁸⁵ THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 116 (1868).

²⁸⁶ *Id.*

Representatives complained the British “military Power is allowed to trample upon the Law of the Land, the common Security, without Restraint.”²⁸⁷ Benjamin Franklin said the “late innovations in respect to the military power obtruded on the civil”²⁸⁸ and critiqued the king for “[i]nvest[ing] the General of your army in the provinces with great and unconstitutional powers, and free him from the Controul of even your own Civil Governors.”²⁸⁹ Thomas Jefferson griped that “instead of subjecting the military to civil powers, his majesty has expressly made the civil subordinate to the military.”²⁹⁰

These views suffused the First Continental Congress in 1774. The body declared that the king “in time of peace, is rendered supreme in all civil governments in America, and thus an uncontrollable military power is vested in officers not known to the constitutions of these colonies.”²⁹¹ When the First Continental Congress passed a Declaration of Colonial Rights, it condemned the use of standing armies “without the consent of the legislature.”²⁹² It should come as no surprise that the same sentiments were expressed in the Declaration of Independence, which said the king “has affected to render the Military independent of and superior to the Civil power.”²⁹³ Indeed, four of the twenty-seven specific grievances against the king had to do with misuse of the military power. Supreme Court Justice Robert Jackson said the Founder’s descriptions of King George III’s monarchical powers in the Declaration of Independence “leads me to doubt that they were creating their new Executive in his image.”²⁹⁴

These principles were made real through the revolutionary war effort. When Congress appointed George Washington as Commander-in-Chief, it made sure he was “its creature . . . in every respect.”²⁹⁵ Congressional instructions for Washington told him “punctually to observe and follow such orders and

²⁸⁷ Letter from Thomas Cushing to Benjamin Franklin (Nov. 6, 1770), <https://founders.archives.gov/documents/Franklin/01-17-02-0165>.

²⁸⁸ Letter from Benjamin Franklin to Thomas Cushing (Feb. 5, 1771), <https://founders.archives.gov/documents/Franklin/01-18-02-0019>.

²⁸⁹ Benjamin Franklin, *Rules by Which a Great Empire May Be Reduced to a Small One*, PUB. ADVERTISER (Sept. 11, 1773), <https://founders.archives.gov/documents/Franklin/01-20-02-0213>.

²⁹⁰ THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774).

²⁹¹ First Continental Cong., Address to the Inhabitants of the Several Anglo-American Colonies (Sept. 5, 1774), <https://www.ushistory.org/declaration/related/decres.html>.

²⁹² DECLARATION OF COLONIAL RIGHTS (Oct. 14, 1774), <https://www.ushistory.org/declaration/related/decres.html>.

²⁹³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁹⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring). Alexander Hamilton also assured the public that there was scarce ground for comparison between the Office of the Presidency and the King of Great Britain. THE FEDERALIST No. 69 (Alexander Hamilton).

²⁹⁵ FISHER, *supra* note 22, at 250.

directions . . . as you shall receive from this or a future Congress.”²⁹⁶ The Continental Congress would go on to delegate much authority to Washington, but that authority still flowed from the legislature.²⁹⁷

Unlike the British tradition, the American Articles of War were “wholly statutory, having been, from the beginning, enacted by Congress as the legislative power.”²⁹⁸ The Continental Congress enacted “policy for captures, seizures, prizes, and reprisals of all ships and goods taken during hostilities and created a Court of Appeals in Cases of Captures.”²⁹⁹ In modern times, Congress created the Uniform Code of Military Justice, which defines the parameters of the military justice system.³⁰⁰ Although the president promulgates the Manual for courts-martial—which puts flesh on the legislative bones—it is largely nonbinding.³⁰¹ In well over 100 reported cases, defense and government counsel have asked judges to set aside various provisions of the manual, and judges have done so in dozens of cases.³⁰²

When the Constitution was drafted, Elbridge Gerry said he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”³⁰³ George Mason spoke, “agst giving the power of war to the Executive, because not [safely] to be trusted with it.”³⁰⁴ The reason for this, as John Jay explained in the *Federalist Papers*, was that if given absolute power, executives would make war for purely personal reasons, such as “thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.”³⁰⁵

The final version gave Congress, not the President, the power to “raise and support Armies,” “provide and maintain a Navy,” “declare War,” “define and punish . . . Offences against the Law of Nations,” among other powers.³⁰⁶ All this makes Congressional “control over the subject [of military power] plenary and exclusive. . . . [I]t can provide the rules for the government and

²⁹⁶ *Id.*

²⁹⁷ An order in 1775 said, “whereas all particulars cannot be foreseen, nor positive instructions for such emergencies so before hand given but that many things must be left to your prudent and discreet management.” *Id.*

²⁹⁸ FISHER, *supra* note 23, at 7 (internal citation omitted).

²⁹⁹ *Id.* at 19.

³⁰⁰ Maggs, *supra* note 282, at 96.

³⁰¹ *Id.* at 96, 115.

³⁰² *Id.* at 84.

³⁰³ FISHER, *supra* note 23, at 16.

³⁰⁴ *Id.*

³⁰⁵ THE FEDERALIST NO. 4 (John Jay).

³⁰⁶ U.S. CONST. art. I, § 8.

regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment.”³⁰⁷

Not only did this buck British tradition, it rejected the writings of great minds who heavily influenced other parts of the government. John Locke wrote that all powers of war, peace, and foreign affairs should be vested in the executive. To share these powers with a legislature would be “apt sooner or later to cause disorder and ruin.”³⁰⁸ Blackstone said, “the king has also the sole prerogative of making war and peace,” and for a war to be “completely effectual, it is necessary . . . that it be publicly declared and duly proclaimed by the king’s authority.”³⁰⁹

But while Congress unquestionably has the power to govern the military, it still lacks the power to usurp an explicit constitutional power of the president. The president’s power to command the military and Congress’s power to govern the military are distinct. As a result, “Congress can not [by rules and regulations] . . . impair the authority of the President as commander in chief.”³¹⁰ Specific powers tend to override general ones. Congress has the general power to regulate the military, but the President has specific authority to grant pardons and reprieves.³¹¹

No one bothered to argue that the anti-suspension provision was supported by history during the drafting of the Uniform Code. The Founders, after all, were skeptical of excessive executive *power*, not excessive executive *mercy*. Whatever controversy surrounded the clemency power, it was that the President would use it to let off his cronies—not that he would suspend death sentences willy-nilly. There is scant support for the idea that the Constitution meant to limit executive clemency for the military. And as noted above, for the first 200 years of our military, the Commander-in-Chief had untrammelled power to forgive. Even Cooley agreed that the legislature could not “divest the executive of, or preclude his exercising, any of his constitutional prerogatives or powers,” which would include pardon power.³¹²

Attorney General John Macpherson Berrien argued in 1829 that the rules afforded “unlimited discretion” to the President in this realm, as he was “the depository of the pardoning power.”³¹³ Thus, “it cannot, I think, be doubted that [the president] has authority to mitigate as well as to confirm or reject the

³⁰⁷ Tarble’s Case, 80 U.S. (13 Wall.) 397, 408 (1871).

³⁰⁸ JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 148 (Jonathan Bennett ed., 2017).

³⁰⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES *257–58.

³¹⁰ Swaim v. United States, 28 Ct. Cl. 173, 221 (U.S. 1893), *aff’d*, 165 U.S. 553 (1897).

³¹¹ Though the military is ultimately subservient to the law of Congress, the president is more than a mere functionary of legislative power. Alexander Hamilton said that the notion that a single president should be able to direct war efforts was so self-evident that “little need be said to explain or enforce it.” THE FEDERALIST NO. 74 (Alexander Hamilton).

³¹² COOLEY, *supra* note 285, at 116.

³¹³ BENET, *supra* note 143, at 153.

sentence of a general court-martial, in the exercise of the supervisory power committed to him by the” Article of War.³¹⁴

V. CONCLUSION

To recap, the plain text of the Constitution gives the president the power to suspend death sentences, virtually every court to consider this question has affirmed this power, scholars are unanimous that executive clemency powers are broad, historical practice shows presidents reprieved death sentences, and Congress basically admitted it was overstepping its bounds. The only reasonable conclusion is that Article 57’s attempt to forbid the suspension of death sentences is unconstitutional.

Unconstitutionality of Article 57 notwithstanding, challenging it in court would be difficult. If courts impose strict standing requirements, it would require a highly unlikely sequence of events. First, a servicemember would have to commit some capital crime, go to trial, be convicted, and sentenced to die.³¹⁵ The President would next have to issue a reprieve suspending the death sentence but refuse a more lenient gesture. Then, a court would have to refuse to honor the suspension based on Article 57. It is also possible that the court would simply refuse to wade into a political fight between the President and Congress, which would effectively render the Article 57 prohibition on suspended sentences toothless.³¹⁶

But we need not wait for a challenge. If Congress wished to resolve the issue, it could do so tomorrow. Amending the law would be a cinch. Only one sentence would need to be excised. It would look like this:

§ 857. Art. 57. Effective date of sentences

EXECUTION OF SENTENCES.

...

(3) APPROVAL OF SENTENCE OF DEATH. If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as the President sees fit. ~~That part of the sentence providing for death may not be suspended.~~

Even in this day and age, it is hard to imagine what kind of interest group would oppose this. It is not clear why Congress wanted the language there in the

³¹⁴ *Id.*

³¹⁵ Military defendants *cannot* plead guilty to a charge where the death penalty is mandatory. See 10 U.S.C.A. § 845(b) (West 2020).

³¹⁶ *E.g., In re Hooker*, 87 So.3d 401, 402 (Miss. 2012) (declining to invalidate acts of executive clemency unless there is a “justiciable violation of a personal right”).

first place. It is clear, however, the Congress knew it was on thin constitutional ice when it limited the president's clemency powers.

It is a bedrock legal principle that courts should make every effort to avoid declaring a law unconstitutional if possible. At the U.S. Constitutional Convention, Colonel George Mason said that judges should strike down laws that are unconstitutional, but only if a law came "plainly under [that] description," otherwise, they "would be under the necessity as Judges to give [laws] a free course."³¹⁷ Courts today still strain to avoid declaring laws unconstitutional if they can help it.³¹⁸ If Article 57 is ever challenged, they may not be able to help it.

Of all the places Congress wished to challenge the President's military powers, this was an odd choice. Without any help from Congress, executive clemency has largely "fallen into disuse and disrepute" due to its association with cronyism and political corruption.³¹⁹ Though it is easy to imagine grants of mercy being misused, at its best, the executive clemency system injects some compassion into the law. For much of our history, it was "exercised regularly and without fanfare to give relief to ordinary people convicted of garden-variety federal crimes."³²⁰ We should work to revive that system, not bury it.

³¹⁷ JAMES MADISON'S NOTES ON THE DEBATES IN THE FEDERAL CONVENTION (July 21, 1787), http://avalon.law.yale.edu/18th_century/debates_721.asp#7.

³¹⁸ See, e.g., *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

³¹⁹ Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty To Be Merciful*, 27 *FORDHAM URB. L.J.* 1483, 1484 (2000).

³²⁰ *Id.* at 1483.