

11-1-2017

Howell v. McAuliffe

L. Michael Berman
University of Richmond School of Law

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [Election Law Commons](#), [Law and Politics Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

L. M. Berman, *Howell v. McAuliffe*, 52 U. Rich. L. Rev. 251 (2017).
Available at: <https://scholarship.richmond.edu/lawreview/vol52/iss1/12>

This Comment is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

HOWELL V. MCAULIFFE

INTRODUCTION

In the summer of 2016, the Supreme Court of Virginia decided *Howell v. McAuliffe*. The case made national headlines as it was in response to Governor Terry McAuliffe's attempt to restore the voting rights of more than 206,000 convicted felons. Among the petitioners in the case was the Speaker of the Virginia House of Delegates, William J. Howell; Majority Leader of the Virginia Senate, Thomas Norent, Jr.; as well as four other registered voters. The petitioners sought an injunction to prevent the Governor from granting pardons on a "blanket" basis. The court ordered the injunction and issued a writ of mandamus instructing precisely how the McAuliffe Administration was to rescind the recently restored voting rights, as well as how to proceed with restorations in the future.¹

State-level politics rarely make national news, but *Howell* was different because it not only highlighted key members of a state legislature suing its own executive, but it also underscored a power that every single executive in the United States possesses (including the President): the power to pardon.² This is a particularly thought-provoking power that many citizens in Virginia, and the United States as a whole, have overlooked throughout much of the country's history, until the recent phenomenon of criminal justice reform became a staple in political campaigns.

The purpose of this comment is to analyze a practice that seems, arguably, archaic. After all, what good is having a criminal justice system established within the confines of the United States Constitution if a "king" can pardon at will? Yet the practice also happens to be justifiably rooted in the Constitution, creating an interesting paradox for all three branches of government on both the state and federal levels. This comment begins with an overview of

1. *Howell v. McAuliffe*, 292 Va. 320, 352–53, 788 S.E.2d 706, 724–25 (2016).

2. U.S. CONST. art. II, § 2 ("[The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."); see, e.g., VA. CONST. art. V, § 12.

pardons, starting with an explanation of the earlier Anglo-Saxon practices, eventually rounding out the seventeenth century and the unilateral overreach that accompanied the Stuart Dynasty's pardoning prerogative. Since this most intriguing pardon case of our generation was decided by the Supreme Court of Virginia, special attention will be given to the Virginia Constitution's treatment of pardons, the Anti-Suspension Clause of the Bill of Rights as constructed in 1776,³ and the evolution of the pardoning power through subsequent revisions. Last, the comment discusses the implications associated with non-adherence to the Anti-Suspensions Clause, as well as pardoning as a political maneuver and the impractical burden McAuliffe's order [the "Order"] placed on state officials and the judiciary.

I. HISTORICAL BEGINNINGS OF PARDONS

A. *Anglo-Saxon Origins*

To understand the implementation of executive pardoning powers in Anglo-Saxon culture, it is necessary to begin with King Ine of Wessex (668–725).⁴ During his reign, according to section 6 of the Laws, the King's power to pardon was explicit, and stated the following: "If any one fight in the king's house . . . be it in the king's doom [i.e., judgment,] whether he shall or shall not have life."⁵ Similar patterns of an absolute pardoning power appeared in subsequent monarchs, namely Alfred (871–901), Ethelred (978–1016), and Cnut (1017–1035).⁶ Each of them added certain elements of personal character that were considered beyond the protective borders of the law. King Alfred's inclusion of the drawing of a weapon can be mentioned as an example, as well as Ethelred's decision to make pardons inapplicable to certain illegal acts that occurred at places of worship.⁷

3. VA. DECLARATION OF RIGHTS of 1776, § 7, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 48, 49 (William F. Swindler ed., rev. ed. 1979).

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

5. *Id.* (citing BENJAMIN THORPE, ANCIENT LAWS AND INSTITUTES OF ENGLAND 107 (London, G.E. Eyre & A. Spottiswoode 1840)).

6. *Id.*

7. *Id.*

In such cases, King Ine determined how accomplices were to be handled, as well as whether to grant any pardons.⁸ According to William Duker's research, "[t]he laws . . . placed the holding of a shire by any 'ealdorman' who 'takes a thief, or to whom one taken is given, and [who] lets him go, or conceals the theft' at the mercy of the sovereign."⁹ This particular law later evolved under the ruling of King Athelstan (924–940), who considered pardons for jailbird offenders and those who chose to provide for the defense of the accused.¹⁰ Despite numerous reforms of the statute, the absolute power to pardon remained intact.

B. *The Stuart Dynasty and Unilateral Prerogatives*

England was marked by nearly a century of ongoing legal reformation by the time James II took the throne in 1685. It is crucial to fully appreciate and understand the context of the reforms and to approach the political landscape of seventeenth century England as a whole to comprehend the implications of the acts of clemency by James II. The early Stuart Kings (1603–1688) believed that a divine right was bestowed upon the throne, giving them the necessary will to multiply their royal prerogatives.¹¹ It is not surprising that this belief did not meet sufficient appreciation among the English people, who had been slowly moving towards constitutionalism since the inception of the Magna Carta in 1215. The Magna Carta provides that even the king is bound to follow the formal law-making process and is forbidden from making laws unilaterally.¹²

At first, this divine-right approach was broadly bolstered by the court, but it soon became widely criticized from the bench. By account of Lord Ellsmere, who was a royal jurist of his time, James's

8. See *id.* at 476–77.

9. *Id.* at 476 (quoting BENJAMIN THORPE, *ANCIENT LAW AND INSTITUTES OF ENGLAND* 54 (London, G.E. Eyre & A. Spottiswoode 1840)).

10. *Id.* at 476–77 (quoting BENJAMIN THORPE, *ANCIENT LAWS AND INSTITUTES OF ENGLAND* 97 (London, G.E. Eyre & A. Spottiswoode 1840)).

11. See JAMES I, *KING OF ENGLAND*, *The Trew Law of Free Monarchies*, in *THE POLITICAL WORKS OF JAMES I* 53, 54–55 (Harvard Univ. Press 1918). Although previous Kings had similarly believed their proclamations to be the force of law, the most relevant inquiry is into that of the Stuart dynasty.

12. See A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 15–16, 23 (rev. ed. 1998); see, e.g., *MAGNA CARTA* chs. 23, 24, 39, 61 (1215), reprinted in HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY*, *supra*, at 42, 45, 51–53 (limiting the King's power and requiring he abide by the rule of law).

decision to limit construction was aided by the court, allowing him to “maintain the power and prerogative of the King.”¹³ And, when coming from an absence of precedential authority, the court’s assumption should be to “leave it to the King to order it according to his wisdom.”¹⁴ It should be noted that this approach by the court did not last long. Chief Justice Coke declared that it was impermissible for the king to bring any changes to the law without turning to parliamentary authority.¹⁵

The court was not the only place where these conflicting and contradictory beliefs were discussed. Extending beyond the court, they ultimately influenced the English Civil War. Yet, after the war came to an end—and Oliver Cromwell died—the monarchy was restored once again.¹⁶ Nevertheless, Charles II continually created conflict by further expanding royal prerogatives.¹⁷ Charles’s brother and heir to the throne, James, fueled this feud by converting to Roman Catholicism and refusing to take an oath to the Church of England. Charles attempted to extend religious liberty by issuing the first Declaration of Indulgence¹⁸ in 1672. In 1673, however, Parliament’s fierce opposition to the Declaration of Indulgence compelled Charles to sign the Test Act, which required all those holding office to swear an oath to the Church of England.¹⁹

13. 2 JOHN L. CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 361 (5th ed. 1868).

14. *Id.*

15. *Id.*

16. Robert Stevens, *The Act of Settlement and the Questionable History of Judicial Independence*, 1 OXFORD U. COMMONWEALTH L.J. 253, 255 (2001).

17. *See id.*

18. In regard to the Declaration of Indulgence,

[t]he Court noted that historically the king could not dispense with laws that affected a man’s life, liberty, or estate; the king could not grant a man a dispensation to annoy or damage another; he could not grant a man a dispensation to avoid doing that which he was required to do for the public benefit; and he could not grant a dispensation that would deprive a third party of an advantage that would have accrued to that party had the dispensation not been granted.

Duker, *supra* note 4, at 486.

19. *Catholics and Protestants*, UK PARLIAMENT, <http://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/overview/catholicsprotestants/> (last visited Sept. 27, 2017).

James took the throne following the death of Charles in 1685.²⁰ Rather than place his trust in Protestant militias and the local gentry to protect against rebellion, James sought to create an army under full command of Catholic officers.²¹ In order to accomplish this goal, he granted formal pardons from the Test Act.²² Despite legislation by Parliament which forbid this, James's actions allowed Catholics to hold numerous high-level positions in both the military and civil service.²³ With this Act, James demonstrated his ability to make bold political maneuvers through the use of pardons.

Staying within the earlier opinion of Chief Justice Coke, regarding limiting powers of the throne, Parliament responded by claiming that the Test Act could be repealed or nullified through only parliamentary action.²⁴ James subsequently disbanded Parliament, removed all of the judges he found to be uncooperative, and arranged the famous test case of *Godden v. Hales* to assert the powers of the throne.²⁵ The court held "that the Kings of England were absolute Sovereigns; that the laws were the King's law; that the King had a power to dispense with any of the laws of Government as he saw necessity for it; [and] that he was sole judge of that necessity."²⁶

In the aftermath of *Godden*, James II made it possible for Catholics to be "employed in any Office or Place of Trust either Civil or Military, under Us or under Our Government" by suspending the ecclesiastical laws.²⁷

James continued along his path of unilateral proclamations by issuing the second Declaration of Indulgence in 1688, intending to extend religious liberties to all Roman Catholics and non-conformists.²⁸ Wanting to continue his quest of surrounding himself with religious allies, ensuring political favorability among loyalists, and

20. Richard E. Boyer, *English Declarations of Indulgence of 1687 and 1688*, 50 CATH. HIST. REV. 332, 334 (1964).

21. See Alfred F. Havighurst, *James II and the Twelve Men in Scarlet*, 69 L.Q. REV. 522, 529 (1953).

22. *Id.* at 530.

23. *Id.* at 532.

24. LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, at 63 (1981).

25. See Boyer, *supra* note 20, at 335-36.

26. *Godden v. Hales* (1686) 89 Eng. Rep. 1050, 1051; 2 Show. 475, 478 (K.B.).

27. Boyer, *supra* note 20, at 349.

28. See *id.* at 363-64.

further asserting his power, he required the Anglican clergy to read the second Declaration aloud to their congregants.²⁹ The second Declaration suspended all penal laws that targeted individuals who refused to take an oath to the Church of England.³⁰ There was contemporaneous resistance from members of the clergy. In what would later become known as the "Seven Bishops," the Archbishop of Canterbury and six others petitioned to the King to withdraw the order.³¹ As a result of this petition, James charged the bishops with seditious libel,³² and declared that "God ha[d] given [him] the dispensing power and [that he would] maintain it."³³ The King's Bench reached a split decision, 2-2.³⁴

Among the most passionate defenders of the bishops was Justice John Powell. Powell explained his vote by declaring he had no recollection, in any case, of the dispensing power being inherent to the king's authority, and that it ultimately "amounts to an abrogation and utter repeal of all the laws . . ."³⁵ He continued by saying if this were to be allowed once, then there would be no need for a parliament, as all legislative powers would be vested in the king.³⁶

Following Powell's emotional proclamations against the dispensing power of the king, the court decided to proceed to a jury.³⁷ The jury returned with an acquittal for the bishops, and the court erupted with cheer as the verdict was announced.³⁸

As the news of the joyous acquittal spread, there grew a resentment against James II and his executive entourage. The verdict, in effect, was as much a rebuke of the prerogatives of the crown as it was an exoneration of the bishops' guilt.³⁹ Being so impacted by James's latest attempt to abscond from the limitations of the Crown, some of the most prominent English citizens supported

29. *See id.* at 364.

30. *See id.* at 348, 349, 364.

31. Edwin W. Hadley, *Bias and Prejudice or the Case of the Seven Bishops*, 32 B.U.L. REV. 265, 274-75 (1952).

32. *Id.* at 275.

33. *Id.* at 274.

34. *Trial of the Seven Bishops*, 12 Howell St. Tr. 183, 426-29 (1688).

35. *Id.* at 427.

36. *Id.*

37. *Id.* at 430.

38. Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack Upon the Royal Dispensing Power 1597-1689*, 29 AM. J. LEGAL HIST. 197, 229 (1985).

39. *Id.* at 229-30.

James's son-in-law, William of Orange, to depose James and take command of the English throne along with his wife, Mary.⁴⁰

Following the overthrow of his father-in-law, William issued a Declaration of Reasons, detailing the basis for his actions, which included, among others things, the abusive exercise of the dispensing power of his predecessor.⁴¹ William wrote in the Declaration of Reasons that "no Laws can be made but by the joint Concurrence of King and Parliament," and that, once enacted, may only be "repealed or suspended . . . by the same Authority."⁴²

Parliament enacted England's first Bill of Rights in 1689, which abolished the suspending and dispensing powers.⁴³ Multiple members of Parliament provided rationale for the decision to abolish these powers, including Sir Henry Capell. Addressing the House of Commons, he stated, "We know the King has prerogatives . . . but to say 'he has a Dispensing Power' is to say there is no Law."⁴⁴ Sir William Williams additionally declared that nothing is more harmful than the dispensing power.⁴⁵

According to the first declaration of the Bill of Rights, "the pretended Power of Suspending of Laws, or the Execution of Laws, by regal Authority, without Consent of Parliament, is illegal."⁴⁶ This language was echoed in the second Declaration, which reads: "[T]he pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."⁴⁷ The civil unrest that occurred through seventeenth-century England, as a result of what we would consider in the present-day to be "executive overreach," cemented political philosophies that would lay the foundation for the creation of both the federal and state constitutions of the United States.

40. Carolyn Edie, *Revolution and the Rule of Law: The End of the Dispensing Power*, 10 EIGHTEENTH-CENTURY STUD. 434, 440 (1977) [hereinafter Edie, *Revolution and the Rule of Law*].

41. 10 H.C. Jour. (1688) 1 (Eng.).

42. *Id.*

43. Edie, *Revolution and the Rule of Law*, *supra* note 40, at 441–42.

44. *Id.* at 442.

45. *Id.*

46. *English Bill of Rights 1689*, LILLIAN GOLDMAN L. LIBR.: AVALON PROJECT, YALE L. SCH., http://avalon.law.yale.edu/17th_century/england.asp (last visited Sept. 27, 2017).

47. 5 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, at 485 (Cobbett ed. 1806).

II. VIRGINIA CONSTITUTION

The text of the first Virginia Constitution, enacted in 1776, makes clear that the framers took extreme caution so as not to repeat the issues of unilateral proclamations that arose in seventeenth-century England in regard to the pardoning power, statute suspension, and nullification. This Part will analyze the breadth of that text, as well as how the pardoning power has been affected by subsequent versions of the Virginia Constitution.

A. *Executive Clemency*

Throughout Virginia's colonial period, the governor's power to grant pardons was representative of the rights held by the crown at the time, as described above.⁴⁸ The right was made official through the Virginia Charter of 1609.⁴⁹ Wanting to break free from the despotism inherent to the crown, Virginia constitutional framers James Madison and George Mason took particular care to limit the powers of the executive with regard to pardoning. The Virginia Constitution of 1776 stated,

[H]e shall, with the advice of the Council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates, or the law shall otherwise particularly direct; in which cases, no reprieve or pardon shall be granted, but by resolve of the House of Delegates.⁵⁰

Insight into the colonial history, dissolution, and later reformation of the council is relevant to the framers' quest to restrain the powers of the executive. Prior to Virginia declaring independence from the crown, the council—consisting of some of the wealthiest and most politically prominent citizens—served highly influential executive, legislative, and judicial roles.⁵¹ The council would advise the governor on matters of “routine functions of govern-

48. Walter A. MacFarlane, *The Clemency Process in Virginia*, 27 U. RICH. L. REV. 241, 243 (1993); see also Duker, *supra* note 4, at 497 (discussing the “full and absolute Power and Authority [bestowed on the Governor] to correct, punish, pardon, govern”).

49. MacFarlane, *supra* note 48, at 243.

50. VA. CONST. of 1776, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 51, 54 (William F. Swindler ed., rev. ed. 1979).

51. See James L. Anderson, *The Virginia Councillors and the American Revolution: The Demise of an Aristocratic Clique*, 82 VA. MAG. OF HIST. & BIOGRAPHY, Jan. 1974, at 56.

ment,” such as the issuance of land grants, appointment of inspectors, appointment of militia members, and would also resolve legal and domestic disputes.⁵² Upon declaring independence, the council was dissolved and stripped of their power; however, the newly formed General Assembly was authorized to form a new council, which it did.⁵³

Still, due to a strong fear of executive abuse, the new council, despite being removed from their earlier legislative and judicial responsibilities, essentially retained control over the governor by requiring the executive to heed their counsel and approval on nearly all matters.⁵⁴ Despite the language granting the power to pardon remaining largely unchanged within the Virginia Constitution of 1830, some accused persons began to push the envelope of expecting pardons in return for good behavior or testifying against criminal associates. That is exactly what occurred in the case of *Commonwealth v. Dabney*, where Dabney asserted he had the right to an automatic pardon given his testimony against a co-defendant.⁵⁵ The court saw otherwise, reasoning that it would be improper for the judiciary to force the executive to carry out a power in which he, along with the advice of the council, has the *option* to exercise.⁵⁶

The power to pardon became better defined with each constitution revision.⁵⁷ With the enactment of the Virginia Constitution of 1851, the requirement that the governor be advised by the Council of the State was finally abolished.⁵⁸ Additionally, the governor was granted the authority to “remit fines and penalties in such cases and under such rules and regulations as may be prescribed by law.”⁵⁹

52. *Id.* at 60–61.

53. *Id.* at 66–67.

54. See VA. CONST. of 1830, art. IV, § 5, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 57, 65 (William F. Swindler ed., rev. ed. 1979) (“The Governor shall, before he exercises any discretionary power conferred on him by the Constitution and laws, require the advice of the Council of State . . .”).

55. 40 Va. (1 Rob.) 696, 696–97 (General Ct. 1842).

56. See *id.* at 707–08 (holding that an accomplice is not entitled to an automatic pardon for testifying against the other accomplice under Virginia law).

57. See A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 642 (1974) [hereinafter HOWARD, COMMENTARIES].

58. *Id.*

59. *Id.*

This autonomy and broadened scope of clemency authority was also met with two new restrictions. One was limiting the execution of pardons and reprieves to the post-conviction period, and the second was that the governor "communicate to the [G]eneral [A]ssembly . . . the particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted" with stated reasons as to why each was granted.⁶⁰ It is worth noting that, despite the provision remaining in article V, section 12, the General Assembly does not possess the authority to revoke any such pardon.⁶¹

The constitution revisions in 1870 added new executive power in the form of the ability to "remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption" of the revised version.⁶² Although the governor's clemency powers vested in the Virginia Constitution had undergone three revisions at the time—with the ultimate trajectory of those revisions making clear that the power to pardon rests solely with the executive—the Supreme Court of Virginia wrestled with this notion in 1872. The case of *Lee v. Murphy*, where the governor reduced a convicted felon's sentence from three years to twelve months, solidified the concept that it was, indeed, an executive power.⁶³ Justice Bouldin, still fearful of an executive being granted too much power, however, argued in his dissent that the pardoning power is one that should be granted only with extreme limitations, if at all.⁶⁴

In 1927, due to increased demand on the governor to review requests for pardons, the Prentis Commission recommended that the constitution be amended to allow the General Assembly to install

60. VA. CONST. of 1851, art. V, § 5, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 68, 83 (William F. Swindler ed., rev. ed. 1979); see *Blair v. Commonwealth*, 66 Va. (25 Gratt.) 850, 853, 857 (1874) (suggesting post-conviction to mean the stage after the verdict is rendered).

61. See HOWARD, COMMENTARIES, *supra* note 57, at 642.

62. VA. CONST. of 1870, art. IV, § 5, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 112, 119 (William F. Swindler ed., rev. ed. 1979).

63. See generally *Lee v. Murphy*, 63 Va. (22 Gratt.) 789 (discussing history of pardon power being vested in the king and executive).

64. *Id.* at 803–05.

a pardoning board, consisting of three members, to serve under appointment and pleasure of the governor.⁶⁵ The board was limited to dealing with pardon requests from non-felons.⁶⁶

For a brief four-year period beginning in 1944, the clemency power was again limited by the General Assembly. Following a 1944 constitutional amendment, the General Assembly possessed authority to form a board with the power to commute death sentences and grant pardons or reprieves in cases of misdemeanors or felonies.⁶⁷ The clemency power shifted back to the governor in 1948 and has since remained under his exclusive control.⁶⁸

At the recommendation of the 1969 Commission on Constitutional Revision, the language that allowed the convening of a pardoning board was removed entirely from the current Virginia Constitution, thus bolstering the notion that matters of clemency were vested in the executive.⁶⁹

B. *Types of Clemency*

As noted earlier, there are many different types of clemency the Virginia governor has the power to grant. The governor typically handles four different types of pardons, as well as requests for restoration from certain civil disabilities.⁷⁰

1. Absolute

Although rarely granted,⁷¹ an absolute pardon voids a criminal conviction as if it never happened.⁷² An absolute pardon is not so “absolute,” however, as it still requires that a separate request for restoring civil disabilities be made.⁷³

65. HOWARD, COMMENTARIES, *supra* note 57, at 643.

66. *Id.*

67. *See id.*

68. *Id.*

69. *See id.* at 644.

70. *See* MacFarlane, *supra* note 48, at 245.

71. *Pardons*, COMMONWEALTH OF VA., <https://commonwealth.virginia.gov/judicial-system/pardons/> (last visited Sept. 27, 2017).

72. MacFarlane, *supra* note 48, at 246.

73. *See id.*

In 1993, Governor Douglas Wilder granted an absolute pardon to a man who had been wrongly convicted of rape and was later exonerated through the release of DNA evidence.⁷⁴ The absolute pardon is typically reserved for a very limited number of petitioners that have been incarcerated under similar circumstances.⁷⁵

2. Simple

A simple pardon will forgive the legal violation, but it does not expunge the record of the criminal conduct.⁷⁶ Although this pardon really does nothing aside from "advance . . . [the] employment, education, and self-esteem" of the petitioner, the governor will not grant one unless he is given a positive recommendation from the Virginia Parole Board.⁷⁷ While this type of pardon does little to nothing for the prior convict, and is granted liberally upon recommendation by the Virginia Parole Board, the petitioner must still request a restoration of rights.⁷⁸

3. Conditional

The most widely used, while also producing a vast body of case law, conditional pardons are granted to individuals who are still incarcerated and are seeking an early release.⁷⁹ The governor will set specific terms and conditions for the release, where, if violated, the individual will return to the custody of the state.⁸⁰ Although the power of the governor to grant conditional pardons was not always crystal clear, the doubt was removed in 1872.⁸¹ This power was reaffirmed again in 1938 when a defendant was pardoned on the condition that he maintain good behavior, and later, having breached the terms of the pardon agreement, was denied habeas corpus relief when he was re-imprisoned.⁸² Upon being returned to

74. *Snyder v. City of Alexandria*, 870 F. Supp. 672, 675, 677 (E.D. Va. 1994).

75. *Pardons*, *supra* note 71.

76. *Id.*

77. *Id.*

78. *See id.*; MacFarlane, *supra* note 48, at 246.

79. *Pardons*, *supra* note 71.

80. MacFarlane, *supra* note at 48, at 247.

81. *See generally* Lee v. Murphy, 63 Va. (22 Gratt.) 789 (1872) (explaining the pardon power of the governor of Virginia as it stood in 1872).

82. *Wilborn v. Saunders*, 170 Va. 153, 162, 195 S.E. 723, 727 (1938) ("A pardon is granted on the theory that the convict has seen the error of his ways, that society will gain

the state's custody, it is easy to see how habeas corpus relief would often be sought by petitioners who believe they are not in violation of the agreed upon terms of the pardon.

4. Medical

Medical pardons are rare, and until the early 1990s, there was no specific foundation for what circumstances would qualify for a medical pardon.⁸³ Those with terminal illnesses are among the most common conditions to be granted release from state custody.⁸⁴

5. Restoration of Rights and Civil Death

Because the restoration of rights—voting rights in particular—was a focal point of the *Howell* decision, a more in-depth analysis is provided. The concept of stripping certain civil and political rights dates back to the ancient Roman era and the granting of pardons during that time.⁸⁵ At the time, a felon who was pardoned was considered “civilly dead,” or *civiliter mortuus* in Latin, and had no protections under the law.⁸⁶ Many previously convicted felons who escaped execution, or those who were spared conviction by the praetor, were eventually killed by fellow citizens because their lives were completely outside of the law.⁸⁷ This notion continued in England through the penalty of attainder.⁸⁸ As discussed earlier, in seventeenth-century England, those who refused to take an oath to the Church of England were treated in similar fashion, as they could not hold military or political positions until James II nullified the Test Act.⁸⁹

nothing by his further confinement . . . [I]t is fitting, under some circumstances, that certain conditions insuring good conduct should be required of the convict for this opportunity to escape the service of the full penalty prescribed for his former crimes.”)

83. See MacFarlane, *supra* note 48, at 248.

84. See *id.*

85. Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSPECTIVES ON POL. 491, 492 (2004).

86. *Civiliter Mortuus*, BLACK'S LAW DICTIONARY (6th ed. 1990); Manza & Uggen, *supra* note 85, at 492.

87. See Manza & Uggen, *supra* note 85, at 492.

88. *Id.*

89. See *supra* Part I.B.

Virginia is currently one of fourteen states that has legislation disenfranchising inmates, probationers, and some or all ex-felons.⁹⁰ The list of possible disabilities includes, but is not limited to, revocation of the right to vote, possess a firearm, and obtain a driver's license.⁹¹ Particular forms of disenfranchisement began in 1785, when death sentences for convicted felons no longer became automatic. Disenfranchisement was first codified when the Virginia Constitution was revised in 1830, denying voting rights to "any person convicted of any infamous offence."⁹²

Additional changes occurred regarding voter qualification within the Virginia Constitutions of 1851 and 1870. In 1851, language was added that disqualified from voting those convicted of bribery, and, in 1870, the word "felony" was added to replace "infamous offense."⁹³ The Virginia Constitution of 1902 expanded the list of crimes that stripped citizens of their suffrage rights to include treason, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery, or perjury.⁹⁴ The current version of the Virginia Constitution eliminated the exhaustive list, and simplified the disqualification: "No person who has been convicted of a felony . . . unless his civil rights have been restored by the Governor or other appropriate authority."⁹⁵

Although the concept has been around for millennia, Virginia still struggles with its application of restoring rights of prior convicted felons. Subject to article II, section 1, upon conviction of a felony in the Commonwealth, citizens are denied their right to vote.⁹⁶ Current Virginia law allows for certain prior convicted felons (mostly non-violent offenders) to have their voting rights restored upon petitioning their local circuit court judge.⁹⁷ The gover-

90. Manza & Uggan, *supra* note 85, at 494.

91. Interview with Thomas Soldan, Attorney, THOMAS SOLDAN ATTORNEY AT LAW, <https://virginialawfirm.net/soldan-consequences-misdemeanor-felony.html>.

92. VA. CONST. of 1830 art. III, § 14, *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 57, 63–64 (William F. Swindler ed., rev. ed. 1979).

93. HOWARD, *supra* note 57, at 338–39.

94. *Id.* at 339–40, 340 n.22.

95. VA. CONST. art. II, § 1.

96. *Id.*

97. VA. CODE ANN. § 53.1-231.2 (Repl. Vol. 2013).

nor, however, still has authority to grant pardons to those individuals, as well as those who do not meet the criteria of the circuit court petition.⁹⁸

Despite the clemency power being returned to the governor after enactment of the Virginia Constitution of 1971 and the Supreme Court of Virginia making clear that “the Governor has the exclusive constitutional authority to pardon or commute sentences after conviction,”⁹⁹ the General Assembly retains the right to challenge the process by which the governor chooses to exercise his clemency power.¹⁰⁰ In the case of *Howell*, this meant questioning the suspension of a codified Virginia law.¹⁰¹

III. LIMITATION ON SUSPENSIONS

Perhaps the most significant constraint on unilateral executive overreach, which has remained unchanged since the enactment of the first Virginia Constitution, is section 7 of the Declaration of Rights.¹⁰² This provision declares the “suspending [of] laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.”¹⁰³ In drafting the Bill of Rights, George Mason knew exactly what was at stake if executive power was left unchecked. This clause, much like that of the governor’s original clemency power mentioned earlier, is clearly representative of the fear of an abusive executive. It is also a clear derivative of the English Bill of Rights enacted under William and Mary in 1689, which placed similar constraints on the English monarch’s suspension powers.¹⁰⁴

98. VA. CONST. art. V, § 12; VA. CODE ANN. § 53.1-231.2 (Repl. Vol. 2013).

99. *Montgomery v. Commonwealth*, 62 Va. App. 656, 665, 751 S.E.2d 692, 696 (2013).

100. *See, e.g., Howell v. McAuliffe*, 292 Va. 320, 327, 341, 788 S.E.2d 706, 710, 718 (2016).

101. *See generally id.* (examining Governor McAuliffe’s executive order in light of statutory pardoning power).

102. VA. CONST., art. I, § 7; VA. DECLARATION OF RIGHTS of 1776, § 7, *reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 48, 49 (William F. Swindler ed., rev. ed. 1979).

103. VA. CONST., art. I, § 7; VA. DECLARATION OF RIGHTS of 1776, § 7, *reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 48, 49 (William F. Swindler ed., rev. ed. 1979).

104. *English Bill of Rights 1689*, LILLIAN GOLDMAN L. LIBR.: AVALON PROJECT, YALE L. SCH., http://avalon.law.yale.edu/17th_century/england.asp (last visited Sept. 27, 2017) (“By

Despite the Virginia Constitution undergoing six revisions since it was first enacted in 1776, the Anti-Suspension Clause has remained unchanged.¹⁰⁵ Virginia was the first state to adopt a Bill of Rights and complete a constitution that forbade the practice.¹⁰⁶ It is without question that the unilateral abuses of the Stuart era, and even those that continued throughout the colonial period in America, heavily influenced this provision.¹⁰⁷

By maintaining a power believed to be fundamental to the executive, as Blackstone explained¹⁰⁸—yet ensuring that power remained unalterable, but for the power vested in the people through their representatives in the General Assembly—Mason established an inherent system of checks and balances that is as critical in its application today as it was over 240 years ago.

IV. *HOWELL V. MCAULIFFE*

The *Howell* court relied heavily on the historical background relating to the governor's clemency powers, as well as the reasoning behind article I, section 7—the Anti-Suspension Clause of Virginia's Bill of Rights. While both of these items have been discussed previously, this Part will focus on how Governor McAuliffe's actions—despite his good intentions—created a unique separation of powers issue. Further, this Part discusses the use of pardons as a means of increasing political favorability, as well as the Governor's impractical reliance on other Commonwealth agencies and the judiciary to enforce the Order.

assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament; By committing and prosecuting divers worthy prelates for humbly petitioning to be excused from concurring to the said assumed power.”).

105. COMM'N ON CONSTITUTIONAL REVISION, *THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION TO HIS EXCELLENCY, MILLS E. GODWIN, JR., GOVERNOR OF VIRGINIA, THE GENERAL ASSEMBLY OF VIRGINIA, AND THE PEOPLE OF VIRGINIA* 85, 90 (1969).

106. See HOWARD, *COMMENTARIES*, *supra* note 57, at 36, 90–91.

107. See *id.* at 90 (referring to Governor Dunmore's Emancipation Proclamation issued in the December prior to the 1776 Convention, freeing any slave that agreed to join the royal forces and fight against the revolution).

108. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 *YALE L.J.* 541, 660 (1994) (“[I]t is reasonable that he [the Executive] only who is injured should have the power of forgiving.”).

A. *Unilateral Overreach*

As Virginia's seventy-second governor, Terry McAuliffe was the first in the Commonwealth's history to attempt to pardon on a categorical basis.¹⁰⁹ This means that, rather than comply with the 1851 constitutional provision—which still exists today within article V, section 12—requiring the governor to report all individual acts of clemency (including restoration orders), he sought to issue pardons to all prior felons who had completed their post-incarceration probationary period.¹¹⁰ Thus, the Governor's action in suspending a portion of a law to “restor[e] the voting rights of everyone,” was equal to “rewrit[ing] . . . the law. . . .”¹¹¹

As discussed earlier, the framers—George Mason in particular—took great care to ensure limitations on the executive so as not to lead to unilateral prerogatives by including the Anti-Suspension Clause within the Bill of Rights.¹¹² It is this principle that founded the basis for a majority of the Bill of Rights and the Virginia Constitution as a whole, which embodies the protection of rights as secure from legislative or executive infringement.¹¹³

Governor McAuliffe's actions usurped that protection by abridging the separation of powers enumerated in the Bill of Rights—that “[t]he legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others.”¹¹⁴ Adhering to this language, it is the legislative body only—the elected representatives of the people of Virginia—that may amend or repeal current laws.¹¹⁵ If the Supreme Court of Virginia were to allow this type of executive maneuver to take place, the consequence could be dire. Creating precedent of circumventing the process by which Virginia's laws are enacted, enforced, and deliberated upon in its courts would essentially destroy the fabric of the Bill of Rights.

109. *Howell v. McAuliffe*, 292 Va. 320, 327, 341, 788 S.E.2d 706, 710, 718 (2016).

110. *Id.* at 327–28, 788 S.E.2d at 710; VA. CONST. art. V, § 12.

111. *Howell*, 292 Va. at 338, 788 S.E.2d at 716–17.

112. VA. DECLARATION OF RIGHTS of 1776, § 7, *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 48, 49 (William F. Swindler ed., rev. ed. 1979).

113. See HOWARD, COMMENTARIES, *supra* note 57, at 36.

114. VA. CONST. art. III, § 1.

115. VA. CONST. art. IV, §§ 14–15.

Further bolstering the principle of division of powers, Governor Timothy Kaine, who was the Democratic Party predecessor to Governor McAuliffe, was placed under considerable pressure to conduct a categorical pardon during his tenure in office.¹¹⁶ His administration responded by saying, “A blanket order restoring the voting rights of everyone would be a rewrite of the law rather than a contemplated use of the executive clemency powers.”¹¹⁷ By comparison to what the Stuarts did in the seventh century, the current Governor’s actions are very similar. Not only did Governor McAuliffe suspend a portion of law to pardon a large group of people, there is also the possibility that his executive order was intended to increase political favorability and provide protection for loyalists, just as James II’s Test Act suspension provided.

B. *Pardoning for Political Favor*

Another aspect of Governor McAuliffe’s action that has ties to the tumultuous Stuart era is the likelihood of the blanket pardons being made for political promotion. James II pardoned as a means to ensure he could install military officers or royal appointments to those who he knew would support him in an instance of rebellion, and also to improve his favorability among fellow Catholics, who had been removed from certain rights for being considered dangerous to the government and the community.¹¹⁸ As Alexander Hamilton noted, “there are often critical moments, when a well-timed offer of pardon . . . may restore the tranquility of the commonwealth.”¹¹⁹

The McAuliffe administration will not readily admit to this assertion, but it is worth noting that studies have concluded that approximately eighty percent of prior convicted felons who have their voting rights restored register as Democrats—Governor

116. *Howell*, 292 Va. at 338, 788 S.E.2d at 716.

117. Laura Vozzella, *GOP Sues to Block McAuliffe Order to Let 200,000 Virginia Felons Vote*, WASH. POST (May 23, 2017), https://www.washingtonpost.com/local/virginia-politics/gop-sues-to-strip-209k-felons-from-va-voter-rolls/2016/05/23/ef2587a8-20e4-11e6-aa84-42391ba52c91_story.html?utm_term=.06dcc3f2dfce.

118. See Brief for Governor Abbot et al. as Amici Curiae Supporting Respondents at 8, 14–16, *United States v. Texas*, 579 U.S. ___, 135 S. Ct. 906 (2016) (No. 15-674) [hereinafter *Governor Abbot et al. Amicus Brief*].

119. THE FEDERALIST NO. 74, at 484 (Alexander Hamilton) (N.Y. Modern Library ed. 1937).

McAuliffe's party affiliation.¹²⁰ Although the Governor himself is limited to serving one term, per article V of the Virginia Constitution,¹²¹ the motive to quickly restore the rights of individuals who would likely put his party in power in the General Assembly, as well as help his party's presidential candidate, cannot be overlooked.

As well intentioned as it is to restore the rights of those who have served their respective sentences, this cannot be done without respecting the Virginia Constitution in its entirety. At first glance, it may even seem that James II was a forward-thinking champion for religious liberty; however, further review will reveal that his actions were (1) aimed at destroying religious liberty of Protestants, and (2) mired by controversy in not only suspending the law, but also forcing the judicial body to decide in his favor.¹²²

C. *Impracticality of the Order*

In addition to Governor McAuliffe's attempt to grant a blanket pardon via executive fiat being wholly unconstitutional, it was also equally impractical from a policy perspective. By nature of the Order, each voter registrar throughout the Commonwealth was faced with the burden of registering to vote anyone who claimed to have had their right restored as a result of the Governor's Order.¹²³ Therefore, the voter registrar was tasked with determining not only the identity of the recently restored voter applicant, but also whether the individual had completed their sentences of incarceration subsequent to any felony conviction, as well as any period of supervised release.¹²⁴

The writ of mandamus issued by the court remedied this by ordering the Commonwealth's Election Commissioner to direct the registrars to remove the names that had been added since the Order's implementation.¹²⁵ However, because the Order also restored

120. Manza & Uggen, *supra* note 85, at 497.

121. VA. CONST., art. V, § 1.

122. See Governor Abbot et al. Amicus Brief, *supra* note 118, at 15–19.

123. Howell v. McAuliffe, 292 Va. 320, 352, 788 S.E. 2d 706, 725 (2016); see Press Release, Office of the Governor, Governor McAuliffe Restores Voting and Civil Rights to Over 200,000 Virginians (Apr. 22, 2016), <https://governor.virginia.gov/newsroom/newsarticle?articleId=15008>.

124. See Press Release, Office of the Governor, *supra* note 123.

125. See Howell, 292 Va. at 351–52, 788 S.E. 2d at 724–25.

the right of prior felons to serve on a jury, the impractical burden placed on Virginia's Circuit Courts by requiring judges to decide *who* would be eligible to serve on a jury became apparent in at least one case.¹²⁶ Judge Victor Ludwig of Augusta County explained the issues inherent with the order's ambiguity in his opinion, saying, "it is difficult to discern to whom the Order applies or when it applies."¹²⁷ He then fleshed out a scenario in which prior convicted felons with a suspended sentence would have no idea when, or if, their rights should be restored.¹²⁸

In another case, in Wise County, Virginia, Judge Chadwick Dotson refused to grant a prior convicted felon's petition to possess a firearm on the premise that his other rights—the right to vote and serve on a jury—had not been reinstated by the Governor.¹²⁹ Judge Dotson reasoned that, despite having received notification from the Governor's office, the petitioner's rights could not have been reinstated because the petitioner himself never actually sought to have them reinstated, which is required under the Virginia Code.¹³⁰ Although a law's impracticalness does not always mean it is unconstitutional, it is without question, at least in this case, that only law which adheres to the Virginia Constitution can ensure fairness for the Commonwealth and its citizens through its application and enforcement. This equivocality will continue until the governor's office amends the current restoration process to ensure compliance with the Virginia Code, and, in turn, the Virginia Constitution.

CONCLUSION

The Supreme Court of Virginia decision in *Howell v. McAuliffe* demonstrates the essence in which the state and nation were founded. Government exists by and for the people. While it's arguable that Governor McAuliffe's actions were righteous because he gave those who had served their time the ability to regain a right that is inherent to all law-abiding citizens of their respective states, it is not in question that the method by which the Governor went about executing the pardons was, indeed, a violation of the process prescribed within Virginia's Bill of Rights.

126. See *Commonwealth v. Broce*, 92 Va. Cir. 412, 412 (2016).

127. *Id.* at 413.

128. *Id.*

129. *Tickles v. Commonwealth*, 95 Va. Cir. 152, 153 (2017) (Wise County).

130. *Id.*; VA. CODE ANN. § 53.1-231.2 (Repl. Vol. 2013).

This process, as well as the larger principle of separation of powers and ensuring only the representatives of the people can change the law, is inherent to the social contract that is our foundation. The framers knew the difficulties that could arise from an unconstrained executive. They knew this because they were sound political historians, well aware of the acts of the Stuart Dynasty in the 17th century. This is why article I, section 7, the “Anti-Suspension Clause,” of the Bill of Rights has remained unchanged despite the Virginia Constitution being on its sixth revision. This is also the reason no Virginia governor, of the seventy-one that preceded Governor McAuliffe, thought the Virginia Constitution afforded them the power he claimed to possess. As Justice Holmes declared in 1921, “a page of history is worth a volume of logic.”¹³¹

*L. Michael Berman **

131. *New York Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921).

* J.D. Candidate, 2018, University of Richmond School of Law. B.S., 2015, George Washington University. I would like to extend a special thank you to Professor W. Hamilton Bryson for his invaluable guidance and support throughout the duration of this project. I also wish to thank the members of the *University of Richmond Law Review* for their time and effort preparing this comment for publication.
