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## TRANSPARENCY AND COMPARATIVE EXECUTIVE CLEMENCY: GLOBAL LESSONS FOR PARDON REFORM IN THE UNITED STATES

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Andrew Novak\*

### INTRODUCTION

Federal law enforcement and prosecution in the United States expanded greatly over the course of the twentieth century, but presidential clemency, one of the few explicit constitutional checks on prosecutorial and police powers, has fallen into disuse over the last thirty years.<sup>1</sup> No category of cases has suffered the decline of clemency more than death penalty cases; capital clemency at the federal level has all but vanished.<sup>2</sup> Today, the federal criminal justice system has grown in size and scope due to expansive criminal laws, overcrowded and expensive systems of incarceration, and the debilitating collateral consequences of conviction that hinder an individual's reintegration into society long after a sentence is served.<sup>3</sup>

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1. See Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 807–08, 815–17 (2015). Presidential clemency has declined considerably over the course of American history. Between 1860 and 1900, nearly half of all applications for presidential pardons were granted, though this was in a time before widespread pardon and parole procedures and the development of special procedures for juveniles and persons with mental illness. Kathleen Dean Moore, *Mr. President, Misusing this Pardon Power is Unpardonable*, 13 FED. SENT'G REP. 159, 159 (2000-2001). From Franklin Roosevelt's presidency through Jimmy Carter's, more than 200 people each year received presidential clemency. This number fell to only about 200 each term during Ronald Reagan's presidency and only 77 in four years for George W. Bush. *Id.* at 159. This decline is especially precipitous with federal death penalty cases, declining to the point of insignificance, especially with the abolition of the mandatory death penalty. See AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* 35 (2005); Dwight Aarons, *Adjudicating Claims of Innocence for the Capitally Condemned in Tennessee: Embracing a Truth Forum*, 76 TENN. L. REV. 511, 546 (2009); Michael Heise, *The Death of Death Row Clemency and the Evolving Politics of Unequal Grace*, 66 ALA. L. REV. 951 (2015).

2. See Heise, *supra* note 1. From 1977 to 2009, 245 prisoners on death row received clemency, which included the mass commutation of 167 commutations and four pardons by then-Governor George Ryan of Illinois in 2003. Aarons, *supra* note 1, at 546. Only one of those 280 grants of clemency was by the President of the United States for a prisoner on federal death row: David Ronald Chandler in 2001 by then-President Bill Clinton for concerns about innocence. *Clemency*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/clemency#List> (last visited Oct. 14, 2015). Today, 62 persons are on federal death row. The U.S. federal government has only executed three people since 1963. *Federal Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/federal-death-penalty> (last visited Dec. 12, 2015).

3. Barkow, *supra* note 1, at 808–09.

The United States is not alone. The crisis of incarceration is a global one.<sup>4</sup> Increasing reliance on the president's pardon power is not a substitute for legislative reform, but it holds some promise to mitigate the worst injustices. A legal system with a well-functioning parole or probation system and judicial discretion to determine appropriate sentences may make clemency superfluous, or at least rare.<sup>5</sup> In the United States, however, opportunities for federal parole have declined and constraints on judicial discretion have increased.<sup>6</sup>

The secretive and opaque nature of federal clemency in the United States has contributed to perceptions that the pardon power may be misused.<sup>7</sup> Although the usual federal clemency process is governed by Article II of the Constitution and by federal regulations,<sup>8</sup> the President and his administrative counterparts in the Department of Justice have no obligation to provide reasons for a denial of clemency, to seek the views of other stakeholders, including victims, or to reveal aspects of the deliberative process.<sup>9</sup> The secrecy of the clemency process underscores a fundamental tension

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4. See Roy Walmsley, *Global Incarceration and Prison Trends*, 3 F. ON CRIME & SOC. 65, 70–71 (2003) (discussing prison growth rates of varying degrees throughout the world, while also noting some less statistically significant prison population decline in certain countries).

5. Prior to the establishment of modern parole, remissions, and probation systems in the early twentieth century, conditional pardons served to shorten punishment and ensure law-abiding behavior, but these required the executive branch to monitor persons receiving conditional pardons to ensure compliance with the conditions. Harold J. Krent, *Conditioning the President's Pardon Power*, 89 CAL. L. REV. 1665, 1677–78 (2001). Parole, remissions, and probation systems institutionalized the shortening of sentences for rehabilitative purposes, ensuring application of consistent criteria and less erratic decision-making. *Id.* at 1678. *But see* Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT'G REP. 125, 125–26 (2000–2001) (“Even after pardon’s role in the justice system was largely taken over in the 1930s by parole and probation, and obviated by procedural improvements in the legal system, the practice of pardoning in the federal system remained vital through the 1970s.”).

6. See Frank O. Bowman, *The Failure of the Federal Sentencing System: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1333–34, 1336–37 (2005) (describing the curtailment of judicial sentencing discretion and the rise of prosecutorial discretion); David Robinson, *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U.L.Q. 881, 882 n.5, 890 (1996) (describing restrictions on parole and sentence reductions).

7. See Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. (forthcoming 2016) (“On the rare occasions when the public becomes aware of the way the pardon process operates, it confirms persistent myths about pardoning that are a long way from [Alexander] Hamilton’s vision of the pardon power as an integral part of the constitutional scheme.”).

8. U.S. CONST. art. II, § 2; 28 C.F.R. §§ 0.35, 0.36.

9. Daniel T. Kobil, *Should Clemency Decisions Be Subject to a Reasons Requirement?*, 13 FED. SENT'G REP. 151, 151–52 (2000–2001) (discussing the failure to provide reasons). *See also* Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. ON C.L. & C.R. 191, 203 (2003) (noting that there is “no constitutional right to clemency” as such and that federal courts have refused to require that clemency decisions be made in accordance with minimal due process standards).

of the clemency power: is a pardon designed to be a rare and unanticipated “act of grace,” an other-worldly charismatic power that strikes like a lightning bolt? Or is it a routine bureaucratic decision subject to constitutional due process and principles of administrative law, predictable and reliant on explicit criteria?<sup>10</sup> Although the first conception of the clemency power has historical resonance, the clemency decision-making process would benefit from applying constitutional due process and equal protection principles to clemency decisions and applying transparent and predictable administrative criteria. This in turn may help restore public confidence in federal clemency.

The word “clemency” is an umbrella term encompassing the four traditional forms of executive mercy at common law: pardons, reprieves, commutations of sentence, and remissions of fines and forfeitures. At common law, the sovereign had unlimited discretion to replace one form of punishment with a lesser one or none at all. A pardon is the full cancellation of a punishment, either freely or conditionally. A reprieve is a temporary delay or suspension of punishment, while a commutation is substitution of a greater sentence with a lesser one.<sup>11</sup> Because the pardon is the broadest form of clemency and encompasses the full range of executive power, “clemency” and “pardon” will be used interchangeably, except in the unusual circumstance where a specific constitution distinguishes between the pardon power and other forms of clemency.

The pardon power in the United States is uniquely positioned to benefit from comparative perspectives because it descends directly from English royal power.<sup>12</sup> The U.S. Constitution states that the president has the “Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment,” a power that has been expansively interpreted to allow individual or group pardons before, during, or after trial, conditionally or absolutely.<sup>13</sup> Every common law country possesses a mechanism for

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10. In sociological terms, reference to Max Weber’s distinction between charismatic and bureaucratic legitimate authority is relevant to this question. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196–98, 245–52 (Hans H. Gerth & C. Wright Mills, trans., eds., 1946). The transformation of the clemency power from a charismatic prerogative of the monarch to a bureaucratic decision of a justice department or ministry parallels the power’s development in the history of the common law.

11. S.E. Martin, *Commutation of Prison Sentences: Practice, Promise, and Limitation*, 29 CRIME & DELINQ. 593, 594 (1983).

12. JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 27 (2009).

13. U.S. CONST. art. II, § 2; *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (citing *Ex parte Garland*, 71 U.S. 333, 380 (1866)).

clemency outside of the judicial branch.<sup>14</sup> Although most common law executives have pardon powers that are more limited than those of the U.S. president, many of these countries exercise that power far more frequently than the United States does.<sup>15</sup> An executive's power to grant clemency is subject to enormous variation and experimentation worldwide because all countries must wrestle with clemency's underlying tensions between unchecked discretion and law; between individualization and arbitrariness; and between mercy and justice.

The clemency power descends from the royal prerogative of mercy, dating approximately to the early common law period.<sup>16</sup>

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14. Globally, only a handful of countries have no provision for pardons or clemency at all, including in death penalty cases. The People's Republic of China has no clemency mechanism outside of the judicial branch, even for capital cases, which is out of compliance with international law. Liu Renwen, *Recent Reforms and Prospects in China*, in CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS, AND PUBLIC OPINION 107, 118–20 (Roger Hood & Surya Deva eds., 2013). In civil law nations, the clemency power frequently encompasses an “amnesty” power. However, unlike the common law prerogative of mercy, civil law amnesty is not universally accepted, especially where it is used to give impunity to human rights violators. Leslie Elazar Sebba, *Pardon and Amnesty: Juridical and Penological Aspects i–iii* (June 1975) (unpublished LL.D. Thesis, Hebrew University of Jerusalem) (on file with the Senate of the Hebrew University of Jerusalem).

15. The majority rule in the Commonwealth is that an executive may only grant pardons after conviction. See, e.g., BELIZE CONST. art. 52(1)(a); JAM. CONST. art. 90(1)(a); FIJI CONST. art. 115(1)(a); GHANA CONST. art. 72(1)(a); SIERRA LEONE CONST. art. 63(1)(a); KENYA CONST. art. 133(1)(a); TANZ. CONST. art. 45(1)(a); INDIA CONST. art. 72(1). The clemency and pardon power is frequently used in developing countries, especially those that lack modern mechanisms for probation and parole and where prison overcrowding is endemic. In these countries, mass grants of clemency may be issued on holidays and anniversaries, for instance. ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 317–18 (5th ed., 2015). Besides prohibiting advance pardons, many common law constitutions outside of the United States contain additional limitations on the pardon power. In Nigeria, certain corruption offenses are excluded. NIGERIA CONST. sched. 5 art. 18. In Malaysia, Malawi, and some Micronesian states, self-pardons by the executive are prohibited. MALAWI CONST. art. 89(2)(b); MALAY. CONST. art. 42; CHUUK (MICR.) CONST. art. 6, § 2(a); KOSRAE (MICR.) CONST. art. 5, § 10; YAP (MICR.) CONST. art. 6, § 6. Courts-martial and some military crimes are excluded in Falkland Islands and Uganda. FALKLAND IS. CONST. art. 71(2); UGANDA CONST. art. 121(6) (excluding from the pardon power convictions from field courts martial during military operations). The Malaysian constitution restricts pardon of Islamic law offenses by secular state governors. MALAY. CONST. art. 42(10). Some constitutions prohibit pardons of offenses under international criminal law, pursuant to treaty. MAURITIUS CONST. art. 75(7); SEY. CONST. art. 60(5); SWAZ. CONST. art. 78(6).

On the other hand, the United States is one of only a handful of constitutions that exclude impeachment from the pardon power. LIBER. CONST. art. 59; MALAWI CONST. art. 89(2)(b); N. MARIANA IS. CONST. art. 3(9)(c); PALAU CONST. art. 8(7); TONGA CONST. art. 37. Forty out of forty-nine U.S. state constitutions, plus Puerto Rico, also prohibit pardons for impeachment (Oregon does not have an impeachment mechanism in its constitution). ANDREW NOVAK, *COMPARATIVE EXECUTIVE CLEMENCY: THE CONSTITUTIONAL PARDON POWER AND THE PREROGATIVE OF MERCY IN GLOBAL PERSPECTIVE* 103 (2015).

16. See David Caruso & Nicholas Crawford, *The Executive Institution of Mercy in Australia: The Case and Model for Reform*, 37 U.N.S.W. L.J. 312, 314 (2014); Stanley Grupp, *Some Historical Aspects of the Pardon Power in England*, 7 AM. J. LEGAL HIST. 51, 52–53 (1963).

Because of the overly harsh application of criminal law, particularly the mandatory death penalty, clemency remained robust even during parliamentary supremacy in England.<sup>17</sup> The conditional pardon also eased chronic labor shortages in the colonies as transportation to a penal colony was offered in exchange for a pardon.<sup>18</sup> After 1837 and the rise of the modern administrative state, the pardon power was exercised on the monarch's behalf by the Home Secretary in England and Wales and later the Secretaries of State for Scotland and Northern Ireland and the Colonial Secretary.<sup>19</sup> The royal prerogative of mercy was delegated to colonial governors, usually without interference from London.<sup>20</sup> This diffusion of the prerogative of mercy formed the basis of the constitutional pardon power in the English-speaking world.

One of the most serious concerns about clemency in general is the potential for self-dealing by an executive. This concern extends to the United States, where the President's pardon power is broad.<sup>21</sup> Although no U.S. president has pardoned himself, the most controversial pardons were made outside the formal Department of Justice review process: President Gerald Ford's pardon of Richard Nixon, President George H.W. Bush's pardon of the officials involved in the Iran-Contra scandal, President Bill Clinton's pardon of Democratic Party donor Marc Rich, and President George W. Bush's commutation of sentence for Vice President Dick Cheney's Chief of Staff I. Lewis "Scooter" Libby.<sup>22</sup> Because other constitutional systems have wrestled with these same concerns about executive self-dealing, a number of other countries' constitutions contain a range of constitutional provisions limiting or modifying such powers. The constitution of Kenya, for instance, prohibits pardons by lame-duck or outgoing executives.<sup>23</sup> The Malaysian constitution contains an elaborate provision establishing an

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17. See David Plater & Sue Milne, *The Capital Case of Sarah McGregor and Mary Maloney in New South Wales in 1834: 'Justice Is Due Even to Them,'* Paper Presented to the Legal Histories of the British Empire Conference at 7 (July 2014); ANDREW NOVAK, *THE GLOBAL DECLINE OF THE MANDATORY DEATH PENALTY: CONSTITUTIONAL JURISPRUDENCE AND LEGISLATIVE REFORM IN AFRICA, ASIA, AND THE CARIBBEAN* 5 (2014).

18. Harold J. Krent, *Conditioning the President's Pardon Power*, 89 CAL. L. REV. 1665, 1671 (2001). MOORE, *supra* note 1 at 19.

19. A.T.H. Smith, *The Prerogative of Mercy, the Power of Pardon and Criminal Justice*, 1983 PUB. L. 398, 426–27.

20. Caruso & Crawford, *supra* note 16 at 314; Norman D. Lattin, *The Pardoning Power in Massachusetts*, 11 B.U. L. REV. 505, 507–08 (1931); Krent, *supra* note 18 at 1672.

21. See *supra* note 13 and accompanying text.

22. Lauren Schott, *Breaking Into the Pardon Power: Congress and the Office of the Pardon Attorney*, 46 AM. CRIM. L. REV. 1535, 1542–45 (2009). Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 FED. SENT'G REP. 5, 5, 6 (2007–2008).

23. KENYA CONST. art. 134(1).

alternative process for executive self-pardons or pardons for immediate family members.<sup>24</sup> Several other constitutions prohibit pardons for corruption, impeachment, or abuse of political office.<sup>25</sup> A comparative constitutional analysis of the mercy power reveals a wide range of experimentation aimed at improving transparency, preventing arbitrariness, and providing reasoned decision-making in the executive clemency process.

The clemency process's secrecy at common law allowed a harsh sentence to be modified after sentencing without undermining the deterrence value of the original sentence.<sup>26</sup> In the modern world, however, unchecked executive discretion and a decision-making process entirely outside of public view risks political manipulation, improper influence, and arbitrary results. Transparency and public participation may improve the quality of clemency grants and prevent arbitrary decision-making, which can in turn boost public confidence in the process.<sup>27</sup>

This Article argues for transparency in the clemency process and contends that the concept of clemency as a benign sovereign's "act of grace" is no longer appropriate in the modern world where executive action is subordinate to principles of constitutional due process and administrative equity. Despite calls for federal clemency reform in the United States,<sup>28</sup> little comparative research examines clemency elsewhere in the common law world. This Article compares common law countries' constitutional clemency mechanisms designed to promote openness, public and victim participation, and rational decision-making. In addition, this Article proposes four reforms to the U.S. pardon system that other English-speaking countries use, which will be explored in the four parts that

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24. MALAY CONST. 1993 art. 42(12).

25. The U.S. Constitution prohibits pardons for impeachment. U.S. CONST. art. II § 2 (the President shall "have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment"). Other constitutions with impeachment exceptions include Liberia, Tonga, and Malawi. LIBER. CONST. art. 59; MALAWI CONST. art. 89(2)(b) (preventing the president from pardoning herself or the vice president in the case of impeachment); TONGA CONST. 2010 art. 37 (replacing "maladministration" with "impeachment"). Nigeria has a provision exempting corruption and economic crimes from the scope of the pardon power where the sentence was handed down by the Code of Conduct Tribunal. NIGERIA CONST. sched. 5, art. 18(7).

26. Anthony N. Doob, *Punishment in Late-Twentieth-Century Canada: An Afterword, in QUALITIES OF MERCY: JUSTICE, PUNISHMENT, AND DISCRETION* 166, 172–73 (Carolyn Strange ed., 1996).

27. Noel Cox, *The Gradual Curtailment of the Royal Prerogative*, 25 DENNING L.J. 1, 12–13 (2012).

28. See Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153–55 (2009); Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730, 730–31 (2012); Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561 (2001).

follow: implementing an open decision-making structure (Part I); allowing judicial review of clemency decisions (Part II); applying freedom of information laws and reporting and publication requirements to clemency deliberations (Part III); and creating a role for victims and communities in the decision-making process (Part IV).

### I. TOWARD AN OPEN DECISION-MAKING STRUCTURE

The bureaucratic structure of the federal clemency process in the United States contrasts with the more common committee structure used in many U.S. states and smaller common law nations.<sup>29</sup> These mercy committees are typically independent from a bureaucracy and are composed of experts on law, corrections, medicine, or community relations, rather than political appointees. By contrast, large jurisdictions such as the United Kingdom, South Africa, and India have bureaucratic systems in which a government ministry controls the pardon application process.<sup>30</sup> Although the bureaucratic structure used in the United States and other large jurisdictions may allow application of formal criteria and expeditious handling of large numbers of cases, inefficient processing and extensive delay, as in India, may affect the quality of the final recommendation.<sup>31</sup> A committee structure, by contrast, benefits from more actors being involved in the clemency process and resists “capture” of the clemency mechanism by law enforcement or prosecutorial interests. This Part will explore both models of clemency decision-making and consider alternatives to the bureaucratic procedure that currently prevails at the U.S. federal level.

The closed bureaucratic structure of the federal clemency process in the United States is an obstacle to greater transparency and public accountability. The Office of the Pardon Attorney originated

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29. In the constitutions of the Commonwealth Caribbean, common law Africa, and countries such as Malaysia, Papua New Guinea, and the Solomon Islands, an open committee structure prevails. *See, e.g.*, ANT. & BARB. CONST. art. 85; BOTS. CONST. art. 54; GREN. CONST. art. 73; GUY. CONST. art. 189; MALAWI CONST. art. 89(2)(a); MALAY. CONST. art. 42; PAPUA N.G. CONST. art. 152; SOLOM. IS. CONST. art. 45(2).

30. NOVAK, *supra* note 15 at 39–40, 143–44.

31. *See* ASIAN CENTRE FOR HUMAN RIGHTS, ARBITRARY ON ALL COUNTS: CONSIDERATION OF MERCY PLEAS BY THE PRESIDENT OF INDIA 12–24 (2014) (discussing failures of Home Ministry to consult with proper trial records and Ministry’s concealment of relevant evidence); Poor-nima Sampath & Priyadarshini Narayanan, *Mercy Petitions: Inadequacies in Practice*, 12 STUDENT ADVOC. 72, 72–74 (2000) (discussing the notorious delays in processing a clemency petition in India).

from an Act of Congress in 1865 and is housed today in the Department of Justice.<sup>32</sup> The Code of Federal Regulations specifies the process of application, review, and determination, and requires a five-year waiting period after conviction to apply.<sup>33</sup> After receiving an application, the Pardon Attorney reviews the entire package and makes a final recommendation to the President.<sup>34</sup> As former Pardon Attorney Margaret Colgate Love writes, the pardon power has declined since 1980 in part because career prosecutors are in charge of advising on clemency decisions.<sup>35</sup> In recent years, Justice Department officials have rubber-stamped the recommendations of prosecutors without subjecting them to thorough review.<sup>36</sup> Love recalls that by the time President Clinton entered office in 1993, the pardon program had lost its independence and functioned primarily to ratify the results achieved by prosecutors: “To be sure, the pardon process was disciplined and regular. But it had no sense of mission, and produced very little.”<sup>37</sup> When President Clinton granted pardons outside of this process at the end of his term, he suffered a major political backlash.<sup>38</sup> The combination of cautious, politically-accountable officials and reluctance of civil servants in the Department of Justice created an opaque, unaccountable structure that has contributed to the erosion federal clemency in the United States. Other large jurisdictions besides the United States face a similar challenge regarding law enforcement and prosecutorial interests’ influence on the clemency process, the lack of transparency in the deliberation process, and inefficient processing of large numbers of petitions. In the United Kingdom, the Home Office is politically responsible for law enforcement.<sup>39</sup> If a clemency petition requires a police investigation, the Home Office is not able to second-guess the police.<sup>40</sup> In India, the Ministry of Home Affairs has resisted identifying clemency guidelines despite

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32. Lauren Schorr, *Breaking Into the Pardon Power: Congress and the Office of the Pardon Attorney*, 46 AM. CRIM. L. REV. 1535, 1535, 1542–43 (2009).

33. 28 C.F.R. § 1.2 (2015).

34. Jody C. Baumgartner & Mark H. Morris, *Presidential Power Unbound: A Comparative Look at Presidential Pardon Power*, 29 POL. & POL’Y 209, 216 (2001).

35. Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton’s Last Pardons*, 32 CAP. U. L. REV. 185, 192–93 (2002).

36. *Id.*; see also H. Abbie Erler, *Executive Clemency or Bureaucratic Discretion? Two Models of the Pardon Process*, 37 PRESIDENTIAL STUD. Q. 427, 443 (2007).

37. Love, *supra* note 36 at 193.

38. *Id.* at 198–200; Erler, *supra* note 36, at 445 (noting that President Clinton lacked a close relationship with his Attorney General).

39. See Smith, *supra* note 19 at 398, 430.

40. *Id.*

accusations from human rights organizations that grants of clemency are arbitrary.<sup>41</sup> South Africa also has a bureaucratic mercy process involving senior-level government officials.<sup>42</sup> Like the president of the United States, the South African president has full power to pardon or reprieve offenders and to remit fines, penalties, and forfeitures.<sup>43</sup> The South African pardon policy has evolved to require an application to the Department of Justice and Constitutional Development, which considers the merits and provides a recommendation to the president.<sup>44</sup> The South African system, however, is “cumbersome” and “not cost effective” given the involvement of senior state officials in reviewing an increasing number of relatively low-level matters.<sup>45</sup> The burden on South Africa’s pardon system is further compounded by poor or outdated record keeping.<sup>46</sup> At its best, a bureaucratic process can be orderly and efficient. At its worst, it can be secretive, slow-moving, and unaccountable.

An open committee structure has several advantages over the closed bureaucratic systems in the United States and its counterparts in the United Kingdom, India, South Africa, and elsewhere. This structure, which prevails in many smaller common law countries and most U.S. states, involves a constitutional framework in which the executive must consult with the cabinet or executive council, a general advisory body, or a specially-appointed advisory mercy committee, all of which provide recommendations outside of a formal bureaucracy, such as a justice ministry.<sup>47</sup> Jurisdictions vary on whether the committee’s advice is simply a recommendation or whether it binds the executive.<sup>48</sup> The makeup of the committee and

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41. See ASIAN CENTRE FOR HUMAN RIGHTS, *supra* note 31 at 10.

42. B.C. Naudé, *The Pardoning Power As a Duty of Justice*, 15 S. AFR. J. CRIM. JUST. 159, 160–61 (2002).

43. S. AFR. CONST. art. 84(2)(j).

44. Naudé, *supra* note 42, at 160–61.

45. *Id.* at 171.

46. *Id.*

47. In Papua New Guinea, the governor-general must act on the advice of the National Executive Council (the cabinet), which in turn receives advice from the Advisory Committee on the Power of Mercy. PAPUA N.G. CONST. arts. 151–52. In Ghana, a general advisory body known as the Council of State, akin to a council of elders, advises the president on the exercise of many different executive powers, including the mercy power. GHANA CONST. art. 72(1). Zambia is illustrative of a host of constitutions where the president receives advice directly from an advisory mercy committee. See ZAM. CONST. art. 94–95.

48. Lesotho’s constitution provides an example of a provision in which the committee’s advice is binding on the executive: the King’s pardon power “shall be exercised by him acting in accordance with the advice of the Pardons Committee.” LESOTHO CONST. art. 101(2). Brunei Darussalam’s constitution provides an example of a provision in which the committee’s advice is nonbinding: “In exercising his powers, His Majesty the Sultan and Yang Di-Pertuan may have regard to, but is not bound to act in accordance with, the advice of the

the terms and conditions of membership also differ. In some jurisdictions, such as Florida, New Zealand, and Sri Lanka, the executive is required to receive the advice or approval of at least one other cabinet minister before granting clemency.<sup>49</sup> In a number of South Pacific nations, as well as Singapore, Zimbabwe, and Malta, the executive must consult with the entire cabinet,<sup>50</sup> although the executives in these jurisdictions are not bound by the committees' advice.<sup>51</sup> By contrast, in the Solomon Islands and eight U.S. states, the executive holds the clemency power, but he or she may only grant clemency upon a clemency committee or pardons board's favorable recommendation.<sup>52</sup> Finally, in nine U.S. states, the clemency power is vested exclusively in an executive board; in three of these states (Nevada, Minnesota, and Nebraska), the governor sits as a member of the board.<sup>53</sup> Although these structures vary widely

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Pardons Board." BRUNEI CONST. art. 9(2) (suspended by Constitution of Brunei Darussalam (Suspension) Order (2006)).

49. SRI LANKA CONST. art. 34(1) (requiring the president to consult with both the minister of justice and the attorney general); FLA CONST. art. 4 § 8 (requiring the governor to receive approval from two cabinet members); Denis Blundell, *Some Reflections Upon the Office of Governor-General in New Zealand*, 10 VICTORIA U. WELLINGTON L. REV. 197, 200 (1980).

50. See MALTA CONST. art. 93(2), ZIM. CONST. art. 112(1); MARSH. IS. CONST. art. 5, secs. 1(1), 3(f). For Singapore, see SING. CONST. ART. 22P(1)-(2); *Yong Vui Kong v. Att'y Gen.*, [2011] SGCA 9 (Sing.) (holding that the president is bound by the advice of the cabinet).

51. See, e.g., PAPUA N.G. CONST. arts. 151(1) (stating that the head of state may grant pardons "acting with, and in accordance with, the advice of the National Executive Council"), 152; MARSH. IS. CONST. art. 5 §§ 1(1), 3(f); ZIM. CONST. art. 112(1) (2013); MALTA CONST. art. 93(2). All these provisions require the executive to consult with the committee, but do not require the executive to follow that advice. The constitution of Saint Helena is even more explicit, stating that the governor "shall exercise the powers conferred by this section acting in his or her discretion, but after consulting the committee established by section 30." ST. HELENA CONST. art. 29(2). Compare TUVALU CONST. art. 80(1); KIRIBATI CONST. art. 50 (stating that the governor must act "in accordance with the advice of the Cabinet"). See *id.* All of these provisions require the executive to consult with the committee, but do not require the executive to follow that advice. The constitution of Saint Helena is even more explicit, stating that the governor "shall not exercise the powers conferred by this section acting in his or her discretion, but after consulting the committee established by section 30." ST. HELENA CONST. art. 29(2).

52. SOLOM. IS. CONST. art. 45(5); ARIZ. CONST. art. 5 § 5; ARIZ. REV. STAT. § 31-401; DEL. CONST. art. 7 § 1; IND. CONST. art. 5 § 17; IND. CODE § 11-9-2-1; LA. CONST. art. 4 § 5(E)(1); OKLA. CONST. art. 6 § 10; PENN. CONST. art. 4 § 9; TEX. CONST. art. 4 § 11(b). Until a legislative change in 2015, the governor of Montana required a favorable recommendation from a hearing panel appointed by the pardon board, except in death penalty cases. H.R. 43 2015 Leg., 64th Sess. (Mont. 2015), amending MCA 46-23-301 (removing the phrase "In noncapital cases, if the hearing panel recommends that clemency be denied, the application may not be forwarded to the governor and the governor may not take action on the case").

53. ALA. CONST. art. 5, § 124 (amended 1939); CONN. CONST. art. 4, § 13; GA CONST. art. 4, § 2 para. 1; IDAHO CONST. art. 4, § 7; MINN. CONST. art. 5, § 7 (amended 1896); NEB. CONST. art. 4, § 3; NEV. CONST. art. 5, § 14 (1); UTAH CONST. art. 7, § 12; CONN. GEN. STAT. § 54-124a; S.C. CODE ANN. § 24-21-920.

in practice, they also possess core advantages. They may help provide consistency and institutional memory in the exercise of the mercy power and, compared to a bureaucracy, may be resistant to political influence.<sup>54</sup>

Another advantage of an open committee structure is that including experts and nonpolitical actors in committee membership may broaden the diversity of represented views. This prevents narrow interests or political forces from influencing the clemency authority. Some constitutions frequently require that a legal actor, such as a minister of justice or a corrections expert, be involved in these committees.<sup>55</sup> Other countries' constitutions require a medical practitioner to evaluate the prisoner's treatment and mental health.<sup>56</sup> The diverse membership of clemency committees reflects a range of sentencing priorities across jurisdictions: an Islamic legal authority in Brunei; a social worker in the Solomon Islands; a crime victim in Pennsylvania or Colorado; a wrongfully convicted person in Connecticut.<sup>57</sup> The constitutions of Uganda, Kenya, Malaysia, Guyana, and Lesotho variously exclude members of parliament, lawyers, or other government officials in favor of members of civil society.<sup>58</sup>

A nonpolitical selection process and terms of appointment for members may improve decision-making. In some Commonwealth Caribbean nations, the governor-general must consult with the

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54. One objection to a committee structure is that it may be more conservative with systematic or policy-driven grants of clemency compared to an executive acting alone. *But see* Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT'G REP. 184, 184–85 (2000–2001). Over a fifteen-month period in 2000 and 2001, the Georgia Board of Pardons granted 138 pardons to permanent resident aliens who suddenly found themselves subject to deportation due to a change in federal immigration laws. Discretionary mercy authority allowed the Board to correct manifest injustice not otherwise subject to redress, especially to misdemeanants who had lived in the U.S. for many years or had U.S. citizen children. *Id.*

55. BOTS. CONST. art. 54(1)(b); UGANDA CONST. art. 121(1)(a); GUY. CONST. art. 189(b); TRIN. & TOBAGO CONST. art. 88(c); KENYA CONST. art. 133(2); PENN. CONST. art. 4 § 9(b).

56. ANT. & BARB. CONST. ART. 85(c); BOTS. CONST. ART. 54(1)(c); FALKLAND IS. CONST. ART. 70(d); GRENADA CONST. ART. 73(c); PENN. CONST. ART. 4, § 9; SOLOM. IS. CONST. ART. 45(2)(A); ST. LUCIA CONST. ART. 75(1); SWAZI. CONST. ART. 78(2).

57. BRUNEI CONST. art. 8A, (suspended by Constitution of Brunei Darussalam (Suspension) Order (2006)); SOLOM. IS. CONST. art. 45(2)(a); PENN. CONST. art. 4, § 9 (amended 1997); Exec. Order No. B-008 (2007) (Colo.) (requiring one member to be a crime victim); Jenny Wilson & Alaine Griffin, *Malloy Appoints Man Wrongfully Convicted of Murder to Parole Board*, HARTFORD COURANT (Oct. 8, 2014, 8:35 PM), [www.courant.com/politics/hc-malloy-appointments-judges-board-20141008-story.html](http://www.courant.com/politics/hc-malloy-appointments-judges-board-20141008-story.html).

58. GUY. CONST. art. 189(2); KENYA CONST. art. 133(2); LESOTHO CONST. art. 102(1); MALAY. CONST. art. 42(7); UGANDA CONST. art. 121(1)–(3).

prime minister or opposition leader,<sup>59</sup> while in Lesotho and Seychelles, appointments are vetted through a judicial appointments authority.<sup>60</sup> In Sierra Leone, the cabinet, not the president, appoints the committee.<sup>61</sup> Gambia and the U.S. states of Georgia and Utah require legislative approval of appointees.<sup>62</sup> Term limits for members are also common: four years in Uganda, three years in Malaysia, Belize, and Guyana, and two years in Fiji.<sup>63</sup>

Research from the United States suggests that an impartial committee, operating under regulated procedures and insulated from politics, is more likely to grant routine pardons than an elected official acting alone.<sup>64</sup> According to former U.S. Pardon Attorney Margaret Colgate Love's statistics, the most frequent clemency grants occur in states with independent pardons boards (such as Alabama, Connecticut, Georgia, and South Carolina).<sup>65</sup> States where a governor requires a recommendation from a board to grant clemency, called a hybrid model, have more mixed results: some states frequently grant clemency while others do not.<sup>66</sup> Even in states where governors possess final clemency power, governors frequently consult with an appointed board on the assumption that it is politically safer.<sup>67</sup> For example, former Illinois Governor Pat Quinn, who frequently granted clemency, often consulted with his state's Prisoner Review Board.<sup>68</sup> In Maryland, Michigan, and Missouri the parole board is required by statute to review all clemency petitions and make non-binding recommendations.<sup>69</sup> Even in jurisdictions where such a board does not exist, governors have found it politically expedient to create one. By executive order in 2007, the governor of Colorado established a seven member Executive Clemency Advisory Board to make recommendations on mercy at the governor's request.<sup>70</sup>

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59. ANT. & BARB. CONST. art. 85(a)-(d); DOMINICA CONST. art. 74(1)-(2); GREN. CONST. art. 73(1)-(5).

60. LESOTHO CONST. art. 102; SEY. CONST. art. 61.

61. SIERRA LEONE CONST. art. 63(1).

62. GAM. CONST. art. 82(2); GA. CONST. art. 4 § 2; UTAH CONST. art. 7 § 12(1).

63. BELIZE CONST. art. 54 (amended 1988); FIJI CONST. arts. 115(2)-(3), 169(k), 170(2), 183(1)(1), 183(2); GUY. CONST. art. 189(3); MALAY. CONST. art. 42(4)-(11); UGANDA CONST. art. 121(1)-(3).

64. See Love, *supra* note 28 at 744-47.

65. *Id.*

66. *Id.*

67. *Id.*

68. See *Id.* at 749.

69. MICH. COMP. LAWS § 791.244 (2015); MO. REV. STAT. § 217.800; MD. REGS. CODE tit. 12 § 18.01.16.

70. Exec. Order B-008 (2007) (Colo.).

The implementation of a committee structure at the federal level to consider clemency requests could benefit the routine clemency process in several ways. First, the committee structure would bring a diverse range of views to bear on a clemency petition and could resist capture by prosecutorial or law enforcement interests. Expertise from medical practitioners, justice reform advocates, and others would improve the caliber of the clemency recommendation and preserve the independence of the committee members from organizational pressures. Second, as the experience of states shows, committees frequently improve the transparency of the clemency process through open deliberations, access to stakeholders such as victims, families, and local officials, and public reporting and record-keeping. A number of federal agencies incorporate the advice or deliberations of independent boards or committees into their routine operations precisely to take advantage of outside expertise and diversity of viewpoint.<sup>71</sup> The Department of Justice could benefit from the diversity of views a committee structure would provide, even if such a committee provided only non-binding recommendations.

## II. JUDICIAL REVIEW OF EXECUTIVE CLEMENCY

The United States has not followed the international trend toward increasingly robust judicial review of the clemency and pardon power. Judicial review ensures the executive branch follows established legal processes and protects the due process rights of applicants. These due process rights include assurances that an applicant has the right to seek clemency, that consideration of the petition is timely and in good faith, that the deliberation process is genuine and free from conflicts of interest, and that an applicant will not be executed while a petition is still pending.<sup>72</sup> In many

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71. See generally Stephen P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Governance*, 14 YALE J. ON REG. 451, 452–53 (1997) (explaining how the Federal Advisory Committee Act, which regulates external advisory policy boards of federal executive agencies, was intended to promote openness, impartiality, and administrative efficiency).

72. These rights are among the minimum standards required by international law in death penalty cases. See United Nations, International Covenant on Civil and Political Rights (ICCPR), art. 6, ¶ 49, draft general comment No. 36 CCPR/C/GC/R.36/Rev.2 (Sept. 2, 2015) (“pardon or commutation procedures must offer certain essential guarantees, including clarity about the processes followed and the substantive criteria applied; a right for individuals sentenced to death to initiate pardon or commutation procedures and to make representations about their personal or other relevant circumstances; a right to be informed in advanced when the request will be considered; and a right to be informed promptly about the outcome of the procedure”).

countries, the clemency process is becoming subordinated to principles of constitutional and administrative law; this contrasts with clemency's origins as an unreviewable prerogative power of the English monarch.<sup>73</sup> Judges are increasingly willing to evaluate pardons to determine whether the constitutional mercy procedure is followed. Judicial review also ensures that a defendant is provided minimal due process protections and that a grant of clemency is not arbitrary or discriminatory, although judges typically stop short of reviewing the ultimate pardon decision. Opening the clemency process to judicial scrutiny is one means of increasing transparency and ensuring that an applicant's due process rights are protected, especially in death penalty cases.

Judicial oversight of clemency in the United States is extremely minimal, even though the right to seek clemency in death penalty cases is required by international law.<sup>74</sup> The U.S. Supreme Court has considered the constitutionality of state clemency proceedings based on the Due Process Clause of the Fourteenth Amendment. In *Connecticut Board of Pardons v. Dumschat*, the Court held that a clemency applicant has no constitutionally-protected interest in non-capital clemency proceedings; therefore, the Due Process Clause imposes no limitations on the executive.<sup>75</sup> In 1998, the Court addressed the constitutional standards of clemency in capital cases in *Ohio Adult Parole Authority v. Woodard*, a plurality decision.<sup>76</sup> Because she provided the crucial fifth vote, the narrow concurring opinion of Justice Sandra Day O'Connor is recognized as controlling.<sup>77</sup> Justice O'Connor concluded that "some minimal procedural safeguards apply to clemency proceedings" because a death row prisoner has an interest in his or her life and judicial intervention might be warranted where, for instance, a state official merely flipped a coin.<sup>78</sup> In dissent, Justice Stevens cited a broader list of constitutionally troublesome circumstances, including instances of

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73. See Cox, *supra* note 27, at 12–13.

74. International Covenant on Civil and Political Rights (ICCPR), art. 6(4), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 85 (entered into force Mar. 23, 1976). The United States has ratified the ICCPR.

75. See *Connecticut Board of Pardons v. Dumschat* 452 U.S. 458, 464–65 (1981).

76. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998).

77. Although the Court ruled 8-1 to uphold the Ohio provisions as constitutional, five justices (O'Connor's concurrence, joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer, and the dissent by Justice John Paul Stevens) supported the proposition that a prisoner under a death sentence has a constitutional interest in protecting his right to life and therefore some minimal constitutional safeguards were required. *Id.* at 288 (O'Connor, J., concurring). The dissent by Justice Stevens supported more robust constitutional protections. *Id.* at 290–91 (Stevens, J., concurring in part and dissenting in part).

78. *Id.* at 274, 288. (O'Connor, J., concurring in part and concurring in the judgment).

bribery, personal or political animosity, or fabrication of false evidence, that implicated broader Due Process concerns than those protected under Justice O'Connor's rationale.<sup>79</sup> The Court rejected the clemency applicant's argument that the Ohio clemency authority provided insufficient notice for a clemency hearing and did not offer assurances that the applicant's counsel could attend and participate in proceedings.<sup>80</sup>

*Woodard* provides only the most minimal protections for clemency applicants and is out of sync with a growing consensus in the English-speaking world. *Woodard* applies only in death penalty cases and prevents only the most egregious and wanton conduct. One of the rare cases where clemency proceedings were found to violate due process was *Young v. Hayes*, in which the U.S. Court of Appeals for the Eighth Circuit found a city attorney's threat to fire a lawyer under her supervision if the lawyer provided information to the governor or the parole board concerning a death row inmate's clemency petition was akin to the fortuitousness that Justice O'Connor identified as the due process standard in clemency cases.<sup>81</sup> The lawyer had concerns about the quality of the inmate's counsel, but was under pressure not to embarrass the city attorney's office.<sup>82</sup> The Eighth Circuit ruled in favor of the inmate, holding that the Due Process Clause prevented state officials from frustrating a clemency petition by threatening the job of a potential witness.<sup>83</sup> Except for the most obvious conflicts of interest, as in *Young v. Hayes*, *Woodard* has been interpreted to provide virtually no due process protections in state clemency proceedings, even in capital cases. In 1998, relying on *Woodard*, the U.S. District Court for the Western District of Texas upheld Texas clemency proceedings even though the Texas Board of Pardons and Paroles rarely met to discuss any petitions for clemency and its members were allowed to meet in private, or by telephone, and were allowed to call or fax in their votes.<sup>84</sup> The Board did not keep records of meetings and never conducted an investigation or held a hearing. Yet the Board must favorably recommend clemency before the governor can even

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79. *Id.* at 290–91 (Stevens, J., concurring in part and dissenting in part).

80. *See id.* at 277.

81. *See Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000).

82. *Id.* at 852.

83. *Id.* at 853.

84. *Faulder v. Tex. Bd. of Pardons and Paroles*, 178 F.3d 343, 344–5 (5th Cir. 1999) (per curiam).

consider the merits of a case.<sup>85</sup> As it has been interpreted, the U.S. Constitution places few limitations on the clemency process.<sup>86</sup>

The rise of judicial review in clemency cases elsewhere in the common law world provides important comparisons for the U.S. federal process. In many countries, the unlimited discretion of the executive in granting clemency has yielded to judicial review in at least some cases.<sup>87</sup> Under the traditional conception of the prerogative of mercy, courts could determine the existence and extent of the royal prerogative of mercy but could not review the manner of its exercise.<sup>88</sup> As summarized by the Judicial Committee of the Privy Council in *De Freitas v. Benny*, mercy “is not the subject of legal rights. It begins where legal rights end.”<sup>89</sup> Beginning in the 1980s, however, judicial un-reviewability of other royal prerogative powers came under increasing scrutiny. In *Council of Civil Service Unions (CCSU) v. Minister for the Civil Service*, a majority of the Law Lords in the English House of Lords found that royal prerogative powers (in that case, the royal Order-in-Council prerogative) were subject to judicial review on administrative law grounds.<sup>90</sup> Although the royal prerogative of mercy was not originally included in the category of royal prerogative powers subject to judicial review, the Queen’s Bench for England and Wales determined in 1992 that the Home Secretary had not given adequate consideration to the posthumous mercy petition of Derek Bentley, who was hanged in 1953 for a crime committed at age 19.<sup>91</sup> *Ex Parte Bentley* established the proposition that the common law prerogative of mercy could be

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85. See *id.*; Daniel T. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567, 576 (2000); Allen L. Williamson, *Clemency in Texas: A Question of Mercy?*, 6 TEX. WESLEYAN L. REV. 131, 148–49 (1999).

86. One major constitutional constraint is that an exercise of the clemency power cannot violate other constitutional rights, such as equal protection, or infringe on the powers of other branches of government. Hoffstadt, *supra* note 28, at 594–95 (noting that grants of clemency probably cannot interfere with the vested property rights of a third party in violation of the Takings Clause of the Fifth Amendment or require the payment of funds from the U.S. Treasury in violation of the Taxing and Spending Clause); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 116 (2002) (noting that a pardon probably cannot violate equal protection).

87. The majority rule in the Commonwealth is that a court can inquire into whether the executive properly considered a clemency petition, but not review the substance of the final decision. NOVAK, *supra* note 30, at 194.

88. Smith, *supra* note 1939, at 432–33.

89. *De Freitas v. Benny* [1976] AC 239 (PC) 247 (appeal taken from Trin. & Tobago).

90. *Council for Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374 (HL) at 375 (appeal taken from Eng.).

91. *Queen v. Secretary of State for the Home Department (Ex parte Bentley)* [1994] QB 349 (Eng.).

subject to judicial review where the executive decision-maker did not properly consider a clemency petition.<sup>92</sup>

A number of Commonwealth countries followed the opening established by the House of Lords in *CCSU*. In New Zealand, the Court of Appeal held in *Burt v. Governor General* that the prerogative of mercy could be subject to judicial review in exceptional circumstances.<sup>93</sup> In 2000, the Privy Council reversed *De Freitas v. Benny* and a number of later cases in *Lewis v. Attorney General of Jamaica*.<sup>94</sup> According to the Privy Council, the exercise of mercy was reserved for the governor acting on the recommendations of the advisory mercy committee and the merits were not for review in court. However, the court could inquire into whether the governor general consulted with the committee, whether the committee refused to look at the required information, or whether the recommendation was made by people unqualified to sit as members of the committee.<sup>95</sup> *Lewis* has been favorably cited by the Caribbean Court of Justice, the Hong Kong Court of First Instance, the Supreme Court of the Australian Capital Territory, and the Queen's Bench of Northern Ireland.<sup>96</sup> Canadian and South African jurisprudence are also in accord regarding the reviewability of pardons.<sup>97</sup> Applying judicial review to aspects of the mercy process represents an emerging consensus in the Commonwealth and makes a clean break with the historical conception of the King's mercy as a divine act of providence.

The global trend toward opening the mercy power to judicial review is also occurring in countries where, like the United States, the pardon power derives from a written constitution rather than common law conventions. Compared to the United States, India has enacted more robust judicial review over clemency matters, a product of perpetual tension between the executive branch and the

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92. *Id.*

93. Christopher Gelber, *Reckley (No 2) and the Prerogative of Mercy: Act of Grace or Constitutional Safeguard?*, 60 MOD. L. REV. 572 (1997).

94. *Lewis v. Att'y Gen. of Jam.*, [2000] PC 35 (appeal taken from Jam.).

95. *Id.* at ¶ 47.

96. See *Att'y Gen. v. Joseph*, [2006] CCJ 1 (AJ) at ¶ 132; *Ch'ng Poh v. Chief Exec. of H.K. Special Admin. Region*, [2003] H.K.L.R.D. 496 at ¶¶ 31–32 (C.F.I.); *Eastman v A-G (ACT)* [2007] CLR 28 at ¶¶ 49–50, 68–70 (Austl.); *In re Dunn*, [2010] NIQB 54 at ¶¶ 8–9, 18–19.

97. The Constitutional Court of South Africa has held that the presidential pardon power “entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality, diligently and without delay.” *Minister of Justice v. Chonco*, (2010) 1 SACR 325 (CC) at ¶ 30. The Canadian Supreme Court has similarly ruled that the minister of justice “must act in good faith and conduct a meaningful review” in a petition for clemency as he was bound by the duty of fairness under the Canadian Charter of Rights and Freedoms even though he had no legal obligations to an applicant. *Thatcher v. Att'y Gen.*, [1997] 1 F.C. 289 (Can.).

judicial branch on issues concerning the death penalty. Under the constitution of India, “No person shall be deprived of his life or personal liberty except according to a procedure established by law.”<sup>98</sup> In the seminal case *Maneka Gandhi v. Union of India*, the Supreme Court of India ruled that the prescribed procedure had to be “fair, just, and reasonable,” importing principles of due process into the clause.<sup>99</sup> The Court applied this rule to clemency proceedings in *Maru Ram v. Union of India* and ruled that it could review grants of clemency that were “wholly irrelevant, irrational, discriminatory, or *mala fide*.”<sup>100</sup> In a subsequent decision, the Court established that it could review executive clemency decisions for procedural impropriety and violations of individual rights, but could not review the substantive merits.<sup>101</sup> The Court has, at times, been vigilant about procedural delay in disposing of clemency petitions.<sup>102</sup> In addition, the Court has quashed state clemency orders with a direction to reconsider the petition when, for instance, irrelevant considerations entered into the decision-making process or a state governor made a mechanical decision.<sup>103</sup> Undoubtedly, this constitutional regime provides more robust oversight than that of *Woodard*.

By contrast, a dwindling number of common law jurisdictions resist judicial review of clemency deliberations. Singapore’s Court of Appeal has constructed a model of judicial review of the clemency power that is similar to that of the United States under *Woodard*. In *Yong Vui Kong v. Attorney General*, the court ruled that exercise of the pardon power was governed by the fundamental rules of natural justice and was therefore reviewable on the classic grounds of illegality, irrationality, and procedural impropriety.<sup>104</sup> However, the Court found that the petitioner did not have the right to file a clemency petition, the right to be heard, or, rejecting *Lewis*, the right to see material presented to the cabinet.<sup>105</sup> Other jurisdictions that adhere to a more traditional conception of judicial review of

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98. INDIA CONST. art. 21.

99. *Maneka Gandhi v. Union of India*, (1978) 2 S.C.R. 621, 658.

100. *Maru Ram v. Union of India*, (1981) 1 SCC 107 at ¶ 9.

101. *See* *Kechar Singh v. Union of India*, AIR 1989 SC 653, 664.

102. *See, e.g.*, *Vatheeswaran v. State of Tamil Nadu*, (1983) 2 SCC 68; *Triveniben v. State of Gujarat*, (1989) 1 SCC 678.

103. *See, e.g.*, *Satpal v. State of Haryana*, (2000) 5 SCC 170; *Epuru Sudhakar v. State of Andhra Pradesh*, AIR 2006 SC 385.

104. *Yong Vui Kong v. Att’y Gen.*, [2011] SGCA 9.

105. *Id.*

clemency decisions include Swaziland and Malaysia, where the prerogative of mercy has been determined to be non-justiciable.<sup>106</sup> These countries are increasingly in the minority and all three of them have constitutional regimes that differ considerably from the individual due process protections in the U.S. Constitution.<sup>107</sup> The United States stands apart from an emerging consensus on judicial reviewability of clemency proceedings.

Opening the common law prerogative of mercy to judicial review helps protect the rights of defendants and ensures that a clemency authority follows constitutional requirements for the consideration of petitions. The United States, however, has resisted this trend. *Woodard* provides only the most minimal due process protections for clemency petitions and only in death penalty cases.<sup>108</sup> Not only is this stance out of sync with the growing majority rule in the common law world, such minimal due process protections may not be compliant with international law, which requires an effective clemency mechanism and genuine consideration process in every death penalty case.<sup>109</sup> The International Court of Justice (ICJ) scrutinized American clemency proceedings in *Avena and Other Mexican Nationals (Mexico v. United States of America)* in its decision that the United States violated the consular notification rights of Mexican nationals on death row in Texas.<sup>110</sup> According to the ICJ, while clemency could provide an appropriate remedy for redressing due process violations, the actual practice of clemency in the United States was “not sufficient in itself” to comply with the United States’s obligations toward death row inmates.<sup>111</sup> Increasing judicial scrutiny of

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106. *Nkosi v. Att’y Gen.*, [2004] SZHC 79 (June 17, 2004); *Juraimi bin Husin v. Lembaga Pengampunan Negeri Pahang*, [2001] 3 M.L.J. 458.

107. The constitutions of Malaysia and Singapore lack protection of a right to a fair trial and a prohibition of cruel, inhuman, and degrading punishment. See generally MALAY. CONST. arts. 5–13 (detailing the fundamental rights provisions of both constitutions); SING. CONST. arts. 9–16. In addition, both Singapore and Malaysia have constitutional systems that establish strong executives with relatively weak judicial power, a law and order ethos, and a general intolerance of political dissent. See DAVID T. JOHNSON & FRANKLIN E. ZIMRING, *THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA* 413 (2009). Similarly, Swaziland’s constitution fails to protect political freedoms or limit the power of the monarchy, though the 2005 constitution provides an elaborate Bill of Rights. See Sabelo Gumedze, *Human Rights and the Rule of Law in Swaziland*, 5 AFR. HUM. RTS. L.J. 266, 276 (2005); Chris Maroleng, *Swaziland: The King’s Constitution*, 12(3) AFR. SECURITY REV. 45, 47 (2003). Charles Manga Fombad, *The Swaziland Constitution of 2005: Can Absolutism Be Reconciled with Modern Constitutionalism?*, 23 S. AFR. J. ON HUM. RTS. 93, 111 (2007).

108. See *supra* notes 7480 and accompanying text.

109. See HOOD & HOYLE, *supra* note 15, at 312–13.

110. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, 58, ¶¶ 142–143 (Mar. 31).

111. *Id.*

the clemency process and ensuring more robust due process protections for clemency applicants would accord with an emerging global trend and ensure compliance with international minimum standards.

### III. TRANSPARENCY

In addition to constitutional doctrine, principles of administrative law, including freedom of information laws and reporting and publication requirements, have increasingly been applied to clemency proceedings. In contrast to the minimal constitutional standards imposed on the federal clemency process in the United States, the Pardon Attorney's deliberations have slowly opened to administrative scrutiny under the Freedom of Information Act (FOIA) over the last decade. This is a positive development.

In 2004, the U.S. Court of Appeals for the District of Columbia Circuit applied FOIA to the U.S. Pardon Attorney in *Judicial Watch, Inc. v. U.S. Department of Justice*.<sup>112</sup> In that case, a public interest judicial watchdog organization requested documents related to President Clinton's pardon requests. The Justice Department under President Bush invoked the presidential communications privilege under FOIA Exemption 5, which protects "inter-agency or intra agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."<sup>113</sup> The Justice Department argued that the Pardon Attorney's "sole" responsibility was to advise the President on pardon applications, and therefore the presidential communications privilege should apply to all pardon-related documents, or at least that the President's exercise of a "quintessential and non-delegable power" such as the pardon power should be protected under executive privileges as a general matter.<sup>114</sup> The D.C. Circuit disagreed, holding that the presidential communications privilege only applies to those pardon documents actually solicited and received by the President or his immediate White House advisors.<sup>115</sup> Because the Pardon Attorney's advice is filtered through the deputy attorney general, a privilege rule encompassing the Pardon Attorney would sweep much of the

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112. 365 F.3d 1108 (D.C. Cir. 2004).

113. Chad T. Marriott, *A Four-Step Inquiry to Guide Judicial Review of Executive Privilege Disputes Between the Political Branches*, 87 OR. L. REV. 259, 283 (2008) (citing 5 U.S.C. § 552(b)(5) (2006)).

114. Marriott, *supra* note 1133, at 284.

115. *Judicial Watch*, 365 F.3d at 1123.

executive branch under the privilege.<sup>116</sup> Today, the Pardon Attorney receives FOIA requests as a matter of course, indicating that the office “maintains a clemency case file for each individual who has applied for or has been granted or denied clemency.”<sup>117</sup> FOIA makes these files reviewable, along with historical records and public correspondence.<sup>118</sup>

Opening executive clemency to public scrutiny through administrative freedom of information laws has also occurred in other common law jurisdictions. Australia is a notable example. In 2005, the Civil and Administrative Tribunal of the state of Victoria ordered that clemency documents must be released under Victoria’s Freedom of Information Act of 1982 in *Osland v. Victorian Department of Justice*.<sup>119</sup> In that case, new evidence came to light strongly suggesting that Heather Osland, the petitioner, acted in self-defense when she killed her husband. Her clemency application was denied. The tribunal found that the public interest favored such a release, given high media interest and lack of public confidence in the decision.<sup>120</sup> Victoria’s FOIA law protected from disclosure documents that “would be privileged from production in legal proceedings on the ground of legal professional privilege,” akin to the work-product doctrine in the United States.<sup>121</sup> Using the examples of President Gerald Ford’s pardon of Richard Nixon and President Bill Clinton’s pardon of Democratic Party donor Marc Rich, the judge concluded that the “exercise of the prerogative of mercy – or the grant of a pardon – in circumstances which are not transparent or beyond question have the potential to undermine public confidence in the justice system.”<sup>122</sup>

Adhering to the traditional conception of clemency as unreviewable in court, a three-judge panel of the Supreme Court of Victoria reversed, holding that the matter did not implicate a broader public interest as a matter of law and that the documents remained privileged.<sup>123</sup> According to one of the concurrences:

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116. *Id.* at 1122

117. U.S. DEP’T OF JUSTICE, PARDON ATTORNEY FOIA, <http://www.justice.gov/pardon/pardon-attorney-foia> (last accessed August 20, 2015).

118. *Id.*

119. [2005] VCAT 1648 (Austl.).

120. *Id.* at ¶¶ 48–55.

121. *Freedom of Information Act of 1982* (Vic) Sec 32(1) (Austl.).

122. *Osland* [2005] VCAT 1648 at ¶ 49 (Austl.).

123. *Sec’y to the Dep’t of Justice v Osland* [2007] VSCA 96 at ¶ 103 (Austl.).

Whether the prerogative is exercised or not is entirely within the province of the Sovereign advised by the executive government. No question of legal rights is involved. No reasons need be given for the decision taken. . . . The decision itself is not reviewable, nor are the reasons, motives, or intentions of the Crown's representative. Why then should the advice the Attorney-General received before advising the Crown's representative to deny the petition be placed in the public domain?<sup>124</sup>

The Australian High Court remitted the case back to the Supreme Court of Victoria to actually inspect the documents to determine whether the public interest would be served, emphasizing that Victoria's FOIA law contained a "public interest override" in which documents otherwise exempt from disclosure could be disclosed where the public interest so requires.<sup>125</sup> However, the Supreme Court of Victoria again unanimously ruled that the public interest override could not apply since clemency was a non-reviewable and discretionary act of the executive.<sup>126</sup> On appeal, the Australian High Court reversed and reinstated the Tribunal's original decision granting access to the documents. According to the High Court, "exercise of the prerogative of mercy in relation to a person convicted of murder engages the public interest at a high level of importance," and a decision against exercise of the prerogative in such a case involves "considerations of fundamental importance to the whole community."<sup>127</sup>

Both the D.C. Circuit's decision in *Judicial Watch* and the Australian High Court's decision in *Osland* have created important new opportunities for academics, journalists, the general public, and the applicants themselves to scrutinize the bureaucratic and otherwise opaque clemency process. The decisions in the United States and Australia may herald a trend toward applying principles of administrative law to clemency proceedings, which, like applying constitutional due process protections to such proceedings, can help improve the quality of the clemency process.

Transparency in the clemency process can prevent arbitrariness, discrimination, and political favoritism by allowing media and public scrutiny and allowing applicants to challenge deficiencies.

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124. *Osland v Sec'y to the Dep't of Justice* [2008] HCA 37 at ¶ 43 (Bongiorno AJA, concurring) (Austl.).

125. *Id.*

126. *Sec'y to the Dep't of Justice v Osland* [No. 2] [2009] VSCA 69 (Austl.); (2009) 254 ALR 590.

127. *Osland v. Sec'y to the Dep't of Justice* [2010] HCA 24 at ¶ 47.

Application of freedom of information laws is one mechanism for improving transparency; provision for written or oral representations and reporting and publication requirements are others. Unlike state constitutions or the constitutions of other common law jurisdictions, the U.S. constitution provides no reporting or publication requirements to inform the public, the victim, or even the applicant of the timing, nature, or result of a clemency determination. Under federal regulations, a clemency applicant receives notice of a clemency determination, but a provision for an oral hearing through counsel is only permitted at the discretion of the Pardon Attorney and only in federal death penalty cases.<sup>128</sup> This Part suggests some additional constitutional participation, reporting, and publication mechanisms used in other jurisdictions that permit public and judicial scrutiny and that could improve public perceptions of the pardon process.

One of the most common constitutional mercy provisions in the Commonwealth requires that the trial judge (or the chief justice if the trial judge is unavailable) provide a written report to the clemency decision-maker in death penalty cases, a codification of the British colonial practice.<sup>129</sup> Twenty-three common law jurisdictions require a mercy report in capital cases.<sup>130</sup> The constitutions of Uganda and Botswana are illustrative of the general provision in which a trial judge or the chief justice must provide a written report in all capital cases to the Advisory Committee on the Prerogative of Mercy.<sup>131</sup> Other constitutions have more substantial requirements. In Sierra Leone, a medical report on the prisoner is also required in addition to the trial judge's report.<sup>132</sup> The constitution of Singapore requires not only a report from the trial judge, but also

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128. 28 C.F.R. §§ 1.6–1.10.

129. For more on mercy reports in death penalty cases during the British colonial period, see HELEN LACEY, *ROYAL PARDON: ACCESS TO MERCY IN FOURTEENTH CENTURY ENGLAND* 21 (2009) (discussing the role of reports from the trial judge to the chancellor in medieval England); B.v.D. van Niekerk, . . . *Hanged By the Neck Until You Are Dead*, 86 S. AFR. L.J. 457, 460–61 (1969) (discussing the role of the mercy report in South Africa); Kenneth L. Avio, *The Quality of Mercy: Exercise of the Royal Prerogative in Canada*, 13 CAN. PUB. POL'Y 366, 368 (1987) (discussing the role of the mercy report in Canada).

130. ANT. & BARB. CONST. art. 86(1); BAH. CONST. art. 92(1); BARB. CONST. art. 78(3); BELIZE CONST. art. 53; BOTS. CONST. art. 55(1); DOMINICA CONST. art. 75; FIJI CONST. art. 115(4); GHANA CONST. art. 72(2); GREN. CONST. art. 74(1); GUY. CONST. art. 190(1); JAM. CONST. art. 91(1); MALTA CONST. art. 93(2)(a); MAURITIUS CONST. art. 75(6); SIERRA LEONE CONST. art. 63(2); SING. CONST. art. 22P(2); SOLOM. IS. CONST. art. 45(7); SRI LANKA CONST. art. 34; ST. KITTS & NEVIS CONST. art. 68(1); ST. LUCIA CONST. art. 76; ST. VINCENT CONST. art. 67(1); SWAZ. CONST. art. 78(5); TRIN. & TOBAGO CONST. art. 89(1); UGANDA CONST. art. 121(5).

131. BOTS. CONST. art. 55; UGANDA CONST. art. 121(5).

132. SIERRA LEONE CONST. art. 63(2).

reports by the appellate judges that affirmed the sentences.<sup>133</sup> In Canada, before the abolition of the death penalty, the Remissions Service of the Department of Justice gathered court records, the trial judge's report, representations on behalf of the accused, psychiatric reports, and police reports in preparation for consultation between the Director of the Remissions Service and either the minister of justice or the solicitor general, who then consulted with the cabinet.<sup>134</sup> The U.S. Constitution, by contrast, imposes no particular requirements as to the documentation on which the clemency authority must rely.<sup>135</sup>

Jurisdictions vary as to whether an applicant for clemency is entitled to an oral hearing or the right to make written representations to a clemency authority,<sup>136</sup> but such provisions undoubtedly improve the quality of the deliberations. Federal regulations in the United States provide a procedure by which clemency applicants can request a hearing before the Office of the Pardon Attorney; victims may also participate in the hearing.<sup>137</sup> However, these provisions are not legally binding and are only applicable to death penalty cases.<sup>138</sup> Nonetheless, four U.S. state constitutions (Idaho, Utah, Pennsylvania, and Delaware) specifically provide for a public hearing for clemency petitions.<sup>139</sup> A total of twenty-four U.S. states expressly permit hearings for pardon applicants; in eleven of them, the hearings may be *ex parte*, and in ten the applicant's presence is required.<sup>140</sup> Clemency hearings tend not to be directly adversarial, and the applicant and other interested parties may testify in the narrative rather than in a question-and-answer format.<sup>141</sup> In Louisiana, the pardon board even travels to prisons so that current inmates can appear.<sup>142</sup> Outside of the United States, oral hearings

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133. SING. CONST. art. 22P(2).

134. Avio, *supra* note 129, at 367–68.

135. The U.S. Constitution provides no procedure for the exercise of the president's clemency power at all. *See* U.S. CONST. art. II, § 2.

136. According to Hood and Hoyle, Tanzania and Trinidad and Tobago allow the applicant to make written representations to the mercy committee. Kenya does not. HOOD & HOYLE, *supra* note 15 at 316.

137. 20 C.F.R. § 1.10(c).

138. *Id.* at § 1.10(c), 1.11.

139. DEL. CONST. art. 7 § 1(1); IDAHO CONST. art. 4 § 7; PENN. CONST. art. 4 § 9(a); UTAH CONST. art. 7 § 12.

140. Clifford Dorne & Kenneth Gewerthe, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 446 (1999).

141. *Id.*

142. *Id.*

for clemency applications are unusual.<sup>143</sup> More common are provisions specifically allowing the petitioner and his or her representative to make written representations to the deliberating mercy committee.<sup>144</sup> The applicant is also notified of the time of the clemency deliberations and the final determination.<sup>145</sup> The constitution of Barbados, for instance, gives an applicant the right to submit written representations to the Governor General or the advisory mercy committee (known as the Barbados Privy Council) with respect to any of their functions, but the applicant “is not entitled to an oral hearing.”<sup>146</sup> Nonetheless, a constitutional requirement that an applicant has the right to make representations to the clemency committee either personally or through legal counsel helps ensure that the deliberation process will be genuine and may prevent clemency decisions that are arbitrary, secretive, or discriminatory.

Reporting and publication requirements also help improve transparency in the mercy process, in particular by preventing secret pardons. The constitution of Belize has a clause typical of this type, authorizing an annual report to the prime minister that is subject to consideration by the National Assembly.<sup>147</sup> The new constitution of Zimbabwe similarly allows for transparency through reporting; the Zimbabwe constitution states that all clemency grants must be published in the official government gazette, a provision that did not exist in the previous constitution.<sup>148</sup> Some national constitutions even require that the executive provide reasons for a pardon. In Tuvalu, if the governor-general exercises the mercy power, the prime minister must present a statement giving reasons for the grant at the next session of parliament.<sup>149</sup> In the U.S., twenty-seven states require that the governor report his or her clemency actions to the state legislature.<sup>150</sup> In addition, seven states require that a

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143. I am not aware of any non-U.S. jurisdictions that provide for an oral hearing in clemency proceedings.

144. See HOOD & HOYLE, *supra* note 15 at 316.

145. Notification of the time of clemency deliberations and the final disposition of the petition are required by *Lewis v. Att’y Gen. of Jam.*, [2000] PC 35, and jurisdictions that follow that decision. These are also required by international law. See, e.g., *McKenzie v. Jamaica*, Case 12.023, Inter-Am. Comm’n H.R., Report No. 41/00, OEA/Ser.L/V/II.106, doc. 3 ¶ 228 (2000); *Edwards v. Bahamas*, Case 12.067, Inter-Am. Comm’n H.R., Report No. 48/01, OEA/Ser.L/V/II.111, doc. 20 (2000).

146. BARB. CONST. art. 78(5). This provision was added by constitutional amendment in 2002. *Id.*

147. BELIZE CONST. arts. 54(14), (18), (19).

148. ZIM. CONST. art. 47(4) (2013); see also ZIM. CONST. art. 31 (1979).

149. TUVALU CONST. art. 80(2).

150. Kathleen M. Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, 24 CRIM. JUST. 26, 38 (2009–2010).

pardon or parole board give a periodic report to the governor.<sup>151</sup> In Georgia, the board must report to the legislature.<sup>152</sup> The strength of this reporting requirement varies among U.S. states: in Massachusetts, the governor only needs to provide an annual list to the legislature of pardons granted the previous year,<sup>153</sup> while in Colorado and Arkansas, the governor must report to the legislature the reasons for granting a pardon.<sup>154</sup> Pennsylvania's constitution requires that the pardons board shall keep records available for public inspection.<sup>155</sup> These reporting and publication requirements allow some media and public scrutiny of clemency decisions.

At the U.S. federal level, the president's pardon power does not require that justifications or reasons be given for a pardon, though notice of the decision is required.<sup>156</sup> However, some observers have argued that even though justification is not required, it would benefit the pardon system.<sup>157</sup> Detailed explanations for clemency usually accompany only the most controversial pardons, such as the opinion by President Clinton in *The New York Times* in 2001 justifying his pardon a month earlier of Democratic Party donor Marc Rich.<sup>158</sup> President Ford included a statement of reasons with his pardon of Richard Nixon, as did George H.W. Bush with his pardon of the defendants in the Iran-Contra scandal.<sup>159</sup>

These are the exceptions rather than the rule. The president or the Pardon Attorney rarely explains grants or denials of clemency.<sup>160</sup> Justifications for clemency could help improve public confidence in the quality of clemency decisions and force a clemency authority to assess and evaluate the strength and

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151. Dorne & Gewerthe, *supra* note 140, at 438.

152. *Id.*

153. Gavriel B. Wolfe, *I Beg Your Pardon: A Call for Renewal of Executive Clemency and Accountability in Massachusetts*, 27 B.C. THIRD WORLD L.J. 417, 432 (2007).

154. Ernest Morris, *Some Phases of the Pardoning Power*, 12 A.B.A. J. 183, 187–88 (1926); ARK. CONST. art. 6, § 18.

155. PENN. CONST. art. 4, § 9(b).

156. 28 C.F.R. §§ 1.7, 1.8; Kobil, *supra* note 9, at 151–52 (noting that “detailed explanations for clemency are certainly the exception rather than the rule”).

157. *See, e.g.*, Kobil, *supra* note 9, at 151.

158. *See also* William Jefferson Clinton, Opinion, *My Reasons for the Pardons*, N.Y. TIMES (Feb. 18, 2001), <http://www.nytimes.com/2001/02/18/opinion/my-reasons-for-the-pardons.html?pagewanted=all>.

159. President Gerald Ford, Remarks upon Signing a Proclamation Granting a Pardon to Former President Richard Nixon (Sept. 8, 1974) in 13 FED. SENT'G REP. 207, 207–08 (2000–2001); President George Bush, Proclamation 6518 upon Granting Executive Clemency to Former Secretary of Defense Caspar Weinberger and Others (Dec. 24, 1992) in 13 FED. SENT'G REP. 209, 209–10 (2000–2001).

160. *See* Kobil, *supra* note 9, at 151.

persuasiveness of the justifications.<sup>161</sup> Conversely, a transparency requirement could discourage use of the clemency power and could invite judicial scrutiny.<sup>162</sup> One possibility for a middle ground would be to require an executive to specify the charges being pardoned without necessarily providing reasons for the pardon; this would focus the attention of the news media and allow inquiry into the underlying crimes.<sup>163</sup> Finding a compromise requirement could balance a clemency seeker's interest in privacy (especially considering the harsh collateral consequences of a criminal conviction), the public's interest in government transparency, and the victim's interest in preventing undeserved grants of clemency.

Too much transparency can work to an applicant's detriment. Louisiana's process is unusually public: upon an application for clemency, the Board of Pardons must give notice to the district attorney and the sheriff in the parish where the applicant was convicted and to the injured victim or next-of-kin.<sup>164</sup> All stakeholders have the opportunity to testify at a clemency hearing.<sup>165</sup> In addition, the offender must advertise his petition for clemency three times in a local newspaper.<sup>166</sup> The sessions of the pardon board are public and all recommendations for clemency may be opened to public inspection, which may discourage public officials from supporting clemency bids.<sup>167</sup>

Some jurisdictions have resolved the tension between public transparency and a clemency seeker's privacy interest in novel ways. Love describes one interesting alternative: two parallel pardon processes in South Dakota, where an applicant could make either a direct application to the governor or an indirect one to the Board of Pardons and Paroles.<sup>168</sup> If a petitioner first seeks a recommendation from the Board and undergoes a public application process and an open hearing, a pardon by the governor on the board's recommendation seals the record of conviction and the pardon itself.<sup>169</sup> Since 2004, all clemency grants in South Dakota have been through this alternative process.<sup>170</sup> All of these state constitutional

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161. *Id.* at 150.

162. *Id.* at 151–52.

163. See Christopher E. Smith & Scott P. Johnson, *Presidential Pardons and Accountability in the Executive Branch*, 35 WAYNE L. REV. 113, 1125, 1130 (1989).

164. Helen Ginger Berrigan, *Executive Clemency, First-Offender Pardons; Automatic Restoration of Rights*, 62 LA. L. REV. 49 (2001).

165. *Id.* at 55–56 (citing LA. STAT. 15:572.4.).

166. *Id.*

167. *Id.*

168. Love, *supra* note 28, at 749–50.

169. *Id.*

170. *Id.*

devices—mercy reports, hearings, and reporting and publication requirements—help improve public confidence and may shield an executive from a political backlash in the event of one “bad” pardon.

#### IV. RESTORATIVE JUSTICE AND A ROLE FOR COMMUNITY STAKEHOLDERS

The restorative justice movement has spurred a new critique of executive clemency, namely that it is insensitive to victims by focusing on the offender.<sup>171</sup> Restorative justice refers to the array of non-adversarial, reconciliatory mechanisms for dispute resolution that emphasize the healing of the victims, families, and community after trauma.<sup>172</sup> Victims want an offender to own responsibility for harm and feel genuine remorse, something that punishment alone may not be able to deliver.<sup>173</sup>

This Part examines several constitutional clemency mechanisms that promote restorative justice goals. First, provisions that seek consideration or involvement by crime victims may serve restorative goals, especially when such involvement is not directly adversarial to the defendant and serves to promote reconciliation. In the U.S. federal clemency process, victims, families, and communities do not necessarily play a formal role and may or may not be able to submit their views.<sup>174</sup> Second, a number of jurisdictions have special procedures for claims based on actual innocence. At present, the Office of the Pardon Attorney is poorly-suited to such claims, given the

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171. See, e.g., ELIZABETH BECK, IN THE SHADOW OF DEATH: RESTORATIVE JUSTICE AND DEATH ROW FAMILIES 83–84 (2007) (describing how the clemency process is insensitive to the concerns of families of death row inmates and the views of victims, especially where victims oppose an execution); Austin Sarat, *Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan's Clemency*, 82 N.C. L. REV., 1345, 1345–46 (2004).

172. Cathleen Burnett, *Restorative Justice and Wrongful Capital Convictions*, 21 J. CONTEMP. CRIM. JUST. 272, 280–81 (2005); Rick Ruddell & L. Thomas Winfree, *Setting Aside Criminal Convictions in Canada: A Successful Approach to Offender Reintegration*, 86 PRISON J. 452, 466 n.4 (2006); Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415, 1419–20 (2004).

173. Weisberg, *supra* note 172 at 1419–20. See also Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Justice*, in FORGIVENESS, MERCY, AND CLEMENCY 29–30 (Austin Sarat & Nasser Hussein eds. 2007).

174. Under the Office of the Pardon Attorney's regulations, the Attorney General must make reasonable effort to notify victims of a clemency petition if he determines that investigation of the clemency case warrants contacting the victim, and he has the discretion to seek the victim's views, though this is not formally required. 28 C.F.R. § 1.6. However, the regulations only reach victims who have suffered direct harm as the result of the crime for which clemency is sought and who have a request for notice on file. See generally Deborah A. Devaney, *A Voice for Victims: What Prosecutors Can Add to the Clemency Process*, 13 FED. SENT'G REP. 163, 166 (2000–2001).

lengthy waiting periods and the lack of a formal process for considering new evidence, including forensic evidence.<sup>175</sup> Adopting a decision-making process that is more receptive to such claims could reinvigorate clemency as a tool for redressing wrongful convictions. Finally, posthumous pardons, historically very rare at the U.S. federal level,<sup>176</sup> may provide an opportunity to symbolically right an historic injustice and promote community restoration.

Although victims do not play a formal role in United States federal clemency proceedings (though the Pardon Attorney can solicit their views), other constitutional systems provide more formal mechanisms for the involvement of victims.<sup>177</sup> Under Kenya's 2010 constitution, the Advisory Committee on the Power of Mercy "may take into account the views of the victims of the offence" when deliberating on a recommendation to the president.<sup>178</sup> Involving victims in the clemency process not only serves restorative justice goals, but may also provide political cover to an executive and thereby encourage grants of clemency. Former Governor Bob Ehrlich of Maryland, for instance, sought input from victims before granting a clemency application in order to neutralize political opposition.<sup>179</sup> As a frequent granter of clemency, this helps explain why his clemency record was generally not controversial in his reelection campaign.<sup>180</sup>

A second way the federal clemency process could serve the goals of restorative justice and contribute to community and victim healing is through innocence pardons for wrongful convictions. Some U.S. states have carved out a special clemency or pardon procedure for claims based on actual innocence; these procedures usually exempt such claims from waiting periods and other barriers and often

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175. Hoffstadt, *supra* note 28, at 580–81.

176. Only two federal posthumous pardons have been granted in U.S. history. See STEPHEN GREENSPAN, POSTHUMOUS PARDONS GRANTED IN AMERICAN HISTORY (2011), <http://www.deathpenaltyinfo.org/documents/PosthumousPardons.pdf>; NOVAK, *supra* note 15, at 94–95.

177. Above, I argued that one of the reasons for the decline of federal clemency in the United States was control of the process largely by career prosecutors, who may be reluctant to second-guess the determinations of prosecutors and judges as to the guilt or sentence of a criminal defendant. Providing victims a "voice" in the clemency process may make the process more adversarial and risks making a grant of clemency more difficult if one assumes that victims oppose clemency in a given case. Some authors have asserted that prosecutors *should* contribute to the clemency recommendation process precisely because prosecutors are in the best place to protect the interests of victims. See, e.g., Devaney, *supra* note 174, at 166. Nonetheless, receiving the views of prosecutors and victims in the clemency process is different from prosecutorial influence or control over the process. Executive decision-making would likely benefit from a diversity of views. Responding to prosecutorial and victim opinion may improve the final decision and provide some political cover for difficult cases.

178. KENYA CONST. art. 133(4) (2010).

179. Barkow, *supra* note 28, at 155–56.

180. *Id.*

restore a petitioner's full rights.<sup>181</sup> The waiting periods, limitations on new evidence, and lack of a hearing make the Office of the Pardon Attorney ill-suited to claims based on actual innocence.<sup>182</sup> Implementing such a procedure is critical because the U.S. Supreme Court has identified clemency as the primary means of relief in innocence cases where no procedural violation exists.<sup>183</sup> A special clemency process for claims based on actual innocence, such as removing the five-year waiting period for filing a clemency application and allowing formal consideration of new forensic (including DNA) evidence,<sup>184</sup> could make a restructured Office of the Pardon Attorney more receptive and sensitive to such claims.

Several U.S. states provide examples of how the U.S. federal clemency institution could effectively enact a special innocence pardon process. The Constitution of Georgia exempts claims of actual innocence from restrictions on the pardon power.<sup>185</sup> According to Georgia's constitution, the legislature may prohibit the State Board of Pardons and Paroles from granting pardons for twenty-five years of a life sentence after commutation of a death sentence; for mandatory minimum sentences or sentences without the possibility of parole; for sentences of persons with prior convictions for the same crime; and for consecutive life sentences.<sup>186</sup> Claims of actual innocence, however, are excluded from these restrictions.<sup>187</sup> Similarly, in Alabama, claims based on actual innocence are excluded from the three year waiting period for seeking clemency, and in Louisiana, applicants with a life sentence may avoid the fifteen year waiting period if they have new evidence pertaining to actual innocence.<sup>188</sup> Some states also provide for an innocence-specific clemency mechanism. In Montana, the pardons board specifically permits pardon or commutation of sentence for claims based on actual innocence, and an applicant may present new evidence to

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181. Sarah Lucy Cooper & Daniel Gough, *The Controversy of Clemency and Innocence in America*, 51 CAL. W. L. REV. 55, 93–94 (2014) (citing GA. CONST. art. 4, ¶ II(b)–(c); GA. CODE ANN. § 42-9-39(d); ALA. CODE § 15-22-36(c); LA. STAT. ANN. §. 15:572; MONT. ADMIN. R. 20.25.901A(1)(a)).

182. Hoffstadt, *supra* note 28, at 580–81.

183. See *Herrera v. Collins*, 506 U.S. 390, 390–91 (1993).

184. OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, RULES GOVERNING PETITIONS FOR EXECUTIVE CLEMENCY § 1.2 (2015).

185. GA. CONST. art. 4, § 2, ¶ II(e)

186. *Id.* at ¶ II(b)–(c)

187. *Id.* at ¶ II(e); GA. CODE ANN. § 42-9-39(d).

188. ALA. CODE § 15-22-36(c) (LexisNexis 2011); LA. STAT. ANN. § 15:572.4D. See also Cooper & Gough, *supra* note 181, at 92–95.

the pardon authority.<sup>189</sup> North Carolina provides for a specific “pardon of innocence,”<sup>190</sup> while Tennessee grants to the governor an additional clemency power known as an “exoneration.”<sup>191</sup> Both a pardon of innocence and an exoneration expunge all criminal records and restore all rights of citizenship.<sup>192</sup> The Texas Board of Pardons and Parole similarly has the ability to grant a “pardon of innocence” upon evidence of actual innocence from the trial judge, prosecutor, sheriff, or habeas corpus proceeding in state court.<sup>193</sup> A clemency application process specifically for innocence cases at the federal level (for instance, exempting them from the five-year waiting period) could make federal clemency an effective tool for cases of wrongful convictions.

Finally, the posthumous pardon is a third restorative justice mechanism that could benefit the communities and families of a convicted person and thereby promotes restorative justice goals: breaking cycles of revenge, promoting community harmony, and encouraging resolution of future problems.<sup>194</sup> Governments around the world have used the posthumous pardon to great effect in historically controversial innocence cases.<sup>195</sup> No constitution in the common law world specifically makes provisions for posthumous pardons, but such pardons existed in pre-modern England.<sup>196</sup> Posthumous pardons are still occasionally used to right wrongful convictions. In 1966, the British government granted a posthumous pardon for Timothy Evans, who was wrongfully executed in 1950 for the murders of his daughter and wife.<sup>197</sup> Three years later, one of the prosecution witnesses confessed to the murders and was hanged in 1953.<sup>198</sup>

Posthumous pardons carry important symbolism in cases tainted by discrimination. In 2010, Canada gave its first posthumous pardon in history to Viola Desmond, a black woman jailed for defrauding the government by one penny when she sat in a whites-

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189. MONT. ADMIN. R. 20.25.901A(1)(a).

190. N.C. GEN. STAT. ANN. § 15A-149 (2013).

191. TENN. CODE ANN. § 40-27-109 (2015).

192. N.C. GEN. STAT. ANN. § 15A-149 (2013) (providing for expungement); TENN. CODE ANN. § 40-27-109 (2015) (providing for expungement and restoration of citizenship rights).

193. TEX. DEP’T CRIM. JUSTICE, PARDON FOR INNOCENCE, [www.tdcj.state.tx.us/bpp/forms/PFI%20App.pdf](http://www.tdcj.state.tx.us/bpp/forms/PFI%20App.pdf) (last revised Jan. 11, 2010).

194. Steiker, *supra* note 173 at 29.

195. See *infra*, notes 200–216 and accompanying text.

196. See J.G. Simms, *County Sligo in the Eighteenth Century*, 91 *ROYAL SOC’Y ANTIQUARIES* 153, 154 (1961) (discussing example of a posthumous pardon in premodern England).

197. Bernie Matthews, *Australian Miscarriages of Justice*, 10 *NAT’L LEGAL EAGLE* 15, 15 (2004).

198. *Id.*

only section of a movie theater in protest of the theater's segregation policy.<sup>199</sup> In addition, a controversial campaign is underway for a posthumous pardon for Louis Riel, a Métis rebel leader hanged for treason in Canada in 1885.<sup>200</sup> Métis leaders and the Riel family oppose such a pardon because they do not believe that he committed any crime at all, a flash point in Canada's relationship with Quebec and with First Nations leaders.<sup>201</sup> In what may confirm a broader Commonwealth trend, Nigeria and Australia have also granted posthumous pardons.<sup>202</sup> Posthumous pardons have symbolic power, and for this reason they can both right historical injustice and perpetuate historical controversy.

Posthumous pardons may help right historical injustices. In 2013, after a multiyear campaign, the Queen granted a royal pardon to Alan Turing, the World War Two codebreaker who committed suicide after his 1952 conviction for "gross indecency" and homosexual acts.<sup>203</sup> Following the Turing pardon, gay rights advocates called for posthumous pardons for all 49,000 men convicted under Britain's anti-sodomy laws.<sup>204</sup> Perhaps the largest posthumous pardon was the 2006 mass pardon for 306 soldiers in the British Army during World War One who were "shot at dawn" for

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199. *In Rare Posthumous Pardon, Nova Scotia Apologizes for Black Woman's 1946 Arrest*, GLOBE & MAIL, Apr. 15, 2010, <http://www.theglobeandmail.com/news/national/in-rare-posthumous-pardon-nova-scotia-apologizes-for-black-womans-1946-arrest/article4315080>; PREMIER'S OFFICE, *Late Viola Desmond Granted Apology, Free Pardon* (Apr. 15, 2010), <http://novascotia.ca/news/smr/2010-04-15-pardon.asp>.

200. Jean Teillet, *Exoneration for Louis Riel: Mercy, Justice, or Political Expediency?*, 67 SASK. L. REV. 359, 359-60 (2004).

201. *Id.*

202. In Nigeria, President Goodluck Jonathan pardoned several coup plotters, including a former vice president who died in prison and a former military governor who died in a car accident, which allowed them to posthumously receive their pensions for their ranks in the Nigerian armed forces. Festus Owete, *Nigerians Condemn Pardons for Alamiyeseigha, Bulama*, PREMIUM TIMES (Mar. 13, 2013), <http://www.premiumtimesng.com/news/124411-nigerians-condemn-pardon-for-alamiyeseigha-bulama.html>; *How Pardon was Granted to Alamiyeseigha, Others*, THIS DAY, Mar. 14, 2013, <http://www.thisdaylive.com/articles/how-pardon-was-granted-to-alamiyeseigha-others/142114>; Bayo Oladeji, *State Pardon: Yar-Adua, Diya, Others Get N1.01 Billion as Benefits*, LEADERSHIP (Mar. 18, 2013), <http://allafrica.com/stories/201303180345.html>. In what is believed to be Australia's first posthumous pardon, the Governor of Victoria pardoned Colin Campbell Ross, a wine bar owner executed in 1922 for the sensational "gun alley murder" in Melbourne. Modern forensic evidence showed that he was innocent. John Silvester, *Ross Cleared of Murder Nearly 90 Years Ago*, THE AGE (May 27, 2008), <http://www.theage.com.au/articles/2008/05/26/1211653938453.html>.

203. *UK Grants Posthumous Pardon to World War II Code-Breaker Alan Turing*, INDIAN EXPRESS (Dec. 25, 2013, 12:21 AM), <http://archive.indianexpress.com/news/uk-grants-posthumous-pardon-to-world-war-ii-codebreaker-alan-turing/1211378>.

204. Emma Margolin, *Petition Calls for Pardon of 49,000 Men Prosecuted Under UK Anti-Sodomy Law*, MSNBC, (Feb. 23, 2015, 12:15 PM), <http://www.msnbc.com/msnbc/petition-calls-pardon-49000-men-prosecuted-under-anti-sodomy-law>.

cowardice or desertion.<sup>205</sup> Among these was Private Henry Farr, shot at dawn for cowardice on October 16, 1916, after he refused to go to the front line, exhibiting symptoms of shell shock or what would later be termed post-traumatic stress disorder.<sup>206</sup> Historical and academic inquiries into the “shot at dawn” soldiers fed a public campaign that garnered press attention and spawned letter-writing campaigns, spreading to Ireland, Canada, Scotland, and New Zealand.<sup>207</sup> Farr was the first British soldier pardoned in August 2006; the other 305 soldiers were pardoned in November that year.<sup>208</sup> A blanket pardon was controversial because it implied censure of those attempting to administer justice on the front lines. In addition, it is certain from the extant records that not all of those shot at dawn suffered from shell shock, and is likely that only a small proportion of them did.<sup>209</sup> Nonetheless, some injustice was undeniable, and today the shot at dawn soldiers are treated as war victims and not as criminals.

The United States has historically not granted posthumous pardons at the federal level. Only two have been granted to date. In February 1999, President Bill Clinton granted the first posthumous presidential pardon in American history to Lieutenant Henry Ossian Flipper, the only African-American in the commissioned officer corps, who was dismissed from the army in 1881 after a court-martial for conduct unbecoming an officer.<sup>210</sup> Flipper’s descendants had criticized the U.S. Pardon Attorney’s policy of not granting posthumous pardons.<sup>211</sup> In 2008, President George W. Bush pardoned Charles Winters, who served 18 months in prison after providing three military aircraft to Israel in the late 1940s, helping to ensure the newly-independent country’s survival in the wars that followed.<sup>212</sup>

The President can learn from the states in the posthumous pardon context because the states have much longer histories in granting posthumous pardons than the federal government. In

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205. Ben Fenton, *Pardoned: The 306 Soldiers Shot at Dawn for ‘Cowardice,’* THE TELEGRAPH, (Aug. 16, 2006, 12:01 AM), <http://www.telegraph.co.uk/news/1526437/Pardoned-the-306-soldiers-shot-at-dawn-for-cowardice.html>.

206. Simon Wessely, *The Life and Death of Henry Farr*, 99 J. ROYAL SOC’Y. MED. 440, 440 (2006).

207. Douglas C. Peifer, *The Past in the Present: Passion, Politics, and the Historical Profession in the German and British Pardon Campaigns*, 71 J. MIL. HIST. 1107, 1111–19 (2007).

208. *Id.*

209. David Sharp, *Shocked, Shot, and Pardoned*, 368 LANCET 975, 975–76 (2006).

210. Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 75 IND. L.J. 1251, 1251–53 (1999).

211. *Id.*

212. Greenspan, *supra* note 177.

1893, the governor of Illinois made one of the first posthumous pardons in American history when he pardoned the eight defendants convicted of inciting the 1886 Haymarket Square riot due to fair trial concerns.<sup>213</sup> Five of the eight pardons were posthumously issued for the four defendants executed for the crime and one who committed suicide the day of the execution.<sup>214</sup> In 1977, Massachusetts Governor Michael Dukakis pardoned Nicola Sacco and Bartolomeo Vanzetti, Italian immigrants infamously executed following an unfair trial.<sup>215</sup> Posthumous pardons have even been granted in states where the pardon power is held by an independent board or where the governor and the board share the power. Because of advances in forensic technology, especially DNA evidence, posthumous pardons are issued more frequently than in prior decades for crimes ranging from obscenity convictions of entertainers to wartime sedition and cases with racial overtones.<sup>216</sup>

For clemency to play a role in a system of restorative justice, clemency must mean more than simply declining to carry out a deserved punishment out of compassion for an offender; rather, it must include a role for victims and communities in order to bring about reconciliation.<sup>217</sup> In addition, creating a special procedure for claims of actual innocence, such as exempting such claims from mandatory waiting periods, could transform the federal clemency process into a tool to address the problem of wrongful convictions. Finally, the selective use of posthumous pardons can provide symbolically important redress for historical controversies and injustice. All three clemency proposals could play a role in a restorative justice approach to criminal justice.

## V. CONCLUSION

Pardon reform at the federal level in the United States has attracted considerable scholarly attention, but comparative

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213. *Id.* at 6.

214. Charlie Gofen, *Haymarket Riot Remembered*, CHICAGO TRIBUNE, Nov. 9, 1987, [http://articles.chicagotribune.com/1987-11-09/news/8703240258\\_1\\_haymarket-riot-modern-unions-bloody-riot](http://articles.chicagotribune.com/1987-11-09/news/8703240258_1_haymarket-riot-modern-unions-bloody-riot).

215. Greenspan, *supra* note 212, at 6.

216. *Id.* at 3–10. In 2013, Alabama's parole board granted a posthumous pardon to the Scottsboro boys, nine African-American teenagers falsely accused and convicted of raping two white women on a train. The legislature unanimously passed the Scottsboro Boys Act earlier that year to allow the State Board of Pardons and Parole to issue posthumous pardons, exempting them from notification, waiting, and publication requirements defined in Alabama law. See Alan Blinder, *Alabama Pardons 3 "Scottsboro Boys" After 80 Years*, N.Y. TIMES, Nov. 22, 2013, at A14; S.B. 97 2013 Leg., Reg. Sess. (Ala. 2013).

217. Steiker, *supra* note 173 at 29.

perspectives are lacking despite the near-universal recognition of executive clemency as a crucial tool of criminal justice reform.<sup>218</sup> In the United States, the current federal clemency process is a bureaucratic, opaque process controlled by career prosecutors in the Department of Justice.<sup>219</sup> Looking to other jurisdictions in the common law world, this Article identified a number of constitutional and policy innovations that may promote transparency in the federal clemency process.

First, the creation of an advisory committee of experts drawn from civil society, medical fields, corrections, and academia could broaden the range of views in the deliberation process. The dominant model of clemency decision-making in the common law world is an independent advisory committee structure rather than a closed bureaucracy. Additionally, the United States stands largely outside of a global trend toward opening the clemency process to judicial and administrative scrutiny, even in death penalty cases where the risks are greatest. The application of FOIA to Department of Justice clemency proceedings, however, is a welcome development that could improve the decision-making process. This Article also considered a range of reporting and publication requirements that could guide media and public inquiries, especially where pardons occur before a criminal investigation is carried out or a trial record is developed. Finally, this Article turned to policy innovations that address one of the most persistent critiques of the clemency process: insensitivity to victims, families, and communities. No single clemency structure can completely resolve the competing interests of victims, the public, the justice system, and the clemency-seeker. A comparative constitutional analysis of the pardon power confirms a growing global trend toward transparency and accountability in the clemency process and offers a rich array of options for improving the quality of executive decision-making.

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218. Rachel Barkow makes the case for clemency, arguing that the process allows individualization of sentences, especially where punishments are mandatory; serves as a safety valve for contentious cases or cases of possible innocence; and draws attention to systemic failings in the criminal justice system. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1360–61, 1364–65 (2008).

219. Love, *supra* note 35, at 192.