ABUSING A LIMITLESS POWER: EXECUTIVE CLEMENCY IN ILLINOIS

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I. INTRODUCTION

On Friday, January 10, 2003, 164 people were under a sentence of death in Illinois.[1] A day later, none were.[2] The emptying of death row resulted not from a mass execution but rather from Illinois Governor George Ryan's grant of executive clemency to all people sentenced to death in Illinois (hereinafter "blanket commutation"), changing the majority of their sentences to life imprisonment.[3] As this event demonstrates, the Illinois Constitution vests the governor with broad discretion in granting clemency.[4] However, with this broad discretion also comes the possibility of abuse. This comment will, after defining clemency, trace the history of executive clemency. It will then recount the events leading up to Governor Ryan's blanket commutation. It will then evaluate Illinois' and other states executive clemency schemes in light of the purpose of executive clemency and the potential for abuse under each scheme. It will ultimately suggest Illinois consider changing its present executive clemency scheme to one that will reduce the possibility of abuse in the future.

II. CLEMENCY DEFINED

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1. Maurice Possley & Steve Mills, *Clemency For All: Ryan Commutes 164 Death Sentences to Life in Prison Without Parole*, CHI. TRIB., Jan. 12, 2003, at 1, *available at* 2003 WL 3743023.
2. *Id.*
3. *Death Row Inmates Receive Life; Ryan Issues Blanket Clemency*, CHI. TRIB., Jan. 12, 2003, at 18, *available at* 2003 WL 3743234. Governor Ryan commuted three men's death sentences to 40 years' imprisonment and the remaining 156 inmates' sentences to life imprisonment. *Id.*
4. "The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law." ILL. CONST. art. V, § 12.

Clemency is defined as mercy or leniency, usually used to describe acts of the President or a governor when pardoning a convicted criminal or commuting a sentence.[5] Clemency encompasses a number of forms of mercy by the executive and is generally used to include five varieties of leniency, which are "pardon, amnesty, commutation, recission of fines, and reprieve."[6]

A pardon is an act of grace from the governing power that mitigates the punishment demanded by the law for the offense and restores the rights and privileges lost on account of the offense.[7] Several types of pardons exist. An absolute or unconditional pardon frees the criminal with no condition whatsoever, while a conditional pardon attaches a condition that must occur before the pardon becomes effective.[8] A partial pardon exonerates a person from some but not all of the legal consequences or punishment for a crime.[9] A general pardon, also called amnesty, is generally given to whole classes or communities, not individuals, who are subject to trial but have not yet been convicted.[10] Amnesty is usually granted before conviction and is generally for political offenses.[11] When an executive commutes a sentence, he or she changes a punishment imposed by the judiciary to one that is less severe.[12] At the federal level, the executive branch has the power to remit fines and forfeitures for violations of the laws of the United States.[13] A reprieve, derived from *reprendre*, which means to take back, is the withdrawing of a sentence for an interval of time so that its execution is suspended.[14] When one is granted a reprieve, he gets temporary relief from, or postponement of, execution of a criminal punishment.[15] Reprieve usually refers to postponement

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5. BLACK'S LAW DICTIONARY 245 (7th ed. 1999).
6. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575 (1991).
7. Verneco, Inc. v. Fidelity & Cas. Co. of N.Y., 219 So. 2d 508, 511 (La. 1969).
8. *See* Schick v. Reed, 419 U.S. 256 (1974) (discussing conditional pardons).
9. Warren v. State, 74 S.W.2d 1006, 1008 (Tex. Crim. App. 1934).
10. Brown v. Walker, 161 U.S. 591, 601–02 (1896).
11. BLACK'S, *supra* note 5, at 83. For instance, in defense of his grant of amnesty to people who dodged the draft during the Vietnam War, President Carter said their crimes were not forgiven, as they may have been if he had pardoned them, but were merely forgotten. Kobil, *supra* note 6, at 577.
12. BLACK'S, *supra* note 5, at 274. For instance, a commutation occurred when Illinois Governor Jim Edgar commuted the death sentence of Gwen Garcia to life imprisonment on the eve of her execution. Art Barnum, *Proposals Would Spare Some Dupage Death Row Inmates*, CHI. TRIB., April 18, 2002, at 5, *available at* 2002 WL 2646086.
13. The Laura, 114 U.S. 411, 414 (1885).
14. *Ex parte* U.S., 242 U.S. 27, 43 (1916).
15. BLACK'S, *supra* note 5, at 1305.

of a death sentence.[16] An example of a reprieve would be when a governor delays a pregnant woman's execution so she can give birth.[17]

This paper will refer to clemency as the power of the executive to change a criminal sentence and will use clemency as generally encompassing all of the above discussed forms of clemency unless otherwise stated. Before discussing Illinois' procedure for clemency, it is necessary to discuss the history of clemency, its concepts, and how it has evolved from ancient concepts and come to be used in the United States and in Illinois.

III. EVOLUTION OF EXECUTIVE CLEMENCY

A. Ancient Times

The ancient Greeks used a form of clemency, but that power rested with the people rather than with the sovereign.[18] Before a person could obtain clemency under the Greek process they needed a petition supported by at least 6,000 people in a secret poll.[19] Because of the difficulty in getting the required support for such a petition, clemency was not often granted.[20] The Ancient Greeks made more frequent use of amnesty where, for example, in 403 B.C., there was a general amnesty for all of the citizens who had participated in the Athenian Civil War.[21]

In Ancient Rome, the clemency power was often used for political reasons rather than justice or mercy.[22] The executive would pardon a person to enhance his own popularity or to appease the people.[23] A well-known example of this is the Biblical story in which Pontious Pilate pardoned Barabbas rather than Jesus.[24]

B. England

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16. *Id.*
17. *Ex parte* U.S., 242 U.S. at 44.
18. Kobil, *supra* note 6, at 583.
19. *Id.*
20. *Id.*
21. *Id*. at 584.
22. *Id.*
23. *Id.*
24. *Id*. Pilate presented the Jews with a choice between freeing Barabbas or Jesus, and when the crowd demanded Barabbas be freed and Jesus crucified, Pilate turned Jesus over to the Jews for crucification. *Matthew* 27:15–26.

At common law, the King had broad power to pardon offenders either before or after conviction.[25] Before the clemency power became concentrated in the King, many people sought to claim it, including the clergy, the great earls, and the feudal courts.[26] The power to grant pardons gradually became concentrated in the King, and Henry VIII formally took the power by a Parliamentary act that gave the crown the entire power to pardon or remit treasons, murders, felonies, manslaughters, and other crimes.[27]

The clemency power remained solely in the King until the impeachment of the Lord High Treasurer of England, Thomas Osborne in 1678.[28] Osborne had secretly followed the King's order to extend an offer of neutrality to France in exchange for money.[29] This offer was made shortly after Parliament had passed an act to raise funds for a war with France.[30] The King, Charles II, attempted to grant clemency to Osborne to block Parliament's impeachment of Osborne.[31] This incited a fight over the extent of the King's clemency power and its proper limits.[32] Parliament and the King reached a compromise in which Parliament did not impeach Osborne, but instead imprisoned him in the Tower of London for five years.[33]

After the Osborne-Impeachment Crisis, Parliament passed several acts limiting the King's clemency power.[34] The Habeas Corpus Act of 1679 prohibited royal clemency in situations where people were convicted of causing others to be imprisoned outside of England, placing them outside the reach of English habeas corpus protection.[35] In 1689, Parliament passed the Bill of Rights, which deprived the King of the power to either suspend the operation of a law or ignore its execution.[36] In 1700, the Act of Settlement prohibited the King's use of pardoning powers in impeachment cases before the individual

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25. James N. Jorgenson, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 349 (1993).
26. Kobil, *supra* note 6, at 586.
27. *Id*.
28. *Id.* at 586–87.
29. *Id.* at 587.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* The common law writ of habeas corpus was a procedural device for review of pretrial, executive detention. It was not available to challenge a conviction entered by a court of competent jurisdiction. Rosa v. Senkowski, No. 97 CIV. 2468, 1997 WL 436484 (S.D.N.Y. Aug. 1, 1997).
36. Kobil, *supra* note 6, at 587–88.

had been impeached, but not after.[37] In 1721, Parliament gave itself the same power as the King to grant pardons.[38]

C. Clemency In the United States at the Federal Level

1. History

Article II, Section 2, of the United States Constitution provides, in pertinent part, the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[39] The framers drafted the clause in its present form to make clear the power was only to extend to offenses against the United States, and added the same limitation that existed in English law, that the power did not extend to impeachments.[40] The history of the executive pardoning power shows consistent reliance on English practices.[41] In *United States v. Wilson*,[42] Chief Justice Marshall spoke of the pardoning power in the United States in light of English practices:

> As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.[43]

The first report of the Committee of Detail[44] proposed that the pertinent clause read the President "shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment."[45] Alexander Hamilton supported placing the power in the executive, writing: "[i]t is not to be doubted, that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives, which may plead for and against

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37. *Id.* at 588.
38. *Id.*
39. U.S. CONST. art. II, § 2, cl. 1.
40. *Ex parte* Grossman, 267 U.S. 87, 112 (1925).
41. Schick v. Reed, 419 U.S. 256, 262 (1974).
42. 32 U.S. 150 (1833).
43. *Id.* at 160.
44. The Committee of Detail was appointed after two months of debate at the Constitutional Convention to commit the Convention's resolutions to writing by drafting a constitution. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85–87 (Max Farrand ed., 1937) (July 23, 1787).
45. Schick, 419 U.S. at 262; *see also* U.S. CONST. art. II, § 2, cl. 1.

the remission of the punishment, than any numerous body whatever."[46] Reflecting on the recent American Revolution, he added that, "[i]n seasons of insurrection or rebellion, there are often critical moments, when a well timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth."[47]

The limitation on the power with regard to impeachments tracked a similar effort made in the Constitutional Convention to amend what finally emerged as Article II, Section 2, and is reflected in James Madison's journal for August 25, 1787, where the following note appears: "Mr. Sherman moved to amend the 'power to grant reprieves and pardons' so as to read 'to grant reprieves until the next session of the Senate, and pardons with consent of the Senate.'"[48] The proposed amendment was rejected by a vote of 8 to 1.[49] Later, Edmund Randolph proposed adding the words "except cases of treason."[50] "Madison's description of Randolph's argument reflects familiarity with the English form and practice: 'The prerogative of pardon in these [treason] cases was too great a trust.'"[51] Randolph's proposal was rejected by a vote of 8 to 2, and the clause was adopted in its present form.[52]

2. Scope of the President's Clemency Power

"Executive Clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal laws."[53] "The plain purpose of the broad power conferred by [the clemency provision] was to allow plenary authority in the President to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable."[54] The President's power to grant pardons comes directly from the Constitution and cannot be modified or diminished in any way by an

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46. THE FEDERALIST NO. 74 (Alexander Hamilton).
47. *Id.*
48. *Id.* (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 419 (Max Farrand ed., 1937) (August 25, 1787).
49. *Id.* at 263.
50. *Id.*
51. *Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626 (Max Farrand ed., 1937) (August 25, 1787).
52. *Id.* The present clause provides, the President "shall have power to Grant Reprieves and Pardons for offenses against the United States, except in Cases of Impeachment." U.S. CONST. art. II, § 2, cl. 1.
53. *Ex parte* Grossman, 267 U.S. 87, 120 (1925).
54. Schick, 419 U.S. at 266.

act of Congress,[55] and, since it is an enumerated power, any limitations on it must be found in the Constitution itself.[56]

D. Executive Clemency in Illinois

1. Development of the Clemency Power in Illinois

Illinois has had four constitutions since becoming a state in 1818. The first was in 1818, and its clemency provision provided that the governor "shall have power to grant reprieves and pardons after conviction, except in cases of impeachment."[57] This language mirrors the Federal Constitution almost word for word, except for the addition of "after conviction."

The Illinois Constitution of 1848, provided:

> The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the general assembly at its next meeting, when the general assembly shall pardon the convict, commute the sentence, direct the execution thereof, or grant a further reprieve. He shall, biennially, communicate to the general assembly each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime for which he was convicted, the sentence and its date, and the date of commutation, pardon or reprieve.[58]

By its plain language, this version expressly excludes impeachments and treason. The 1848 Constitution is the only one in Illinois history that attempted to involve the General Assembly in what has otherwise been a power exclusive to the governor.[59]

Article V, section 13, of the Illinois Constitution of 1870 stated the power as follows: "[t]he governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor."[60] The

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55. *Id.*
56. *Id.* at 267.
57. ILL. CONST. of 1818, art. III, § 5.
58. ILL. CONST. of 1848, art. IV, § 8.
59. *Id.*
60. ILL. CONST. of 1870, art V, § 13.

records from the 1870 Constitutional Convention show the Committee on the Executive Department's report on article V, section 13, provided as follows: "The Governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses, under such regulations as may be provided by law."[61] In February the convention resolved itself into the Committee of the Whole to consider the Executive Department's report.[62] The chairman of the Committee on the Executive Department explained that section 16 differed from the executive clemency provision in the Constitution of 1848 in that it provided for the legislature to fix the terms upon which the governor could exercise the clemency power.[63] In the debate that followed, some delegates favored retaining the 1848 constitutional provision, while the members of the reporting committee vigorously defended the new proposal.[64]

One member of the Reporting Committee said some members supported giving a full pardoning power to the governor; some were against it, and others were in favor of it under regulations prescribed by law.[65] He said they thought Section 16 was the "golden mean."[66] The delegates discussed the abuse or possible abuse of the pardoning power, the desirability or undesirability of having the legislature fix the limits under which this power could be exercised, whether innocent men were convicted of crimes, and the desirability of providing hope for convicted men to encourage their reformation.[67]

In April 1870, the Executive Department's report was presented to the convention.[68] Section 17 of the report (the former Section 16) was adopted without change.[69] The section read: "The Governor shall have power to grant reprieves, commutations and pardons, after convictions, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying for such reprieve, commutation or pardon."[70] The adopted report was referred to the Committee on Revision and Adjustment, whose only change to Section 17, which had become article V, section 13, was to substitute the word "therefor" for the last six words of the section, "for such

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61. 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 746 (1870) (providing verbatim transcripts of the convention).
62. *Id.* at 745.
63. *Id.* at 748.
64. *Id.* at 781–91.
65. *Id.* at 783.
66. *Id.*
67. *Id.* at 781–91.
68. 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 1370 (1870) (providing verbatim transcripts of the convention).
69. *Id.* at 1374.
70. *Id.*

reprieve, commutation or pardon."[71] The provision as enacted read "[t]he governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor."[72]

The present constitution, which was drafted by a constitutional convention in 1968 and approved in 1970, provides, "[t]he Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law."[73] During discussion of what would become article V, section 12, the following colloquy occurred:

> Mr. J. Parker: The General Assembly has authority to act on the question of parole, but they would not have any effect on the governor's exercise of his power of granting pardons . . .
>
> Mr. Friedrich: The governor could now and can pardon everyone in Stateville, including those in death row, and can continue to do it under this [constitution]. He has complete authority in this area.[74]

Illinois courts have interpreted the clemency provision in line with the view of its drafters, consistently holding that the governor's power to grant clemency after conviction is exclusive and not subject to limitation by the legislature or the courts.[75] In interpreting article V, section 13, of the 1870 Constitution, the Illinois Appellate Court stated:

> In regard to the provision which became section 13 of Article V, we conclude that it was the intention of the drafters of the provision to give the governor unlimited power to grant reprieves, commutations and pardons. They defeated the proposal of the Committee on the Executive Department that this power be subject to legislative supervision. They recognized that imperfections can exist in the judicial machinery and occasions might arise when an innocent person would be convicted of a crime; they also foresaw that the pardoning power would be a means of encouraging guilty persons to become upstanding citizens of the community and to prove by exemplary conduct that they were worthy of public confidence. It was the manifest purpose of those who designed our constitutional framework to give the governor full and untrammeled discretion in remedying injustices, in lowering sentences and in restoring the rights of citizenship . . . . The only

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71. *Id.* at 1781.
72. ILL. CONST. of 1870, art V, § 13.
73. ILL. CONST. art. V, § 12.
74. 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1332 (May 28, 1970) (providing verbatim transcripts of the convention).
75. People *ex rel.* Gregory v. Pate, 203 N.E.2d 425, 427 (Ill. App. Ct. 1964).

> qualification attached to [S]ection 13 was procedural: "subject to such regulations as may be provided by law relative to the manner of applying therefor."

Section 13 in no way limits or modifies the full force and effect of the governor's power and discretion. Section 13 vests in the governor the exclusive power to grant, after conviction, reprieves, commutations and pardons. Such power is subject only to the limitation that the legislature may establish the manner of applying therefor.[76]

With an understanding of executive clemency's history, we turn next to the events surrounding Governor Ryan's blanket commutation.

IV. EVENTS LEADING UP TO BLANKET COMMUTATION IN ILLINOIS

During Illinois Governor George Ryan's administration, the Governor and the General Assembly did not see eye-to-eye on the death penalty. During his term, Governor Ryan drew attention to alleged flaws in Illinois' administration of capital punishment, and, as evidence, he pointed to the fact that, since reinstating the death penalty in 1977, Illinois had executed twelve people, while thirteen people sentenced to die had been exonerated.[77]

According to Governor Ryan, the fact more people were released from death row than were executed raised questions about the fairness of the system.[78] In apparent acknowledgment of this same statistic, the General Assembly considered a moratorium[79] on executions while the problems with the system were investigated.[80] House Bill 0723 of the 1999–2000 term would have halted all executions in Illinois and created a commission on the death

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76. People *ex rel.* Symonds v. Gualano, 260 N.E.2d 284, 290 (Ill. 1970) (citations omitted).
77. Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty; Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, at 1, *available at* 2000 WL 3632010; The number of people released from death row grew to 17 when, on January 10, 2003, Governor Ryan pardoned four men on death row. Steve Mills & Christi Parsons, *"The System Has Failed"; Ryan Condemns Injustice, Pardons 6; Paves the Way for Sweeping Clemency*, CHI. TRIB., Jan. 11, 2003, at 19, *available at* 2003 WL 3742677.
78. Exec. Order No. 2000–4, Creating the Governor's Commission on Capital Punishment, 2000 Ill. Laws 2307.
79. Moratorium usually refers to an authorized postponement in the deadline for paying a debt or performing an obligation. BLACK'S LAW DICTIONARY 1026 (7th ed. 1999). In this context, it means the indefinite postponement of the carrying out of death sentences.
80. H.B. 0723, 91st Gen. Assem. (Ill. 1999).

penalty to study Illinois death penalty law and procedure and report back to the General Assembly within eight months.[81] The bill died in committee.[82]

Because the General Assembly failed to make any headway on the problems he perceived with the Illinois' administration of the death penalty, Governor Ryan issued his own moratorium on the death penalty in January 2000.[83] Governor Ryan's reason for the moratorium were the persistent problems in the administration of the death penalty, as illustrated by the thirteen individuals on death row whose death sentences and convictions had all been previously vacated by the courts.[84] Governor Ryan's authority for the moratorium came from the Illinois governor's constitutional responsibility to see that the laws of the state are faithfully executed.[85] In his executive order, Governor Ryan created the Governor's Commission on Capital Punishment (hereinafter "Commission") to review the administration of the death penalty in Illinois and to file a report detailing its findings.[86] The Commission's goal was to provide advice and recommendations to the Governor to ensure the fairness and accuracy of Illinois' administration of the death penalty.[87]

In April 2002, after two years of research, the Commission submitted its report to Governor Ryan.[88] The report made over eighty recommendations for changes to the law relating to the death penalty in Illinois.[89] Presumably, the goal of the review process is to change Illinois law based on the Commission's recommendations.[90] Changes in Illinois law, however, require action by the General Assembly.

The General Assembly did not respond to the Commission's recommendations in the manner Governor Ryan had hoped. House Bill 4697,[91] introduced in February 2000, would have required mandatory videotaping of interrogations of suspects, one of the Commission's recommendations.[92] The General Assembly watered down the bill, and it never made it to the floor for

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81. *Id.*
82. ILL. LEGIS. REFERENCE BUREAU, LEGIS. SYNOPSIS AND DIG. 1492, 1493 (1999).
83. Exec. Order No. 2000–4, 2000 Ill. Laws 2307.
84. *Id.*
85. ILL. CONST. art. V, § 8. "The Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws." *Id.*
86. Exec. Order No. 2000–4, 2000 Ill. Laws 2307, 2308.
87. *Id.*
88. Steve Mills & Christi Parsons, *Ryan's Panel Urges Fixes in Death Penalty*, CHI. TRIB., Apr. 15, 2002, at 1, *available at* 2002 WL 2645012.
89. *Id.*
90. Exec. Order No. 2000–4, 2000 Ill. Laws 2307.
91. H.B. 4697, 91st Gen. Assem. (Ill. 2000).
92. *Id.*; Mills, *supra* note 92.

a full House vote.[93] House Bill 5788,[94] which would have prohibited the execution of mentally retarded people, also failed to reach the floor for a vote.[95] These bills were aimed at correcting problems with Illinois' administration of the death penalty, such as police coerced confessions. However, the General Assembly did pass House Bill 2058, the terrorism bill, which included a new capital offense for convicted terrorists.[96] This bill was passed only six weeks after the Governor's Commission made its report recommending changes to the death penalty.[97] Governor Ryan used his amendatory veto power, not to strip the bill of its death penalty component, but to add some of the Commission's recommendations to it.[98] The Governor stated he was:

> troubled by the relative ease with which a death penalty expansion bill was able to pass before any real legislative attention had been given to carrying out much needed reforms. If [the] system is allowed to continue unchanged and unreformed, then there undoubtedly will be more innocent men and women who find themselves awaiting their death at the hands of the people of the state of Illinois for a crime they did not commit.[99]

The General Assembly overrode the Governor's amendatory veto on December 5, 2002, and the act became effective the same day.[100] The tension between the General Assembly and Governor Ryan set the stage for the blanket commutation, which followed.

Since the legislature showed no signs of cooperating with the Governor in making changes to Illinois' administration of the death penalty, the Governor announced he was considering a blanket commutation for every person on death row.[101] His announcement appeared to be in hopes of encouraging the General Assembly to pass the reforms the Commission recommended. In October 2002, the Illinois Prisoner Review Board began a series of clemency

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93. ILL. LEGIS. REFERENCE BUREAU, LEGIS. SYNOPSIS AND DIG. 3098, 3099–3101 (2000).
94. H.B. 5788, 92nd Gen. Assem. (Ill. 2002).
95. ILL. LEGIS. REFERENCE BUREAU, LEGIS. SYNOPSIS AND DIG. 2952 (2002).
96. H.B. 2058, 92nd Gen. Assem. (Ill. 2001).
97. Illinois Government News Network, *Governor Ryan uses Amendatory Veto Powers on Terrorism Bill, Urges Reforms of System Before Expanding Death Penalty* (Aug. 23, 2002), available at http://www100.state.il.us/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=1875.
98. Christi Parsons, *Ryan Making End Run on Death Penalty; Veto Could set up Vote in Legislature*, CHI. TRIB., Aug. 24, 2002, at 1, *available at* 2002 WL 2688226.
99. *Id.*
100. 2002 Ill. Legis. Serv. 2924, 2929 (West) (to be codified at 720 ILCS 5/9–1(b)(21).
101. Steve Mills, *A Late Plea on Clemency Hearings*, CHI. TRIB., Oct. 15, 2002, at 1, *available at* 2002 WL 101651571.

hearings for nearly every person on Illinois' death row.[102] On December 19, 2002, Governor Ryan gave official pardons to Rolando Cruz, Gary Gauger, and Steven Linscott, who had all been wrongly convicted of murder but previously exonerated and freed.[103] Then, on January 10, 2003, Governor Ryan pardoned Madison Hobley, Stanley Howard, Aaron Patterson, and Leroy Orange, saying Chicago police tortured the men into confessing to crimes they did not commit.[104] Finally, on January 11, 2003, with only days left in his term, Governor Ryan commuted the sentences of all inmates on Illinois' death row, saying with regard to the Illinois' administration of capital punishment, "the legislature couldn't reform it, lawmakers won't repeal it, and I won't stand for it."[105]

The incident raises questions about Illinois' executive clemency procedure, such as how Governor Ryan was able to grant a blanket commutation and whether he used the clemency power appropriately. Additionally, if blanket commutations are inappropriate, more should be done to prevent them from being granted in the future. This comment will next examine various state clemency schemes in light of proper and improper uses of the power. It will argue that, because of its vulnerability to misuse, Illinois' executive clemency provision should be changed.

V. VARIOUS STATE CLEMENCY PROCEDURES

A. Overview

The United States Supreme Court described the purpose of the clemency power as follows:

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102. Christi Parsons & Steve Mills, *Clemency Hearings Forum for Unknown*, CHI. TRIB., Oct. 14, 2002, at 1, *available at* 2002 WL 101651324.

103. Steve Mills & Ray Long, *Cruz, 2 Others Pardoned*, CHI. TRIB., Dec. 20, 2002, at 1, *available at* 2002 WL 104498680. Cruz was twice convicted of the 1983 murder of a 10-year old girl but was acquitted in 1995 after a Dupage County sheriff recanted critical testimony. *Id.* Also, DNA tests linked another convicted murderer to the case. *Id.* Gauger was convicted of the 1993 murder of his parents, but two members of the Outlaw motorcycle gang were later convicted of the crime. *Id.* A jury convicted Linscott of the 1980 murder of a nursing student. *Id.* After twice receiving a new trial, in 1992, DNA tests failed to link Linscott to the crime and the State dropped the charges. *Id.*

104. Steve Mills & Christi Parsons, *"The System Has Failed;" Ryan Condemns Injustice, Pardons 6; Paves the Way for Sweeping Clemency*, CHI. TRIB., Jan. 11, 2003, at 19, *available at* 2003 WL 3742677.

105. *Excerpts from Ryan's Speech*, CHI. TRIB., Jan. 12, 2003, at 16, *available at* 2003 WL 374 3010.

> The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.[106]

Sometimes, mere confidence the executive will not abuse the clemency power is not enough. An executive may abuse the power by accepting a bribe to grant clemency, threatening use of the power to coerce the legislature into making certain policy decisions, or using clemency for personal reasons, such as opposition to the death penalty or to benefit a friend or family member. The goal of any executive clemency scheme should be to allow clemency to serve its purpose, which is allowing the executive to change a sentence under appropriate circumstances, while eliminating or reducing as much abuse as possible. With that in mind, this comment will first examine Illinois' executive clemency scheme and explain why Governor Ryan's blanket commutation was an abuse of the power. It will then evaluate other states' executive clemency schemes and evaluate their loyalty to the purpose of executive clemency as well as their potential for abuse.

B. Illinois

In Illinois, applicants for clemency must write a petition addressed to the governor and file it in the office of the Prisoner Review Board.[107] The applicant must include a brief history of the case, the reasons for seeking executive clemency, and any other information the Prisoner Review Board requires.[108] Additionally, applicants who intend to petition for clemency must give notice to anyone who may want to voice their opinions about the petition to the Prisoner Review Board by publishing notice in a newspaper.[109] The Prisoner Review Board then conducts a hearing on the petition, where counsel, victims, or any other person who appears in support of or in opposition to the

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106. *Ex parte* Grossman, 267 U.S. 87, 120–21 (1925).
107. 730 ILL. COMP. STAT. 5/3–3–13(a) (2002); ILL. ADMIN. CODE tit. 20, § 1610.180(a) (2003).
108. 730 ILL. COMP. STAT. 5/3–3–13(a) (2002).
109. ILL. ADMIN. CODE tit. 20, § 1610.180(c) (2003).

petition can speak.[110] The Prisoner Review Board then determines by a majority vote whether or not to recommend the petition to the governor in a confidential report.[111] The Prisoner Review Board's recommendation is purely advisory and the governor is free to accept or reject its recommendation.[112]

A majority of states have constitutional schemes similar to that of Illinois, which vest the clemency power solely in the governor, so Illinois is by no means an anomaly. States generally vest the clemency power in the governor in one of two ways. Either the governor makes the decision of whether or not to grant clemency without help from a board or advisory group,[113] or he takes a recommendation from a board or advisory group but is not bound by its recommendation.[114] For purposes of the analysis that follows, these are essentially the same, because the governor has ultimate discretion to use the clemency power as he chooses.

Illinois' executive clemency scheme preserves the purpose of executive clemency, as the governor has the power to grant clemency in appropriate situations, such as in the case of the conviction of an innocent person or an excessive sentence. The clemency scheme acts as a check on the judicial branch, as contemplated by the Supreme Court in *Grossman*.[115] However, schemes like Illinois' are also vulnerable to abuse, as Governor Ryan and governors in other states have used the power for inappropriate reasons.

For example, Oklahoma Governor Lee Cruce commuted the death sentences of twenty-two men during his term because he personally opposed the death penalty.[116] He did this under a constitutional system similar to Illinois', where the ultimate decision was in his hands.[117] The Oklahoma legislature later amended the constitution to provide for a parole and pardon board to investigate applications for pardons and commutations and make a

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110. ILL. ADMIN. CODE tit. 20, § 1610.180(f) (2003).
111. 730 ILL. COMP. STAT. 5/3–3–13(c) (2002); ILL. ADMIN. CODE tit. 20, § 1610.180(h) (2003).
112. 730 ILL. COMP. STAT. 5/3–3–13(e) (2002).
113. *See, e.g.*, COLO. CONST. art. IV, § 7.
114. *See, e.g.*, ILL. CONST. art. V, § 12.
115. *Ex parte* Grossman, 267 U.S. 87, 120–21 (1925).
116. Robert Mark Carney, *The Case for Comparative Proportionality Review*, 59 NOTRE DAME L. Rev. 1412, 1419 (1984).
117. Before amendment in 1944, the relevant section read: "The Governor shall have power to grant, after conviction, reprieves, commutations, paroles, and pardons for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law. He shall communicate to the Legislature, at each regular session, each case of reprieve, commutation, parole, or pardon, granted, stating the name of the convict, the crime of which he was convicted, the date and place of conviction and the date of commutation, pardon, parole, or reprieve." OKLA. CONST. art. VI, § 10 (amended 1944).

recommendation to the governor.[118] Without a favorable recommendation from the board, the governor cannot grant clemency.[119]

In 1970, Arkansas Governor Winthrop Rockefeller spared the lives of more than a dozen men on Arkansas' death row, leaving no one under sentence of death in Arkansas.[120] Similarly, the Arkansas Constitution provides for a non-binding recommendation from the parol board to the governor.[121] In 1986, at the very end of his term, New Mexico Governor Tony Anaya commuted the death sentences of five men on New Mexico's death row.[122] This too occurred under a system like Illinois', where the discretion was completely in the governor's hands.[123] Shortly before leaving office, Ohio Governor Richard Celeste commuted the death sentences of four men and four women to life imprisonment.[124] This blanket commutation was also done under a clemency scheme like Illinois where the governor had complete discretion to use the power.[125]

Illinois' executive clemency system and those like it allow a governor to make sweeping grants of clemency. The question then is why is it an abuse for a governor to make sweeping grants of clemency? There are several reasons.

A system that allows the governor to grant a blanket commutation allows him to *de facto* change state laws enacted by a democratically elected legislature. A state has the death penalty because the people of that state made the death penalty the law through the legislative process.[126] A governor frustrates the legislative process if he uses his constitutional prerogative to refuse to allow the laws to be carried out; he, in effect, rewrites the law. One might argue that even executive clemency exercised properly frustrates the legislative and judicial processes because it undermines the work of the judges and juries of the state. However, executive clemency is an exception that should be invoked only sparingly, when a particular set of circumstances cries out for justice or mercy. If a governor can refuse to enforce a law or refuse to allow a sentence to be carried out across the board, the exception of executive clemency swallows the law. For example, if a governor thought

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118. *See* OKLA. CONST. art. VI, § 10.
119. *Id.*
120. Steve Mills & Maurice Possley, *Decision Day for 156 Inmates*, CHI. TRIB., Jan. 12, 2003, at 1, *available at* 2003 WL 3742735.
121. ARK. CONST. art. VI, § 18; ARK. CODE ANN. § 16–93–204.
122. Mills, *supra* note 121.
123. N.M. CONST. art. V, § 6.
124. Mills, *supra* note 124.
125. OHIO CONST. art. III, § 11.
126. 720 ILL. COMP. STAT. 5/9–1 (2002).

possession of marijuana should not be a Class A misdemeanor, he could commute the sentence of every person convicted of possession of marijuana to something less than the sentence for a Class A misdemeanor, completely undermining the legislative process.

Since clemency is generally used to refer to mercy or leniency by the executive, one might argue, in commuting the death sentences of all people on death row, the governor is showing mercy or leniency to all of them. Illinois law, however, provides for a public hearing on each petition for clemency,[127] and the Prisoner Review Board makes a recommendation to the governor on each petition.[128] Therefore, the Prisoner Review Board reviews the merits of each petition on a case-by-case basis. If the governor commuted the sentences of every person on death row, he would not be considering each one on an individualized basis. He, at the least, should be required to find a specific flaw in Illinois' administration of the death penalty and commute on that basis, instead of commuting everyone at once after claiming the system is generally flawed. Moreover, if the governor is free to disregard the individualized recommendations of the Prisoner Review Board and commute everyone, the Board's function is a waste of time and taxpayers' money. Governor Ryan's rationale for granting a blanket commutation was that all of the people on death row were sentenced under a flawed system, which is a complex political question. At the least, the governor should look at each case and identify the flaw or flaws requiring commutation in each particular instance. Undoubtedly, some of those on death row received fair trials and were properly convicted and sentenced. Under Illinois' current system, the governor does not have to make an individualized determination.

Additionally, in Illinois, the clemency system raises a separation of powers concern. Article II, section 1, of the Illinois Constitution provides, "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."[129] "The separation of powers doctrine exists to insure that each of the three branches of government retains its own sphere of authority, free from undue encroachment by the other branches."[130] The separation of powers requirement does not, however, contemplate an entirely separate and distinct exercise of authority by the three branches.[131] Properly exercised, the executive clemency is a slight overlap in the powers of the branches of government. It is a mere check on the judicial

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127. ILL. ADMIN. CODE tit. 20, § 1610.180(f) (2003).
128. 730 ILL. COMP. STAT. 5/3–3–13(c) (2002); ILL. ADMIN. CODE tit. 20, § 1610.180(h) (2003).
129. ILL. CONST. art. II, § 1.
130. Murneigh v. Gainer, 685 N.E.2d 1357, 1364–65 (Ill. 1997).
131. *Id.* at 1365.

processes, whereby the governor can step in to show mercy or to correct a manifest injustice. Illinois' system, however, is susceptible to the governor making broad decisions as to what laws will be enforced, a legislative power, and serving as judge and jury, a judicial function. Illinois must balance its commitment to separation of powers against its commitment to its present form of executive clemency. The commitment to separation of powers cannot be reconciled with a provision in the constitution so susceptible to such an egregious violation of separation of powers as the executive clemency provision. No separation of powers problem exists as a matter of constitutional law, of course, because the clemency provision cannot violate separation of powers, since anything in the constitution is undisputably constitutional.

Governor Ryan's blanket commutation shows, as do those by previous governors in other states with similar executive clemency schemes, the arrangement is prone to abuse. Because Illinois' clemency system is prone to abuse the General Assembly should consider changing it to reduce the possibility of abuse. As a model, the General Assembly can look to states whose executive clemency schemes differ from Illinois. For example, some states have chosen to completely take the clemency power away from the governor and place it with a board or advisory group.

C. Board or Advisory Group Makes Clemency Determination

In several states, the clemency power is solely in the hands of a board or advisory group, with the governor completely removed from the process. For example, in Connecticut, the power to grant commutations of punishment or releases in the case of any person convicted of any offense against the state and commutations from the penalty of death is solely in the hands of the Board of Pardons.[132] The Board is composed of five residents of the state appointed by the governor with the advice and consent of either house of the general assembly.[133] Three of the Board members must be attorneys, one must be skilled in the social sciences, one must be a physician, and not more than three can be members of the same political party.[134]

Similarly, Georgia's Constitution provides "the State Board of Pardons and Paroles shall be vested with the power of executive clemency, including the powers to grant reprieves, pardons, and paroles; to commute penalties; to remove disabilities imposed by law; and to remit any part of a sentence for any

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132. CONN. GEN. STAT. § 18–26 (2003).
133. CONN. GEN. STAT. § 18–24a (2003).
134. *Id.*

offense against the state after conviction."[135] When a sentence of death is commuted to life imprisonment, the board does not have the power to pardon the person until that person has served at least twenty-five years in prison.[136] The board consists of five members, who are appointed by the governor and confirmed by the senate.[137]

In Idaho, the Board of Pardons has the "power to remit fines and forfeitures, and, only as provided by statute, to grant commutations and pardons after conviction of a judgment, either absolutely or upon such conditions as they may impose in all cases of offenses against the state except treason or conviction on impeachment."[138] The governor, however, has the

> power to grant respites or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment, but such respites or reprieves shall not extend beyond the next session of the board of pardons; and such board shall at such session continue or determine such respite or reprieve, or they may commute or pardon the offense, as herein provided.[139]

The clemency scheme where a board or advisory group makes the clemency decision preserves the ultimate purpose of clemency, which is to prevent an injustice or to show mercy, thus allowing the executive branch to be a check on the judicial branch. The possibility of abuse under the above mentioned constitutional scheme is low, because the decision is removed from one person's discretion and spread out over several people who would need to cooperate to misuse the power. The Connecticut Constitution's requirements that the governor appoint members with the advice and consent of the General Assembly places the duty of screening who is a member of the Board on the General Assembly. The requirement that not more than three members be members of the same political party further protects from a governor trying to load up the Board with his own people, who may be willing to use the power for improper purposes.

Although this system greatly reduces the risk of abuse of the power, it does not resemble the power that has existed throughout history and cannot rely on history as precedent for its existence. It is hard to see such a board of pardons as anything but a usurpation of the judiciary's power. Under a system where a board makes the clemency determination, the process for clemency

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135. GA. CONST. art. IV, § 2, para. II(a).
136. GA. CONST. art. IV, § 2, para. II(b)(1).
137. GA. CONST. art. IV, § 2, para. I.
138. IDAHO CONST. art. IV, § 7.
139. *Id.*

resembles the process for parole.[140] Alternatively, some states have given a board or advisory group power to make a binding recommendation to the governor for his exercise of clemency.

D. Binding Recommendation From Board or Advisory Group

Several states have set up their executive clemency so that a board or advisory group reviews each case and makes a recommendation to the governor as to whether to grant or deny a petition for executive clemency.[141] This part of the process is identical to Illinois' process.[142] The difference is in the governor's options after receiving the board's recommendation. In some states, the governor is free to deny clemency even if the board has recommended it, but he cannot grant clemency unless the board recommends it.[143] Essentially, the governor is free to deny clemency whenever he wants on whatever grounds he wants, as in Illinois, but he can only grant it when the board recommends it. Delaware has adopted this procedure, where the constitution provides, in pertinent part:

> The Governor shall have power to remit fines and forfeitures and to grant reprieves, commutations of sentence and pardons, except in cases of impeachment; but no pardon, or reprieve for more than six months, shall be granted, nor sentence commuted, except upon the recommendation in writing of a majority of the Board of Pardons after full hearing; and such recommendation, with the reasons therefor at length, shall be filed and recorded in the office of the Secretary of State, who shall forthwith notify the Governor thereof.[144]

The Delaware Board of Pardons is composed of the Chancellor, Lieutenant-Governor, Secretary of State, State Treasurer, and Auditor of Accounts.[145]

The Louisiana Constitution similarly provides, in pertinent part, "[t]he governor may grant reprieves to persons convicted of offenses against the

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140. Parole is release from prison before serving the full sentence. BLACK'S, *supra* note 5, at 1139. Parole differs from a pardon in that a pardon releases an offender from the entire punishment. BLACK'S LAW DICTIONARY 1113 (6th ed. 1990). In Illinois, the same Prisoner Review Board that considers petitions for executive clemency is also the paroling authority for people convicted under the laws of Illinois. 730 ILL. COMP. STAT. 5/3–3–2; 3–3–13(a) (2002).
141. See, e.g., DEL. CONST. art. VII, §§ 1, 2; LA. CONST. art. IV, § 5.
142. 730 ILL. COMP. STAT. 5/3–3–13(c) (2002); ILL. ADMIN. CODE tit. 20, § 1610.180(h) (2003).
143. DEL. CONST. art. VII, § 1; LA. CONST. art. IV, § 5(E)(1).
144. DEL. CONST. art. VII, § 1.
145. DEL. CONST. art. VII, § 2.

state and, upon favorable recommendation of the Board of Pardons, may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses."[146] The Louisiana Board of Pardons consists of five electors who are appointed by the governor, confirmed by the Senate, and serve a term concurrent with the governor who appointed them.[147] Delaware and Louisiana both allow for reprieves to be granted for limited periods of time, but for permanent actions like a pardon or a commutation of a sentence, the constitution requires a favorable recommendation of the board that reviews the clemency application.

Montana's executive clemency provision reads as follows: "[t]he governor may grant reprieves, commutations and pardons, restore citizenship, and suspend and remit fines and forfeitures subject to procedures provided by law."[148] This appears to be similar to Illinois' clemency provision, but the Montana legislature has limited the governor's power through statutory enactments. The statutes created a board of pardons and parole[149] to advise the governor,[150] which acts as a filter in the clemency application process. The board of pardons and parole consists of three members and four auxiliary members.[151] Members of the board of pardons and parole must have academic training in psychology, law, social work, sociology, or guidance and counseling, and each must also have knowledge of American Indian culture, gained through training as required by rules adopted by the board.[152]

In non-capital cases, if the Montana board of pardons and parole recommends clemency be denied, then the application is not forwarded to the governor, and the governor has no power to grant clemency.[153] In capital cases, the board must transmit the application to the governor with a recommendation that clemency be granted or denied.[154] The governor must review the record of the hearing and the board's recommendation before granting or denying the relief sought.[155] The governor is not bound by the board's recommendation and is free to go against it.[156] The governor does, however, retain the sole authority to grant respites (reprieves) independent of

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146. LA. CONST. art. IV, § 5(E)(1).
147. LA. CONST. art. IV, § 5(E)(2).
148. MONT. CONST. art. VI, § 12.
149. MONT. CODE ANN. § 2–15–2302 (2003).
150. MONT. CODE ANN. § 46–23–301(3) (2003).
151. MONT. CODE ANN. § 2–15–2302(2) (2003).
152. *Id.*
153. MONT. CODE ANN. § 46–23–301(3) (2003).
154. *Id.*
155. *Id.*
156. *Id.*

any action by the board of pardons, provided the respite is for a limited duration.[157]

The Delaware and Louisiana systems, which allow the governor to grant reprieves for a limited time, make sense from a policy standpoint. Reprieves can be granted quickly, for example, when a person is imminently facing execution, and the governor believes there is something unresolved or a question as to some new evidence. Also, the executive does not change the underlying sentence, but merely postpones it, so he cannot unduly trammel on judicial authority. The advisory board, with the power to make binding recommendations with regard to granting clemency, reviews petitions requesting permanent changes in a sentence, such as a commutation or a pardon, as opposed to a mere postponement. These petitions are less urgent and require a more thorough investigation, because they involve undoing what the state courts have already decided.

The Delaware and Louisiana systems, however, impose a major restriction on the governor's authority to grant clemency. The governor can either agree with the advisory board's recommendation and grant clemency, or he can refuse to grant clemency. He has no power to grant clemency on his own. The advisory board tells the governor when he can grant clemency. In comparing Delaware's and Louisiana's clemency procedures, it appears they made a different policy choice than Illinois. The choice is between the traditional clemency procedure, where the executive is trusted to use the power properly and one in which the need to prevent abuse is the primary concern. Illinois chose the traditional approach, while Delaware and Louisiana presumably framed their clemency procedures to guard against abuse.

Under systems such as Delaware's and Louisiana's, the ultimate purpose of clemency is still present, as manifest injustices can be corrected and mercy shown by the board in making its recommendation. It is less likely under a system like Delaware's or Louisiana's that the power could be abused, since the governor is required to have a recommendation from the advisory board before he can pardon anyone. The rationale is that when more people are involved in the process, it is less prone to abuse. This would, however, depend on the amount of influence the governor had over the members of the advisory group. For example, in Louisiana, the Board of Pardons, consisting of electors appointed by the governor, would presumably be more likely to be influenced by the governor. The governor would likely nominate people who share his political views and who have some degree of loyalty to him. Under this

157. MONT. CODE ANN. § 46–23–315 (2002).

system, like one giving the board complete discretion, it appears to be a usurpation of judicial authority without any precedent.

Montana's system, which treats clemency petitions differently depending on whether it is a capital case or not, is a sort of compromise between those schemes placing the clemency power in a board or advisory group and those leaving it solely in the governor. The risk of abuse under Montana's system is relatively low when dealing with a petition for clemency in a non-capital case, since the governor has no chance of granting clemency unless the board of pardons and parole recommends clemency be granted. However, the risk of abuse and possibility of a blanket commutation is much higher because the scheme is identical to Illinois in capital cases, where the governor takes a non-binding recommendation from the board of pardons and parole and then is free to do as he pleases.

Additionally, a system like Montana's that vests the constitutional power in the governor and then limits it through legislative enactment would be unconstitutional in Illinois, because in Illinois the governor has complete authority to grant clemency.[158] Any statute granting the power to another is invalid.[159]

Finally, some states have chosen to make the governor a member of the board that has the clemency power.

E. Governor As Part of the Board that Makes Determination

Several states place the clemency power in the hands of a board of which the governor is a member. For example, the Nebraska Constitution provides, in pertinent part:

> The Governor, Attorney General and Secretary of State, sitting as a board, shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment. The Board of Parole may advise the Governor, Attorney General and Secretary of State on the merits of any application for remission, respite, reprieve, pardon or commutation but such advice shall not be binding on them.[160]

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158. People *ex rel.* Brundage v. La Buy, 120 N.E. 537, 538 (Ill. 1918).
159. *Id.*
160. NEB. CONST. art. IV, § 13.

The governor serves as the chair of the Board of Pardons, and the Secretary of State is the secretary and keeps its records or designates someone to do so.[161]

Similarly, in Nevada, the relevant portion of the constitution reads:

> The governor, justices of the supreme court, and attorney general, or a major part of them, of whom the governor shall be one, may, upon such conditions and with such limitations and restrictions as they may think proper, remit fines and forfeitures, commute punishments, except as provided in subsection 2, and grant pardons, after convictions, in all cases, except treason and impeachments, subject to such regulations as may be provided by law relative to the manner of applying for pardons.[162]

Additionally, a sentence of death or life imprisonment without the possibility of parole may not be commuted down to a sentence that would allow parole.[163]

This constitutional scheme greatly reduces the possibility of abuse of the clemency power, while still allowing the purpose of clemency to be served. The board can grant clemency under appropriate circumstances. However, the governor is not free to use the clemency power based on his own political views or take a bribe, unless the other members of the advisory board agree to grant use the power in such a manner. While abuse is possible in a board system such as this, it is less likely to happen than when a governor can act unilaterally. Additionally, a system where the governor is a member of a board would also eliminate the possibility of the governor using the clemency power to rewrite the state's laws or undermine the work of the judiciary. This would be especially true in Illinois if the state were to adopt this system and include officials like the attorney general, secretary of state, or a justice of the supreme court, because in Illinois, these individuals are not politically appointed but rather generally elected.[164] Therefore, the governor would have to work with people on the board who are not his appointees, and perhaps not even members of his political party. In Illinois, the Attorney General filed suit against Governor Ryan to try and to stop him from holding clemency hearings

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161. NEB. REV. STAT. § 83–1, 126 (2002).

162. NEV. CONST. art. V, § 14(1). Subsection 2 provides, "Except as may be provided by law, a sentence of death or a sentence of life imprisonment without possibility of parole may not be commuted to a sentence which would allow parole." NEV. CONST. art V, § 14(2).

163. NEV. CONST. art. V, § 14(2).

164. "The Executive Branch shall include a Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller and Treasurer elected by the electors of the State." ILL. CONST. art. V, § 1. Election of Justices of the Supreme Court is provided for in ILL. CONST. art. VI, § 12.

before Governor Ryan granted the blanket commutation.[165] This situation would never arise if the governor and the attorney general were part of the same board that made clemency decisions. If the attorney general were a member of the board, then he would have the same power as the governor, as would the secretary of state or any other member of the board. They would act as a check on each other, and the likelihood of abuse of the power would be reduced.

VI. CONCLUSION

Executive clemency has existed as a power exclusive to the chief executive for a very long time, but history has shown that clemency schemes similar to Illinois are prone to abuse. As long as executive clemency exists as a completely discretionary power, the possibility of another governor using it inappropriately, as Governor Ryan did, is present. In considering the different ways states handle executive clemency, several schemes exist that would reduce or eliminate the possibility of abuse. Those states who have included more people in the decision-making process have accordingly reduced the possibility of abuse, but retained the ultimate purpose of the clemency power as stated by the Supreme Court in *Ex parte Grossman*.[166]

If Illinois were to decide to change its clemency scheme, the easiest change to adopt is the form of clemency in which the governor is a member of a small committee or board that has exclusive discretion to grant or deny clemency. Making this change would require amending the language of the clemency provision to include several other executive officers in addition to the governor, such as, for example, the attorney general and secretary of state. The language would then need to provide that the members sit as a board and by unanimous or majority vote have the power to grant reprieves, commutations, and pardons, after conviction, for all offenses on such terms as they think proper, or some variation thereof. The statutory and regulatory framework could remain unchanged. The Prisoner Review Board would still serve the same function: receive petitions, hold hearings, and make recommendations.[167] The Prisoner Review Board's recommendations would still be purely advisory and the governor's board would have ultimate discretion to accept or reject the recommendations.[168] The legislature might also

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165. John Chase & Steve Mills, *Jim Ryan Sues to Halt Clemency*, CHI. TRIB., Sept. 18, 2002, at 1, *available at* 2002 WL 100518689.
166. 267 U.S. 87, 120–21 (1925).
167. 730 ILL. COMP. STAT. 5/3–3–13 (2002); ILL. ADMIN. CODE tit. 20, § 1610.180(a), (f), (h) (2003).
168. ILL. ADMIN. CODE tit. 20, § 1610.180(e) (2003).

consider vesting the governor with the power to unilaterally grant reprieves in capital cases for a limited period of time, perhaps six months, with durations beyond six months requiring consent of both the other executive officers on the board. The governor would still have the power to grant last minute reprieves to be done quickly, without the problem of getting the board members together on short notice.

While a possibility exists that the members of the governor's board would agree to use the power inappropriately, that chance can never be totally eliminated while retaining the power. The Illinois General Assembly should consider a change in the Illinois Constitution so executive clemency decisions are not left solely to the governor's discretion.