University of Cincinnati Law Review

Volume 88 | Issue 4 Article 6

May 2020

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KEEPING UP WITH THE COMMUTATIONS: THE JUDICIARY'S AUTHORITY AFTER AN EXERCISE OF EXECUTIVE CLEMENCY

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"So grateful to @realDonaldTrump, Jared Kushner & to everyone who has showed compassion & contributed countless hours to this important moment for Ms. Alice Marie Johnson. Her commutation is inspirational & gives hope to so many others who are also deserving of a second chance."[1]

- Kim Kardashian West

I. INTRODUCTION

The unlikely pair of President Donald Trump and Kim Kardashian West recently brought the executive clemency power into news headlines.[2] Widely known reality TV star Kardashian West has used her platform since 2018 to lobby for criminal rights reform, inspired by her late father, the famous O.J. Simpson trial attorney, Robert Kardashian.[3] Kardashian West successfully lobbied President Donald Trump for inmate Alice Marie Johnson's sentence commutation in 2018.[4] Kardashian West spoke at the White House as recently as October 19, 2019, pleading for a clemency grant for Julius Jones, a death row inmate.[5] Kardashian West took action on behalf of Julius Jones after the Supreme Court of the United States rejected his appeal in April 2019, which accused a juror of racial discrimination.[6] Kardashian West specifically has used her Twitter platform to instantly reach over 62 million followers

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1. Kim Kardashian West (@KimKardashian), TWITTER, (June 6, 2018, 1:18 PM) https://tinyurl.com/y4vqo3rz [https://perma.cc/WPM5-TA7Z].

2. Michelle Mark, *Here are all the people Trump has pardoned so far — and who he could choose next*, BUSINESS INSIDER (Aug. 9, 2019, 1:28 PM), https://www.businessinsider.com/who-has-trump-pardoned-so-far-arpaio-johnson-scooter-libby-2018-5 [https://perma.cc/J7FS-7R2M].

3. Kaitlyn Frey, *Kim Kardashian Read Dad Robert's O.J. Simpson Trial Evidence Books as a Teen*, PEOPLE.COM (Sept. 12, 2019, 9:00 AM), https://people.com/tv/kim-kardashian-read-dad-oj-simpson-evidence-books/ [https://perma.cc/JU53-9PSF].

4. Jane C. Timm, *Trump commutes sentence of grandmother serving life on drug charges after Kim Kardashian meeting*, NBC NEWS (June 6, 2018, 4:44 PM), https://www.nbcnews.com/politics/donald-trump/trump-commutes-sentence-grandmother-serving-life-drug-charges-after-kim-n880291 [https://perma.cc/4QT6-6J5D].

5. Associated Press, *Kim Kardashian urges clemency for Oklahoma death row inmate,* ABC NEWS (October 17, 2019, 6:20 PM), https://abcnews.go.com/US/wireStory/kim-kardashian-urges-clemency-oklahoma-death-row-inmate-66350107 [https://perma.cc/L9Q2-JTCD].

6. *Id.*

and has brought what she feels are apparent injustices to light.[7]

Presidential commutation of inmate sentences is not a new concept, of course.[8] President Barack Obama's "Fair Sentencing Act" commuted many sentences which led some news outlets to label him the "Commuter-in-Chief."[9] After an initial commutation though, cases arose in the lower courts dealing with collateral attacks on already commuted sentences.[10] Many of these cases have just recently reached the federal circuit courts, revealing an explicit disagreement between the Fourth Circuit and Sixth Circuit.[11] These circuit courts disagree on whether an act of executive clemency divests the courts of authority over the criminal sentence, or whether the courts can still entertain collateral attacks on the original sentence.[12] The answer to this question remains important as more Obama-era commuted inmates collaterally attack their original sentences and as Trump-era inmates do the same. In modern times, the executive clemency power is seemingly viewed as a shortcut to achieving justice.[13] As former U.S. Pardon Attorney Margaret Colgate Love explained, "[n]o legal system should have to rely on executive clemency to do justice, but ours does."[14]

Part II of this Article examines the history of the clemency power and the implications that the power holds for the courts' jurisdiction over criminal sentences in federal courts. Next, Part II shifts to review the current jurisprudence of federal circuit courts on the issue of judicial authority over commuted sentences. Part III then argues that a presidential commutation does not divest courts of authority over the case because the case law is moving toward this conclusion and because the doctrines of mootness and separation of powers embrace this conclusion. Part III ends with a brief overview of possible implications and solutions to the

7. *Id.*

8. A presidential commutation is a "substitution of a punishment of a different character for that which has been awarded by the court." S. Elizabeth Gibson*, Constitutional Law -- Presidential Pardons and the Common Law*, 53 N.C. L. REV. 785, 790 (1975) (quoting Peter Brett, *Conditional Pardons and the Commutation of Death Sentences*, 20 MOD. L. REV. 131 (1957)).

9. Tyler Durden, *Commuter-In-Chief: Obama Sets New Single-Day Clemency Record; More Than Previous 11 Presidents Combined*, ZEROHEDGE (Dec. 19, 2016, 10:15 PM), https://www.zerohedge.com/news/2016-12-19/commuter-chief-obama-sets-new-single-day-clemency-record-more-previous-11-presidents [https://perma.cc/5ZBX-K6L7].

10. 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 [https://perma.cc/EN87-4E9K]. *See also* United States v. Surrat, 855 F.3d 218 (4th Cir. 2017); Dennis v Terry, 927 F.3d 955 (6th Cir. 2019); Dennis v. Terry, 927 F.3d 955, 957-58 (6th Cir. 2019).

11. United States v. Surrat, 855 F.3d 218 (4th Cir. 2017); Dennis v Terry, 927 F.3d 955 (6th Cir. 2019); Dennis v. Terry, 927 F.3d 955, 957-58 (6th Cir. 2019).

12. *Id.*

13. Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 FED. SENT. R. 5, 5 (2007).

14. *Id.*

imperfections of the current clemency power. Part IV concludes by calling upon Congress to take more vigorous action for criminal justice reform.

II. BACKGROUND

Part II-A briefly summarizes the extensive history and evolution of the executive clemency power. Part II-B then discusses the relevance of the doctrines of mootness and separation of powers to the executive clemency inquiry. Then, Part II-C focuses on the current federal circuit split on the issue of whether an act of executive clemency divests the courts of authority over the sentence, or whether the courts can still entertain collateral attacks on the original sentence.

A. History of the Clemency Power

The institution of clemency has roots in ancient Rome and Greece where grants of clemency focused more on the political popularity of the pardoned as opposed to justice.[15] Centuries later, early England incorporated the idea of clemency into varying codes that placed wrongdoers at the mercy of monarchs.[16] Under the criminal justice system of ninth-century England, being pardoned by the king was the only path to justice for the innocent, which led to excessive use and haphazard application of clemency grants.[17] Further, only those who could pay for a pardon received one.[18] Although ineffective in bringing justice to the innocent, English common law greatly affected the institution of clemency in the Thirteen Colonies.[19]

In the Thirteen Colonies, the King of England delegated power to royal colonial governors, and a variation of the power to pardon was enumerated in each colony's respective governing document.[20] After the adoption of the Declaration of Independence, the pardoning power was entrusted to the local governor, state legislatures, the legislative body, or a combination of the three, most likely because early colonists distrusted centralized power in one executive.[21] A provision containing the

15. Daniel T. Kobil, *Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991).

16. William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476 (1977).

17. *Id.* at 479.

18. *Id.*

19. *Id.* at 497.

20. Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be*, 51 ARIZ. ST. L.J. 71, 76 (2019).

21. *Id.*

executive's power to pardon was included in neither the Virginia Plan nor the New Jersey Plan at the Constitutional Convention, but instead spawned from Alexander Hamilton's suggested amendments to the Virginia Plan which were included in the Committee of Detail's drafts.[22] This version included an impeachment limitation and was adopted into the final text and is the same Article II, Section II, Clause 1 found in the United States Constitution today.[23]

The pardoning clause states: ". . . [The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[24] The first Supreme Court case discussing the power to pardon was *United States v. Wilson.*[25] In *Wilson,* the Court determined that a person did not have to accept a pardon, and if they did not, the Court could not force the pardon upon the person who received it.[26] Within the opinion, Chief Justice John Marshall described a presidential pardon as "an act of grace."[27] Supreme Court jurisprudence suggests that the power to pardon is indeed a plenary one[28]: a power that neither Congress nor the federal courts can usurp, and any limitation on the power must come from the Constitution itself.[29] President William Howard Taft articulated the only practical limitation: the president may not exercise this power against the public interest.[30]

Formal rules were not developed regarding the process of granting clemency until President William McKinley in 1898 directed that all clemency requests be processed through a Congress-funded Pardon Attorney working within the Department of Justice.[31] Pardons became less frequent during the Carter and Reagan Administrations, and continued to steadily decline through the Bush Administration.[32] This drop-off in clemency grants may be attributed to the delegation of clemency petition review to the Deputy Attorney General, from the Attorney General, at the end of the Carter Administration.[33] This delegation to a lower position severed the direct line to the president; now,

22. *Id.* at 77.

23. *Id.* at 79.

24. U.S. CONST. art. II, § 2, cl. 1.

25. United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833).

26. *Id.* at 161.

27. *Id.* at 160.

28. Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 449, 451 (2009).

29. Schick v. Reed, 419 U.S. 256, 267 (1974).

30. WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 121 (1915).

31. Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465, 472 (2017).

32. *Id.* at 473. *See also Clemency Statistics*, U.S. DEPT. OF JUSTICE OFF. OF THE PARDON ATT'Y, https://www.justice.gov/pardon/clemency-statistics [https://perma.cc/M6KJ-PEX4].

33. Osler, *supra* note 31*,* at 473-74.

the clemency process has to first go through White House Staff, involving over seven levels of review.[34] The complicated process has some critics calling for creation of a Presidential Clemency Board,[35] which may in itself pose a separation of powers issue due to over-regulation by Congress of an executive plenary power.[36] Regardless of the solution, critics agree that a reform that creates transparency and accountability in the clemency process would benefit the criminal justice system.[37]

This need for reform comes amidst a backdrop of presidential abuse of the pardoning power, which consistently causes public outcry. For example, in 1974, unelected President Gerald Ford gave previous President Richard Nixon a full and complete pardon, allowing Nixon to completely subvert any punishment for the serious offenses committed during his presidency.[38] President George H. W. Bush pardoned six White House officials who were involved in the Iran-Contra scandal, and his son President George W. Bush commuted the criminal sentence of I. Lewis "Scooter" Libby, who was Vice President Dick Cheney's former Chief of Staff.[39] Pardons and commutations such as these cause critics to believe that the pardoning power is used to pursue the president's personal or political goals, as opposed to being used to pursue justice for the innocent or fairness within the courts.[40]

Although the potential for abuse persists, some pardons are well intentioned. In 2014, President Barack Obama launched a clemency initiative focused on commuting sentences of non-violent, low-level offenders.[41] Specifically, the Department of Justice announced that applicants who met the following criteria would be prioritized: (1) the inmate is currently serving a federal sentence in prison and has served at least ten years of her/his sentence; (2) the inmate likely would have received a substantially lower sentence if convicted of the same offense(s) under the guidelines in effect today; (3) the inmate is a non-violent, low-level offender without significant ties to large scale criminal organizations, gangs or cartels and without a significant criminal history; and (4) the inmate has demonstrated good conduct in prison and has no

34. *Id.* at 477.

35.*See* Menitove, *supra* note 28, at 457. *See also* Osler, *supra* note 31, at 499.

36. Paul J. Jr. Larkin, *Revitalizing the Clemency Process*, 39 HARV. J. L. & PUB. POL'Y 833, 904 (2016).

37. Glenn Harlan Reynolds, *Congressional Control of Presidential Pardons*, 2 NEV. L.J.F. 31, 36 (2017).

38. Ronald J. Glick, *The Presidential Pardon: A Call to Amend a Constitutional Error,* 1 S.U. L. REV. 153, 159 (1975).

39. Menitove, *supra* note 28*,* at 448.

40. Colgate Love, *supra* note 13, at 12.

41. Sanjay K. Chhablani, *Legitimate Justice: Using Clemency to Address Mass Incarceration*, 16 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 48, 50-51 (2016).

history of violence prior to or during the current term of imprisonment.[42] Although the initiative did not define these terms or specifically target drug offenders, the sentences of drug offenders were most applicable because the sentences were generally longer than ten years and were also non-violent.[43] Violent offenders did not qualify, while property and public order crimes often did not warrant more than ten years' imprisonment.[44] Over 30,000 inmates responded, driving the American Bar Association to create "Clemency Project 2014" to provide free counsel to screen inmates.[45] Although the process was slowed by bureaucracy[46], President Barack Obama commuted 1,715 prison sentences by the end of his presidency.[47]

In recent years, presidents are highly influenced by the positive public reactions exhibited via the press or social media. Reality TV star Kim Kardashian West brought a particular inmate to President Donald Trump's attention in 2018.[48] The president received praise for commuting the sentence of Alice Marie Johnson, a low-level drug offender who was also a grandmother.[49] Not all of the president's commutations have hailed praise, however; specifically, he faced backlash for pardoning Sheriff Joe Arpaio who had been convicted of criminal contempt.[50] Regardless, the potential for backlash has not stopped President Donald Trump from taking an even more expansive view of the pardoning power than his predecessors.[51]

B. The Mootness and Separation of Powers Inquiry

Contemporary scholars view the expansive pardoning power as one of the executive's checks on the legislative and judicial branches.[52] But some scholars believe the judiciary also should have a check on the executive's

42. *Announcing New Clemency Initiative, Deputy Attorney General James M Cole Details Broad New Criteria for Applicants*, DEP'T OF JUSTICE OFF. OF PUB. AFFAIRS (Apr. 23, 2014), http://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new [https://perma.cc/HJ4U-TVA8].

43. Chhablani, *supra* note 42, at 51.

44. *Id.* at 51-52.

45. *Id.* at 53-54.

46. Lorelei Laird, *Clemency Calling*, 103 A.B.A. J. 18, 19 (2017).

47. *Clemency Initiative*, DEP'T OF JUSTICE OFF. OF THE PARDON ATT'Y, https://www.justice.gov/pardon/clemency-initiative [https://perma.cc/3BP4-KR4R].

48. *Executive Grant of Clemency*, DEP'T OF JUSTICE (June 6, 2018) https://www.justice.gov/pardon/page/file/1068926/download [https://perma.cc/X6HU-DQKB].

49. *Id.*; *see also* Timm, *supra* note 4.

50. Eckstein & Colby, *supra* note 20, at 91.

51. *Id.* at 88.

52. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 831 (2015).

pardoning power to ensure that a pardon complies with other provisions of the Constitution.[53] Regardless, judicial review can disturb neither the grant nor denial of clemency on the merits based upon the essential facts of the case.[54] Rather, the judiciary can determine whether a president's motivation complied with the Constitution. For example, the judiciary can review the grant or denial of clemency to ensure the president was not using the power in a racially-discriminatory manner.[55] The consensus among scholars seems to be that any reform or any action by the courts or Congress should be viewed through the lens of separation of powers to ensure compliance with the Constitution.[56]

Judicial review of a presidential grant of clemency brings forth another concern: mootness of an offender's claim. Under the mootness doctrine, an offender who is released may be precluded from challenging the original sentence because the offender already finished serving his sentence and therefore has no concrete interest in the collateral attack being heard.[57] Some commentators believe that a president's commutation should not deprive the offender of an opportunity to collaterally attack his original sentence for unconstitutionality.[58] A commutation that swaps a shorter sentence for the originally imposed sentence may still be less effective for serving justice than a total judicial reversal of an improper or unconstitutional sentence.[59]

C. The Circuit Split

Federal courts are split over whether a presidential commutation effectively divests the courts of authority over a criminal sentence. Specifically, the Fourth and Sixth Circuits disagree on this question.[60] In 2017, the Fourth Circuit in *United States v. Surrat* determined that a "president's commutation order simply closes the judicial door."[61] In *Surrat*, the petitioner was convicted of multiple crack cocaine offenses, which at the time were considered "felony drug offenses" and led a

53. Kobil, *supra* note 15, at 616.

54. Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 594 (2001).

55. Kobil, *supra* note 15, at 617; s*ee also* Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1705 (2001) (arguing that judges should be able to check abuse of a presidential pardon when the situation shocks the conscious of society or when an offender challenges the constitutionality of a condition placed on a commutation or pardon).

56. Hoffstadt, *supra* note 54, at 635.

57. *Postrelease Remedies for Wrongful Conviction*, 74 HARV. L. REV. 1615, 1615-16 (1961).

58. *Id.* at 1617.

59. *Id.*

60. United States v. Surrat, 855 F.3d 218 (4th Cir. 2017); Dennis v Terry, 927 F.3d 955 (6th Cir. 2019).

61. *Surrat*, 855 F.3d at 219.

sentence of life in prison.[62] Five years later, Congress passed the Fair Sentencing Act ("FSA"), [63] which reduced the sentence for crack cocaine offenses to a ten-year mandatory minimum if at least one prior conviction was a "felony drug offense."[64] Importantly, the FSA retroactively applied these more lenient mandatory minimums to offenders whose unlawful acts took place before the FSA was passed.[65]

Based on the revised sentencing guidelines found in the FSA, the petitioner moved for rehearing when President Obama commuted his life imprisonment sentence to a 200-month term of imprisonment.[66] The Fourth Circuit ruled that the president's commutation mooted the petitioner's collateral attack on the length of his sentence.[67] Judge J. Harvie Wilkinson, in a concurring opinion to the dismissal on the grounds of mootness, explained that the court may not readjust the president's commutation.[68] Emphasizing the president's lawful exercise of the pardoning power, the court considered the pardon a new "presidentially commuted sentence" that the court had no authority over, and thus dismissed the petitioner's appeal.[69] Further, the president's commutation was a "final judgment" and mercifully brought the petitioner's "saga to an end."[70] A year later in *Blount v. Clarke*, the Fourth Circuit reaffirmed the ruling in *Surrat*, further solidifying the Fourth Circuit's view that a presidential commutation divests the courts of authority over a sentence.[71]

Judge James Wynn dissented in *Surrat*, arguing that the case was not moot because the petitioner retained a concrete interest in the resolution of the case even after the commutation.[72] Had the sentence not been commuted, the petitioner would have to serve several more years.[73] On the other hand, if the court had heard the case, the case would have been remanded for resentencing consistent with the FSA, and the petitioner would have been released because his time served exceeded the upper end of the new sentencing guidelines.[74] Further, the Judge Wynn disagreed with the concurring opinion's reasoning that the sentence becomes a new

62. *Id.* at 222 (Wynn, C.J., dissenting).

63.Pub. L. No. 111-220, 124 Stat. 2372 (2010).

64. *Surrat*, 855 F.3d at 222-23 (Wynn, C.J., dissenting).

65. *Id.* at 223.

66. *Id.* at 224.

67. *Id.* at 219.

68. *Id.* at 219-20 (Wilkinson, C.J., concurring).

69. *Id.*

70. *Id.* at 220.

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

72. United States v. Surrat, 855 F.3d 218, 221(4th Cir. 2017) (Wynn, C.J., dissenting).

73. *Id.*

74. *Id.*

presidentially-commuted one.[75] He explained that the president cannot *impose* a sentence on anyone, and that the judgment remained the judgment of the court.[76] Because the petitioner had the right to collaterally attack his original sentence, the case was not mooted by the president's commutation, and the court should be able to remedy its own errors.[77] The dissent relied heavily on the Seventh Circuit's reasoning in *Simpson v. Battaglia* to argue that, because the petitioner would face a lesser sentence if the petitioner prevailed on the collateral attack, the petitioner retained the right to seek relief.[78]

Two years after the Fourth Circuit's decision in *Surrat,* the Sixth Circuit explicitly disagreed with the Fourth Circuit's reasoning and determined that a commutation does not deny an offender opportunity to seek judicial relief from a potentially unconstitutional sentence.[79] In *Dennis v. Terry*, the President Obama commuted an inmate's life sentence to a 30 year sentence.[80] To properly accept this commutation, the inmate had to enroll in a residential drug program, thus making this a *conditional* commutation.[81] The petitioner enrolled and received the commutation.[82] The petitioner then filed a habeas petition arguing that he should have only been subject to a 20-year mandatory sentence in the first place.[83] Although the court eventually dismissed the petitioner's appeal on the merits, the court determined that the commutation did not render his habeas petition moot.[84] The court first reasoned that the president's ability to place conditions on commutation supports the federal court's continued jurisdiction over a commuted sentence because, if the offender violates the condition, the commutation would be rescinded and the offender would be returned to prison to serve the rest of his time, sans commutation.[85] A commutation is merely swapping out the judicially imposed sentence with a lesser one, the court noted.[86] The court emphasized that the sentence remains primarily a judicially imposed one,[87] and that the possibility that the petitioner's sentence might be

75. *Id.* at 221.
76. *Id.* at 221-22, 230.
77. *Id.* at 228-29.
78. *Id.* at 226 (citing Simpson v. Battaglia, 458 F.3d 585, 595 (7th Cir. 2006)).
79. Dennis v. Terry, 927 F.3d 955, 957-58 (6th Cir. 2019).
80. *Id.* at 957.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 957, 961.
85. *Id.* at 958 (citing Vitale v. Hunter, 206 F.2d 826, 829 (10th Cir. 1953)).
86. *Id.*
87.*Id.* (citing Duehay v. Thompson, 223 F. 305, 307-08 (9th Cir. 1915)).

reduced is a sufficient concrete interest to make the dispute non-moot.[88]

Notably, the Sixth Circuit partially agrees with the Fourth Circuit on the issue of whether the sentence remains a judicial one.[89] In *Dennis*, the Sixth Circuit noted that the sentence is carried out by the executive branch and that branch retains authority to commute it, a conclusion that is in line with the Fourth Circuit's reasoning.[90] However, the Sixth Circuit continued by explaining that the altered sentence is not free from judicial scrutiny in regard to any mistakes the courts may have made.[91] While the court cannot alter a president's commutation (unless unconstitutional), the courts may still hear collateral attacks.[92] The opinion in *Dennis* specifically notes that the decision is at odds with the Fourth Circuit and points out the lack of clarity in the Fourth Circuit's brief opinion.[93]

Although the Sixth Circuit is the only court to expressly discuss the circuit split, other courts have ruled on cases after a presidential commutation, leading to similar conclusions on the issue of mootness. The Seventh Circuit in *Simpson v. Battaglia* continued with a habeas petition even after a governor's commutation, determining that the commutation did not moot the action.[94] The Ninth Circuit in *United States v. Hearst* determined that the case was not rendered moot even though President Barack Obama had commuted the petitioner's sentence.[95]

Courts have also dealt with the question that the Fourth and Sixth Circuit partially agreed on whether a commutation replaces a judicial sentence with an executive one. The Ninth Circuit weighed in on this issue, determining that a presidential commutation does not create a new judgment.[96] The court explained that the only way to create a new sentence is to legally invalidate the prior judgment.[97] This echoes the Ninth Circuit's 1915 decision in *Duehay v. Thompson*: "In short, the executive has superimposed its mind upon the judgment of the court; but the sentence remains, nevertheless, the judgment of the court[.]"[98]

Finally, in *Robson v. United States* the First Circuit determined that the petitioner's release from custody did not preclude his ability to seek review of the constitutionality of the original sentence.[99]

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88. *Id.* at 959.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 960.
93. *Id.* (citing United States v. Surrat, 855 F.3d 218, 219 (4th Cir. 2017)).
94. Simpson v. Battaglia, 458 F.3d 585, 595 (7th Cir. 2006).
95. United States v. Hearst, 638 F.2d 1190, 1192, n.1 (9th Cir. 1980)
96. United States v. Buenrostro, 895 F.3d 1160, 1164-65 (9th Cir. 2018)
97. *Id.* at 1166.
98. Duehay v. Thompson, 223 F. 305, 307-08 (9th Cir. 1915).
99. Robson v. United States, 526 F.2d 1145, 1147 (1st Cir. 1975).

In short, the federal circuit courts are split on whether a presidential commutation of a criminal sentence divests the courts of authority over the criminal sentence. This is highly relevant in light of President Donald Trump's expansive application of the pardoning power. Additionally, more Obama-era petitioners who had their sentences commuted may attempt to collaterally attack their original sentences. Therefore, this power struggle between the courts and the executive will remain relevant for years to come.

III. DISCUSSION

This Part argues that the weight of relevant case law supports the conclusion that the courts are not divested of authority over a sentence, even after a presidential commutation. First, Part III-A highlights the flaws of the Fourth Circuit's opinion in *Surrat.*[100] Part III-B then discusses arguments supporting the judiciary's retainment of authority over a presidentially commuted criminal sentence, including the issues of mootness and separation of powers. Finally, Part III-C discusses possible implications of this conclusion and the possible solutions to the current imperfections of executive clemency.

A. The Fourth Circuit's Surrender

The Fourth Circuit's opinion in *Surratt* evidences the scant justification for divesting the courts of such authority. First and foremost, the infirmity of the Fourth Circuit's position is exemplified by the woefully short majority opinion. The opinion is three sentences:

> By order dated February 14, 2017, the court directed the parties to address the impact of the President's commutation of Appellant Surratt's sentence and, in particular, the questions of mootness and jurisdiction. Upon consideration of the responses to the court's order, the court finds this appeal moot. The appeal is, accordingly, dismissed as moot.[101]

The concurring opinions also leave much to be desired by way of explanation. The concurring Judge J. Harvie Wilkinson explains, briefly, that the offender now serves a presidentially imposed sentence that the judiciary may not touch.[102] What is even more disheartening is that this particular concurring opinion uses the purpose of "finality" as an excuse to cut off judicial authority.[103] The concurring opinion almost

100. United States v. Surrat, 855 F.3d 218, 219 (4th Cir. 2017).

101. *Id.*

102. *Id.* at 220 (Wilkinson, C.J., concurring).

103. *Id.*

condescendingly shames the dissenting opinion by stating, "Some reason is somehow always found for a case to go on and on and on."[104]

This sentiment is wholly misguided. What better reason is there for a case to continue than the possibility that justice will finally prevail? In *Surratt*, had the court not given up jurisdiction, the case would have been remanded and the offender would have most likely walked free because he had already served the mandatory length of the commuted sentence. Although this remand and rehearing would have taken more time, the final outcome would have been better for the inmate. The inmate would have, on a whole, served less time. More importantly, he would no longer have served an improper sentence.

The dissent correctly explains that a presidential commutation only partially remedied the court's errors. The FSA was used to sweep with a broad brush, commuting many sentences, but not giving each case close scrutiny. When the executive branch commutes a class of inmate sentences, the likelihood that there will still be issues with the original sentences remains. This method of commutation, although effective in commuting the highest amount of sentences in one stroke, does not give each case as much scrutiny as needed and likely does not fully serve justice. The Obama Administration recognized this in a blog written by the former Counsel to the President: "Only Congress can achieve the broader reforms needed to ensure over the long run that our criminal justice system operates more fairly and effectively in the service of public safety."[105]

Surrat illustrates this perfectly: while the FSA indeed made Surratt's sentence shorter, he was still sentenced incorrectly in the first place. This original injustice remains unremedied.

Next, the history of clemency illustrates that the purpose of the power has always been mercy. Chief Justice John Marshall described the exercise of the clemency power as "an act of grace."[106] The Fourth Circuit seemingly ignored the prerogative of mercy in its decision. The concurring opinion sidesteps the issue of the original unlawful sentence by saying that "it was indisputably lawful when entered and the correctness has divided judges ever since." Thus, it appears the Fourth Circuit divested itself of jurisdiction simply because the case is difficult. Further, the sentence may have been "lawful" when imposed, but the FSA was applied retroactively, meaning that the once-lawful sentence was no

104. *Id.*

105. Neil Eggleston, *President Obama Has Now Granted More Commutations than Any President in this Nation's History*, WHITE HOUSE: BLOG (Jan. 17, 2017, 4:17 PM), https://obamawhitehouse.archives.gov/blog/2017/01/17/president-obama-has-now-granted-more-commutations-any-president-nations-history [https://perma.cc/J8GL-HAS6].

106. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833).

longer lawful. If mercy and grace historically are at the heart of clemency grants, it follows that should a presidential commutation fall short of wholly doing justice, the courts still retain authority to deliver justice.

Finally, the Fourth Circuit's decision kept the petitioner in prison longer by refusing to exercise authority over the sentence and to remand the case for resentencing. This matters because of the psychological effects of incarceration. Although not every inmate reacts to incarceration the same way, many inmates "suffer long-term consequences from having been subjected to pain, deprivation, and extremely atypical patterns and norms of living and interacting with others."[107] In line with clemency's mercy motivation, no inmate should serve more time than Congress has deemed appropriate for his or her crime. The inmate in the Fourth Circuit's decision most likely would have walked free had the court simply remanded his case. But instead, the Court surrendered jurisdiction.

Further, parental incarceration has significant adverse effects on children. Parental incarceration significantly increases the likelihood of antisocial behavior, poor mental health, drug use, school failure, and unemployment.[108] Thus, parental imprisonment has shown to be a strong predictor of multiple adverse outcomes for children.[109] These two examples are illustrative of the importance of courts retaining authority over criminal sentences to ensure that no inmate serves more time than deserved.

The sentiments of finality and respect for a president's particular exercise of clemency do not outweigh the true purpose of clemency: justice and mercy. Further, the sentiments do not outweigh the collateral, adverse effects on not only the inmates, but also the children of those inmates. The Fourth Circuit's opinion and the supporting concurring opinions fall woefully short of justifying their surrender of jurisdiction and are incorrect.

B. Retainment of Jurisdiction and Supporting Explanations

The Fourth Circuit's *Surratt* and *Blount v. Clarke* opinions are some of the only pieces of case law that support the conclusion that the court is divested of authority over a sentence once it has been commuted by an executive, thus rendering the case moot. Having already pointed out the

107. Craig Haney, Off. of the Assistant Secretary for Planning and Evaluation, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment,* U.S. DEP'T OF HEALTH AND HUMAN SERVS. (Dec. 1, 2001), https://aspe.hhs.gov/basic-report/psychological-impact-incarceration-implications-post-prison-adjustment [https://perma.cc/6APF-3AXQ].

108. Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME AND JUST. 133, 186-87 (2008).

109. *Id.* at 187.

issues with the Fourth Circuit's brief justifications, arguments that support the opposite conclusion need to be examined. This Section discusses multiple considerations supporting the conclusion that courts should retain authority over a sentence even after a presidential commutation. Subsection (a) discusses the mootness inquiry; Subsection (b) discusses the idea of the sentence becoming an executively-imposed one; Subsection (c) discusses separation of powers; and finally, Subsection (d) discusses the ideal of mercy that underlies the clemency power.

1. Mootness

The Sixth Circuit correctly emphasized that if a party retains a concrete interest in the outcome of the case, the case is not moot. The mootness doctrine is an issue of Constitutional law. The role of the judiciary is to resolve live disputes, and the mootness doctrine ensures that the court does not waste its time hearing cases where no one is adverse to one another and where there is no true dispute of law or fact. If these principles are accurately applied to collateral attacks of original, pre-commutation sentences, it becomes clear that these cases are not moot.

A defendant retains a concrete interest in the resolution of the case when there are still grounds for a defendant to seek a lower term of imprisonment. In *Surratt*, the petitioner's original sentence was most likely incorrect, and therefore, the court should have remanded instead of dismissing the collateral attack. Had the court chosen this route, the petitioner would have most likely walked free instead of remaining behind bars. The state and the petitioner remain adverse to one another so long as the validity of the original sentence can be attacked in some way. The Sixth Circuit in *Dennis* used this line of reasoning: "All of this means 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."[110]

The Seventh Circuit in *Simpson* similarly concluded that a commutation does not preclude a defendant's ability to challenge the original sentence.[111] Even though the Governor commuted a death sentence to life imprisonment, the defendant still had an opportunity to seek a mandatory minimum sentence under the statute as opposed to the life sentence.[112] In this situation, the state and the inmate remain adverse to one another, and the defendant holds a concrete interest in trading his

110. Dennis v. Terry, 927 F.3d 955, 959 (6th Cir. 2019).

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

112. *Id.* at 586.

commuted sentence for an even shorter one due to some issue with the original sentence. Dismissal of the mootness inquiry was so obvious for the Ninth Circuit that the inquiry in one case received no more discussion than a single-sentence footnote. In *Hearst*, the court dismissed the issue of mootness quickly by pointing out that the district court will have the power to vacate the defendant's conviction if deemed appropriate.[113] If an inmate is asserting a collateral attack, then the state and the inmate are indeed adverse, and the case is not moot.

2. Judicial or Executive Sentence?

The Fourth Circuit claimed that a commuted sentence becomes an executive sentence, thus divesting the courts of authority. The Sixth Circuit disagreed. However, the two opinions are not completely at odds with one another.

The majority opinion in *Dennis* explains that because of the common use of conditional commutations, "the [judicially imposed] judgment remains in place, ready to kick into full effect if the recipient violates the conditional cap."[114] A commutation merely swaps the longer sentence for a shorter one. Thus, the sentence remains a judicially-imposed one. The opinion in *Dennis* then stated, "The executive branch, not the judicial branch, executes the sentence, and the President retains authority, constitutional authority, to lower it or end it or eliminate the conviction altogether."[115] This particular assertion is not completely at odds with the Fourth Circuit. The opinion in *Dennis* then states, "Yet this does not mean that the altered sentence becomes an executive sentence in full, free from judicial scrutiny with respect to mistakes the courts may have made."[116] This statement explains that the *Dennis* opinion did not go so far as to say that there is no executive element to an inmate's new commuted sentence. But the Sixth Circuit, unlike the Fourth Circuit, did not believe that the executive element of a commuted sentence gives any reason for the courts to be unable to hear a collateral attack.

Note also that the Ninth Circuit in *Duehay* explicitly reached the conclusion that the judicial sentence remains even if the president commutes the original sentence.[117]

It does not matter how the new commuted sentence is labelled. The Fourth Circuit's dissent and the Sixth Circuit agree that in no instance does a commutation strip a defendant of his or her right to attack his or

113. United States v. Hearst, 638 F.2d 1190, 1192 (9th Cir. 1980).

114. Dennis, 927 F.3d at 958.

115. *Id.* at 959.

116. *Id.*

117. Duehay v. Thompson, 223 F. 305, 307-08 (9th Cir. 1915).

her sentence collaterally. This conclusion wholly respects the president's plenary clemency power, while still upholding a petitioner's right to relief from a potentially unconstitutional original sentence.

3. Separation of Powers

The doctrine of separation of powers also supports a conclusion that courts should retain authority over a case after a presidential commutation. The clemency power is one of the president's plenary powers, which means the judiciary cannot infringe upon it. It follows that the only reason a court may review a commuted sentence is if the commuted sentence was unconstitutional in some way or if the court is seeking to review the original sentence for mistakes made *by the courts*.[118] The court may only review the actual substance of a commutation if its constitutionality is being questioned. The court may only look at the substance of collateral attacks on the original, judicially imposed sentence and choose whether to grant relief.

The legislative branch cannot be forgotten. Congress, not the executive branch, is granted the authority to define crimes and punishments. Therefore, the courts must faithfully apply sentencing laws as Congress provides. To illustrate, in *Surratt*, the FSA applied retroactively to crimes that occurred before the FSA was passed. It would be an infringement on separations of powers for the court *not* to hear a collateral attack on the petitioner's original sentence that was subsequently altered by the FSA.

The president has no constitutional authority to impose any sentence. He may alter sentences as he pleases, exercising his plenary power, but the judiciary has the job of imposing sentencing guidelines set by Congress. In this way, courts retaining authority over presidentially commuted sentences protect the doctrine of separation of powers.

4. Mercy Motivation

A commutation is an act of mercy from the president. The president's only motivation, if exercised correctly without abuse, should be to do justice or to give deserved second chances. Therefore, the court furthers this motivation by continuing to entertain collateral attacks even after a commutation. For example, the judiciary's retainment of authority is in the interest of justice if an individual still wishes to challenge the original sentence on the basis of a racially biased juror, or the like. In *Surrat*, the court declared the collateral attack moot due to the president's

118. Dennis, 927 F.3d at 959 (Wilkinson, C.J., concurring).

commutation and thus denied the inmate the possibility of walking free had his case been remanded. If the goal is mercy, there is no justification for the courts to deny the right of a defendant to collaterally attack the original sentence.

C. Implications

Although not every circuit has squarely faced the issue of whether a presidential commutation divests the courts of authority over a sentence, the Sixth, Ninth, and First Circuits all lean toward the conclusion that the court is not divested of authority to entertain collateral attacks on original, judicially imposed sentences. Thus, should the Supreme Court of the United States be confronted with this question, the weight of case law would most likely lead the Court to conclude that so long as the commuted sentence is not disturbed (unless for constitutional reasons), the courts are not divested of authority over the defendant's sentence. If this conclusion were to become the law of the land, there would be serious implications as to how the clemency power should be exercised.

The FSA was well-intentioned but commuting an entire class of inmates will lead to the courts still hearing collateral attacks of original sentences. Such class commutations leave many cases only partially remedied and do not address collateral attack issues such as constitutionality of the original sentence or issues with the original trial. So, while indeed many inmates' sentences will be shortened, some inmates may still continue to serve sentences that were unlawful in the first place.

The solution is unclear. Scholars suggest the creation of a Presidential Clemency Board that would be made up of members of Congress:

> The hope is that the creation of such a Board would establish a system that is agile enough to respond to those situations where the public interest demands a pardon, responsive enough to allow deserving offenders the opportunity to receive clemency, and accountable enough to the electorate to deter corruption.[119]

Such a board would give federal offenders personal attention, catering the commutation to the constitutionality of the original sentence. The pressure from their constituents would urge these members of Congress to give more specific scrutiny to each offender. The opportunity for more in-depth scrutiny would decrease the likelihood that collateral attacks are needed:

> Because members of Congress are more accessible to citizens, increasing their formal role in the pardoning process would grant an individual with a

119. *See* Menitove, *supra* note 28, at 448.

sympathetic case a greater opportunity to be heard.[120]

While neither the Congress-funded, Department of Justice-housed Pardon Attorney nor the potential solution of the Presidential Clemency Board is perfect, the Presidential Clemency Board would most likely be more efficient. Taking clemency review out of the hands of unelected bureaucrats and into the hands of elected congressional officials would increase accountability and hopefully speed up the clemency process through the added sense of urgency coming from a congressperson's constituency with regard to highly publicized individuals. Further, this added accountability would decrease the likelihood that presidents would abuse the clemency power. The Department of Justice is under the direct control of the president, which may shine light on why those closest to the president receive commutations or pardons, regardless of how egregious their offenses.

Scholars have pointed out, though, that there are potential separation of powers issues with delegating the review of clemency grants to the legislative branch.[121] For one, this strategy could be viewed as usurping the executive branch's plenary clemency power. But, so long as the president makes the final decisions, there is no authority within the Constitution that exclusively requires the executive branch to aid in choosing whom to pardon and what sentence to commute. In fact, so long as Congress does not restrict the president's plenary power, there should be no separation of powers conflict. The president would still be free to pardon whom he or she pleases, even if the Presidential Clemency Board did not specifically recommend the inmate. So long as the president's power remains plenary and the president makes the final decisions, separation of powers is satisfied.

Overall, one of the main criticisms of the current clemency process is that the president is detached from the inmate seeking relief, as is the Office of the Pardon Attorney. The more personalized the clemency process, the more likely the grant of clemency would address all issues with the original sentence, such as catering the commutation to retroactive application of new sentencing standards.

IV. CONCLUSION

A presidential commutation of a criminal sentence does not divest the courts of authority over the sentence. Justice requires that courts still be free to hear collateral attacks of original sentences, especially if there is a

120. *Id.* at 459.

121. *See* Larkin, *supra* note 36, at 833.

possibility that the inmate will have to serve even less time than the presidentially commuted sentence. This is in line with the constitutional doctrines of separation of powers and mootness. The president retains his plenary power of executive clemency, while the judiciary may still resolve mistakes the courts might have made. Each branch of government retains its proper role.

This issue will continue to be at the forefront of politics as presidential candidates and celebrities use their platforms to advocate for criminal justice reform. Due to deeply rooted issues with America's criminal justice system, the public seemingly is recognizing just how important the executive clemency power is to deliver justice for a handful of deserving inmates.

In order to achieve more widespread change, Congress needs to not only create new, fairer sentencing guidelines, but also needs to determine an effective way to address those who are currently serving time under unlawful sentences.

The Sixth Circuit properly concluded that a presidential commutation of a criminal sentence does not divest the courts of authority over that sentence. If more circuit courts follow suit, there would be less men and women serving time under unlawful sentences in our criminal justice system.