

Politics and the Power of Pardons
Response Paper

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With the power of the pen, the Framers authored the United States Constitution Article II, Section 2 proclaiming, “[the President] shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment”. Since it’s 1787, this found legislation has had various interpretations and intentions. Often pardons are viewed as seasonal gifts or acts of grace extended for political prowess to gain influence, “granting powers to the wealthy and well-connected, as well as to offenders who could provide some kind of political advantage” (Menitove 2009, 455). While the use and structure of presidential pardon powers appears to be unchecked, limitless, and subject to abuse, pardons should be used to increase clemency to deserving offenders and decrease the potential for recidivism. Pardons are constitutional powers, which when properly enforced should benefit the collective society served by “inflicting less harm, than that of the judgment fixed” and are also exercised by United States Governors (Menitove 2009, 451). There are many deserving clemencies and commuted sentences: for amnesty, for humanitarian reasons, for non-violent drug and self-defense offenders, and minors. This paper will examine the history of pardons, prominent and controversial presidential pardons, the process of pardons, and the disparities of women unjustly incarcerated under the criminal justice system to understand the scope of pardons granted by the United States Constitution.

Executive clemency is not merely an American President’s prerogative, but one that originated from the British ideology of pardons, which were at times abused, until the draft of the 1700 Act of Settlement. While this act addressed many items, it eliminated many pardoning power loopholes, but agreed to disallow pardons to the king, by the king, whereas “no pardon under the great seal of England [shall] be pleadable to an impeachment by the commons in parliament” (Duker 1977, 496). While later on the Constitutional Convention of 1787 failed to

include pardon power, Alexander Hamilton among others argued in favor of this executive privilege (501). At the time, legislators believed checks and balances were necessary to restrain and curtail pardon rights, but also were quick to issue pardons to maintain peace and order during times of extreme civil unrest. Justifiably, the first use of pardons was issued to rebels convicted of treason and sentenced to death; George Washington issued these pardons during the Whiskey Rebellion to quell escalated violence between the militia and rebel protesters over the tax on whiskey and other spirits. The Supreme Court has argued that the general terms that pardon power is exercised is “an act of grace” adopted by discretion and principles used by the person in power in *United States v. Wilson* (506-7). Furthermore, *Brown v. Walker* affirmed Congressional interference to pass acts of general pardon and amnesty questioning the exclusive rights to just the President (522). If Presidential Pardons are exercised by unrestricted, discretionary policy, the scope of such powers, come under question.

Presidential Pardons use judgement and a high degree of latitude when granting clemency. Issuing pardons utilizing this broad interpretation, is how “President Trump pardoned Joe Arpaio, an Arizona sheriff held in contempt of court after ignoring a court order to cease and desist detaining suspected undocumented immigrants,” clearly obstructing international human rights law and unjust (Brown 2019, 333). Was this pardon to appease President Trump’s anti-immigrant and racist base of constituents? President Ford’s Nixon pardon resulting from the Watergate Scandal remains controversial as President Nixon resigned from office, thereby stopping impeachment proceedings and associated degradation. It brings to question the use of executive authority, it’s complications, abuses and misuses, and political leanings. Other notable Presidential Pardons include: President Carter granting clemency to Patty Hearst for robbing a bank while kidnapped, developing Stockholm syndrome; President Reagan pardoning George

Steinbrenner, the owner of the New York Yankees, for illegal campaign contributions; President Obama commuted Chelsea Manning's sentence to seven years from thirty-five, who infamously gave information to WikiLeaks, and thousands convicted of federal crimes during the Civil War, Vietnam War, Prohibition Era, and World War II (Walsh 2018; Andrews 2013). The history of pardoning over the twentieth century makes the public wonder, how will those decisions impact the remainder of the twenty-first century? Should pardons have stricter guidelines, for more accountability? Are there political costs to Presidents in granting pardons? Should pardons be used to serve the intended role in the criminal justice system, for deserving offenders, that may disproportionately impact those of racial, ethnic, and gender disparities?

The process of pardons is a serious business and should be fairly used to “grant federal pardons, conditional pardons, commutations of sentence, remission of fines, reprieves, and amnesties” (Menitove 2009, 447-8). To obtain a federal pardon, petitioners must “wait . . . at least five years after conviction or release from confinement . . . before filing a pardon application” (United States Department of Justice 2018, 9-140.112). To be considered for a pardon, a petitioner has to demonstrate good conduct while serving a sentence and after release. A petitioner must accept responsibility, lead a respectful and productive life, admit the seriousness of the convicted crime, and atone for offenses (Ibid). The United States Pardon Attorney Office receives petitions for all clemency procedures. In this duty, the attorney receives petitions for “Executive Clemency, . . . initiates and directs necessary investigations, and prepares a report and recommendation for submission to the President for every case” (United States Department of Justice 2018, 9-140.110). This is a thoughtful and thorough process, involving hours and sometimes years of investigations, meetings, and inquiries. Although, there is dissent about pardon misuse, former U.S. Pardon Attorney, Margaret Love stated, “I get sort of

annoyed whenever I see it treated as a sort of holiday gift-giving. That's not what it is. It's part of the system, or at least ought to be" (Armstrong 2015). She infers that pardoning is completed through a just system, under the rule of law, to provide deserving individuals with renewed opportunities to transition back to society, gaining back their civil rights due to a sentencing narrative that was unjust. Is the pardoning system fair or used as a politicization act? Where does being soft on crime end? Or are we not soft enough and more transformation is needed?

Legislation regulating the criminal justice system was first enacted in the early twentieth century, and since has seen only modest reforms to reduce jail sentences, and therefore accelerate pardons for qualified petitioners. On the other hand, the percentages of females arrested and jailed have risen dramatically, across all categories based on Klein and Kress' *Any Woman's Blues: A Critical Overview of Women, Crime and the Criminal Justice System*. Women imprisoned are portrayed as "an instrument of control . . . [that] reinforces the particular position of women as well as the ideology of sexism" (163). Women prisoners are oppressed and reinforced to be the passive, subservient individuals that should rely on the historically outdated patriarchal system to be male dependent. Many of these women have committed "victimless" offenses [of] prostitution, drug use, drunkenness, juvenile running away," drug trafficking and other non-violent crimes that if "decriminalized, the number of women arrested could drop considerably" (173). After investigating the cases of many women, including that of Kemba Smith, on the recommendation of the University of Richmond's Professor Simpson of Gender, Politics and Prisons course, I discovered a deeper understanding of the importance of pardoning through the Sentencing and The Marshall Project. Kemba's case, a classic incident of a women affiliated with her boyfriend's drug trafficking, delivering money, serving as a courier, unwilling to testify out of fear of continued physical and emotional abuse, relying on her boyfriend and

living off of the proceeds of his drug crimes (The Sentencing Project 2018). Although a first-time offender, she was sentenced to 24 years due to mandatory minimums of United States drug policy guidelines and subsequently pardoned (Ibid). In addition, it is strange to think that the biggest criminal justice reform in recent history was started by grandmother Alice Johnson, who was serving a life sentence for conspiracy in a nonviolent drug crime, which garnered an argument to reduce sentencing terms (George 2018). As evident by Johnson's case, a majority of those serving prison time are related to drug offenses, not just women. The 2018 FIRST STEP Act notably endorsed by Kim Kardashian and political commentator, Van Jones to "shorten mandatory minimums for nonviolent drug offenders" making the Fair Sentencing Act retroactive which includes more good time credit (Grawert and Lau 2019). In addition, these non-violent drug offenses have "disproportionately affected those of color and in low-income communities" and thus would reduce their sentences (Ibid). Furthermore, the bill is a win for females, "banning the shackling of pregnant women and offering programs to reduce recidivism" (Ibid). Arguably, the FIRST STEP act has been the most bipartisan and significant criminal justice measure of the Trump administration. The Marshall Project discusses the need for further criminal justice reform, which could increase the granting of pardons for not only deserving women offenders, but all marginalized genders.

Women in society have a unique role to be caretakers, in and outside of the home, regardless of the twenty-first century progressive movements where women are equally employed in the workplace. This position is no different for women criminals, where "criminologists have begun to confront the economic, social, and political conditions that have a direct bearing on the incidence of crime" (Klein and Kress 2014, 166). *Incarcerated Women: A History of Struggles, Oppression, and Resistance in American Prisons* is a collection of female

inmate experiences of varied race, education, economic, and geographic backgrounds who struggled due to education barriers, lack of finances, and representation based on gender. Many of these incarcerated women committed suicide as it was seen as a final resolution. Others died from natural causes or murderous plots. Some escaped prison claiming that could be their only way to obtain actual freedom (Hayden and Jach 2017, 117). Pardon requests were common in a few forms -- commutation requests asking forgiveness, religious symbolism, re-evaluating the severity of the crimes, and wealth status (118-23). Other pardon petitioners, like that of Mittie Alford, learned to work with the government to turn State's evidence, with Mittie's husband, Rufus advocating for her to the Governor, claiming she was needed at home to care for her son and daughter, demonstrating family hardship (132). Erica Rhodes Hayden and Theresa R. Jach examine these challenges, along with reforms, training, and transition necessary to properly prepare females to exit incarceration to become independent, deserving their fair share of freedom, rehabilitation, and re-entry into society. These women and others are "innately good in nature" should be pardoned, be released, be forgiven (114).

Hence, pardoning power is controversial. William Duker's *The President's Power to Pardon: A Constitutional History* suggests four alternatives -- leave it unchecked, eliminate it, concentrate it in a different branch, or change it when an abuse of power is sensed. It seems that that pardon system, while beneficial to those with wrongful convictions, egregious sentences, or the unlawful enforcement of minimum guidelines, is flawed in terms of gender and socio-economic status and overreach of executive privilege. Regardless, pardons remain one of the oldest and most fundamental pieces of government legislation and representation of leniency.

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