JUDICIAL AUTONOMY V. EXECUTIVE AUTHORITY: WHICH PREVAILS IN THE CASE OF A POSTCOMMUTATION COLLATERAL ATTACK?

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> *It is emphatically the province and duty of the judicial department to say what the law is.*
>
> —*Chief Justice John Marshall*[1]

Introduction

The judicial and executive branches have struggled to define the limits of their power—with the Executive often overstepping its authority and the Judiciary attempting to reign in the Executive—since the Founding of the United States.[2] Perhaps the most famous—and earliest—example of the judicial and executive branches attempting to determine where one branch's power ended and the other's began occurred on February 24, 1803, when Chief Justice John Marshall announced that the federal courts not only have the power to declare legislative and executive acts unconstitutional, but that it is the Court's duty to do so.[3] Notwithstanding a federal court's duty to "say what the law is,"[4] the Executive necessarily retains the authority to take some action that the courts cannot question. However, the line where executive authority ends and judicial scrutiny begins can often be blurry. Despite the

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1 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

2 In the clemency context, this may take the form of a President using acts of clemency to "accomplish objectives that they otherwise lack power to attain, such as lengthening punishment or compelling observance of particular religious practices." Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 Calif. L. Rev. 1665, 1670 (2001).

3 *See Marbury*, 5 U.S. (1 Cranch) at 177–78.

4 *Id.* at 177.

seemingly clear language in the Constitution regarding executive clemency,[5] the President's authority to commute an inmate's sentence in a way that forecloses further judicial proceedings is one of the most recent issues in the case of judicial autonomy v. executive authority.

The authority of an executive to commute a criminal sentence existed long before the formation of the United States, and it endures under the Constitution today.[6] For example, the July 2020 commutation of President Trump's longtime friend and campaign advisor Roger Stone[7] thrust acts of executive clemency back into the limelight after being unnoticeably absent for over a year since the last time President Trump made headlines for an act of clemency.[8] Donald Trump is by no means the only President to make headlines for his commutations. The Fair Sentencing Act (FSA), signed into law by President Obama, resulted in more acts of clemency in a single day than occurred under the previous seven Presidents combined.[9] These commutations generated a maelstrom of media attention in which Obama was dubbed the "Commuter in Chief."[10] Additionally, similar to President Trump's obviously political commutation of Roger Stone's sentence,[11] President Bill Clinton waited until the end of his second term to provide clemency for Marc Rich, whose "primary qualification for [clemency] appeared to be that his wife had donated large sums of money to Democratic Party causes."[12] While some of these clemency acts are more overtly political than others, it is

5 The Constitution unequivocally gives the President the "[p]ower to grant . . . [p]ardons." U.S. CONST. art. II, § 2, cl. 1. *But see* Patrick R. Cowlishaw, Note, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149, 164 (1975) (claiming that the grant of power is vague).

6 *See* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 583–84 (1991) (discussing clemency's roots in ancient Rome and Greece where grants of clemency were awarded based solely on political considerations as opposed to mercy or justice); *see also* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476 (1977) (discussing England's incorporation of clemency).

7 *See* Jill Colvin & Eric Tucker, *Trump Commutes Longtime Friend Roger Stone's Prison Sentence*, AP NEWS (July 10, 2020), https://apnews.com/article/4d9cba90d023cde628040b1ca0eb89fd.

8 *See, e.g.*, Jane C. Timm, *Trump Commutes Sentence of Grandmother Serving Life on Drug Charges After Kim Kardashian Meeting*, NBC NEWS (June 6, 2018), https://www.nbcnews.com/politics/donald-trump/trump-commutes-sentence-grandmother-serving-life-drug-charges-after-kim-n880291 (highlighting just one example of President Trump granting clemency based on the advice of a Washington outsider).

9 *See* Emily Cahn, *President Obama Has Now Commuted More Sentences than the Previous 7 Presidents—Combined*, YAHOO! SPORTS (June 3, 2016), https://sports.yahoo.com/news/president-obama-now-commuted-more-210800532.html.

10 *Id.*

11 *See* Tom Porter, *A Prosecutor from the Mueller Investigation Says Trump Spared Roger Stone from Prison as a Reward for 'Keeping His Lips Sealed'*, INSIDER (July 14, 2020), https://www.businessinsider.com/roger-stone-spared-jail-silence-reward-mueller-lawyer-andrew-weissman-2020-7 (explaining that the primary reason Stone received his commutation was for political reasons).

12 Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 979 (2003).

clear that political considerations play an increasing role in determining who receives clemency and the specifics of the clemency act.[13]

Executive clemency is not often the topic of political discussion in America. In fact, outside the walls of the Justice Department, it may be discussed rarely, if at all.[14] That is, until there is an act of clemency. Then, the public, the media, and politicians discuss, debate, and disagree about clemency for weeks.[15] Although clemency is not at the forefront of the minds of the American people most of the time, it is a topic about which many people care deeply. Accordingly, Presidents have long considered public perception before making any clemency decisions. Furthermore, even though some of the aforementioned examples of clemency are not directly related to the issues discussed in this Note, they provide necessary context regarding the relevance of discussing clemency in legal discourse and help to contextualize the changing nature of presidential commutations by highlighting the increased politicization of clemency in the United States.[16] Understanding this context is vitally important when discussing the roles played by the Executive and the Judiciary when an inmate who receives a commutation attempts to seek further redress in the courts.

An inmate with a commuted sentence will sometimes collaterally attack his already commuted sentence.[17] This raises the question: Does an act of executive clemency divest the courts of authority to hear the collateral attack? In other words, does clemency moot the issues involved in the collateral attack? While multiple circuit courts have weighed in on this question, the Fourth and Sixth Circuits have developed the most robust discussions, disagreeing about whether federal courts may hear these cases.[18] The Fourth Circuit has held that a collateral attack postcommutation is moot as

13 *See infra* Section II.B.

14 *See* William M. Landes & Richard A. Posner, *The Economics of Presidential Pardons and Commutations*, 38 J. LEGAL STUD. 61, 62 (2009).

15 A Lexis+ search for the terms "Roger Stone" and "commut!" conducted on October 3, 2020, yielded 1662 different publications. Similarly, a Lexis+ search for the terms "Fair Sentencing Act" and "commut!" conducted on October 3, 2020, yielded 521 results. For specific examples of media coverage regarding commutations see, for example, Peter Baker, Maggie Haberman & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html; Kara Gotsch, Opinion, *Thousands Are Stuck in Prison—Just Because of the Date They Were Sentenced*, WASH. POST (Jan. 31, 2018), https://www.washingtonpost.com/opinions/thousands-are-stuck-in-prison—just-because-of-the-date-they-were-sentenced/2018/01/31/0c1629e2-fd68-11e7-ad8c-ecbb62019393_story.html.

16 *See infra* Part II.

17 A collateral attack is an attack "on a prior judgment in a new case (i.e., not by direct appeal)." *Collateral Attack*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/collateral_attack. Examples of a collateral attack include habeas corpus petitions and claims that a prior judgment is invalid. *Id.*; *see* Dennis v. Terris, 927 F.3d 955, 957 (6th Cir. 2019); United States v. Surratt, 855 F.3d 218, 220 (Wynn J., dissenting) (4th Cir. 2017).

18 *See generally Dennis*, 927 F.3d 955; *Surratt*, 855 F.3d 218.

the "President's commutation order simply closes the judicial door."[19] In contrast, the Sixth Circuit has held that a commutation does not moot a collateral attack.[20]

This Note argues that the Sixth Circuit reached the correct result but has erred in focusing primarily on mootness. Specifically, this Note argues that separation of powers considerations, not mootness, should determine this issue. Part I provides an overview of the split between the Fourth and Sixth Circuits. Part II provides an overview of the justifications for, and development of, presidential commutations. It discusses how the justifications for commutations—and clemency more generally—have shifted from executive mercy to a political gamble. Part III provides an overview of the mootness doctrine and how it is relevant to this issue. Part III also explains the separation of powers and issues involving judicial autonomy and executive authority in the clemency context. Part IV argues that although a collateral attack postcommutation is almost never moot, the federal courts should focus their analysis of whether commutations foreclose judicial review on other separation of powers considerations, including preserving the sanctity of their role in reviewing unconstitutional convictions. Finally, Part IV also argues that the politicization of the pardon power in the modern era necessitates the court's involvement in postcommutation collateral attacks in order to (1) effectuate the ideals of mercy and justice and (2) protect the power of judicial review.

I. THE CIRCUIT SPLIT

The Fourth and Sixth Circuits disagree on the following question: Does a presidential commutation effectively divest the federal courts of authority over a criminal sentence? More specifically, does a commutation moot an inmate's collateral attack on his sentence?

In *United States v. Surratt*, the Fourth Circuit determined in a short opinion that the "President's commutation order simply closes the judicial door."[21] Raymond Surratt, Jr., was convicted in 2005 of numerous crack cocaine offenses, which resulted in a sentence of life in prison.[22] In 2010, Congress passed the FSA, which retroactively reduced the mandatory minimum sentence from life imprisonment to ten years.[23] Under the FSA, Surratt was entitled to have his sentence reconsidered. However, in 2017, President Obama commuted Surratt's sentence to a 200-month (just under

19 *Surratt*, 855 F.3d at 219 (Wilkinson, J., concurring).

20 *Dennis*, 927 F.3d at 957.

21 855 F.3d at 219.

22 *See id.* at 222 (Wynn, J., dissenting).

23 *See id.* at 223; Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372 (codified at 21 U.S.C. § 841); U.S. SENT'G COMM'N, *Frequently Asked Questions: 2011 Retroactive Crack Cocaine Guideline Amendment*, https://www.ussc.gov/policymaking/amendments/frequently-asked-questions-2011-retroactive-crack-cocaine-guideline-amendment#NaN (last visited Feb. 23, 2021).

seventeen-year) term of imprisonment[24] while Surratt was simultaneously collaterally attacking his underlying conviction.[25]

The Fourth Circuit held that the President's commutation mooted Surratt's collateral attack.[26] Although the opinion itself provides no reasoning for the court's decision, Judge Wilkinson attempted to explain its reasoning in a concurrence.[27] He claimed that the Judiciary is "simply without power" to "readjust or rescind" the commutation absent some constitutional infirmity.[28] Surratt, Judge Wilkinson reasoned, is "no longer serving a judicially imposed sentence, but a presidentially commuted one."[29] He thus believed that by hearing the case, the court would be injecting itself "into the lawful act of a coordinate branch of government," thus interfering with the President's power to commute a sentence.[30] He explained that "[i]t would be a curious logic to allow a convicted person who petitions for mercy to retain the full benefit of a lesser punishment with conditions, yet escape burdens readily assumed in accepting the commutation which he sought."[31] In 2018, the Fourth Circuit reaffirmed *Surratt* in *Blount v. Clarke*, again holding that a presidential commutation moots a collateral attack.[32]

In dissent, Judge Wynn argued that holding Surratt's case moot was "if not an outright injustice, at least an abandonment of fairness."[33] He rejected the argument that Surratt is no longer serving a judicially imposed but rather an executive sentence because, in his view, neither the Constitution nor caselaw contemplates the existence of an executive sentence.[34] "[T]he part of the sentence that remains after commutation is part of a judicial sentence, not a newly created executive sentence."[35] Since Surratt's sentence would be shorter as a result of a successful collateral attack, his case could not be moot.[36] The dissent further argued that the President cannot wield his commutation authority in such a way that offends separation of powers princi-

24 *See Commutations Granted by President Barack Obama (2009–2017)*, U.S. DEP'T OF JUST., https://www.justice.gov/pardon/obama-commutations (last updated Jan. 25, 2021).

25 *See Surratt*, 855 F.3d at 220 (Wynn, J., dissenting).

26 *Id.* at 219 (Wilkinson, J., concurring).

27 *See id.* at 219–20.

28 *Id.* at 219.

29 *Id.*

30 *Id.*

31 *Id.* at 220 (alteration in original) (quoting Schick v. Reed, 419 U.S. 256, 267 (1974)).

32 Blount v. Clarke, 890 F.3d 456, 462–63 (4th Cir. 2018).

33 *Surratt*, 855 F.3d at 220 (Wynn, J., dissenting).

34 *See id.* at 221, 227.

35 *Id.* at 221; *see also* United States v. Buenrostro, 895 F.3d 1160, 1165–66 (9th Cir. 2018) (holding that a presidential commutation does not create a new judgment); Duehay v. Thompson, 223 F. 305, 307 (9th Cir. 1915) ("[T]he executive has superimposed its mind upon the judgment of the court; but the sentence remains, nevertheless, the judgment of the court . . . .").

36 *See Surratt*, 855 F.3d at 226 (Wynn, J., dissenting) (citing Simpson v. Battaglia, 458 F.3d 585, 595 (7th Cir. 2006)).

ples.[37] Finally, Judge Wynn explained that Surratt's case could not be moot as he still had an interest in the outcome; there would be collateral consequences to his conviction even with the commutation.[38] Accordingly, he concluded that the case could not be moot.

In 2019, the Sixth Circuit reached the opposite conclusion in *Dennis v. Terris*. In *Dennis*, the Sixth Circuit held that a commutation does not prevent an inmate from collaterally attacking an unconstitutional sentence.[39] The inmate in *Dennis* had received a commutation of his life sentence to a thirty-year sentence from President Obama on the condition that he enroll in a residential drug program.[40] After receiving his commutation, the inmate collaterally attacked his sentence, asserting that the underlying conviction was flawed and that he should only have been subjected to a twenty-year sentence in the first place.[41]

Even though the court did not reach a decision on the merits, it did hold that the commutation did not render the case moot.[42] The court reasoned that regardless of the commutation, the sentence was still a judicial one.[43] The court stated: "To render judgment is a judicial function. To carry the judgment into effect is an executive function."[44] As such, the remaining sentence (or collateral consequences resulting from conviction) are not "free from judicial scrutiny with respect to mistakes *the courts* may have made."[45] The court further explained that holding otherwise would enable the President to use the pardon power to preclude inmates from judicial relief. The court explained further:

> Anyone who takes the position that executive pardons or commutations necessarily eliminate the judicial sentence must account for this reality. It would mean that a mischievous chief executive could interfere with an inmate's efforts to obtain deserved relief in court. Suppose the President didn't like a Supreme Court decision that would result in some prisoners receiving lower sentences on collateral review. Is it really the case that the President could unconditionally commute each of those prisoners' sentences by a day and thereby deny them any judicial relief from their unconstitutional sentences? We don't think so.[46]

37 *Id.* at 227; *see also* United States v. Libby, 495 F. Supp. 2d 49, 55 (D.D.C. 2007) ("[I]t is certainly conceivable that the President, through the exercise of his commutation power, could encroach upon the authority or functions of one of the coordinate branches in a manner that would impermissibly 'offend the Constitution.'" (quoting Schick v. Reed, 419 U.S. 256, 266 (1974))).

38 *See Surratt*, 855 F.3d at 226 (Wynn, J., dissenting).

39 *See* Dennis v. Terris, 927 F.3d 955, 957 (6th Cir. 2019).

40 *Id.*

41 *Id.*

42 *Id.* at 957, 961.

43 *Id.* at 958.

44 *Id.* (quoting United States v. Benz, 282 U.S. 304, 311 (1931)).

45 *Id.* at 959.

46 *Id.* (citation omitted).

The court also opined that the conditional nature of the commutation created the functional equivalent of collateral consequences. Since the commutation was only granted on the condition that the inmate enroll in a residential drug program, the judgment "remain[ed] in place, ready to kick into full effect if the recipient violate[d] the conditional cap."[47] Finally, the court asserted that the mere possibility that the inmate could receive a sentence less than the commutation provided if he got a favorable ruling from the court was enough to hold that the case was not moot.[48]

Other circuits have agreed with the Sixth Circuit, holding that the case cannot be moot notwithstanding the commutation. In *Simpson v. Battaglia*, the Seventh Circuit held that an inmate's case was not moot even though the sentence had already been commuted.[49] Also, in *United States v. Hearst*, the Ninth Circuit held that the case was not moot even though President Carter had already commuted the sentence.[50]

The circuit courts are split on a significant issue of constitutional importance. Accordingly, a closer examination of these issues is warranted to ensure that the executive and judicial branches are exercising their power as conveyed by the Constitution. Furthermore, given the increased politicization of the pardon power, it is likely that many inmates are not receiving the justice or mercy that they deserve. As a result, they are either in prison on unconstitutional sentences or released from prison with unconstitutional collateral consequences. Until this question is resolved, the case of judicial autonomy v. executive authority cannot be closed.

II. Formation and Development of the Pardon Power

A. *Constitutional Background: The Framers' Understanding of (and Justifications for) the Pardon Power*

The U.S. Constitution gives the President the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[51] The Supreme Court has interpreted the Pardon Clause to include five forms of clemency: "pardons, commutations of sentence, reprieves, remissions of fines and penalties, and amnesties."[52] A commutation is unique in terms of its legal effect because, unlike a pardon, it merely reduces or eliminates an inmate's sentence; the inmate is still a convicted criminal postcommutation.[53] As such, there will almost always be ongoing

47 *Id.* at 958.

48 *Id.* at 959.

49 *See* Simpson v. Battaglia, 458 F.3d 585, 595 (7th Cir. 2006).

50 *See* United States v. Hearst, 638 F.2d 1190, 1192 & n.1 (9th Cir. 1980).

51 U.S. Const. art. II, § 2, cl. 1.

52 Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 Tex. L. Rev. 561, 570 (2001) (footnotes omitted).

53 *See* W.H. Humbert, The Pardoning Power of the President 26–27 (1941). It is important to note that many sources use the terms "pardon" or "clemency" interchangeably; the term is used when discussing all forms of clemency. Furthermore, some sources

collateral consequences of conviction for an inmate—such as permanently losing the right to vote—even after receiving a commutation.[54] Furthermore, unlike a pardon, an inmate generally does not have the right to consent to a commutation; it is awarded unilaterally by the President.[55] The President may also attach conditions to his commutation as long as they do not "otherwise offend the Constitution."[56]

The pardon power has an "unambiguously broad reach"[57] and has even been described as "unlimited."[58] In other words, the President can issue a commutation for any reason or no reason at all.[59] Despite the broad reach of the pardon power, it received little debate at the framing of the Constitution,[60] a fact that is surprising considering the Framers were gravely concerned with the dangers of executive overreach.[61] Notwithstanding this concern, the Founding Fathers, Alexander Hamilton chief among them, argued that the pardon power should be vested in a single individual "of prudence and good sense."[62] Hamilton argued that this power should not be vested in a group because one person "appears to be a more eligible dis-

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simply use the term pardon even if the discussion pertains to commutations. This is because the Supreme Court has interpreted the pardon power to allow commutations under the theory that it is a lesser power included in the pardon power. *See, e.g.*, Ill. Cent. R.R. v. Bosworth, 133 U.S. 92, 103 (1890); Osborn v. United States, 91 U.S. 474, 478 (1876); David B. Hill, *The Pardoning Power*, 154 N. AM. REV. 50, 52 (1892) ("[I]t has been adjudicated that the general power of pardon includes the lesser power of commutation . . . ."). Due to this, the terms "clemency", "pardon", and "commutation" will all be used somewhat interchangeably in this Note in order to best reflect the meaning of the author in any cited material.

54 *See* Cowlishaw, *supra* note 5, at 150 n.11.

55 *See* Biddle v. Perovich, 274 U.S. 480, 487 (1927); *see also In re* Greathouse, 10 F. Cas. 1057, 1059–60 (N.D. Cal. 1864) (No. 5741) (explaining that consent is generally irrelevant in the commutation context as "the public welfare," not the individual's consent, governs).

56 Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV 802, 812 (2015) (quoting Schick v. Reed, 419 U.S. 256, 266 (1974)).

57 *Id.* at 807.

58 *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) ("The power thus conferred is unlimited, with the exception [for impeachment] stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.").

59 *See* Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 467 (1981) (Brennan, J., concurring) (explaining that the President may grant clemency for "no reason at all"); Hoffa v. Saxbe, 378 F. Supp. 1221, 1225 (D.D.C. 1974) ("[T]he President may exercise his discretion under the Reprieves and Pardons Clause for whatever reason he deems appropriate . . . .").

60 *See* Cowlishaw, *supra* note 5, at 164.

61 *From Thomas Jefferson to John Melish, 13 January 1813*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/03-05-02-0478 (last visited Oct. 24, 2020).

62 THE FEDERALIST NO. 74, at 386 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

penser of the mercy of the government than a body of men."[63] In other words, the President would be in the best position to carefully consider the case and aid someone in distress.[64] Hamilton and his supporters rebuffed concerns that a President might misuse the pardon power, arguing that the prospect of impeachment would induce a President to wield the power according to its fundamental precepts of mercy and justice.[65]

Mercy and justice are the primary justifications the Framers relied upon when drafting the Pardon Clause; however, these considerations have been supplanted by notions of political expediency in the modern era. The Supreme Court has observed that the Pardon Clause is meant to serve the ideal of mercy time and again in upholding the President's authority to grant clemency.[66] Although the Court has not discussed justice as a justification for the pardon power nearly as much as the justification of mercy, considerations of justice have factored into its opinions along with the work of legal scholars. "Clemency is a key tool for addressing . . . injustices in th[e] system."[67] For example, the Framers intended the pardon power to function as a check on legislative power "in light of Congress's inability to foresee the particularities of every crime and the circumstances of every offender."[68] Furthermore, the power is intended to serve as a critical means of controlling overzealous prosecutors in the criminal system.[69]

Despite the fact that clemency was initially predicated on the Framers' belief that those convicted of a crime may be in need of mercy—or that they did not receive justice—clemency has increasingly been awarded on the basis

63 *Id.* at 385. *But see* 4 WILLIAM BLACKSTONE, COMMENTARIES *390 (arguing that the pardon power cannot exist in a democracy "for there nothing higher is acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and of pardoning to center in one and the same person").

64 *See* Paul F. Eckstein & Mikaela Colby, Note, *Presidential Pardon Power: Are There Limits and, if Not, Should There Be?*, 51 ARIZ. STATE L.J. 71, 79–80 (2019).

65 *See* JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 18 (2009) ("Despite the wide reach of the clemency power . . . the protections [are] adequate because the president w[ill] always be subject to impeachment if he act[s] improperly . . . ."). *See generally* THE FEDERALIST NO. 69 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). While the prospect of impeachment is always an option, at least structurally, this view does not seem to consider how difficult it is to impeach a President today. The impeachment trials of both Presidents Clinton and Trump are prime examples of how partisanship and a stark political divide between America's two major parties dilute the threat of impeachment. As such, impeachment does not seem to serve as much of a deterrent for Presidents who are considering abusing the pardon power.

66 *See, e.g.*, Schick v. Reed, 419 U.S. 256, 267 (1974); United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833). Some have even gone so far as to analogize acts of clemency to religious forgiveness. *See* Mark Osler, *A Biblical Value in the Constitution: Mercy, Clemency, Faith, and History*, 9 U. ST. THOMAS L.J. 769, 775 (2012).

67 Barkow, *supra* note 56, at 803.

68 Krent, *supra* note 2, at 1674; *see also* THE FEDERALIST NO. 74, *supra* note 62, at 385 (Alexander Hamilton) (explaining that without easy access to exceptions of the criminal code, "justice would wear a countenance too sanguinary and cruel").

69 *See* Barkow, *supra* note 56, at 808–09.

of political considerations; little, if any, weight may be given to the merits of the recipient or their actual need for mercy, and notions of justice have similarly taken a backseat to politics. As a result, the primary justifications for the use of the pardon power in the modern era have shifted from notions of justice and mercy to notions of political expediency and favoritism.

B. The Pardon Power's Shift from Executive Mercy to Political Expediency

One can plot the shift in the pardon power's use from executive mercy to political expediency in two phases: one, from the adoption of the Constitution until the Watergate scandal—where the pardon power functioned almost exclusively as the Framers intended—and two, from the Watergate scandal until the present day—where the pardon power is a political tool as opposed to a tool of justice.[70] For example, scholars describe President Clinton's commutation of sixteen members of the Fuerzas Armadas de Liberación Nacional Puertorriqueña ("FALN") "as a crass political move designed to enhance the electoral chances of his wife in New York's senatorial election."[71] In that case, President Clinton was not motivated by mercy or justice. Rather, it was pure political expediency that prompted his commutation offer. More recently, President Trump "has relied on private recommendations of family members, celebrities, or other individuals he knows personally or has heard about" rather than heeding the advice of experts at the Justice Department when making commutation decisions.[72] The increased use of overtly political pardons illustrates that the official route to clemency has closed, but the "back-door route" has opened.[73]

Even commutations that are not political on their face are still driven primarily by political considerations in the modern era because an increase in the number of pardons produces diminishing marginal benefits, but increasing marginal costs.[74] As such, even if a President wants to commute an inmate's sentence for reasons of justice or mercy, his benign motives may be overshadowed by political considerations; if he grants the commutation, what are the costs? Will it prevent him from granting another commutation he is considering? What does he gain by granting the commutation? If he gains nothing, is the commutation even worth it notwithstanding the fact that

70 *See* Budd N. Shenkin & David I. Levine, *Should the Power of Presidential Pardon Be Revised?*, 47 HASTINGS CONST. L.Q. 3, 8 (2019). For a more robust discussion of how the Watergate scandal impacted the use of the pardon power, see CROUCH, *supra* note 65, at 53–65. Even the federal judiciary has lambasted the Executive for granting clemency for political purposes. *See generally* Murphy v. Ford, 390 F. Supp. 1372 (W.D. Mich. 1975) (upholding President Ford's pardon, but criticizing him for granting it in the first place).

71 Krent, *supra* note 2, at 1667.

72 Paul J. Larkin, Jr., *The Future of Presidential Clemency Decision-Making*, 16 U. ST. THOMAS L.J. 399, 409 (2020); *see also supra* note 8 and accompanying text (describing President Trump's commutation of an inmate based on pressure from Kim Kardashian).

73 Larkin, *supra* note 72, at 410 n.41 (quoting Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1171 (2010)).

74 *See* Landes & Posner, *supra* note 14, at 68.

it would be just to do so? The fact that a President must consider these questions is determinative of the notion that commutations are no longer solely predicated on the justifications that informed the Framers when they drafted the Pardon Clause.

Since the 1960s, politicians in the United States must either be "tough on crime" or risk losing their elections.[75] This shift in the political climate has exacerbated the problems associated with political clemency, driving politicians even further away from the ideals of mercy and justice when making clemency decisions. America's "tough on crime" mentality is unlikely to reverse itself soon.[76] Clemency has evolved into a "self-protective act" in which politicians are more concerned with either currying political favor from their allies or appealing to the electorate to win elections.[77] Take, for example, the 1988 election between then Vice President George H.W. Bush and Governor Michael Dukakis. Bush ran campaign ads against Dukakis for granting clemency to Willie Horton who later committed rape and murder.[78] Dukakis lost the election, and many credit the ad as being critical to that defeat.[79] At least, that is the lesson politicians have taken from it.[80] As a result, politicians are less likely to award clemency—or at the very least temper their clemency awards to make them more palatable to the American people—unless they can be sure that the benefits outweigh the costs for fear of the political consequences.

One does not have to look very far to see the consequences of political pardoning. For evidence of a President's reluctance to award clemency to meritorious applicants for apolitical reasons, look no further than the ratio of clemency applications to clemency awards over the last thirty years. Since the elimination of parole from the federal system in 1989, the number of clemency applications has remained roughly the same while actual grants of clemency have sharply decreased.[81] The most likely explanation for this is politicians' fears of granting clemency to inmates who may later commit a crime, thus tarnishing the President's public image and hurting his chances for reelection. As such, politics has defeated mercy in the clemency arena;

75 *See* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 105, 112 (2019); *see also* Landes & Posner, *supra* note 14, at 67 (opining that the political cost of clemency is greater when there is public anxiety over crime and/or recidivism).

76 *See* Shenkin & Levine, *supra* note 70, at 11.

77 *Id.* at 10; *see also* Beermann, *supra* note 12, at 980 (explaining that President Clinton felt the political gains of FALN's clemency outweighed potential losses, unlike the clemencies he deliberately waited until the end of his second term to grant); Landes & Posner, *supra* note 14, at 66.

78 To view the ad, see *William Horton 1988 Attack Ad*, YOUTUBE (Nov. 4, 2008), https://www.youtube.com/watch?v=Io9KMSSEZ0Y (last visited Oct. 24, 2020).

79 *See generally* DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE (1995) (describing how Dukakis's defeat and the Willie Horton ads altered the clemency decisions of future politicians).

80 *Id.*

81 *See* Landes & Posner, *supra* note 14, at 75 & n.16, 76.

this has all been at the expense of justice for inmates deserving of clemency. Furthermore, in order to protect the President, the clemency process has primarily become impersonal; the President often does not even review inmates' petitions out of fear that he might offer clemency to an inmate who may prove politically troublesome.[82] Yet again, this undercuts the very premise upon which the Founders justified vesting the sole discretion to grant pardons and reprieves in only one person: the President.[83]

Many scholars and lawmakers are calling for reform or increased oversight of executive acts of clemency as a result of its overtly political use in recent decades.[84] Most notably, some have even called for a constitutional amendment divesting the President of the pardon power and vesting it with the federal courts, asserting that the courts are the best forum for clemency determinations.[85] These recommendations are worthy of discussion; however, a constitutional amendment is not required to address every problem relating to clemency decisions. Namely, the courts' existing power of judicial review would be an adequate measure to address at least some of the misuse of the pardon power. While it may not fully address the abuse of the pardon power, the power of judicial review will ensure that political considerations do not prevent an individual from receiving full justice in the event that they are awarded a commutation by the President.

III. Mootness and Separation of Powers: Evidence for the Plaintiff in the Case for Judicial Autonomy

A. The Mootness Doctrine: What It Is and How to Get Around It

The mootness doctrine is designed to ensure that courts can actually do something about the cases that they hear. As such, mootness attempts to ensure that a party does not bring a case too late or that an injury can be adequately redressed by a favorable decision.[86] In its current formulation, a

82 *See generally* Paul J. Larkin, Jr., *Delegating Clemency*, 29 FED. SENT'G REP. 267 (2017). President Donald Trump has been an exception to this general rule of executive clemency. As discussed above, he has relied almost exclusively on his personal connections and his own personal involvement when making clemency decisions. However, it is just as bad, if not worse, for a President to grant clemency solely for personal or political reasons by being too involved in the process than it is for a President to not be involved at all. The point is that, a proper balance must be struck, and clemency has been out of balance for many years.

83 *Id.* at 268.

84 *See generally* Shenkin & Levine, *supra* note 70.

85 *See* Larkin, *supra* note 72, at 410–12.

86 *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 606 (1992); *see also Ex parte* Steele, 162 F. 694, 701 (N.D. Ala. 1908) ("[A] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any *practical legal effect upon a then existing controversy*." (emphasis added)).

court will find a case moot for two reasons: the issues presented are no longer "live," or the parties lack a legally cognizable interest in the outcome.[87] As such, a case is moot if the dispute "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights."[88] The controversy must exist not only when the complaint is filed, but at all stages of litigation.[89] So long as the parties have a concrete interest, *no matter how small*, in the litigation's outcome, the case cannot be moot.[90] Thus, to establish mootness, a "demanding standard" must be met.[91] However, the Supreme Court has been sufficiently vague in its explanation of mootness to create confusion and consternation in the lower courts, and that is exactly the case in the commutation context.[92]

"That the Court will summarily dismiss a mooted case has long been one of the basic principles in its disposition of cases."[93] Cases are mooted for many reasons. For example, a case will be dismissed as moot if the relief sought has already been granted or if a statute has been passed that renders the action unnecessary.[94] However, it is also a well-established tradition in the law that if a court can find *any* reason not to moot a case, it will endeavor to do so.[95] In fact, the courts even have a history of hearing cases of inmates appealing their convictions after release "in which no justiciable interest was apparent by traditional standards."[96]

The Court has developed various exceptions to mootness. One such exception is the collateral consequences exception for inmates collaterally attacking their convictions. First articulated in *Sibron v. New York*, the collat-

87 *See* Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982) (per curiam)).

88 Alvarez v. Smith, 558 U.S. 87, 93 (2009).

89 *Id.* at 92.

90 Chafin v. Chafin, 568 U.S. 165, 172 (2013).

91 Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1660 (2019).

92 *Compare* United States v. Surratt, 855 F.3d 218, 219 (4th Cir. 2017), *with* Dennis v. Terris, 927 F.3d 955, 960 (6th Cir. 2019). For further explanation on the uncertainty surrounding the application of mootness, see Emily Tancer Broach, Comment, *Post-Conviction Proceedings, Supervised Release, and a Prudential Approach to the Mootness Doctrine*, 2010 U. CHI. LEGAL F. 493, 512 (explaining that the Court has not articulated clear guidance as to which factors should be considered when determining mootness or how the doctrine of mootness can be distinguished from standing).

93 Lawrence T. Hammond, Jr., Comment, *Constitutional Law—Case or Controversy—Dismissal for Mootness*, 41 N.C. L. REV. 847, 848 (1963).

94 *See id.* at 848; *see also* Lewis v. Cont'l Bank Corp., 494 U.S. 472, 474 (1990) (holding that the case was rendered moot by the 1987 amendments to the Bank Holding Company Act).

95 *See* Hammond, *supra* note 93, at 850; *see also* Cook v. Bennett, 792 F.3d 1294, 1299 (11th Cir. 2015) (explaining that a case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party" (quoting Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 307 (2012))).

96 *Postrelease Remedies for Wrongful Conviction*, 74 HARV. L. REV 1615, 1616 (1961); *see, e.g.*, Pollard v. United States, 352 U.S. 354, 358 (1957); Robson v. United States, 526 F.2d 1145, 1147 (1st Cir. 1975).

eral consequences exception states that a case is moot "only if it is shown that there is *no possibility* that *any* collateral legal consequences will be imposed."[97] Collateral consequences are any further penalties or disabilities that can be imposed on a convict as a result of his conviction.[98] Being subject to repeat offender statutes, losing the right to vote, or being unable to serve on a jury are just some examples of collateral consequences that will prevent a case from being deemed moot.[99] It is important to note that when the Court discusses collateral consequences, it speaks in terms of possibilities, rather than certainties.[100] As such, it does not need to be certain that a petitioner will face collateral consequences in order for courts to hear the case; it must only be a mere possibility.[101]

B. Separation of Powers: The Courts Have More Autonomy than They Think

Justifications for the mootness doctrine are centered on maintaining the separation of powers in our tripartite system of government.[102] As such, any discussion of mootness must necessarily be predicated on a discussion of separation of powers more broadly. Specifically, this Section will discuss the separation of powers as it relates to the pardon power in order to prime our later analysis of the split between the Fourth and Sixth Circuits.

While the Constitution does not explicitly place any limitations on the use of the pardon power—except in cases of impeachment—the Court has held that judicially discernible limitations on the power exist.[103] Furthermore, the federal Judiciary has the constitutional authority to check the use of the pardon power.[104] This is because the Constitution permits interaction between the branches of government so long as that interaction does not rise to the level of "encroachment or aggrandizement" by one branch at the expense of another.[105] With that being said, the Court has traditionally

97 392 U.S. 40, 57 (1968) (emphasis added).

98 *See* G. Andrew Watson, *Mootness—Contingent Collateral Consequences in the Context of Collateral Challenges*, 73 J. CRIM. L. & CRIMINOLOGY 1678, 1678 n.5 (1982).

99 *See* Broach, *supra* note 92, at 500; Watson, *supra* note 98, at 1688.

100 *See* Watson, *supra* note 98, at 1688.

101 *See Pollard*, 352 U.S. at 358 ("The [mere] possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits."); *see also* Broach, *supra* note 92, at 512 (explaining that the Court has taken a flexible approach to the collateral consequences exception).

102 *See* Broach, *supra* note 92, at 515 (explaining that justifications for the justiciability doctrines—of which mootness is one—are generally centered on the maintenance of separation of powers).

103 *See* Kobil, *supra* note 6, at 619.

104 *See* Hoffstadt, *supra* note 52, at 594.

105 Morrison v. Olson, 487 U.S. 654, 695 (1988) (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam)); *see, e.g.*, Mistretta v. United States, 488 U.S. 361, 380 (1989) ("[T]he Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct."); *Buckley*, 424 U.S. at 121 ("[T]he Constitution by no means contemplates total separation of each of these three essential branches of Government.").

given extreme deference to the Executive regarding clemency, typically only reviewing cases where the grant of clemency violated an express provision of the Constitution.[106] Although this has been the tradition of the Court, the primary obstacle to the Court's ability to conduct further review of clemency decisions stems from the Court's *self-imposed* rules of justiciability.[107] As such, the Constitution and separation of powers principles present "no insurmountable obstacle" to the Judiciary's use of judicial review to impose further standards on the use or review of clemency decisions.[108] The Court could choose to reform its mootness jurisprudence and allow lower courts to perform a less deferential scrutiny on constitutional grounds or even review clemency decisions on public policy grounds alone.[109]

There are two issues to consider when determining if the Court should alter its practices to ensure that the pardon power is being used as designed. First, reform is warranted only if a particular function is necessary to the exercise of the power, but is not currently being served.[110] Second, any reform must consider "whether and how it will alter the balance of power between the three branches" of government.[111] In the clemency context, courts should consider the President's motives for granting clemency and their responsibility to determine when the use of the pardon power violates express provisions of the Constitution or infringes on the rights of the petitioner.[112] In the modern context, courts should also consider how the "unfettered nature of clemency today invites arbitrary use, and consequently, abuse of the power."[113] In sum, although the pardon power has traditionally been treated as plenary,[114] separation of powers does not prevent—and may even encourage—courts to begin playing a more active role in cases involving the pardon power in order to strengthen our constitutional governing system.

IV. The Court Finds in Favor of Judicial Autonomy: Why Separation of Powers Considerations Generally Trump Presidential Commutations

A careful analysis of mootness and separation of powers necessitates the conclusion that mootness is not the appropriate doctrine to serve as the analytic focal point of federal courts when determining whether an inmate can collaterally attack his conviction postcommutation. Rather, federal courts should approach this issue considering separation of powers, where the Judi-

106 *See, e.g.*, Schick v. Reed, 419 U.S. 256, 266–67 (1974).
107 *See* Kobil, *supra* note 6, at 618.
108 *Id.* at 616.
109 *See* Hoffstadt, *supra* note 52, at 569.
110 *Id.* at 568.
111 *Id.* at 596.
112 *See* Kobil, *supra* note 6, at 617.
113 Hoffstadt, *supra* note 52, at 596.
114 *See* Jonathan T. Menitove, Note, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 Harv. L. & Pol'y Rev. 447, 451 (2009).

ciary's duty to "say what the law is" requires it to be able to hear a collateral attack on an inmate's conviction postcommutation. This Part will first explain why mootness is not the relevant consideration that courts should be using when determining whether an inmate can collaterally attack his conviction postcommutation. Then, it will argue that to protect judicial autonomy and separation of powers principles, the federal courts must have the opportunity to hear a collateral attack on an inmate's conviction.

A. Mootness: An Improper Mode of Analysis That Nonetheless Does Not Bar a Collateral Attack

There is virtually no formulation of the mootness doctrine that can moot a postcommutation collateral attack. This is especially true when one considers the long-established collateral consequences exception to the mootness doctrine. In fact, notwithstanding the Fourth Circuit's holding in *Surratt*, that circuit seemed much more concerned with infringing on the President's plenary pardon power and offending separation of powers principles than it did with mootness.[115] Judge Wilkinson's concurrence does not even attempt to advance an argument based on the Supreme Court's longstanding mootness jurisprudence,[116] while the opinion itself summarily declares the case to be moot without explanation or justification.[117] In fact, the Fourth Circuit's reasoning rests primarily on the claim that it cannot "inject [itself] into the lawful act of a coordinate branch of government."[118] Thus, although the Fourth Circuit's technical holding was that a postcommutation collateral attack is moot, the opinion is really about separation of powers more broadly and not mootness. However, considering both the Fourth and Sixth Circuits discuss this issue in the context of the mootness doctrine, it is still necessary to discuss why a postcommutation collateral attack is not moot.

As it relates to inmates whose commutations release them from prison altogether, the live issue requirement coupled with the collateral consequences exception is sufficient for courts to determine that these cases should be heard. The live issue requirement ensures that the inmate's controversy regarding his legal rights is sustained throughout the litigation.[119] Ostensibly, it may appear that an inmate whose commutation released him from prison no longer has an active legal controversy; he has been released from the very imprisonment that he is alleging was unconstitutional after all. However, imprisonment is not the sole injury one suffers from a conviction, and a commutation does not eliminate collateral consequences of the conviction.[120] Thus, even if the issue of imprisonment is moot, collateral consequences stemming from the conviction are not. In fact, even if it appears on

115 *See supra* Part I.

116 *See* United States v. Surratt, 855 F.3d 218, 219–20 (4th Cir. 2017) (Wilkinson, J., concurring).

117 *Id.* at 219 (majority opinion).

118 *Id.* (Wilkinson, J., concurring).

119 *See* Alvarez v. Smith, 558 U.S. 87, 92 (2009).

120 *See* Cowlishaw, *supra* note 5, at 150 n.11.

its face that there may not be any collateral consequences from the conviction, the mere possibility of such consequences is enough to hold that the case is not moot.[121]

A conditional commutation that releases an inmate from prison subject to certain conditions is even easier to assess. The effectiveness of a conditional commutation depends on the recipient's compliance with conditions of the grant; noncompliance will be followed by revocation of clemency and execution of any part of the unserved sentence.[122] The Sixth Circuit recognized that noncompliance results in revocation of a conditional commutation in *Dennis* when it stated that the judgment "remains in place, ready to kick into full effect if the recipient violates the condition[s]."[123] As such, there is no scenario in which an inmate's collateral attack on a *conditional* commutation can be moot as a byproduct of the conditions he must adhere to in order to effectuate the commutation. Put differently, the recipient's dispute remains active because the commutation can easily be revoked, and the recipient sent back to prison.

Inmates whose commutations merely reduce their sentence maintain a legally cognizable interest in the outcome. To sustain the case, the court must determine that its judgment can have a "*practical legal effect upon a then existing controversy*"[124] or that it is not impossible to grant any effectual relief.[125] In both *Dennis* and *Surratt*, neither party was challenging the sufficiency or constitutionality of their commutation. Rather, they were challenging their underlying convictions, asserting that they should not be imprisoned at all. As a result, both inmates retained a sufficient concrete interest in the outcome such that the court's judgment would have a practical effect on the controversy. In fact, the Sixth Circuit explicitly recognized that it would have a practical effect on the controversy in *Dennis* when it stated that "Dennis may challenge his original sentence because, if he wins, the district court might sentence him to a term less than his current 30-year commuted sentence."[126] The same logic would apply to any other currently imprisoned inmate who received a commutation and later challenged their underlying conviction.[127] "In this situation, the state and the inmate remain adverse to one another, and the defendant holds a concrete interest in trading his commuted sentence for [either a] shorter one [or acquittal alto-

121 Corey C. Watson, Comment, *Mootness and the Constitution*, 86 Nw. U. L. Rev. 143, 149 (1991).

122 *See* Cowlishaw, *supra* note 5, at 151.

123 Dennis v. Terris, 927 F.3d 955, 958 (6th Cir. 2019).

124 *Ex parte* Steele, 162 F. 694, 701 (N.D. Ala. 1908) (emphasis added).

125 Cook v. Bennett, 792 F.3d 1294, 1299 (11th Cir. 2015).

126 *Dennis*, 927 F.3d at 959.

127 In fact, the Seventh Circuit did apply the same logic in *Simpson v. Battaglia* when it held that despite the governor commuting his death sentence to life imprisonment, the defendant retained the right to seek a statutory mandatory minimum as opposed to the life sentence. 458 F.3d 585, 595 (7th Cir. 2006).

gether] due to some issue with the original sentence."[128] Consequently, even if the commuted portion of the sentence is moot, it cannot be argued that the remaining portion of the sentence is moot.[129] Notwithstanding the partial reduction in sentence as a result of the commutation, when the inmate is eventually released from prison, he will still face the potential, if not the certainty, of collateral consequences.[130] Thus, there is almost no instance in which the collateral attack of an inmate who is still imprisoned can be moot postcommutation.

Based on each of these considerations, one of the only instances in which an inmate's collateral attack postcommutation can *ever* be moot is if the commutation resulted in the inmate's release from prison, rather than merely shortening his sentence, *and* there is not even the possibility of collateral consequences stemming from his conviction. However, this is a near impossibility, if not impossible altogether.[131] As such, there is likely no instance in which a postcommutation collateral attack can be moot given the Court's current mootness jurisprudence.

B. Separation of Powers Considerations Require Federal Courts' Involvement in Some Commutation Scenarios

Not only is a postcommutation collateral attack not moot, but on a more fundamental level, the ability of the courts to hear the attack implicates the sanctity of separation of powers in our constitutional system. Even though the President's power to pardon has traditionally been understood to be plenary, his exercise of that power cannot otherwise infringe on the constitutional power of the other branches of government.[132] It is well established that "the right to try offences . . . [and] to impose the punishment provided by law is [a] judicial [function,] . . . the authority to define and fix the punishment for crime is legislative[,] . . . and that the right to relieve from the punishment, . . . belongs to the [E]xecutive."[133] Considering this, the mere fact that the Executive granted relief from punishment for an individual does not divest the Judiciary of its authority to revisit the imposition of the underlying punishment. If an inmate's conviction was unlawful from the begin-

128 Brianna Vollman, Note, *Keeping up with the Commutations: The Judiciary's Authority After an Exercise of Executive Clemency*, 88 U. CIN. L. REV. 1129, 1142–43 (2020).

129 *Cf.* Hammond, *supra* note 93, at 848, 848 n.3 (explaining that in *Wilson v. United States*, 232 U.S. 563 (1914), the Court declared that even though the constitutional question raised by petitioner was moot, it would retain jurisdiction over the rest of the case). In the commutation context, even if the commuted portion of the sentence is moot, the courts should still retain jurisdiction over the uncommuted portions of the sentence.

130 *See supra* notes 97–101 and accompanying text.

131 By using this interactive database, one can see that collateral consequences are at least a possibility in every state and federal jurisdiction. NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/ (last visited Dec. 7, 2020).

132 *See* United States v. Surratt, 855 F.3d 218, 227–28 (2017) (Wynn, J., dissenting).

133 *Ex parte* United States, 242 U.S. 27, 41–42 (1916).

ning, there is no foundation on which the relief from punishment may stand. Therefore, deferral to the Executive in this context is inappropriate since the judicial branch is better equipped to resolve the issues raised by inmates after they receive a commutation.[134] Furthermore, since it was the machinery of the Judiciary that convicted these individuals, the courts have an obligation to rectify their own mistakes.[135] Thus, it would offend separation of powers principles and infringe on the autonomy of the courts to hold that a presidential commutation divests the courts of their authority to hear a collateral attack.

The claim that hearing a postcommutation collateral attack would infringe on the plenary power of the President to pardon is even more unconvincing when one considers that the court's involvement in a collateral attack postcommutation does not interact with the President's commutation in any way; the Judiciary is only exercising authority over the portion of the sentence that remains untouched by the commutation. Contrary to the Fourth Circuit's view, the Constitution does not explicitly mandate, nor does it even contemplate, the notion that an act of clemency replaces a judicial sentence with a somehow superior executive one.[136] While it may be true that the courts cannot overturn a President's act of clemency unless it violates the recipient's constitutional rights or otherwise violates the Constitution, in both *Surratt* and *Dennis* the petitioners were not challenging the provisions of their clemency decisions.[137] Rather, they were challenging their underlying convictions. If the courts were to hold for petitioners, their commutations would not suddenly be void even though the decision offers greater relief than the commutation. The Constitution is silent on whether the federal courts can provide greater relief to an inmate than a prior commutation, and there is no indication, absent the Fourth Circuit's opinion in *Surratt*, that their ability to hear these cases is constitutionally barred. In fact, given the potential for collateral consequences stemming from the alleged unconstitutional conviction and the court's obligation to correct its mistakes, longstanding separation of powers principles necessitate the court's involvement in a postcommutation collateral attack.

Even if the court were exercising its authority over the entire sentence and not just the uncommuted portions, separation of powers principles allow, and may even necessitate, the court's involvement in a postcommutation collateral attack. The claim that the court's involvement in a case postcommutation constitutes infringement of the executive branch does not carry much weight. Separation of powers principles are vindicated, not disserved, by cooperation between the coordinate branches of government so long as each branch is contributing to a lawful objective through its own processes. Although there are no cases exploring the interaction between the executive and judicial branches in this specific context, there are plenty

134 *See Postrelease Remedies for Wrongful Conviction*, *supra* note 96, at 1617.

135 *Id.*

136 *See Surratt*, 855 F.3d at 221 (Wynn, J., dissenting).

137 *See generally Surratt*, 855 F.3d 218; Dennis v. Terris, 927 F.3d 955 (6th Cir. 2019).

of examples of two or all three branches working together to achieve a common goal. For example, in *Mistretta v. United States*, the Court held that Congress's creation of a sentencing commission did not violate separation of powers principles.[138] The Court stated that "functions that do not trench upon the prerogatives of another Branch and that are *appropriate to the central mission of the Judiciary*" may be delegated to the Judiciary.[139] It cannot be argued that fixing mistakes made *by the Judiciary* is not central to the mission *of the Judiciary*. Furthermore, the Founders made it clear that they were not establishing a system of government in which each branch operates in a vacuum, separate and distinct from the other branches. In *The Federalist No. 51*, James Madison explained that the "great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."[140] To prevent the Judiciary from fixing its own mistakes, the executive branch would take a step toward concentrating the several powers in its own department for potentially personal motives. The *Dennis* court recognized this potential encroachment of the Judiciary by the Executive when it explained a hypothetical scenario where a "mischievous chief executive" could prevent inmates from receiving lower sentences on collateral review by simply commuting their sentences by one day.[141] To prevent the Judiciary from hearing postcommutation collateral attacks would improperly concentrate power in the executive branch and invite further abuse than already exists of the pardon power.

Allowing the courts to hear postcommutation collateral attacks would not constitute impermissible infringement of one branch by another. As discussed previously, the goal of a commutation is to provide justice or mercy to an inmate by reducing the severity of his punishment.[142] It is antithetical to a commutation's purpose to prevent the Judiciary from providing a further reduction from punishment than the commutation provided if it is determined that the inmate is deserving of such a reduction in punishment. For example, a wrongfully convicted inmate does not deserve any punishment whatsoever.[143] As such, the inmate is entitled to a full acquittal, a remedy that a commutation cannot provide. The inmate now has two options: (1) seek a pardon from the Executive, which is highly unlikely since he has already received a commutation and the political cost of a pardon compared

138 *See* Mistretta v. United States, 488 U.S. 361, 412 (1989).

139 *Id.* at 388 (emphasis added).

140 THE FEDERALIST NO. 51, at 268 (James Madison) (George W. Carey & James McClellan eds., 2001).

141 *Dennis*, 927 F.3d at 959.

142 *See supra* Section II.A.

143 *But see* Herrera v. Collins, 506 U.S. 390, 427–29 (1993) (Scalia, J., concurring) (explaining that there should be no right to judicial examination of evidence proving innocence if the trial itself was not defective).

to a commutation is high,[144] or (2) collaterally attack his conviction in court. The fact that the Executive could choose to grant the inmate a pardon is of no consequence since the Judiciary is uniquely situated to determine whether it erred by convicting the inmate in the first place.[145] Additionally, considering that the overall goal of clemency is to reduce the severity of an inmate's punishment, the court's determination that the inmate was never deserving of punishment in the first place does not undermine the President's pardon power; it is merely the Judiciary using its unique processes to effectuate a lawful objective that is shared by both the executive and judicial branches.

Considering the legislative branch's role is also vital when determining the Judiciary's role in a postcommutation collateral attack. It would be an affront to the legislative branch's power to prevent the Judiciary from hearing a collateral attack based on a recently changed law that impacts an inmate's sentence. For example, in *Surratt*, the FSA applied retroactively and would have entitled Surratt to greater relief than his commutation provided him.[146] Although the Executive is responsible for ensuring that the laws are faithfully executed,[147] it is the role of the Judiciary to proscribe punishment based on the laws that are duly enacted by Congress.[148] To prevent the Judiciary from altering the punishment it proscribed as a result of it no longer being based on a valid law would subordinate both the legislative and judicial branches to the will of the executive branch in an impermissible way.

C. The Politicization of the Pardon Power Necessitates Judicial Review for Postcommutation Collateral Attacks

> *Granting clemency because someone has an "in" at the White House is cronyism, not justice, and not mercy. That is not the way to run this railroad.*
>
> —Paul J. Larkin, Jr.[149]

The rampant politicization of executive clemency is yet another justification to support judicial autonomy in the context of postcommutation collateral attacks. The fundamental precepts of justice and mercy from which the pardon power derives its justifications are no longer being served and the courts must step in to rebalance the use of this power in this limited context. The Judiciary should reform its practices when a particular governmental function is necessary but not currently being served so long as it does not impermissibly upset the balance of power between the three branches of gov-

144 Considering the effect of a pardon is greater than a commutation, and the more a President grants clemency the less benefit he receives, it stands to reason that a pardon has greater political costs than a commutation; this is especially true when the President has already used some amount of political capital commuting the sentence of an inmate that he could later pardon. *Cf.* Landes & Posner, *supra* note 14, at 67–69.

145 *See Postrelease Remedies for Wrongful Conviction*, *supra* note 96, at 1626.

146 *See* United States v. Surratt, 855 F.3d 218, 223 (4th Cir. 2017) (Wynn, J., dissenting).

147 U.S. CONST. art. II, § 3.

148 *See Ex parte* United States, 242 U.S. 27, 41–42 (1916).

149 Larkin, *supra* note 72, at 409–10.

ernment.[150] The preceding Section already established how the courts hearing postcommutation collateral attacks does not upset the balance of power between the three branches of government.[151] As such, this Section will focus on explaining how the necessary functions of the pardon power are not being served based on its use since the mid-1900s and further advocates for the courts' ability to hear postcommutation collateral attacks in order to ensure that both justice and mercy have been achieved for inmates receiving clemency.

The Framers vested the pardon power in one individual under the belief that one person would be better able to dispense justice and mercy for deserving inmates.[152] Furthermore, it was believed that the President would be better able to not only give each clemency applicant the individual attention he deserved, but also that he would be best able to avoid bias in his clemency decisions.[153] Over a century after ratification, the Supreme Court explicitly reaffirmed that the ability of and justification for the President to grant pardons unilaterally was based on the notion that he would not abuse that power. In *Ex parte Grossman*, the Court stated: "Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."[154] Thus, it is reasonable to conclude that if the President is abusing his pardon power or that he is making clemency decisions devoid of considerations of justice or mercy, that the courts should be empowered to hear at least certain cases of clemency recipients. This conclusion is further bolstered by the fact that the Court's current rules of justiciability are *self-imposed* and can be altered if they are not serving their intended purpose.[155]

There is virtually no scenario in the modern era in which a President makes a clemency decision void of political considerations. While political considerations do not necessarily constitute an abuse of the pardon power, when those considerations are the primary or sole motivation for the specifics of a grant of clemency it is much more likely that the power is being abused. In these instances, the justification for clemency shifts from mercy to political expediency. The recipient of a politically motivated commutation has not likely been given the commutation that justice or mercy demands. Rather, he has been given a commutation that can be neatly packaged and sold to the American people as "justice" or "mercy." In fact, it is entirely possible that Raymond Surratt, Jr., fell victim to a potentially politically motivated commutation that provided relief that was objectively inferior to the relief he was statutorily entitled to under the FSA. In that case, after recognizing that Surratt's commutation was inadequate and not in compliance with the FSA, President Obama could have amended his commutation order so that Surratt's sentence was in compliance with the punishment that was

150 *See* Hoffstadt, *supra* note 52, at 568, 596.

151 *See supra* Section IV.B.

152 *See* THE FEDERALIST NO. 74, *supra* note 62, at 385–86 (Alexander Hamilton).

153 *Id.*

154 267 U.S. 87, 121 (1925).

155 *See* Kobil, *supra* note 6, at 618.

deemed appropriate by Congress, but he chose not to do so. While there is no way to know for certain what motivated the President's inaction in this instance, it would not be unreasonable to infer that the political cost of providing a second commutation to a convicted felon was just too high.

If this was not a politically calculated decision, then it was certainly an oversight which can often occur in the case of class commutations, where the specifics of each inmate are not scrutinized with the attention and care that the Founders would have expected.[156] Either way, it was not justice nor was it mercy. To prevent the Judiciary from hearing his collateral attack based on what was at best an oversight that would result in Surratt continuing to serve an unjust sentence, and at worst a willful act by an executive who was unwilling to provide the fullest extent of penological relief that Surratt was entitled to for political reasons, is unconscionable. This certainly does not vindicate the ideals espoused by the Founders when they established the pardon power.

Even if one is not convinced that the politicization of the pardon power merits judicial review of postcommutation collateral attacks because the tenets upon which the power is justified are not being actualized, the courts should still be empowered to review postcommutation collateral attacks because the politicization of the pardon power threatens the power of judicial review at its most basic level. Consider the hypothetical case of the "mischievous chief executive" who prevents the holding of a Supreme Court case that will allow inmates to be released from prison on collateral review from being realized.[157] If this action was permissible such that the courts could not review the collateral attacks of these inmates, then it is not unreasonable to conclude that a politically motivated president could expand the abuse of the pardon power to further infringe on the court's power of judicial review.

To be clear, this Note is not advocating for the federal courts' wholesale involvement in all clemency decisions; that is a matter better left for another time or another note. Rather, it is simply arguing that foreclosing judicial review for an inmate who is challenging his underlying conviction based on the reasoning that his commutation was "justice enough" is flawed because it is entirely possible that his commutation was either (1) not awarded based on notions of justice or mercy at all, or (2) the commutation offer may have been tempered or reduced solely for political reasons when the inmate may have been entitled to a greater commutation or a full pardon; the only reason that he did not receive greater relief was because the President was fearful of the political backlash for either the grant itself or of the potential for future backlash if the inmate becomes a victim of recidivism.

Furthermore, even though the pardon power's politicization is one factor that should justify the courts in taking a closer look at postcommutation collateral attacks, it is important to remember that the courts are not reviewing the merits of the commutation itself. Rather, they are reviewing the

156 *See* Eckstein & Colby, *supra* note 64, at 80.

157 *See* Dennis v. Terris, 927 F.3d 955, 959 (6th Cir. 2019).

underlying conviction that in and of itself may be flawed such that the court has an obligation to correct its own mistake. The fact that the inmate did not receive the commutation he may have deserved is only relevant insofar as it is an indication that the politically motivated commutation may be an abuse of the pardon power. Therefore, the inability of the courts to intervene in these narrow circumstances may threaten the power of judicial review and the separation of powers more broadly.

CONCLUSION

It is emphatically the province and duty of the court to say what the law is. That duty and jurisdiction do not disappear after a court has issued its judgment. Furthermore, when a court makes a mistake, it would be a dereliction of its duty not to correct it. It would be a miscarriage of justice, and antithetical to all notions of mercy to prevent a court from exercising its rightful power based on the Constitution and some of its most longstanding precedents in the postcommutation context. This issue becomes even more important when one considers the fact that the pardon power has become a political perversion of what the Founding Fathers intended it to be. Mercy and justice are no longer the foundation of this awesome and plenary executive power; they are simply buzzwords for politicians and the mass media. As a result, inmates who are deserving of mercy or who did not receive justice are falling through the cracks and being forced to serve unjust sentences for many years. Even inmates who receive a commutation often do not receive justice because the political considerations of the Executive prevent him from awarding the clemency that the inmate deserves. As such, in the interests of justice, and to protect the sanctity of the separation of powers, the Judiciary must be empowered to hear an inmate's collateral attack on his sentence postcommutation. Only by empowering the Judiciary to hear postcommutation collateral attacks can the case of judicial autonomy v. executive authority be settled in such a way that protects separation of powers principles and our constitutional structure.