

Structured MERCY:

Historic Origins of Nevada's Unique Pardon Authority

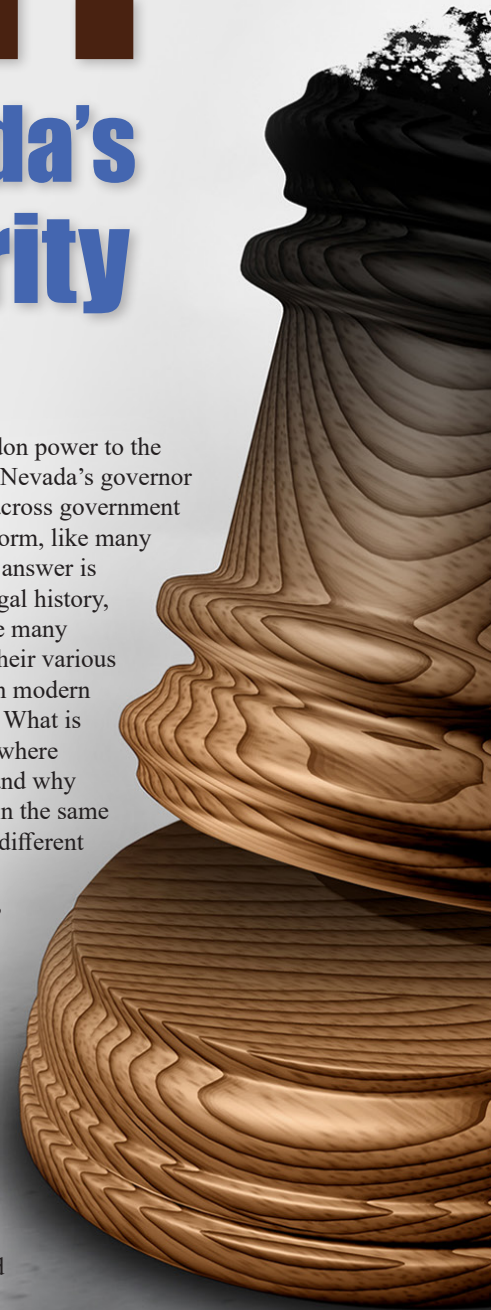
BY GRACE WARBURTON, ESQ.

A few months ago, the Nevada Pardons Board, at the request of then-Governor Steve Sisolak, almost discussed commuting all death sentences within the state. The board removed this item from its agenda only a few days later after a successful legal challenge, but it was too late to quell the news cycle: victims, family and friends of victims, prisoners' rights advocates, and many others had already decided to attend the public meeting, some booking last-minute flights from out of state or placing international calls just to comment, making 2022's final pardons board's meeting one of the year's most memorable.¹

But why the commotion? Governor Sisolak decided to consider the possibility of commuting Nevada's 57 death penalty sentences soon after the governor of Oregon, Kate Brown, commuted her state's 17 death penalty sentences to life in prison without the possibility of parole. And unlike the process in Nevada that would follow it, Brown's commutations came in the form of a concise executive order.² There was no debate or public comment. Why then, did Governor Sisolak not simply do the same? The short answer is found in the states' respective constitutions: Oregon grants

sole executive pardon power to the governor, whereas Nevada's governor shares this power across government branches. In long form, like many legal inquiries, the answer is deeply rooted in legal history, philosophy, and the many manifestations of their various intersections within modern state governments. What is the pardon power, where did it come from, and why do different states in the same country have such different models?

Pardon power, usually referred to more broadly as "clemency"—a term that includes pardons, commutations, and amnesty—is deeply rooted in European history. In ancient Athens, clemency was procedural and





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pragmatic. Each applicant for clemency had to obtain the support of at least 6,000 citizens, and this was just the initial step in a lengthy process. There, clemency often occurred in moments of national crisis, or as an intentional attempt to unify the city-state. Likewise, leaders in ancient

Rome often leveraged clemency politically, whether to appeal to the empire's many subjugated inhabitants or to promote patriotic ideals by forgiving selective crimes. Later on, in England, where monarchs competed for clemency power with clergy, feudal lords, and eventually parliament, clemency was frequently granted for political reasons, or even in exchange for money.³

While history belies the often-pragmatic use of clemency, the policy behind this significant authority was rooted in loftier goals: fundamental religious ideas about human nature and the counter-posed yet cooperative functions of mercy and retribution. Judeo-Christian theology framed mercy as a quality inherent to its god, therefore

both establishing ultimate power in a monotheistic deity and highlighting the fallibility of humans. As Shakespeare in *The Merchant of Venice* famously epitomized, "the quality of mercy is not strained. It droppeth as the gentle rain from heaven ... mercy is above [the temporal power of a monarch]; it is an attribute to God himself."⁴ It is perhaps no wonder then that the monarchs of England sought to consolidate clemency power in the crown in an attempt to equate the crown's power to that of the Christian god's. In fact, this philosophical backdrop formed the basis of British political theorist William Blackstone's position that true clemency could never subsist in a democracy. Rather, Blackstone viewed it as the ideal power for a monarch, for whom "the great operation of his scepter is mercy."⁵

Still, the apparent tension between clemency's purpose and its use in practice became apparent during the foundation of the U.S. Then, distrust of strong executive authority commensurate to the revolution prompted many states to distribute the clemency power between the governor and the legislature. And on the federal level particularly, framers of the Constitution disputed whether, and if so how, clemency power should be limited. Skeptics of the clemency power expressed concern that a centralized model created an unjustifiable risk of abuse. But supporters of the clemency power, most notably Alexander Hamilton, insisted that some sort of clemency power should

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exist in the executive branch for both philosophical and pragmatic reasons.⁶ An eventual compromise resulted in Article II of the U.S. Constitution, which grants the president the ability to grant pardons except in cases of impeachment.

Although the federal government's clemency power is purely executive, the framers' initial debate survives in the variety of structures that clemency takes across the states. In those states where the death penalty is an option, clemency power takes one of three main forms:

- 1) a purely executive model in which the governor has absolute decision-making authority to grant pardons, like that in Oregon;
- 2) an administrative model in which the governor must share authority with other members of an administrative body; or
- 3) a hybrid model in which the governor must, for instance, follow a board's recommendation on whether to grant clemency.⁷

Here, Nevada takes the minority approach by being one of only four states in which the governor sits on a pardons board that also consists of the Supreme Court justices and the Attorney General.

At a cursory glance, the particular structure of a state's clemency power does not "systematically inform clemency outcomes," as much as other factors such as geography, demographic makeup of the accused, or other particular circumstances of the case.⁸ But some scholars have argued that a less-executive clemency power would likewise be less influenced by political forces and pressures.⁹ Whatever the case, Nevada's relatively unique clemency structure is objectively more democratic than one that vests power solely in the individual executive head of state government. Indeed, the latest pardons board meeting provides a stark example of how much Nevada's public can involve itself in the clemency process through public comment. Whatever the case, a historical perspective reveals that Nevada's structure reflects a balance between the competing and sometimes contradictory justifications for clemency as a concept: one that serves as an important mechanism by which mercy and forgiveness can counterpose and therefore temper the firm hand of retributive justice systems. And while the uses of clemency

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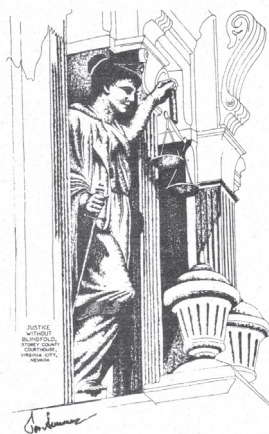
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have historically not always reflected the philosophical justifications that underpin it, the ability to grant forgiveness through a careful process is a long-established practice in cultures that operate highly procedural systems of justice. As the conclusion of Shakespeare's *The Merchant of Venice* monologue on the quality of mercy asks its readers, "[c]onsider this: that in the course of justice none of us should see salvation."¹⁰



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2. OR Gov. Kate Brown, COMMUTATION OF SENTENCE, (Dec. 13, 2022); Or. Const. art. V, § 14; Nev. Const. art. V § 14.
3. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 *Tex. L. Rev.* 569 (1991).
4. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act. 4, sc. 1., l. 190-210 (formatted to prose).
5. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *233 (1769).
6. *THE FEDERALIST* No. 74 (Alexander Hamilton)
7. Death Penalty Information Center, deathpenaltyinfo.org/facts-and-research/clemency/clemency-by-state, (last accessed December 28, 2022).
8. Michael Heise, *The Death of Death Row: Clemency and the Evolving Politics of Unequal Grace*, 66 *Ala. L. Rev.* 949, 952 (2015).
9. Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 *Va. L. Rev.* 239, 242-45 (2003).
10. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act. 4, sc. 1., l. 204-05 (formatted to prose).



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