LIBERTY UNIVERSITY

Liberty University Law Review

Volume 15
Issue 1 *Fall 2020*

Article 6

September 2021

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Recommended Citation

Kane, Dalton (2021) "Jurisdiction of Pardoned and Commuted Sentences Must Remain Within the Judicial Branch," *Liberty University Law Review*: Vol. 15 : Iss. 1 , Article 6.
Available at: https://digitalcommons.liberty.edu/lu_law_review/vol15/iss1/6

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NOTE

JURISDICTION OF PARDONED AND COMMUTED SENTENCES MUST REMAIN WITHIN THE JUDICIAL BRANCH

Dalton Kane

I. INTRODUCTION

Sir William Blackstone defined the power to pardon as an act of executive mercy.[1] The power to pardon allows an Executive to eliminate a court's sentence of an individual. Whereas an expungement eliminates a conviction, a pardon maintains the conviction but eliminates the sentence.[2] Within the power to pardon is the power to commute sentences.[3] Rather than completely eliminating a sentence, this power allows the President to shorten the sentence of an individual.[4] In *Schick v. Reed*, the Supreme Court reaffirmed "the pardon power includes the authority to commute sentences in whole and in part."[5] Finally, within the power to commute sentences, the President may also put conditions on commuted sentences.[6] This allows the President to implement public policy or encourage certain behaviors by commuting a sentence.

The power to pardon is an important tool used by the Executive Branch as a means to enact justice within the laws of the nation. Whereas the Legislative Branch sometimes cannot react quickly to public sentiment, the Executive may use the power to pardon to quickly implement public sentiments toward the law.[7] Similarly, the power to pardon allows the Executive to mitigate the harshness of the law in certain situations.[8] This is important in order to maintain public support of the judicial system.[9] The power to pardon also allows citizens an avenue for seeking justice. When it is no longer possible to obtain justice or mercy from the courts, an individual may still turn to the Executive Branch.

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[1] Dennis v. Terris, 927 F.3d 955, 957–58 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 2571 (2020).

[2] U.S. DEP'T. OF JUST.: OFF. OF THE PARDON ATT'Y, FREQUENTLY ASKED QUESTIONS (2020), https://www.justice.gov/pardon/frequently-asked-questions.

[3] Schick v. Reed, 419 U.S. 256, 260 (1974).

[4] *Id.*

[5] *Dennis*, 927 F.3d at 957–58 (quoting Schick v. Reed, 419 U.S. 256, 260 (1974)).

[6] *Id.* at 958.

[7] *See infra* Section V.C.1.

[8] *See* KATHLEEN D. MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 17 (1989).

[9] *Id.*

Unfortunately, a recent decision by the Fourth Circuit Court of Appeals threatens to undermine the power to pardon. In that case, the court held that the Judicial Branch no longer has jurisdiction over the original conviction of pardoned or commuted sentences; instead, the Executive Branch has jurisdiction over the original conviction.[10] Meanwhile, the Sixth Circuit Court of Appeals held that the Judicial Branch retains jurisdiction over pardoned or commuted sentences.[11] This lack of a uniform standard amongst the courts will result in uncertainty regarding the effects of applying for and receiving a pardoned or commuted sentence. This will result in a chilling effect on the use and acceptance of pardons, and inmates may forfeit a valuable means of seeking justice. Therefore, appellate courts must adopt a uniform standard for which branch of government retains jurisdiction over pardoned or commuted sentences.

This article argues that courts must find that the Judicial Branch retains jurisdiction over pardoned or commuted sentences. Section I introduces the power to pardon and the issue created by the circuit courts of appeals' decisions. Section II explains the historical background of the power to pardon. Section III explains the decisions by the Sixth Circuit Court of Appeals and the Fourth Circuit Court of Appeals affecting the power to pardon. Section IV discusses the Constitution's framework for the distribution of power across the three different branches of government and how the separation of powers requires the Judicial Branch to retain jurisdiction over pardoned or commuted sentences. Section V argues that the public policy interests supported by the power to pardon will be harmed if the courts grant jurisdiction to the Executive Branch. Section VI contains the conclusion.

II. A HISTORICAL BACKGROUND OF THE POWER TO PARDON

The power to pardon has been a vital tool for chief executives to implement policies and counter some of the more severe effects of a nation's laws and judicial sentencings. This power has existed since the beginning of time, from ancient empires to its development in English common law.[12] The pardoning power was adopted in the U.S. Constitution, and it has played an important role in the development of America throughout its history.

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[10] United States v. Surratt, 855 F.3d 218, 219–20 (4th Cir. 2017) (mem.).

[11] Dennis v. Terris, 927 F.3d 955, 958 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 2571 (2020).

[12] MOORE, *supra* note 8, at 15-17.

A. *The Power to Pardon in the Ancient World*

The power to pardon is a fundamental concept of punishment that goes back to the beginning of time.[13] Indeed, perhaps the first pardon was God's commuting of Adam and Eve's sentence for eating from the tree of the knowledge of good and evil.[14] Although God told Adam and Eve that they would "surely die" if they ate from the tree, He instead allowed them to live under a curse.[15] God also commuted Cain's sentence after he killed his brother Abel; rather than condemn Cain to death, God allowed him to roam the Earth under a curse.[16]

Although Hammurabi's Code was known for its somewhat brutal punishments, it also had many instances in which an individual could be pardoned.[17] For example, Article 129 allowed adulterers to be pardoned under certain circumstances.[18] In the Old Testament, the Israelites understood that both God and their leaders had the power to pardon.[19] For example, Joshua extended a conditional pardon to Rahab and her family because she helped the Israelite spies—as long as she kept the presence of the spies a secret, tied a scarlet cord to her window, and remained in her house, she would be spared.[20]

In Ancient Greece, the power to pardon was decided democratically.[21] In order to obtain a pardon, a person needed to obtain 6,000 signatures of Greek citizens in support of his petition.[22] Because of this stringent requirement, Greek celebrities were often the only individuals with the ability to obtain pardons.[23] The Romans had a complicated system for obtaining a pardon—"legislative and judicial, full and partial, pardon by the will of the Emperor . . . ."[24] Marcus Junius Brutus was captured by Julius Caesar when

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[13] *Id.*

[14] *Genesis* 2:17; *Genesis* 3:16–19.

[15] *Genesis* 3:16–19.

[16] *Genesis* 4:10–12; KATHLEEN D. MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 16 (1989).

[17] MOORE, *supra* note 8, at 15.

[18] *Id.*

[19] *See Exodus* 23:21; *Numbers* 14:19.

[20] *Joshua* 2:17–22.

[21] JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 10 (2009).

[22] *Id.*

[23] *Id.*

[24] MOORE, *supra* note 8, at 16.

the Romans defeated Pompey.[25] Caesar pardoned Brutus and allowed him to rise in the ranks of the Roman government; however, after Caesar declared himself dictator, Brutus participated in the plot to assassinate Caesar.[26] Pontius Pilate also exhibited the Roman power to pardon in allowing the people to choose to pardon either Barabbas or Jesus.[27] The people chose Barabbas, and God offered the ultimate pardon to all mankind through the death of Jesus—a pardon for sins.[28]

B. *The Power to Pardon in English Common Law*

Under the English common law, the power to pardon was an important means to soften the harshness of the system of punishment.[29] For example, the punishment for a felony was the death penalty; however, of the 1,254 individuals sentenced to death in 1818, the staggering amount of 1,157 of those people were pardoned by the king.[30] This not only provided justice for specific English subjects charged with crimes, but it also instilled confidence in the system of punishment employed by the crown. Subjects knew that they could appeal to the crown as a potential means of justice.

The power to pardon originated as an absolute power of the king.[31] While this brought benefits to English subjects, the unlimited power also caused corruption and abuse by the crown.[32] For example, some pardons were offered in exchange for money granted to the crown.[33] Further, it was common during a war to issue a pardon to all those that were convicted of homicide if a person volunteered to fight for a certain amount of time.[34] After the impeachment of Lord Danby, a prominent politician during the reign of King Charles II,[35] the power was gradually restricted in order to avoid its abuse.[36] For example, "[p]arliament restricted the power to grant a pardon to

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[25] E. Badian, *Marcus Junius Brutus*, ENCYCLOPEDIA BRITANNICA (Nov. 8, 2019), https://www.britannica.com/biography/Marcus-Junius-Brutus.

[26] *Id.*

[27] *Matthew* 27:17.

[28] *Id.* at 27:21; *Romans* 6:23.

[29] MOORE, *supra* note 8, at 17.

[30] *Id.* at 17–18.

[31] William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 478, 487 (1977).

[32] *Id.* at 483–84.

[33] *Id.* at 478.

[34] *Id.*

[35] *Id.* at 487–92.

[36] Schick v. Reed, 419 U.S. 256, 260 (1972); Duker, *supra* note 31, at 495–96.

one who transported a prisoner overseas to evade the Habeas Corpus Act, because to allow such pardons would drain the Great Writ of its vitality."[37]

Some of the most well-known English political thinkers contributed to the discussion on the power to pardon. John Locke argued that the power of pardon was an important way for the Executive to help mitigate the severe consequences of the law.[38] Montesquieu argued that, while monarchies may benefit from the use of clemency, the power to pardon was not necessary for a republic.[39] Sir William Blackstone also believed that the pardon power was acceptable for monarchies and unacceptable in democracies.[40] American scholars have vehemently countered these assertions and defended the power to pardon in the new Republic.[41] The scope of the power to pardon was hotly contested between the King and Parliament throughout English history, and this debate eventually made its way to the New World.

C. *The Power to Pardon during the Founding of The United States of America*

The English common law power to pardon was carried over from England into the American colonies. In the colony of Plymouth, a colonist named Lyford was convicted and sentenced to banishment from the colony; however, he was given six months to make arrangements, and many colonists intended to release him if he repented of his actions.[42] After changing his behavior and repenting in front of the colonists, he was allowed to enter back into society and teach.[43] The power to pardon also greatly affected the colony of Jamestown. In one of the most famous stories of American history, Chief Powhatan pardoned Captain John Smith from a death sentence at the request of Pocahontas.[44] As a result of this act of mercy, Smith later pardoned and released several of Powhatan's warriors that attacked Jamestown—this repaid Pocahontas for saving his life.[45] As more colonies were established in the New World, the King vested the English governing authorities with the power to

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[37] *Schick*, 419 U.S. at 260.

[38] CROUCH, *supra* note 21, at 13.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] WILLIAM BRADFORD, BRADFORD'S HISTORY OF PLIMOTH PLANTATION 219–20 (1898), http://www.gutenberg.org/files/24950/24950-h/24950-h.htm#Page_219.

[43] *Id.*

[44] DAVID A. PRICE, LOVE & HATE IN JAMESTOWN: JOHN SMITH, POCAHONTAS, AND THE START OF A NEW NATION 68 (Vintage Books ed., 2005) (2003).

[45] *Id.* at 83.

pardon.[46] Many of the colonies eventually bestowed the royal governors with the full power to pardon, and there were few limits placed on this power.[47]

After the Revolutionary War, Americans were skeptical of the powers of a large national government, and the power to pardon was weakened.[48] There was no power to pardon on a national scale, and many states limited the power as well.[49] For example, Georgia did not allow the executive to issue any pardons.[50] However, the system of government which the colonies had formed under the Articles of Confederation was failing, and delegates were sent from the colonies to fix it.[51] The delegates to the Constitutional Convention debated many aspects of executive power, including the power to pardon.[52] This debate helped shape how the power to pardon was written into the Constitution; as a result, the founders added an important tool to the Executive Branch.

The power to pardon, as stated in the U.S. Constitution, was based upon the pardoning power from English common law.[53] Indeed, Chief Justice John Marshall, when analyzing the power to pardon, said the Court should look to English laws in order to understand how this power functions.[54] There was very little debate in the Constitutional Convention with respect to the power to pardon; the only disagreement seemed to be over whether the President could pardon those convicted of treason.[55] James Madison and Gouverneur Morris believed there should be no power to pardon traitors, and Wilson believed the power should extend to those convicted of treason.[56] Ultimately, the delegates allowed the President to pardon treasonable offenses.[57]

In Article II, Section II, clause 1, the United States Constitution states that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[58] Alexander Hamilton, in an attempt to assure the people that the President of the new Republic would not have too much power, stated that the power to pardon

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[46] CROUCH, *supra* note 21, at 12.

[47] Duker, *supra* note 31, at 498–500.

[48] *See id.*

[49] *Id.* at 500.

[50] *Id.*

[51] *Id.* at 501.

[52] *Id.*

[53] Dennis v. Terris, 927 F.3d 955, 957 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 2571 (2020).

[54] United States v. Wilson, 32 U.S. 150, 160 (1833).

[55] DAVID B. ROBERTSON, THE ORIGINAL COMPROMISE 145 (2013).

[56] *Id.*

[57] *Id.*

[58] U.S. CONST. art. II, § 2, cl. 1.

did not extend to impeachment—the Legislature could still check the President's power.[59] Moreover, Hamilton also argued that a well-timed pardon could help to restore the tranquility of the nation.[60]

D. *The Power to Pardon From the Adoption of the U.S. Constitution to Modern Times*

Since the ratification of the Constitution, presidents of the United States have issued several famous pardons. George Washington famously pardoned those who participated in the Whiskey Rebellion.[61] After the Civil War ravaged the nation, President Andrew Johnson granted a pardon to many former Confederates if they would swear allegiance to the United States.[62] Both of these instances of clemency were used to help bring the nation together after times of turmoil, just as Hamilton predicted in his argument in support of the pardon in *The Federalist*.[63]

President Ford pardoned Richard Nixon after the Watergate scandal.[64] When President Ford's pardon was challenged, the court stated that it was understandable that Ford would need to pardon Nixon in order to bring the nation together during such tumultuous times.[65] Modern presidents have continued to use the pardon as a tool for achieving peace, justice, and political goals. For example, Jimmy Carter issued a pardon to those who dodged the draft during Vietnam.[66] President Trump pardoned Sheriff Joe Arpaio, an Arizona sheriff who supported furthering Trump's immigration policy during his campaign.[67] President Trump also commuted the sentence of Alice

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[59] THE FEDERALIST NO. 69 (Alexander Hamilton).

[60] THE FEDERALIST NO. 74 (Alexander Hamilton).

[61] George Washington, Proclamation of Pardons in Western Pennsylvania (July 10, 1795) (transcript available in The Univ. of Virginia Miller Center, https://millercenter.org/the-presidency/presidential-speeches/july-10-1795-proclamation-pardons-western-pennsylvania).

[62] Andrew Johnson, Proclamation Pardoning Persons Who Participated in the Rebellion (May 29, 1865) (transcript available in The Univ. of Virginia Miller Center, https://millercenter.org/the-presidency/presidential-speeches/may-29-1865-proclamation-pardoning-persons-who-participated).

[63] *See supra* note 59 and accompanying text.

[64] Murphy v. Ford, 390 F. Supp. 1372 (W.D. Mich. 1975).

[65] *Id.* at 1374.

[66] The Learning Network, *Sept. 16, 1974: The Conditional Amnesty for Vietnam Draft Dodgers and Military Deserters*, N.Y. TIMES (Sept. 16, 2011, 4:23 AM), https://learning.blogs.nytimes.com/2011/09/16/sept-16-1974-conditional-amnesty-for-vietnam-draft-dodgers-and-military-deserters/.

[67] *See* Kevin Liptak, Daniella Diaz & Sophie Tatum, *Trump Pardons Former Sheriff Joe Arpaio*, CNN (Aug. 27, 2017), https://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-

Johnson as a way to counter the public policy of implementing more stringent sentences for minor drug offenses.[68]

E. *Challenges to the Power to Pardon*

There have been several challenges to the power to pardon that have been resolved by the Supreme Court. The Court settled the issue of whether an individual had to accept a pardon for it to be effective.[69] In a case where an individual would not accept a pardon, Chief Justice John Marshall held that a pardon is only effective if it is accepted by the individual.[70] When it is not accepted, the Court is to ignore the pardon and issue the sentence.[71]

After the pardoning of President Nixon, President Ford's power to pardon Nixon was challenged because Nixon had not been formally charged.[72] The court held that the power to pardon does not extend to impeachments and the House of Representatives could still impeach Nixon.[73] The Court also said that it was understandable that Ford would need to pardon Nixon in order to reassure the nation during the tumultuous times after Watergate.[74] Therefore, the President has the power to pardon an individual before the individual has been formally charged with anything.[75]

In *Schick v. Reed*, a master sergeant in the army was sentenced to death for killing an eight-year-old girl.[76] Although Schick confessed to the murder, he argued that he was insane at the time.[77] On March 25, 1960, President Eisenhower commuted Schick's sentence from the death penalty to life imprisonment on the condition that he would never be eligible for parole.[78] In 1971, Schick filed suit to require the United States Board of Parole to

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donald-trump-pardon/index.html. *See also* United States v. Arpaio, No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072, at *2 (D. Ariz. Oct. 19, 2017) (The court found that Arpaio's pardon meant that he will not face punishment; however, his conviction is still on the record. The court states that the pardon does not erase historical facts, but rather shows executive mercy with regard to the punishment.).

[68] Jeremy Diamond & Kaitlan Collins, *Trump Commutes Sentence of Alice Marie Johnson*, CNN (June 6, 2018), https://www.cnn.com/2018/06/06/politics/alice-marie-johnson-commuted-sentence/index.html.

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

[70] *Id.* at 161–62.

[71] *Id.*

[72] Murphy v. Ford, 390 F. Supp. 1372 (W.D. Mich. 1975).

[73] *Id.* at 1373.

[74] *Id.* at 1374.

[75] *Id.*

[76] Schick v. Reed, 419 U.S. 256, 257 (1974).

[77] *Id.*

[78] *Id.* at 258.

consider him for parole.[79] He made two arguments. First, Schick challenged the validity of the conditional commutation of his sentence.[80] Second, Schick argued that the Supreme Court's decision in *Furman v. Georgia,* which found the death penalty to be unconstitutional, required that he be resentenced to a simple life term with no conditions attached.[81] After explaining the history of the President's power to pardon and commute sentences, the Supreme Court held that the President has the power to attach conditions to the commutation of sentences.[82] The Court also found that, had President Eisenhower not pardoned Schick, he most likely would have been killed prior to the Court's decision in *Furman v. Georgia*.[83] Therefore, Schick could not argue that he was given an "unfair bargain" with the conditional commuting of his sentence, and that he should be resentenced based on how individuals with pending cases were treated when *Furman v. Georgia* was decided.[84] This case was monumental in reaffirming the President's power to issue conditional commutations.

III. THE CIRCUIT SPLIT BETWEEN THE FOURTH AND SIXTH CIRCUIT COURTS OF APPEALS

The Fourth and Sixth Circuit Courts of Appeals have split over jurisdictional questions regarding the power to pardon. These courts disagree on whether the Judiciary retains jurisdiction over the original conviction of an individual after that person has received a pardoned or commuted sentence. This question is important in preserving the separation of powers guaranteed by the Constitution and protecting the Executive Branch's power to pardon. This Article will explain both Circuit decisions and argue how public policy supports finding that the Judiciary should retain jurisdiction over the original conviction of pardoned or commuted sentences.

A. *The Sixth Circuit Court of Appeals*

In *Dennis v. Terris*, Quincy Dennis was convicted of committing several drug offenses and sentenced to life in prison.[85] Dennis was convicted of committing three crimes: "attempting to distribute cocaine base, possessing cocaine base with intent to distribute it, and possessing cocaine with intent

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[79] *Id.*

[80] *Id.* at 258–59.

[81] *Id.* at 259.

[82] *Schick*, 419 U.S. at 267.

[83] *Id.* at 268.

[84] *Id.*

[85] Dennis v. Terris, 927 F.3d 955, 957 (6th Cir. 2019).

to distribute it."[86] Dennis's conviction resulted in a mandatory life prison sentence; however, President Obama commuted Dennis's sentence to thirty years in prison.[87] Dennis filed a habeas petition and argued that he should have only been subject to a mandatory prison sentence of twenty years.[88] Dennis believed that one of his charges did not count as a felony under recidivism enhancement.[89]

The district court found that Dennis's petition was moot for two reasons.[90] First, the court had no authority to alter a commuted sentence.[91] Second, Dennis was no longer serving the original judicial sentence; rather, he was serving a commuted executive sentence.[92] The Sixth Circuit Court of Appeals explained that the "issue is the interaction of an executive branch power . . . with a limitation on a judicial power (to resolve only live cases or controversies)."[93]

The Sixth Circuit Court of Appeals first looked at the history of the power to pardon in America.[94] It quoted the President's power to pardon as stated in Article II of the Constitution and stated that the founding fathers based the power to pardon off of the power held by the English crown.[95] Because of this, the President can also commute sentences, and there are very few limits on the President's power to pardon.[96] The court then quoted Article III of the Constitution to show that the judicial power of the United States is vested in the Supreme Court and inferior courts created by Congress.[97] However, the court explained that, "[c]ourts may resolve only 'Cases' or 'Controversies.'"[98]

The court held that Dennis's petition was not moot.[99] Individuals who receive a commuted sentence are still bound by a judicial sentence, and the commutation only affects how the sentence is carried out.[100] The Judicial Branch renders judgment while the Executive Branch effectuates the

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[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Terris*, 927 F.3d at 957.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 957–58.

[97] *Terris*, 927 F.3d at 958.

[98] *Id.*

[99] *Id.* at 959.

[100] *Id.* at 958.

judgment.[101] The court also explained that the existence of conditional commutations further supports the holding that courts retain jurisdiction over original sentences.[102] For example, if a prisoner fails to abide by the condition placed on a commuted sentence, the original sentence is reinstated.[103] Moreover, because unconditional commutations do not require the recipient's consent, removing the court's jurisdiction over the original sentence could allow the President to strategically prohibit certain people from seeking justice through an unconditional commutation.[104]

The court then distinguished Dennis's petition from that in *Schick v. Reed*, 419 U.S. 256 (1974).[105] While Schick challenged the condition put on the commutation, Dennis challenged the original sentence.[106] Further, Dennis agreed to the conditional commutation of his sentence; however, he did not agree to forgo any potential challenge to the original conviction.[107] The court then recognized that its decision was in tension with the Fourth Circuit.[108] The court stated that it did not understand the Fourth Circuit's reasoning in finding an appeal by a petitioner in a similar situation to be moot; therefore, the Sixth Circuit held that Dennis's petition was not moot.[109] However, the court then denied Dennis's petition on the merits.[110]

B. *The Fourth Circuit Court of Appeals*

In *United States v. Surratt*, Surratt was given a mandatory life sentence based on the court's interpretation of 21 U.S.C. § 841(b)(1).[111] Surratt argued his life sentence was "a fundamental defect of constitutional dimension . . . ."[112] The government agreed with Surratt's argument that he was incorrectly sentenced, but the court assigned independent counsel to argue that Surratt's life sentence was correct.[113] While this was ongoing, the President commuted Surratt's sentence to a 200-month term of

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101 *Id.*

102 *Id.*

103 *Terris*, 927 F.3d at 958.

104 *Id.* at 958–59.

105 *Id.* at 959–60.

106 *Id.* at 960.

107 *Id.*

108 *Id.*

109 *Terris,* 927 F.3d at 960–61.

110 *Id.* at 961.

111 United States v. Surratt, 855 F.3d 218, 220 (4th Cir. 2017) (Wynn, J., dissenting).

112 *Id.*

113 *Id.*

imprisonment.[114] Therefore, because of the commutation of his sentence, the Fourth Circuit Court of Appeals dismissed Surratt's appeal as moot.[115] While the court only issued an order, Judge Wilkinson concurred and wrote an opinion that grants insight into the logic behind the court's decision.[116] Judge Wynn dissented and wrote an opinion with many of the same arguments as those used by the court in *Dennis v. Terris*.[117]

1. Judge Wilkinson's Concurrence

Judge Wilkinson concurred with the Fourth Circuit's order.[118] He argued that Surratt had already received more than the relief he requested.[119] Because the President commuted Surratt's sentence, Judge Wilkinson argued Surratt was no longer serving a sentence imposed by the Judiciary; rather, he was serving a presidentially-commuted sentence.[120] The Judiciary cannot interfere with a commuted sentence by the Executive Branch, and Surratt should not be allowed to receive all of the benefits of the commuted sentence without accepting the burdens as well.[121] Finally, Judge Wilkinson argued the dissenting opinion would violate the principle of finality, as judgments would no longer be final.[122]

2. Judge Wynn's Dissent

Judge Wynn argued that the case was not moot because the dismissal of the case meant that Surratt would have to spend several more years in prison.[123] This meant that the decision by the court would have determined whether Surratt would be released from prison.[124] Therefore, Surratt had a "concrete interest" in his case and its potential resolution.[125] To further support his argument, Judge Wynn cited *Simpson v. Battaglia*.[126] In that case,

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[114] *Id.* at 224.

[115] *Id.* at 219 (majority).

[116] *Id.* at 219–20 (Wilkinson, J., concurring).

[117] *Compare Terris*, 927 F.3d at 958-60, *with Surratt*, 855 F.3d at 221–31 (Wynn, J., dissenting.)

[118] *Surratt*, 855 F.3d at 219-20 (Wilkinson, J., concurring).

[119] *Id.* at 219.

[120] *Id.*

[121] *Id.* at 219–20.

[122] *Id.* at 220.

[123] *Id.* at 221 (Wynn, J., dissenting).

[124] *Surratt*, 855 F.3d at 221 (Wynn, J., dissenting).

[125] *Id.*

[126] *Id.* at 226 (citing Simpson v. Battaglia, 458 F.3d 585, 595 (7th Cir. 2006)).

Simpson was sentenced to death by the Illinois Supreme Court.[127] After filing a habeas petition, the Governor of Illinois commuted Simpson's sentence from death to life imprisonment.[128] Although the State argued that Simpson's habeas petition was moot due to his commuted sentence, the Seventh Circuit held the petition was not moot because, if granted, Simpson would face only a minimum of 20 years imprisonment as opposed to life in prison.[129] This meant that Simpson could still obtain relief and the petition was not moot.[130] Much like *Simpson*, Judge Wynn argued that Surratt's case was not moot because he had a concrete interest in obtaining freedom through less time in prison.[131]

Next, Judge Wynn addressed each of the State's four arguments in support of finding Surratt's case moot. First, the State argued that Surratt, after he accepted the commuted sentence, was serving an executive sentence rather than a judicially-imposed sentence.[132] The Supreme Court held that the President has the power to pardon and to attach conditions to a pardon or commutation; however, there are still some limits to the power to pardon.[133] For example, the President cannot engage in invidious discrimination or violate separation-of-powers principles when attaching conditions to a commutation.[134] Therefore, Judge Wynn argued that the Judiciary still retains jurisdiction over pardoned or commuted sentences in order to ensure that a President's condition does not violate the law.[135] Further, an individual who receives a commuted sentence is still subject to the disabling consequences of receiving the underlying conviction.[136] This means that the courts should still be able to review the original conviction in order to grant relief.

Second, the State argued that the Supreme Court's decision in *Schick* required the court to dismiss Surratt's case.[137] However, Judge Wynn argued that *Schick* was distinguishable from Surratt's case.[138] First, the military proceedings in *Schick* were different from the constitutional proceedings

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127 People v. Simpson, 665 N.E.2d 1228, 1233 (Ill. 1996).

128 *Surratt*, 855 F.3d at 226 (citing Simpson v. Battaglia, 458 F.3d at 595).

129 *Id.*

130 *Id.*

131 *Id.* at 226.

132 *Id.* at 227.

133 *Id.*

134 *Surratt*, 855 F.3d at 227–28.

135 *Id.* at 228.

136 *Id.*

137 *Id.* at 229.

138 *Id.*

involved in Surratt's case.[139] Second, Schick filed his habeas petition ten years after President Eisenhower commuted his sentence; however, Surratt filed his petition years before President Obama commuted his sentence.[140] Finally, while Schick was not serving a death penalty sentence when the Supreme Court found the death penalty unconstitutional in *Furman v. Georgia*, Surratt was serving a mandatory life sentence when the law changed regarding his conviction.[141] Because these distinctions were very important to the Supreme Court's decision in *Schick*, Judge Wynn believed that the holding, in that case, was distinguishable.[142]

Third, the State argued that Surratt was serving a different sentence—his original conviction and judicially imposed sentence was replaced by an executively imposed sentence.[143] Judge Wynn argued a commuted sentence is still the same sentence imposed by the court; rather, the Executive has simply chosen to shorten the sentence.[144] Moreover, Surratt should still be able to obtain relief for his original conviction through the courts.[145] Finally, Judge Wynn argued that, if a condition set by the Executive for a conditional commutation is broken, the prisoner is once again subject to the original sentencing; therefore, the original sentence was never "replaced."[146] Therefore, Judge Wynn argued Surratt should still be able to appeal to the courts for relief from his original conviction.

Finally, the State argued that Surratt waived his right to challenge the original conviction by accepting the commuted sentence.[147] Judge Wynn stated that conditional commutations are viewed as contracts between the Executive and the inmate.[148] Comparing the acceptance of conditional commutations with the acceptance of plea deals, Judge Wynn pointed out that the Supreme Court disfavors inferring a waiver of rights in plea deals.[149]

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[139] *Id.*

[140] *Surratt*, 855 F.3d at 229.

[141] *Id.*

[142] *Id.* at 229–30.

[143] *Id.* at 230.

[144] *Id.*

[145] *Id.*

[146] *Surratt*, 855 F.3d at 230.

[147] *Id.* at 231.

[148] *Id.* (citing United States v. Wilson, 32 U.S. 150, 161 (1833)).

[149] *Id.* at 231. *See, e.g.*, United States v. Attar, 38 F.3d 727, 731–32 (4th Cir. 1994) (not allowing a waiver for defective assistance of counsel); United States v. Jacobson, 15 F.3d 19, 20 (2nd Cir. 1994) (not allowing a waiver for a claim of sentence based on national origin); United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992) (not allowing a waiver for a claim that sentence exceeded statutory maximum).

The Supreme Court disfavors inferring that inmates intended to waive their rights through a plea deal; the waiver of rights should be voluntarily and knowingly made to be valid.[150] Here, Judge Wynn similarly argues that the court should not infer that Surratt's acceptance of the conditional commutation meant that he intended to waive his right to challenge his original conviction.[151]

IV. THE NATURE OF THE CONSTITUTION SUPPORTS FINDING THAT THE JUDICIAL BRANCH RETAINS JURISDICTION OVER PARDONED AND COMMUTED SENTENCES

The Sixth Circuit and Judge Wynn of the Fourth Circuit are correct in finding that courts retain jurisdiction over the original conviction and sentencing of a pardoned individual. The nature of the Constitution and its vesting of the executive and judicial powers in their respective branches supports this assertion. The Constitution implements the separation of powers in order to prevent one branch from becoming too powerful.[152] A finding by the courts that the Judicial Branch no longer retains jurisdiction over pardoned or commuted sentences would violate the separation of powers doctrine. This article outlines the constitutional arguments which support this conclusion below.

A. *The Vesting of the Executive and Judicial Powers in Their Respective Branches Requires Courts to Retain Jurisdiction Over Pardoned or Commuted Sentences*

The Constitution sets out both the executive and judicial powers and assigns them to their respective branches.[153] In Article II, the Constitution vests the executive power in the President and the Executive Branch.[154] The Constitution does not define the term "executive power;" however, history and precedent help to define this term. There are three characteristics of executive power. First, the executive power, in its most basic form, is the power to enforce the laws.[155] This means that the President cannot create or change the laws—he may only enforce the laws that have been passed by

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[150] *Surratt*, 855 F.3d at 231 (citing United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992)).

[151] *Id.*

[152] THE FEDERALIST NO. 51 (James Madison).

[153] U.S. CONST. art. II, III.

[154] U.S. CONST. art. II.

[155] Herbert W. Titus & Gerald R. Thompson, *Legislative and Executive Powers*, LONANG INST. (2006), https://lonang.com/commentaries/conlaw/americas-heritage-constitutional-liberty/legislative-and-executive-powers/.

Congress.[156] Second, the executive power is initiative in nature.[157] This means that the President does not have to wait for circumstances to occur to respond with power; he may exert power at will.[158] Third, the Executive has some discretion in enforcing the laws.[159] For example, the Executive may prioritize certain policy goals or push Congress to focus on different issues.

In contrast, Article III of the Constitution vests the judicial power in the Supreme Court and inferior courts created by Congress.[160] The Constitution also does not define the term "judicial power;" however, history and precedent can help define what this term means. First, judicial power is a responsive power.[161] This means that the courts must respond to the laws already passed—the courts cannot create the law.[162] Second, the judicial power is limited only to the parties in the case before the court.[163] Whereas laws passed by Congress and signed by the President affect all people within the nation, a decision by a court only binds the specific parties in that case. Third, the judicial power must be based on judgment rather than will.[164] The court cannot simply implement its will; the holdings of the court must be based on the application of the law to given facts. These characteristics distinguish the judicial power from the executive and legislative powers, and the separation of these powers into different branches is vitally important in preventing one branch of government from holding too much power.

This analysis of the executive and judicial power can be applied to a conviction and sentencing by a court. When a court convicts an individual and issues a sentence, the court is exercising its judicial power. It is making a decision based on the application of the law to the facts, which is then binding on the parties of that particular case. However, the court then does not have the power to carry out the sentence because the judicial power does not include the power to enforce the law—this ability is reserved to the Executive Branch.[165] Therefore, the Executive Branch carries out and enforces the sentence.

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[156] *Id.; See* Clinton v. New York, 524 U.S. 417, 421 (1998) (finding the line item veto unconstitutional).

[157] Titus & Thompson, *supra* note 155.

[158] *Id.*

[159] *Id.*

[160] U.S. CONST. art. III.

[161] Titus & Thompson, *supra* note 155.

[162] *See id.*

[163] *Id.*

[164] *Id.*

[165] 16A AM. JUR. 2D *Constitutional Law* § 250 (2019).

One way in which the President may choose to enforce a conviction and sentence is to issue a pardon or commute the person's sentence.[166] The power to pardon is one tool the President may use in determining how to best enforce the laws. If the President feels that a law or conviction is unjust, the founders granted the President the power to pardon or commute the sentence.[167] Not only does the power to pardon reinforce the idea that the Executive Branch is vested with the executive power, but it also provides a check on the Judicial Branch. The founders were very concerned one branch of government might become too powerful; the ability of the President to pardon a conviction allows one branch to override the decision of another branch. Therefore, the Constitution grants the Executive discretion in how to enforce a sentence by the Judiciary. The Executive may pardon an individual or commute that individual's sentence when deciding how to best enforce a court's holding.[168]

Based on this analysis, the courts must retain jurisdiction over the original conviction of a pardoned or commuted sentence. Judge Wynn is correct in that it is inaccurate to state that a commuted sentence "replaces" a judicially imposed sentence.[169] Based on the paradigm enacted by the Constitution, the Executive is merely enforcing the judicially-imposed sentence. While the Executive is choosing how to best carry out the sentence, the Judicial Branch is charged with applying the law to the facts before it and deciding the conviction and sentence. This power does not change when an executive decides to use the power to pardon or commute a sentence— the Judiciary retains jurisdiction over the original conviction and original sentencing. Therefore, courts must find that the Judicial Branch has the power to review the original convictions of pardoned or commuted sentences.

In addition, the issue of the President being able to pardon himself further illustrates that the Executive Branch does not have jurisdiction over the original conviction of a pardoned or commuted sentence. During the Constitutional Convention, many of the delegates feared the President would be able to pardon himself from high crimes; in fact, it was debated whether the power to pardon should extend to instances of treason.[170] However, if the President commits treason, he cannot pardon himself—he is still subject to

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[166] Schick v. Reed, 419 U.S. 256, 260 (1974).

[167] U.S. CONST. art. II.

[168] *See supra* Section II.

[169] United States v. Surratt, 855 F.3d 218, 230 (4th Cir. 2017) (Wynn, J., dissenting).

[170] Erick Trickey, *'The President Himself May Be Guilty': Why Pardons Were Hotly Debated by the Founding Fathers*, WASH. POST (Apr. 21, 2019), https://www.washingtonpost.com/history/2019/04/21/the-president-himself-may-be-guilty-why-pardons-were-hotly-debated-by-founding-fathers.

the authority of the Legislature, and it may impeach him if it desires.[171] Therefore, the Legislature may still impeach and remove the President from power, even if he has pardoned himself. By analogy, the Executive's issuing of a pardon or commuted sentence is not the final word for a defendant's sentence. The original conviction is still subject to the authority of the Judicial Branch, and it could overturn a challenged conviction—even if the Executive has issued a pardon or commuted the sentence.

Finally, the nature of the pardon as implemented by the Constitution requires that the Judicial Branch must retain jurisdiction over pardoned or commuted sentences because a pardon does not eliminate the original conviction. If the delegates to the Constitutional Convention wanted the Executive Branch to obtain jurisdiction over the conviction of pardoned sentences, they could have easily allowed a pardon to eliminate the original conviction. However, a pardon only eliminates the sentence—the conviction still stands.[172] It would be illogical for a pardoned individual to then have to appeal to the Executive again to have the original conviction overturned. Instead, because the conviction still stands even after the pardon, the individual must seek justice through the Judiciary regarding the original conviction. A conviction can be overturned by an expungement; however, this is also under the jurisdiction of the Judicial Branch which further shows that the Judicial Branch retains jurisdiction over pardoned or commuted sentences.[173]

V. PUBLIC POLICY SUPPORTS THE JUDICIARY RETAINING JURISDICTION OVER THE CONVICTION OF PARDONED AND COMMUTED SENTENCES

The power to pardon is an extremely important tool of the Executive Branch. Historically it has been a means for the Executive to counteract the harshness of the law and promote trust in the system of government.[174] The power to pardon has created several public policy interests that will be harmed if the power to pardon is weakened. As outlined below, a finding by the courts that the Judicial Branch does not have jurisdiction over the conviction of pardoned or commuted sentences will weaken the power to pardon and inhibit several public policy interests. Therefore, courts must find the Judicial Branch still maintains jurisdiction over pardoned and commuted sentences.

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[171] *Id.*

[172] U.S. DEP'T. OF JUST., *supra* note 2.

[173] *See id.*

[174] *See* MOORE, *supra* note 8, at 17.

A. *Petitioners Still Need the Judiciary as a Means of Justice*

The courts must hold that the Judiciary still retains jurisdiction over a commuted or pardoned sentence in order to ensure a petitioner still has a valid means of obtaining justice. Based on the decision by the Fourth Circuit, Surratt has no valid avenue to pursue justice for his case.[175] While it is true that he could still appeal again to the Executive, obtaining a pardon from an executive is an extremely rare grant of clemency.[176] This not only would exert more of a burden on the Executive Branch, but it also would make it much less likely that a wronged individual would receive justice. The courts were established so that individuals could seek justice and have the law applied to certain circumstances. However, if the courts determine that they no longer have jurisdiction over pardoned or commuted sentences, then this avenue is no longer open. Because it would be very rare that the Executive would again act with respect to a pardon, individuals who have accepted a pardoned or commuted sentence would be left with practically no options for seeking redress for their original conviction and sentencing. This would prohibit part of the population from seeking justice.

B. *Conditional Commuted Sentences Show that the Executive Intends for the Judicial Branch to Retain Jurisdiction over the Original Conviction.*

In *Schick v. Reed*, the Supreme Court reaffirmed the fact that the power to pardon includes the power to enact conditional commuted sentences.[177] A conditional commuted sentence is a sentence that has been shortened as long as the individual fulfills some conditions put in place by the Executive. For example, sometimes individuals convicted for drug offenses are granted commuted sentences conditioned on good behavior in prison or enrollment in certain skill development programs. Conditional commuted sentences allow the Executive to encourage certain behaviors and policy goals. For example, if the President believes that the sentences for drug offenses are generally too harsh, he may grant a commuted sentence that is conditioned on the enrollment in career development programs at the prison. This conditional commuted sentence allows the President to both support his policy agenda against harsh drug laws while also increasing the probability that the individual involved will be a working member of the community.

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[175] *Surratt*, 855 F.3d at 219.

[176] *See* U.S. DEP'T. OF JUST.: OFFICE OF THE PARDON ATTORNEY, CLEMENCY STATISTICS (2020), https://www.justice.gov/pardon/clemency-statistics.

[177] Schick v. Reed, 419 U.S. 256, 259 (1974).

However, if the courts find that the Judicial Branch no longer has jurisdiction over pardoned or commuted sentences, conditional commuted sentences will no longer be given effect. If a prisoner that has been issued a conditional commuted sentence violates the condition, the Executive would have to re-evaluate the conviction and reinstitute a new sentence. Because the prior conviction and sentence would be "replaced" by the conditional commutation in this circumstance, the Executive Branch would have to usurp the judicial power in order to determine a conviction and sentence. For example, suppose the governor of a state commutes a prisoner's sentence from twenty years to ten years on the condition of good behavior. Three years later, the prisoner gets into a fight. If the Judicial Branch no longer has jurisdiction over the original conviction, the governor and that state's executive branch must establish a new conviction and sentence because the original sentence was replaced by the commuted sentence.

On the other hand, if the Judicial Branch still retains jurisdiction over the original sentence and conviction, the courts would only have to reinstate the original sentence and conviction prior to the issuing of the conditional commutation. This accomplishes the very goal of conditional commutations—to encourage certain behaviors by placing conditions on the commutation of prison sentences. The condition encourages certain behaviors, and this is accomplished through a valid threat to reinstate the original conviction. Therefore, the existence of conditional commutations shows that the Judicial Branch must retain jurisdiction over the original conviction and sentencing of individuals.

C. *Taking Commuted or Pardoned Sentences Out of the Jurisdiction of the Judicial Branch Will Result in Injustice to Individuals the Public Interest Seeks to Protect.*

As previously mentioned, the removal of the original conviction and sentencing from the jurisdiction of the Judicial Branch will result in the loss of an avenue of seeking justice. Individuals will no longer be able to look to the courts to enact justice in their circumstances. For example, the most common reason for a governor's decision to commute a sentence from the death penalty to life imprisonment is doubt about the inmate's guilt.[178] If there are doubts about the inmate's guilt, even if the inmate receives a commuted sentence from the death penalty to life imprisonment, there is a strong possibility that the inmate will want to challenge her original conviction with respect to those doubts of guilt. Therefore, it does not make

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[178] Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 MICH. L. REV. 1, 7 (2014).

sense to permanently prohibit inmates from challenging their original convictions in court by removing these cases from the jurisdiction of the Judicial Branch. This will result either in discouraging Executives from commuting the sentences of inmates with questionable guilt or robbing inmates of a potential avenue of justice.

Current public policy goals make it even more evident that finding the Judicial Branch does not retain jurisdiction over pardoned or commuted sentences will result in injustice. First, public policy in many states is turning away from the "three strikes rule" for non-violent drug offenders.[179] Second, the development of new technology has resulted in the overturning and pardoning of some individuals on death row.[180] Both of these policy concerns should be considered when determining whether the Judicial Branch should retain jurisdiction over the original conviction and sentencing of pardoned or commuted sentences.

1. Convictions for Non-Violent Drug Offenses

During the time of the "War on Drugs" and due to the American public's general wish to curtail drug use, many politicians both campaigned on and enacted laws that imposed more harsh sentences for non-violent drug use.[181] One of the most well-known examples of this is the "three strikes law" in which an individual who is convicted for three different non-violent drug offenses is sentenced to life in prison.[182] This law led to the filling of prisons with non-violent drug offenders while many of these individuals serving life sentences were viewed as not being a threat to society.[183] Public opinion has since turned, and is continuing to turn, against these laws, and many individuals want Congress to repeal these laws. Congress is slowly addressing these issues, but there is still much work to be done.[184] Presidents and many state governors have reacted to the public by pardoning individuals convicted

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[179] *See* Kahryn Riley, *Criminal Justice Reforms Are Next Big Measure of State Success,* HILL (Apr. 6, 2019), https://thehill.com/opinion/criminal-justice/437080-criminal-justice-reforms-are-next-big-measure-of-state-success.

[180] American Civil Liberties Union, *DNA Testing and the Death Penalty*, ACLU.ORG (last visited October 30, 2020) https://www.aclu.org/other/dna-testing-and-death-penalty.

[181] *See* Arit John, *A Timeline of the Rise and Fall of 'Tough on Crime' Drug Sentencing,* ATLANTIC (Apr. 22, 2014), https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/.

[182] 18 U.S.C. § 3559(c).

[183] *See* Riley, *supra* note 179.

[184] 115 CONG. REC. H10271 (daily ed. Dec. 19, 2018) (statement of Rep. Grassley) (This is a statement given by Senator Chuck Grassley on the floor of the Senate that shows that, while Congress is making some progress on sentencing reform, there is still much work to be done.).

under the "three strikes rule."[185] As a result, there are a great number of non-violent drug offenders that have either been pardoned or are serving conditional commuted sentences.

These circumstances are similar to circumstances in early Britain where the laws and sentences for felonies were thought to be too severe.[186] The pardon was viewed as a way to enact justice and mercy when such harsh rules were in place,[187] and the courts should see the pardon as a way to enact justice and mercy in the face of harsh laws imposed on non-violent drug offenders. Congress is designed to move very slowly; however, the Executive can act much quicker in issuing pardons to accomplish policy goals.

A finding by the courts that the Judiciary no longer has jurisdiction over the original sentence and conviction of a pardoned or commuted sentence thwarts this policy agenda. The Executive will be more hesitant to use the power to pardon if he or she knows that the Executive will then have to monitor the prisoner and potentially redecide a conviction and sentence. Moreover, those that have been granted pardons or commuted sentences will have to petition the Executive again for a change in conviction or sentence. This would result in the Executive processing fewer pardon requests and granting less pardons.

2. Convictions for Those on Death Row

New developments in technology have cast doubt on many convictions of death-row inmates.[188] This is especially true of DNA technology and testing; what might have appeared a closed case thirty years ago may now be in doubt. In fact, some convictions have been overturned after applying new DNA technology to a case.[189] The power to pardon can be an important tool as courts wrestle with how to apply this new technology to death-row cases. Executives can commute a prisoner's sentence from the death penalty to life in prison if it appears that his guilt is in question. This would spare the prisoner's life, if the execution date is fast approaching, and allow the courts time to determine if DNA, or other new technology, exonerates the prisoner.

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[185] Jeremy Diamond & Kaitlan Collins, *Trump Commutes Sentence of Alice Marie Johnson*, CNN POL. (June 6, 2018), https://www.cnn.com/2018/06/06/politics/alice-marie-johnson-commuted-sentence/index.html.

[186] MOORE, *supra* note 8, at 17-18.

[187] *Id.* at 17.

[188] Richard A. Opel Jr., *Not Just Rodney Reed: New Evidence Taints More Death Row Convictions,* N.Y. TIMES (Nov. 19, 2019), https://www.nytimes.com/2019/11/19/us/death-penalty-rodney-reed-crimes.html.

[189] *Id.*

However, the recent decision by the Fourth Circuit threatens to undermine this potential path of justice. If courts hold that the Judicial Branch no longer has jurisdiction over the original conviction and sentencing of commuted sentences, death row inmates would be forced to accept a commuted sentence and forego the possibility of innocence. For example, suppose an inmate is scheduled to be executed in one week. Many individuals have protested his innocence, and recent developments involving DNA in the case have cast doubt on his guilt. The governor commutes the prisoner's sentence from the death penalty to a life sentence in order to avoid the execution. If the DNA evidence later appears to exonerate the prisoner, he would no longer be able to appeal to the courts to overturn his conviction under the Fourth Circuit's logic. His appeal would be held moot because of the commutation, and the courts would rule that they no longer have jurisdiction over the commuted sentence. This would result in injustice because the prisoner would no longer be able to overturn his conviction.

D. *Removing Commuted or Pardoned Sentences from the Jurisdiction of the Judicial Branch Will Discourage Individuals from Seeking Pardons*

Further, if courts do not allow the Judiciary to be a means of justice, those convicted will be disincentivized from accepting a pardon or commuted sentence. In order for a pardon or commuted sentence to be valid, it must be accepted.[190] If a prisoner knows that the acceptance of a pardon will mean that she can no longer appeal her original conviction, the prisoner will be less likely to accept the pardon or commuted sentence. The pardon should be an avenue of justice that is encouraged and used to correct possible errors.[191] For example, one of the most common reasons that a governor issues a pardon is due to doubt about the original conviction.[192] If this is the case, and a court holds that the Judiciary no longer has jurisdiction over a pardoned sentence, an individual could get into a lose-lose situation: If the prisoner accepts the pardon, the original conviction will never be overturned because the Judiciary does not have jurisdiction, but if the prisoner does not accept the pardon, he relies on the system that already convicted him once to overturn his conviction. Both of these results are negative; yet still, the prisoner is arguably more likely to not accept the pardon because the original conviction will be forever cemented on his record. In contrast, if the courts still had jurisdiction over the original conviction, the prisoner could accept the

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[190] United States v. Wilson, 32 U.S. 150, 161 (1833).

[191] Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U REV. L. & SOC. CHANGE 43, 47, 67 (1998).

[192] Gershowitz, *supra* note 178.

pardon and know that, should more evidence be introduced, there is still a chance he could challenge the original conviction and sentence. Therefore, in order to avoid discouraging individuals from seeking pardons, the courts should hold that the Judiciary still retains jurisdiction over the original conviction.

E. *The Executive Branch Will be Overburdened if it is Required to Analyze the Original Convictions of Pardoned Individuals or Those with Commuted Sentences.*

If courts find the Executive Branch obtains jurisdiction over pardoned or commuted sentences, the Executive Branch will be overburdened and unable to effectively and fairly examine and grant pardons or commuted sentences. The process for evaluating a pardon request is lengthy. First, the Pardon Attorney must review and investigate an application.[193] After this is completed, the Pardon Attorney drafts his recommendation and sends it to the Deputy Attorney General.[194] The Deputy Attorney General reviews the case and drafts the Department of Justice's final recommendation.[195] This recommendation is then sent to the White House for review by the President.[196] The President may then decide whether to grant or deny the request.[197] This long process is coupled with a large number of petition requests. For example, as of January 2020, the White House for fiscal year 2020 had 2,445 petitions pending.[198] The lengthy process and high number of applications show that the Executive Branch is susceptible to being overburdened by pardon requests.

The Office of the Pardon Attorney's request form for a pardon exemplifies the Executive's concerns of being overburdened by pardon requests. This form requires prisoners to be finished with the appeals process of their cases before submitting a request for a commutation.[199] If this requirement was not in place, prisoners could submit multiple requests after each different court decision and overwhelm the system; therefore, the Office of the Pardon Attorney requires the appeals process to be finished before a request for a commuted sentence is submitted. This worry will be realized if courts find

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[193] U.S. DEP'T. OF JUST., *supra* note 2.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] U.S. DEP'T. OF JUST.: OFFICE OF THE PARDON ATTORNEY, COMMUTATION INSTRUCTIONS (2018), https://www.justice.gov/pardon/commutation-instructions.

[198] U.S. DEP'T. OF JUST., *supra* note 176.

[199] U.S. DEP'T. OF JUST., *supra* note 2.

the Executive Branch retains jurisdiction over pardoned or commuted sentences because any prisoners with commuted or pardoned sentences that want to challenge their original conviction will be required to submit a new request to the Executive.

The continual evaluation of conditional commuted sentences would also overwhelm the Executive Branch if courts were to find the Judicial Branch does not retain jurisdiction over pardoned or commuted sentences. The Executive Branch would be required to monitor every conditional commutation issued by the Executive. If a prisoner violated the condition placed on the commuted sentence, the Executive Branch would be required to reinstate a new sentence. Further, if a prisoner challenged his original conviction after receiving a pardon or commutation, the Executive Branch would be forced to re-evaluate the original conviction and sentencing. Not only is this a violation of the separation of powers as previously described, but the Executive Branch is not equipped to hear all of these cases.[200] The Executive Branch would be unable to handle all of the requests, and prisoners would be left without a means of seeking justice. This would also discourage Executives from issuing pardons because they will know that their departments cannot continue to monitor and evaluate the original convictions and sentencings. Therefore, the pardon—an act of mercy meant to soften the harshness of the law[201]—would be discouraged and no longer a means of seeking justice.

F. *Decreasing the Effectiveness of the Power to Pardon Risks Undermining the Public Interest in Maintaining Public Order.*

Alexander Hamilton argued the power to pardon was important because it could be used to maintain public order.[202] In the Federalist Papers, he used the example of pardoning rebels in order to maintain peace in the country.[203] Indeed, President Gerald Ford used this argument when justifying his pardon of President Nixon.[204] While that instance involved one individual person, often time this pardon can be used to pardon many individuals; for example, President Jimmy Carter pardoned Vietnam draft dodgers as a response to public opinion opposing the Vietnam War.[205] If the courts find the Judicial Branch does not retain jurisdiction over the conviction of pardoned or

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200 *See* U.S. DEP'T. OF JUST., *supra* note 176.

201 MOORE, *supra* note 8, at 17.

202 THE FEDERALIST NO. 74 (Alexander Hamilton).

203 *Id.*

204 Murphy v. Ford, 390 F. Supp. 1372, 1374 (W.D. Mich. 1975).

205 The Learning Network, *supra* note 66.

commuted sentences, the Executive will be less likely to use this tool in order to maintain public order and unite the nation.

For example, if the President issued a pardon to a large group of the population that was convicted of treason (most likely through a rebellion), the Executive would then have jurisdiction over all of the original convictions of that segment of the population. If one individual was falsely convicted of treason, or if that individual was not given a fair trial, the individual would understandably want to challenge the original conviction so as not to continue on with the conviction on record. If the courts held that the Executive Branch has jurisdiction over the original conviction, the Executive Branch would have to try the original conviction. However, if the Judicial Branch retains jurisdiction over the conviction of pardoned or commuted sentences, these individuals could plead their case in the courts throughout the country. This would prevent the overburdening of the Executive Branch with these requests, and the Executive would not be discouraged from issuing pardons in order to maintain public order.

G. *Allowing Those Who Have Received Pardons to Challenge Their Original Convictions in Court Grants Them a Better Opportunity of Regaining Lost Rights and Privileges.*

When an individual is convicted of a felony, he loses certain rights; i.e., the right to bear arms, the right to sit on a jury, the right to vote, the right to hold elected office, etc.[206] A pardon will allow a person to regain these rights; however, the conviction and pardon are both placed on the individual's criminal record.[207] Therefore, while the individual may enjoy these rights, he still may face trouble with licenses, bonds, and employment because of the conviction on his record.[208] Therefore, individuals who have received pardons must be allowed to challenge their original convictions in court. Again, a pardon mitigates the sentence, but it does not remove the conviction.[209] Rather, if individuals can challenge their original convictions in the courts, they have a chance of overturning their conviction and removing the stain of a conviction from their record.

VI. CONCLUSION

Courts must find that the Judicial Branch retains jurisdiction over the original conviction of pardoned and commuted sentences. The structure of

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[206] U.S. DEP'T. OF JUST., *supra* note 2.

[207] *Id.*

[208] *Id.*

[209] *Id.*

the U.S. Constitution supports keeping the conviction of pardoned sentences under the jurisdiction of the Judicial Branch because the nature of executive power and the judicial power in their respective branches support this conclusion. Public policy also supports keeping the conviction of pardoned sentences under the jurisdiction of the Judicial Branch. Taking commuted or pardoned sentences out of the jurisdiction of the Judicial Branch will result in injustice. Specifically, those convicted for non-violent drug offenses and those given the death-penalty will suffer under this holding. Moreover, individuals will be discouraged from seeking pardons, and the Executive Branch will be overburdened if it is required to analyze the original convictions of pardoned or commuted sentences. Finally, the existence of conditional commuted sentences shows the Judicial Branch must retain jurisdiction over the conviction of pardoned or commuted sentences. For these reasons, appellate courts must find the Judicial Branch retains jurisdiction over pardoned or commuted sentences.