

The Twilight of the Pardon Power

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Abstract

For most of our nation's history, the president's pardon power has been used with generosity and regularity, to correct systemic injustices and to advance the executive's policy goals. Since 1980, however, presidential pardoning has fallen on hard times, its benign purposes frustrated by politicians' fear of making a mistake, and subverted by unfairness in the way pardons are granted. What was once a steady stream of clemency grants has dwindled to a token few, and the process for administering the president's power now functions primarily to protect the handiwork of federal prosecutors. The diminished role of clemency is unfortunate, since federal law makes almost no provision for shortening a prison term and none at all for mitigating the collateral consequences of conviction. It would be bad enough in these circumstances if presidents had made a conscious choice not to pardon at all, or to make only occasional symbolic use of their constitutional power. But what makes the situation intolerable is that, as the official route to clemency has all but closed, the back-door route has opened wide. In the past two administrations, petitioners with personal or political connections in the White House bypassed the pardon bureaucracy in the Department of Justice, disregarded its regulations, and obtained clemency by means (and sometimes on grounds) not available to the less privileged. Much responsibility for the desuetude and disrepute into which a once-proud and useful institution of government has fallen must be laid at the door of the Justice Department, which has failed in its responsibilities as steward of the pardon power, exposing the president to embarrassment and the power to abuse. To date, President Obama has taken no steps to reform and reinvigorate a pardon process that has, in Justice Anthony Kennedy's words, been "drained of its moral force."

Who hijacked the president's pardon power? Is it worth rescuing, or should it be left to die in peace? To find the answers, this article first looks at pardoning practices in the 19th and early 20th centuries, a time when the pardon power played an important operational role in the federal justice system. It describes how pardon evolved into parole, and how after 1930 pardon came to be used primarily to restore rights of citizenship. It then examines the reasons for pardon's decline in the 1980s and its collapse in the Clinton Administration. Finally, it argues that President Obama should want to revive the power, and suggests how he might do it.

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Introduction

Fourteen months into his first term, President Barack Obama had yet to issue his first pardon.¹ More than 4000 petitions for clemency awaited his consideration.² At the same point in his administration, Abraham Lincoln had granted clemency to more than a hundred ordinary citizens and many more soldiers. Theodore Roosevelt issued 134 first-year clemency grants, Franklin Roosevelt 204, and Truman 107.³ Obama's early reticence in matters of official forgiveness should not be surprising, for it continues a trend begun in the Reagan Administration that accelerated under Bill Clinton. What was once a steady stream of presidential clemency grants has dwindled to a token few, and the process for administering the president's power now functions primarily to protect the handiwork of federal prosecutors. Like his immediate

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¹ President Obama, like Presidents Bill Clinton and George W. Bush before him, confined his first-year pardoning to the Thanksgiving turkey presented to him by the National Turkey Federation and the Poultry and Egg National Board. See Katherine Skiba, *Turkey Gets to Duck Dinner Date: Obama Pardons "Courage" in Holiday Ritual*, CHICAGO TRIBUNE, Nov. 26, 2009, at C3.

² U.S. DEPT. OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION, 1945 TO PRESENT, available at http://www.usdoj.gov/pardon/actions_administration.htm (last updated January 4, 2010) ("OPA Clemency Statistics, 1945-present"). The processing time for pardon petitions has lengthened from months to years, and case backlogs have become permanent. Many of the grants issued by President George W. Bush went to individuals who had filed their petitions more than a decade earlier.

³ Clemency statistics dating from the first Cleveland Administration (1885-89) show a consistent pattern of early first-term pardoning until the presidencies of Bill Clinton and George W. Bush, neither of whom made use of their pardon power until the end of their second full year in office. See U.S. DEPT. OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY FISCAL YEAR, 1900-1945, available at http://www.justice.gov/pardon/actions_fiscal.htm; OPA Clemency Statistics, 1945-present, *supra* note 2.

predecessors, and like most (though by no means all⁴) current governors, President Obama appears to have concluded that there is too little gain and too much risk in pardoning to make it a worthwhile activity.

The diminished role of clemency both reflects and reinforces a justice system has become inhumane and politicized. We live in a nation that imprisons a higher proportion of its population than any other in the world, and that permanently stigmatizes those convicted of crime. But federal law makes almost no provision for shortening a prison term and none at all for mitigating the collateral consequences of conviction.

It would be bad enough in these circumstances if presidents had made a conscious choice not to pardon at all, or to make only occasional symbolic use of their constitutional power. But what makes the situation intolerable is that, as the official route to clemency has all but closed, the back-door route has opened wide. In the two administrations that preceded Obama's, petitioners with personal or political connections to the presidency bypassed the pardon bureaucracy in the Department of Justice, disregarded its regulations, and obtained clemency by means (and sometimes on grounds) not available to the less privileged. The Justice Department invited these end runs by refusing to take seriously its responsibilities as presidential advisor in clemency matters, first exposing President Clinton to charges of cronyism, and later President Bush to charges of incompetence. The two presidents were also at fault: in confirming popular beliefs about pardon's irregularity and unfairness, they disserved both the institution of the

⁴ A few governors have used their pardon power in recent years, some based on a longstanding tradition of granting clemency in their state, some to ease overcrowding in their state's prison system, and some out of personal conviction. See e.g., Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED SENT. REP. 153, 153-155 (2009) (discussing policies of Arkansas Governor Mike Huckabee, Maryland Governor Robert Ehrlich, and Virginia Governor Tim Kaine); Steven Leidel, "Prisoner commutations have been rare and safe for public," DETROIT FREE PRESS, Feb. 14, 2010, at __. (Commutations granted by Michigan Governor Granholm to ease prison budget crisis). State clemency policies and practices are beyond the scope of this article, and are described in MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (William S. Hein, 2006) [hereinafter Resource Guide].

presidency and their own legacies. To date, President Obama has taken no steps to reform and reinvigorate a pardon process that has, in Justice Anthony Kennedy's words, been "drained of its moral force."⁵

Who hijacked the president's pardon power? Is it worth rescuing, or should it be left to die in peace? To find the answers, Part I of this article looks at pardoning practices in the 19th and early 20th centuries, a time when the pardon power played an important operational role in the federal justice system. It describes how pardon evolved into parole, and how in an age of indeterminate sentencing pardon came to be used primarily to restore rights of citizenship. Part II examines the reasons for pardon's decline in the 1980s and its collapse in the Clinton Administration. Part III argues that President Obama should want to revive the power, and suggests how he might do it.

I. Public Mercy from 1789 to 1980

In the *Federalist Papers*, Alexander Hamilton justified giving the president exclusive control of the "benign prerogative of pardoning" in terms of two great public purposes: to temper the law's harsh results as a matter of compassion, and to intercede to defuse a politically inflammatory situation. As to the first of these purposes, Hamilton observed that "without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too

⁵ Anthony M. Kennedy, Speech to the Annual Meeting of the American Bar Association, August 2003, 16 FED. SENT. REP. 126-128 (2003), available at <http://caliber.ucpress.net/doi/pdf/10.1525/fsr.2003.16.2.126>. Pointing out that pardons have "become infrequent," Justice Kennedy opined that "A people confident in its laws and institutions should not be ashamed of mercy." See also *Dretke v. Haley*, 541 U.S.386, 399 (2004)(Kennedy, J., dissenting)("Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider.").

sanguinary and cruel.”⁶ With respect to the second, he proposed that “in 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.” In a government otherwise of limited powers, there was to be no check on the president’s prerogative but public opinion.⁷

Examples of pardon used as a tool of statecraft abound in American history, often linked to wartime exigency or post-war amnesties. George Washington granted his first pardons in 1794 to Pennsylvania farmers challenging the federal government’s power to tax whiskey.⁸ Sixty years later Abraham Lincoln used the pardon power to bring a measured end to another dangerous internal rebellion, this time involving the “largest massacre of whites by Indians in American history.”⁹ Presidents since Thomas Jefferson have issued post-war pardons to

⁶ THE FEDERALIST, No. 74, at 498 (Clinton Rossiter, ed. 1961) (Alexander Hamilton). *See also* Douglas Hay, *Property, Authority and the Criminal Law*, in DOUGLAS HAY, ET AL. ALBION’S FATAL TREE: CRIME AND SOCIETY IN 18TH CENTURY ENGLAND 44 (1975) (Pardon “moderated the barbarity of the criminal law in the interests of humanity. It was erratic and capricious, but a useful palliative until Parliament reformed the law in the 19th century”).

⁷ While the prospect of punishment at the polls or impeachment may have no persuasive value for a president at the end of his term, the Framers believed that the President would always be restrained by the risk of what James Iredell called “the damnation of his fame to all future ages.” Address in the North Carolina Ratifying Convention (July 28, 1788), in THE FOUNDERS’ CONSTITUTION 17 (P. Kurland & R. Lerner, eds. 1987). The political checks on the pardon power have collectively been called “limited and clumsy,” LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-10, at 721 (3d ed. 2000). Even sixty years ago when pardoning was frequent and routine, the only systematic study of the federal pardon power noted the “persistence of erroneous ideas, the lack of exact information, and the absence of publicity concerning the acts of the pardoning authority envelop the power in a veil of mystery.” W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 6 (1941).

⁸ *See* JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 55-56 (2009). After the so-called “Whiskey Rebellion” had ended peacefully with the ringleaders pardoned individually and the other insurgents granted amnesty, Washington explained to Congress that his pardons had been motivated both by mercy and the public interest: “[I]t appears to me no less consistent with the public good than it is with my personal feelings to mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity, and safety permit.” JAMES D. RICHARDSON, 1 MESSAGES AND PAPERS OF THE PRESIDENTS 184 (Government Printing Office 1896).

⁹ DAVID HERBERT DONALD, LINCOLN 392 (1995). Lincoln sent troops to quell the Sioux uprising in Minnesota, and later personally reviewed a list of 303 men condemned to death by military tribunal, commuting all but 38 of them, provoking public outrage. *See also* P. S. Ruckman, Jr. & David Kincaid, *Inside Lincoln’s Clemency Decision Making*, 29 PRESIDENTIAL STUDIES Q. 84, 87-88 (1999).

deserters and draft evaders,¹⁰ and to signal their disagreement with a law.¹¹ Pardon has also figured in politically divisive issues like labor organizing, race relations, polygamy, and Puerto Rican independence.¹² Arguably the most famous statecraft pardon of all is Gerald Ford's of Richard Nixon.

While the tradition of clemency as statecraft is an important and enduring one, this article is concerned with the equally important tradition in American history involving the use of clemency to make "exceptions in favor of unfortunate guilt."

¹⁰ Madison issued amnesties on three separate occasions during the War of 1812 to persuade deserters from the army to return to service. JAMES D. RICHARDSON, 2 MESSAGES AND PAPERS OF THE PRESIDENTS 413, 497, 528 (1897). Lincoln approved amnesties for Confederate rebels during the Civil War in an effort to co-opt them to the Union side, while Andrew Johnson issued amnesties after the conclusion of hostilities to promote national healing. See CROUCH, *supra* note 8 at 40-43, and authorities cited. Theodore Roosevelt pardoned participants in the Philippine insurrection, and Warren Harding pardoned Eugene V. Debs and others convicted of subverting military recruitment during World War I. In gratitude for their service, Harry Truman pardoned ex-convicts who had served in the armed forces during World War II, subject to review by a presidentially-appointed three-person board. *Id.* At 56-60. See also Bibliography of Amnesty in America 22-24 (Morris Sherman ed., 1974). Presidents Ford and Carter pardoned persons guilty of military and selective service violations following the Vietnam War. See U.S. Presidential Clemency Board, Report to the President (1975); Proclamation No. 4483, 3 C.F.R. 4 (1978). As one pardon scholar has observed, "pardons are a better signal than an armistice agreement to show that a war is truly over and that peace is restored." KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 51 (1989).

¹¹ For example, Jefferson pardoned some of those convicted under the Alien and Sedition Acts because he considered these acts unconstitutional. Woodrow Wilson, whose veto had failed to prevent passage of the Volstead Act, pardoned dozens of liquor law violators. See P.S. Ruckman, Jr., *The Pardoning Power: The Other Civics Lessons*, Paper presented at the Annual Meeting of the Southern Political Science Association (November 2001). A similar dislike of a law was behind Bill Clinton's last-day pardon of people prosecuted under the Independent Counsel Act. See Amy Goldstein & Susan Schmidt, *Clinton's Last-Day Clemency Benefits 176; List Includes Pardons for Cisneros, McDougal, Deutch and Roger Clinton*, WASH. POST, Jan. 21, 2001, at A1 ("Clinton appeared to be tying up loose ends from many of the independent counsel investigations that had daunted him and several senior members of his administration virtually from the beginning of his tenure."). In the 1960s, John Kennedy and Lyndon Johnson together commuted the prison sentences of more than three hundred drug offenders, laying the groundwork for repeal of mandatory minimum sentencing laws in the 1970s. See 1963 ATT'Y GEN. ANN. REPT., at 62-63; 1964 ATT'Y GEN. ANN. REPT., at 64. See also Charles Shanor & Marc Miller, *Pardon Us: Systematic Pardons*, 13 FED. SENT. RPTR. 139, 141 (2001).

¹² See CROUCH, *supra* note 8 at 56-60 (discussing clemency grants to Debs, Jimmy Hoffa, Oscar Collazo, Marcus Garvey, and FALN nationalists). James Buchanan pardoned Mormon participants in the Utah War of 1857-58, see http://en.wikipedia.org/wiki/Utah_War (last visited March 7, 2010), and Benjamin Harrison and Grover Cleveland later pardoned Mormon polygamists to smooth the path to Utah's statehood. See <http://hnn.us/blogs/entries/46038.html> (last visited March 7, 2010).

A. The Administration of the Pardon Power Before 1870

From the earliest years of the Republic, pardon was used to benefit ordinary people for whom the results of a criminal prosecution were considered unduly harsh or unfair. This kind of low-level pardoning took place largely out of the public eye, but with some regularity. Presidents spent what seems today like a great deal of time considering pardon requests, which frequently came from judges forced to apply laws they regarded as excessively harsh.¹³ Presidents granted clemency to a high percentage of those who asked for it, forestalling or halting prosecutions, cutting short prison sentences or remitting them entirely, forgiving fines and forfeitures, and occasionally restoring citizenship rights lost as a result of conviction. The secretary of state was the official custodian of pardon documents, but the presidents generally relied on their attorneys general for advice about how and when to exercise their constitutional power. Access to the president's mercy sometimes depended upon personal or political connections, and early pardon warrants reveal that the president frequently gave weight to "respectable testimonials" about a pardon petitioner's former good character from prominent citizens.¹⁴ Thomas Jefferson began the practice of routinely seeking the views of district attorneys and judges, declaring that "No pardon is granted in any case but on the recommendation of the judges who sat on the trial &

¹³ See Margaret Love & George Lardner, Jr., *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT. REP. 212, 212, 213 (2004):

The pardon archives disclose that, in the early federal justice system, the President played an important and active role in making what Alexander Hamilton called "exceptions in favor of unfortunate guilt," often at the behest of a federal judge frustrated by the severity of the penalty he had been required by law to impose. Judges urged the President to intervene not only in capital cases, but also in cases involving mandatory fines (which had to be paid before a person could be released) and prison terms.

.....

Often defendants would petition the sentencing court directly for clemency, giving the judge an opportunity to send the petition on to the President with a recommendation. Occasionally judges took the initiative in approaching the President rather than rely on the cumbersome machinery of law. Such early judicial activism was particularly evident in District of Columbia cases prior to 1831, and in cases involving employee mail theft.

¹⁴ See, e.g., *id.* at 219.

who best know & estimate the degree of the crime, & character and deportment of the criminal.”¹⁵ Later presidents would continue this practice.¹⁶ Reasons for pardon were occasionally spelled out in pardon warrants, though James Polk was the first president to adopt this practice on a systematic basis.¹⁷

The informal and idiosyncratic system for administering the pardon power that prevailed in the first half of the 19th century began to crystallize in 1852, when Daniel Webster, Millard Fillmore’s Secretary of State, formally handed over responsibility for investigating and making recommendations on clemency petitions to Attorney General William Crittenden.¹⁸ Under President Buchanan, a pardon clerk was appointed to assist the attorney general in his new administrative responsibilities.¹⁹

¹⁵ *Id.* at 213 n.21, *citing* Jefferson’s statement in National Archives and Records Administration, Petitions for Pardon – 1789-1860, Record Group 59//893, box 2, file 104.

¹⁶ *See* HUMBERT, *supra* note 7, at 86-88. The requirement to seek the advice of the relevant United States Attorney in every case was spelled out in Justice Department clemency regulations between 1898 and 1946 (available from the Office of the Pardon Attorney, U.S. Department of Justice). After 1962 the requirement was no longer in the clemency regulations, though the pardon attorney invariably seeks the recommendation of the U.S. Attorney and judge when favorable consideration is being considered. *See* Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 39 (2005) (“if the background investigation suggests that a pardon may warranted, or in cases which are of particular importance or in which significant factual questions persist, the Pardon Attorney requests input from the prosecuting authority and the sentencing judge concerning the merits of the petition.”).

¹⁷ Journalist George Lardner, Jr. is preparing a comprehensive history of clemency in the United States, and he has generously shared with me several draft chapters. Most of the information about pardoning prior to 1858 comes from his archival research as reported in a chapter tentatively titled “A Golden Age for the Pardon Power” at pages 339 *et seq.* Lardner reports that Polk “was his own pardon attorney,” who “wrote careful notes, demanding copies of indictments and court records, insisting on reports from judges and district attorneys. . . His pardons often provided harsh glimpses of the justice system, setting out a judges admissions about the unreliability of a key prosecution witness in one case, a jury’s belated discovery of false testimony in another, and in yet another the incompetence of a steamboat inspection that left a crippled captain facing civil prosecution because his boiler exploded.” *Id.* at 341 (citations omitted).

¹⁸ *See* H. CUMMINGS & C. MCFARLAND, FEDERAL JUSTICE 149 (1937). The State Department had previously processed clemency applications, but in 1858, Secretary of State Daniel Webster and Attorney General John Crittenden agreed that “petitions should pass entirely into the Attorney General’s charge, although warrants would still issue from the State Department.” *Id.* at 80. President Cleveland transferred authority to issue pardon warrants to the Justice Department by executive order in 1893. *Id.*

¹⁹ *See* Love & Lardner, *supra* note 13, at 213 n.21.

During the Civil War, President Lincoln's inclination to be merciful, and his sensitivity to pardon's political usefulness, were the source of some frustration to his generals – though his pardoning apparently inspired the troops.²⁰ He once spared the lives of 62 deserters in a single order,²¹ and wrote to General George Meade that he was “unwilling for any boy under 18 to be shot.”²² General William T. Sherman complained to the Judge Advocate General that Lincoln found it “very hard . . . to hang spies,” reporting that he intended “to execute a good many spies and guerrillas . . . without bothering the President.”²³ Lincoln spent long hours reviewing clemency requests from soldiers and their families,²⁴ and famously entertained pardon petitioners at the White House.

While Lincoln's military pardons were the stuff of legend, he also issued 331 clemency warrants to people convicted in the civilian courts. Attorney General Edward Bates, embodiment of an emerging institutional impulse to manage the practice of pardoning, worked

²⁰ A popular poem of 1863 recited a fanciful tale of Lincoln's pardon of William Scott, a soldier sentenced to death for sleeping on sentry duty. FRANCIS DE HAES JAVIER, *THE SLEEPING SENTINAL: AN INCIDENT IN VERSE* (Philadelphia: T. B. Peterson & Bros. 1863) (“He came to save that stricken soul, now waking from despair; and from a thousand voices rose a shout which rent the air! The pardoned soldier understood the tones of jubilee, and, bounding from his fetters, blessed the hand that made him free!”). In 1870, Harper's Weekly published a full-page illustration of Lincoln arriving at the place of Scott's scheduled execution barely in time to save his life, and in 1914, Scott's pardon became the plot of a silent motion picture. Wikipedia, William Scott (The Sleeping Sentinel), [http://en.wikipedia.org/wiki/William_Scott_\(The_Sleeping_Sentinel\)](http://en.wikipedia.org/wiki/William_Scott_(The_Sleeping_Sentinel)) (last visited March 7, 2010).

²¹ See Ruckman & Kincaid, *supra* note 8 at 85, citing BELL IRVIN WILEY, *THE LIFE OF BILLY YANK: THE COMMON SOLDIER OF THE UNION* 216 (1972). A total of 267 men were executed by the military authorities during the Civil War, however, and 141 of them were deserters. See J. T. Dorris, *President Lincoln's Clemency*, 20 J. ILL. STATE HIST. SOC'Y 547, 553 (1953).

²² See CARL SANDBURG, *3 ABRAHAM LINCOLN: THE WAR YEARS* 476 (1939).

²³ See Dorris, *supra* note 21, at 550. When asked on another occasion how he was able to execute court-martialed offenders without Presidential interference, Sherman replied, “I shot them first.” Ruckman & Kincaid, *supra* note 8, at 85.

²⁴ See, e.g., MICHAEL BURLINGAME & JOHN R. TURNER ETTLINGER, eds., *INSIDE LINCOLN'S WHITE HOUSE: THE COMPLETE CIVIL WAR DIARY OF JOHN HAY* 64 (1997) (describing a six-hour session in which Lincoln eagerly “caught at any fact which would justify him in saving the life of a condemned soldier”).

hard to control access to the president and keep track of those to whom he made promises.

Pardon Clerk Edmund Stedman reported, “My chief, Attorney General Bates, soon discovered that my most important duty was to keep all but the most deserving cases from coming before the kind Mr. Lincoln at all; since there was nothing harder for him to do than put aside a prisoner’s application”²⁵ Indeed, the Attorney General declared that Lincoln was “unfit to be trusted with the pardoning power,” partly because he was too susceptible to women’s tears.²⁶ Lincoln accepted advice from all quarters, and frequently provided explicit and detailed reasons for clemency decisions in the warrants themselves.²⁷ At the same time, he approved many capital sentences, in one case rejecting a petition for clemency signed by 91 Members of Congress.²⁸

B. The Justice Department and the Pardon Power, 1870-1930

A regime in which a petitioner could appear personally before the president to plead for a pardon became unthinkable after the Civil War, as the federal justice system grew in size and complexity. Attorney General Bates and General Sherman were also probably correct in

²⁵ Dorris, *supra* note 21, at 550, *citing* Laura Stedman & George M. Gould, 1 Life and Letters of Edmund Clarence Stedman 265 (1910).

²⁶ See RICHARD N. CURRENT, THE LINCOLN NOBODY KNOWS 169 (1958). People joked that enterprising merchants in the District of Columbia rented weeping children and widow’s weeds to the mothers of condemned soldiers before their audiences with the President. See WILLIAM E. BARTON, THE LIFE OF ABRAHAM LINCOLN 149, 255 (1925).

²⁷ Ruckman and Kincaid conclude that Lincoln in this way used “the clemency decision-making process as a way to win the respect and support of the citizenry.” Ruckman & Kincaid, *supra* note 9, at 93-94. Petitioners were evidently well advised to stop on Capitol Hill and other governmental centers on their way to the White House, for Lincoln’s clemency warrants noted the support of U.S. Senators (15 warrants); Members of Congress (14 warrants); governors (12 warrants); judges, including one Supreme Court Justice (73 warrants); prosecutors (78 warrants); and prison officials (44 warrants). They also noted the support of former public officials, state legislators, mayors, aldermen, generals, the Vice President, and many ordinary citizens. The clemency warrant of one offender, for example, recited the endorsement of a “large majority” of the Pennsylvania legislature and “several thousand citizens.” *Id.* at 94.

²⁸ Dorris, *supra* note 21, at 554.

complaining that a system based on personal access made it too difficult for a president to say no, and too easy for individuals with a personal or political agenda to influence the exercise of the president's power. The solution to both problems was to place the administration of the pardon power firmly and exclusively in the hands of the attorney general. This made sense not only to avoid compromising the president or wasting his time, but also to ensure that the pardon power would be able to function as an integral part of the justice system itself.

The administrative system formalized after the Department of Justice was established in 1870 made the unruly power part of the more general transformation of the justice system to an administrative state, and steered most clemency suitors away from the president's door for over 100 years. At this time the attorney general also became responsible for the proper care of federal prisoners, then mostly housed in state facilities, and he made it a priority to ensure their access to the clemency process. In 1880, he reported that:

A system of regular inspection has been instituted whereby prisoners are visited as often as once in six months, with a view of ascertaining from personal observation their treatment and their wants. These visits are made by a representative of this department, and he has personal interviews with the prisoners, individually and alone, in order to determine whether there were just grounds of complaint of the discipline to which they were subjected. I have every reason to believe that he has carefully and humanely performed his duty in the matter. He has also been instructed to bring, through this department, to the attention of the President, consideration of any case which seems to require executive clemency toward sick or friendless prisoners who might otherwise have no means of communicating with the pardoning power. A system of forms has been prepared by this officer by which all jails and prisons are required to furnish monthly reports with full particulars as to prisoners of the United States in their charge.²⁹

In 1887, Clerk of Pardons Alexander Boteler reported to Congress on the general handling of pardon applications: "Every application for pardon addressed to the President is

²⁹ 1880 ATT'Y GEN. ANN. REPT. at 20.

referred to the Attorney-General and by him to the clerk of pardons for his prompt and appropriate attention.” In turn, the pardon clerk asked the United States Attorneys and judges for their views, continuing the practice begun by Jefferson, and then made a full report to the attorney general, always being careful “to accord to the convict all that he may be fairly entitled to have said in his favor.”³⁰ The attorney general, having thus been provided with “an impartial representation of the case,” then sent the president his recommendation as to whether pardon should be granted or not. If it was “the pleasure of the President to grant the pardon asked for,” the attorney general prepared a pardon warrant, which was copied out at the state department, signed by the president, and forwarded to the pardon clerk for delivery to its recipient. If the president declined to grant a pardon, the applicant was so informed. By Cleveland’s second term, it had become the practice for the pardon attorney to deny petitions without sending them on to the president if neither the prosecutor nor the judge had recommended favorably.³¹ In most years, this meant that about 300 petitions were sent to the president every year.³²

Beginning in Cleveland’s first term (1885-1889), the reasons for each pardon recommendation were published in the Annual Reports of the Attorney General, a practice that would continue until 1931. The attorney general at the time was Augustus Garland, famously the recipient himself of a post-Civil War pardon,³³ and he took a personal interest in pardon

³⁰ Report 507, Part 3, 50th Cong., 1st Sess., 20-23.

³¹ 1897 ATT’Y GEN. ANN. REP. at 180 (Report of the Pardon Attorney)(“Cases in which neither the United States Attorney nor the trial judge recommends clemency are not considered by the President unless it is apparent that the health of the convict will be very seriously impaired by further confinement.”).

³² In 1897, for example, 669 petitions for clemency were received by the attorney general, of which 334 were sent on to the president with a recommendation. 1897 ATT’Y GEN. ANN. REP. at 179. Of those 334 petitions, 224 were granted by the president: 98 unconditional pardons, 5 conditional pardons, 80 sentence commutations, 31 pardons “for the purpose of restoring citizenship,” five remissions of fine and five respites. One hundred and ten petitions were denied.

³³ *Ex Parte Garland*, 71 U.S. 333 (1866).

cases.³⁴ During the second Cleveland administration (1893-1897), the President worked directly with the pardon clerk, and wrote out lengthy justifications for pardon in more than 714 cases. Cleveland's detailed and highly personal reasons for pardon offer a fascinating window into the primitive legal system of the time, as well as the thoughtful approach of this most forgiving president.³⁵

The first formal clemency rules approved by President McKinley in 1898 incorporated the same basic features that had evolved less formally under President Cleveland: all clemency petitions were filed in the first instance with the attorney general; the pardon attorney then sent each one promptly to the U.S. Attorney, who was responsible for making a recommendation and

³⁴ HUMBERT, *supra* note 7, at 97.

³⁵ See ATT'Y GEN. ANN. REP., 1893 through 1897. Cleveland personally denied another 516 cases, and allowed more than 750 applications to die without action at the Justice Department. In several early cases, he made clear his dislike of the primitive federal law of murder, which knew no degrees. See commutations granted to Mason Holcomb, William Dickson, Frederick Ray, and Williams Meadows, all sentenced to hang in the District of Arkansas by the notorious hanging judge Isaac Parker. 1885 ATT'Y GEN. ANN. REP. at 344. In one case during his second term, President Cleveland explained his commutation of Thomas Taylor's death sentence as follows:

In disposing of this case I am not able to rest my action upon the far too common allegation of insanity, nor upon the theory of accidental or unintentional homicide, both of which pleas have been strongly urged on behalf of the convict as well as upon his trial as upon his application for Executive clemency. This commutation is granted upon the ground that, in my opinion, there has not been presented in the case such distinct and satisfactory evidence of premeditation as should characterize the crime of murder in the first degree, and because I think it can fairly be assumed from the facts developed that the discovery by the convict just prior to the homicide of the recent and flagrant infidelity of his wife so affected him that he took her life in an instant of blind passion and terrible rage. This case presents another illustration of the desirability of the classification of murder into degrees in the District of Columbia, as has been done with good results in some of the states.

1896 ATT'Y GEN. ANN. REP. at 182-83. In another 1896 case, involving one Eugene LeBeuf, who had been convicted in the Eastern District of New York of sending obscene pictures through the mail and sentenced to two years in Kings County penitentiary, the President noted that

Though I find it exceedingly difficult to extend any measure of clemency in a case involving the despicable crime of which this convict was confessedly guilty, yet I think that this is an exceptional case of its class. The convict has already been imprisoned fourteen months, his character prior to his arrest was good, and he was of industrious habits; but I confess I am more influenced by the sufferings and privations which his longer incarceration would bring upon his innocent wife and child.

Id. at 190.

also soliciting the judge's; and, any pardon application that failed to attract official support could be denied by the pardon attorney without being sent to the president.³⁶ Given the requirement of a favorable recommendation from the prosecutor, it may be surprising (at least to anyone accustomed to the present-day hostility of prosecutors toward clemency) to see that in most years between 1885 and 1936, more than half of the thousands of petitions filed were sent forward to the White House with a favorable official recommendation.³⁷ At the White House, the president usually approved cases recommended favorably by the Attorney General, and sometimes was more inclined to leniency. In 1932, Attorney General William Mitchell commented in a speech to the American Bar Association on the tension that sometimes arose between Justice Department prosecutors, determined to enforce the criminal laws severely, and President Hoover, a veteran practitioner of humanitarian relief:

Reviewing the past three years, I believe that it is in respect to pardons that President Hoover has most often shown an inclination to disagree with the Department of Justice. I suspect he thinks we are too rigid. The pitiful result of criminal misconduct is that the burden of misery falls most heavily on the women and children. If executive clemency were granted in all cases of suffering families, the result would be a general jail delivery, so we have to steel ourselves against such appeals. President Hoover, with a human sympathy born of his great experiences in the relief of human misery, has now and again, not for great malefactors but for humble persons in cases you never heard of, been inclined to disagree with the prosecutor's viewpoint and extend mercy. We have been glad when such incidents occurred.³⁸

The clemency process also appears to have been extremely efficient, judging by the many petitioners who gained release prior to the expiration of prison sentences that were measured in

³⁶ See Rules 1, 3 and 4 of the "Rules Relating to Applications for Pardon," February 3, 1898, signed by President William McKinley and Attorney General John Griggs. See *supra* note 15.

³⁷ See HUBBERT, *supra* note 7, at 108, chart II.

³⁸ Address, Reform in Criminal Procedure, October 13, 1932, quoted in HUBBERT, *supra* note 7 at 121.

months rather than years.³⁹ This bears emphasis in light of present-day case backlogs: hundreds of petitions were fully processed each year by the pardon attorney and a handful of assistants, reviewed by the attorney general, and promptly decided by the president.⁴⁰

The attorney general's practice of reporting the reasons for each clemency recommendation told a grim story about federal justice in the late 19th and early 20th century, suggesting that little progress had been made toward the humane and efficient system that Enlightenment philosophers had expected would eliminate the need for pardon. At a time when basic principles of culpability were still loosely defined, and courts had only limited authority to review a jury's guilty verdict or vary statutory penalties,⁴¹ pardon performed a variety of important error-correcting and justice-enhancing functions that are nowadays played by courts, and was accordingly valued almost as much by prosecutors and judges as it was by criminal defendants.⁴² Indeed, one authority on 19th century pardoning has concluded, based on archival research and the reasons given by the attorney general for recommending pardon, that prosecutors and judges relied upon the easy availability of clemency to excuse a somewhat less

³⁹ Before the 1920s, it is hard to find a court-imposed prison sentence longer than five years in the attorney general's clemency charts, and even in the 1920s, prison sentences as long as 10 years were relatively infrequent.

⁴⁰ See HUMBERT, *supra* note 7, at 91-92 (describing the allocation of responsibility among the seven people in the office of the pardon attorney in 1940, a relatively typical year in which 1293 applications were received and 270 grants were issued).

⁴¹ In 1879, circuit courts were empowered to issue writs of error on a discretionary basis, Act of March 3, 1879, ch. 176, 20 Stat. 354, and a variety of procedural devices, including writs of habeas corpus, motions for a new trial, and certificates of division, allowed some appellate review even before 1879. See Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 531-43 (1992). In 1889 federal defendants sentenced to death gained the right to appeal, Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656, and in 1891 other defendants convicted of serious crimes gained the same right. Act of March 3, 1891, ch. 517, § 5, 26 Stat. 826.

⁴² The sympathy of prosecutors toward pardon was replicated in the states. See, e.g., James D. Barnett, *The Grounds of Pardon*, 17 J. AM. INST. CRIM. L. & CRIMINOLOGY, 490, 505 (1927), quoting H. B. Tedrow, member of the state board of pardons of Colorado, Proceedings of the Annual Congress of the American Prison Association, 1911, at 300-301: "I have read dozens of communications from judges saying their sentences in specific cases were too severe. . . . District attorneys time and again tell us that particular sentences are excessive and thus confess that a well-intended prosecution was transformed into an unintended persecution."

than rigorous attention to due process, and a hands-off approach to jury verdicts.⁴³ Between 1885 and 1931, 181 pardon recommendations were based in whole or in part upon “doubt as to guilt;” 52 cited “insufficient evidence” to support conviction, 93 announced that grantees were innocent or the victims of mistaken identification, and 46 noted the “dying confession of the real murderer.”⁴⁴

Some reasons given for granting pardon during this period would in time become recognized as legal defenses: lack of capacity, duress, insanity, and a variety of other mitigating circumstances or excuses that the jury had either ignored or been unaware of. Others reflect operational considerations relating to age and health (fear of contagion was as likely as imminent death to qualify a prisoner for early release), immigration status (to facilitate or avert deportation), or cooperation with the government (either to reward it or secure it). Sometimes pardon was recommended for reasons that seem quaint (e.g., “to enable petitioner to catch steamer without delay,” “to enable farmer prisoner to save his crops,” “not of criminal type”) or alarming (“mental infirmity of judge”).⁴⁵ Other frequently cited reasons involve the petitioner’s “previous good character,” the destitute circumstances of his wife and children, and the reputation and influence of those supporting clemency.

⁴³ See Lardner, *supra* note 16, at 514 (“Many federal prosecutors and judges across the country were still accustomed to literal application of the laws that could then be ameliorated by recommending a pardon.”). A similar willingness among 18th century English judges to impose harsh laws with an expectation of a later pardon has been described by Dennis Hay, *supra* note 6 at 23 (“Parliament intended their legislation to be strictly enforced, and . . . the judges increasingly vitiated that intention by extending pardons freely). See generally reasons given for grants in the attorney general reports from 1885 through 1910; HUMBERT, *supra* note 7, Tables V and VI.

⁴⁴ HUMBERT, *supra* note 7, at Tables V & VI.

⁴⁵ *Id.* at 124-133.

Pardons during this period were also used to signal the need for law reform. In addition to President Wilson's famous sympathy with liquor law violators,⁴⁶ many acts of clemency prefigured defenses that would eventually be enacted into law. For example, the first federal murder statute, part of the initial federal criminal code of 1790, did not divide murder into degrees, and it declared the crime punishable by death.⁴⁷ Proposals to treat unpremeditated murder as a non-capital offense were heeded only in 1909,⁴⁸ but in the meantime, Presidents Cleveland, Theodore Roosevelt, and Taft reviewed the records in capital cases and commuted the death sentences of murderers who they concluded had not premeditated their crimes.⁴⁹ A 1939 Justice Department study took note of pardon's role in hastening development of legal reforms:

[Pardon] has been the tool by which many of the most important reforms in the substantive criminal law have been introduced. Ancient law was much more static and rigid than our own. As human judgment came to feel that a given legal rule, subjecting a person to punishment under certain circumstances, was unjust, almost the only available way to avoid this rule was by pardon. . . . Quickly

⁴⁶ See *supra* note 11.

⁴⁷ Act of Apr. 30, 1790, 3, reprinted in 2 Annals of Cong. 2273, 2274 (1790) (declaring "willful murder" "within . . . any . . . place or district of country, under the sole and exclusive jurisdiction of the United States" punishable by death).

⁴⁸ See Act of Mar. 4, 1909, ch. 321, §§ 273, 275, 35 Stat. 1143. For one complaint about Congress's failure to divide the crime of murder into degrees, see 1896 ATT'Y GEN. ANN. REP. at vii-viii.

⁴⁹ See Humbert, *supra* note 7, at Table V. President Cleveland explained his 1896 commutation of Thomas Taylor's death sentence as follows:

In disposing of this case I am not able to rest my action upon the far too common allegation of insanity, nor upon the theory of accidental or unintentional homicide, both of which pleas have been strongly urged on behalf of the convict as well as upon his trial as upon his application for Executive clemency. This commutation is granted upon the ground that, in my opinion, there has not been presented in the case such distinct and satisfactory evidence of premeditation as should characterize the crime of murder in the first degree, and because I think it can fairly be assumed from the facts developed that the discovery by the convict just prior to the homicide of the recent and flagrant infidelity of his wife so affected him that he took her life in an instant of blind passion and terrible rage. This case presents another illustration of the desirability of the classification of murder into degrees in the District of Columbia, as has been done with good results in some of the states.

1896 Att'y Gen. Ann. Rep. at 182-83.

pardons on such grounds became a matter of course; and from there to the recognition of such circumstances as a defense was only a short step. This is what happened with self-defense, insanity, and infancy, to mention only three examples.⁵⁰

The range of reasons given for favorable pardon recommendations in the attorney general reports reveal not only that pardon functioned as an integral part of the justice system, but also that its exercise (much like the exercise of prosecutorial discretion) was frequently informed by an idiosyncratic sense of compassion. Attorney General Charles J. Bonaparte observed in 1908 that:

I have always considered with especial care the possible claims to clemency of unenlightened and apparently friendless criminals, particularly those whose crimes might have been the fruits of sudden and violent passion, ignorance, poverty, or unhappy surroundings and to deal less favorably with applications on behalf of offenders enjoying at the time of the crime good social position, material comforts, the benefits of education, and a happy domestic life.⁵¹

In 1897, Grover Cleveland's very last pardon went to a postal thief who he opined was "not entitled to the least clemency." However, the prisoner had "a wife and 8 children who are in a destitute condition, and the situation is made more pitiable by the fact that the wife has lately had a stroke of paralysis, from which there is no hope of her recovery." Noting that a job awaited the prisoner that would enable him to care for his family, the President declared, "[T]his pardon is granted solely on their account."⁵²

The number of grants each year is staggering in light of the relatively small number of the federal defendants. The annual reports of the attorney general for the years between 1885 and

⁵⁰ See 3 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 295-96 (1939) [hereinafter 3 SURVEY OF RELEASE PROCEDURES].

⁵¹ 1908 ATT'Y GEN. ANN. REP. 8. Unfortunately, after 1931 these fascinating records were no longer compiled and published, ostensibly for reasons of efficiency but more likely because of President Roosevelt's preference for confidentiality in the pardon process, and they exist now only in the uncatalogued letters of advice signed by the Attorney General available from the National Archives and Records Administration.

⁵² 1896 ATT'Y GEN. ANN. REP. at 187-88.

1930 reveal that the presidents issued more than 10,000 grants of clemency during this 45-year period, frequently more than 300 per year. More than three quarters of the grants issued before 1910 went to petitioners seeking to reduce or avoid a prison term,⁵³ and post-sentence pardons “to restore civil rights” amounted to less than 20% of all grants⁵⁴ After 1910, most grants to prisoners were styled “sentence commutation,” replacing the full or conditional pardon more frequently used in earlier years to release a person from a prison term. After 1930, post-sentence pardons became the most frequent form of relief, as parole displaced pardon as the primary mechanism for early release.⁵⁵

Pardoning throughout this period was a regular part of the housekeeping business of the presidency. Pardons were granted frequently and generously at regular intervals over the course of each president’s term, with no slow starts and no bunching of grants at the end.⁵⁶ Indeed, between 1902 and 1933 there was only one month in which not a single pardon was granted, the

⁵³ While most grants to prisoners prior to 1895 were simply styled “pardon,” after that time official reports categorized grants in a variety of ways. For example, between 1895 and 1904, the president granted 871 unconditional pardons, 101 conditional pardons, 552 commutations, six conditional commutations, 362 pardons “to restore civil rights,” and 89 miscellaneous grants of reprieve, respite, and remission of fine. See ATT’Y GEN. ANN. REPS., 1895 through 1904. By the 1920s the number of full pardons had declined to about 10% of the total, and most grants were described either as “commutation of sentence” or “pardon to restore civil rights.” For the decade between 1920 and 1929, the presidents issued 1764 commutations, 1239 pardons to restore civil rights, and only 203 full pardons. See ATT’Y GEN. ANN. REPS., 1920 through 1929.

⁵⁴ See HUMBERT, *supra* note 7, at 100-101. Between Reconstruction and 1895, there were few pardons granted to people who were neither imprisoned nor threatened with prison, simply “to restore civil rights.” After 1895, however, “the President disclosed consistently and impressively an inclination toward this form of clemency.” *Id.* at 101.

⁵⁵ The final simplification of the grant typology into two types of grants (commutation for prisoners and pardon for those who had fully served their sentence), was not accomplished until the 1962 clemency rules. However, after 1930 there were few pardons granted to anyone who was still under sentence. The term “commutation” itself did not appear in the clemency rules until 1962.

⁵⁶ Graphs and tables showing pardon grant patterns from 1900 through 2001, based on data from the Justice Department’s Office of the Pardon Attorney, can be found in P.S. Ruckman, Jr., “Last-Minute Pardons: Fact and Fiction,” Annual Meeting of the Midwest Political Science Association 15-27 (2004), available at <http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf>. The practice of regular monthly pardoning continued under Presidents Franklin Roosevelt and Truman, but became less regular beginning with President Eisenhower. *Id.* at 23-25.

month before Warren Harding's fatal 1923 heart attack. Sheer volume protected the president's ability to make an occasional grant for personal or political reasons that the public might otherwise not understand, and the low-key routine of the pardon program was "of such a character as not to attract wide attention."⁵⁷ In addition to the generous grant rate, it was the thoroughness and perceived fairness of the Justice Department's review that guaranteed public confidence in the process and protected the president's ability to exercise his discretion as he thought best. In addition, ensuring a central role in the pardon process to those officially responsible for the underlying criminal case gave the president access to information about the case, and in addition helped insulate the president from political pressure and importuning.

This system had important benefits not just for the presidency, but for the justice system itself. Until the 1950s, the president personally signed hundreds of separate pardon warrants each year, and until the 1980s the attorney general personally signed hundreds of separate letters of advice describing each case and stating the reasons for clemency. In this way, both officials spent a considerable amount of time reviewing the end-product of their justice system. Whatever the efficiencies of such a system, which would be considered unthinkable today, it maximized the chances that pardon would advance the administration's criminal justice agenda.

C. Pardon Gives Birth to Parole: 1910-1930

In 1910, a statutory parole system was introduced at the three then-existing federal penitentiaries,⁵⁸ beginning the process whereby the pardon power would be used less frequently to free prisoners and more commonly to restore rights to those who had served their sentences

⁵⁷ HUMBERT, *supra* note 7, at 5.

⁵⁸ Act of June 25, 1910, 36 Stat. 819 (1910). See U.S. PAROLE COMM'N, HISTORY OF THE FEDERAL PAROLE SYSTEM 6-7 (2003), available at <http://www.justice.gov/uspc/history.pdf>.

and spent a period of time in the free community.⁵⁹ Other sentencing alternatives introduced around this time similarly reduced the demands on pardon,⁶⁰ though this did not immediately depress the demand for clemency.⁶¹

The familial relationship between pardon and parole was reflected in the fact that the two forms of early release were initially administered together. Between 1910 and 1930, the Attorney General reviewed both pardon applications and the recommendations of the three institutional parole boards that the 1910 act created (one in each of the three federal penitentiaries). In 1919 and again in 1920, Attorney General A. Mitchell Palmer complained that the task of reviewing parole and pardon cases had become so onerous that it was “practically impossible for him to give to these cases the thought and attention they require,” and proposed transferring jurisdiction over both pardon and parole cases to a three-person board.⁶² For that

⁵⁹ Pardon’s performance of a paroling function in the 19th century federal justice system, and its gradual displacement by a statutory prison release procedure and sentencing alternatives in the early 20th century, was mirrored in most of the states. *See* 4 U.S. DEPT OF JUSTICE, THE ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES: PAROLE 53 (1939) [hereinafter 4 SURVEY OF RELEASE PROCEDURES]

⁶⁰ The growing number of appeals in non-capital cases reduced the number of prisoner petitions seeking to correct error in the district court, while the authorization of probation in 1923 gave a sentencing alternative to judges not inclined to impose a prison term. In 1926, the attorney general reported that the availability of probation had eliminated “a large number of [clemency] applications involving offenses of a trivial nature.” 1926 ATT’Y GEN. ANN. REP. at 117.

⁶¹ Between the start of 1900 and the end of 1909, presidents approved 1518 grants of clemency; between the start of 1910 and the end of 1919 (the first decade of the statute’s operation), they approved 2534 grants; and between the start of 1920 and the end of 1929, they approved 3588 grants. HUBBERT, *supra* note 7, at 97-99 (Table I). Federal liquor prohibition accounted for much of the increase. In 1930, the pardon attorney estimated that 70 percent of his budget was devoted to processing prohibition cases. *Id.* at 92 & n.18

⁶² 1919 Att’y Gen. Ann. Rep. at 4:

It appears desirable that a board be created for the purpose of passing upon and recommending action to the President in pardon cases and for the purpose of finally approving paroles granted by the parole boards established at institutions where Federal prisoners are confined. It is recommended that a board of three men be constituted and fully empowered to handle this work. The jurisdiction over Federal penal institutions should also be vested in this board.

See also 1920 ATT’Y GEN. ANN. REP. at __.

reason, he urged the creation of a separate federal agency to handle all pardon and parole cases, and to manage the federal prison system. In the late 1920s, parole cases were staffed through the pardon attorney's office, further evidence that the two forms of relief were originally considered complementary if not interchangeable. Finally, in 1930 Congress created the U.S. Board of Parole and gave it authority to approve all paroles, thus relieving the attorney general of responsibility for administering the new system of indeterminate sentences, though he remained personally responsible for clemency cases.⁶³ Two years later, the Attorney General described how the number of parole releases had burgeoned.⁶⁴ By the end of the 1930s, parole had largely supplanted clemency as a means of releasing prisoners. While there were still several dozen commutations granted each year, many were simply to the minimum term so that the recipient might be eligible for parole.

⁶³ See HISTORY OF THE FEDERAL PAROLE SYSTEM, *supra* note 57, at 7. The same year, Congress also created the Federal Bureau of Prisons, whose first director was Sanford Bates. Bates and the Bureau's second director, James V. Bennett, managed the difficult transition to a centralized federal prison system. See Paul W. Keve, *At the Mercy of the States*, in ESCAPING PRISON MYTHS, John W. Roberts, ed. (American Univ. Press, 1994); JAMES V. BENNETT, *I CHOSE PRISON* (Knopf, 1970).

⁶⁴ 1932 ATT'Y GEN. ANN. REP. at ____:

Since 1910 when the Federal parole act became effective, the number of prisoners released annually on parole from the Federal institutions has grown from 133 in 1910-11 to 5,207 in 1931-32. The increase has been especially rapid during the past few years. Parole release numbered 1069 in 1928-29, 2,536 in 1929-30, and 4,566 in 1930-31. Thus the number paroled in 1931-32 was more than five times as large as the number paroled three years previously, and more than twice as large as the number paroled two years previously. The number of parole releases has also increased more rapidly than the prison population Parole releases in 1910-11 numbered only 6.4 per 100 of the prison population . . . while parole releases in 1931-32 numbered 38 per 100 of the prison population . . .

The numbers reported in this passage do not include federal prisoners paroled from state institutions. The 1910 statute empowered state boards to release federal prisoners housed in state institutions on the same terms as other inmates of these facilities (although it also empowered the Attorney General to veto the paroles approved by state boards).

In the beginning, parole was not seen as theoretically distinct from pardon, but rather simply a more efficient way of administering the old system.⁶⁵ Before long, however, different theoretical justifications developed for the two forms of early release: pardon was seen as an end to punishment as a gesture of mercy, while parole was considered a continuation of punishment in the community and intended to rehabilitate. To most students of criminal justice, the substitution of parole for pardon appeared to be progress. Yet the origins of the former in the latter led to some doctrinal and operational confusion, perpetuated up to the joint administration of the two authorities in most of the states.⁶⁶ In 1939, the Attorney General's Survey of Release Procedures observed that "Much of the present trouble with the administration of parole arises from the fact that parole is granted as though it were a pardon."⁶⁷ (Indeed, to the extent that substantial rehabilitation was and still is considered a basis for clemency, it may be that there has always been a much closer kinship between the two forms of relief than the theoreticians have been willing to admit.⁶⁸) All the same, the authors of the 1939 Survey were confident that the availability of parole would limit pardon's role in the justice system: "Are not judicial review

⁶⁵ Parole apparently was originally introduced in some states not for any new interest in encouraging rehabilitation, but for a similar desire to relieve administrative burdens. See, e.g., Sheldon L. Messinger, et al., *The Foundations of Parole in California*, 19 LAW AND SOCIETY 69, 69 (1985) ("Parole was introduced in California, and used for over a decade, primarily to relieve governors of part of the burden of exercising clemency to reduce the excessive sentences of selected state prisoners.").

⁶⁶ Even as late as 1939, in 25 states pardons and paroles were granted by the governor, or by a clemency board that sometimes included the governor. (In six of these states the courts had held parole to be in derogation of the governor's constitutional pardon power.) In another nine states the governor was advised in pardon matters by the parole board. See 4 SURVEY OF RELEASE PROCEDURES, *supra* note 58, at 44-54. The shared administrative framework has continued to the present in 2/3 of the states (although Oklahoma is the only state where the governor still must approve all paroles). See LOVE, RESOURCE GUIDE, *supra* note 4 at 23-36. .

⁶⁷ 4 SURVEY OF RELEASE PROCEDURES, *supra* note 59, at 53.

⁶⁸ Not only are the standards for clemency and parole frequently the same, parole has been held to have similar discretionary attributes. See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 293 (1980) ("parole is simply an act of executive grace"); *Conn. Bd. Of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) ("A commutation decision . . . shares some of the characteristics of a decision whether to grant parole.").

and modern release procedures like parole sufficient to do all that pardon ever did--and do it better? To a large extent the answer must be yes.”⁶⁹ After the federal experiment with parole was abandoned in 1984, and a system of determinate sentences reinstated, some scholars anticipated that pardon would once again claim a useful role,⁷⁰ though to date this has not happened.

D. Pardon in the Age of Indeterminacy, 1930-1980

The 1898 McKinley rules contemplated that pardon would be the relief sought by individuals faced with or already serving a prison sentence, and mentioned almost as an afterthought pardon “merely” to restore civil rights. But after 1931, the existence of an independent paroling authority and indeterminate sentencing limited the role of clemency as a prison release mechanism, and post-sentence pardons became by far the most frequent form of clemency. Franklin Roosevelt granted more than 3000 post-sentence pardons during his 13 years in office, but only 488 commutations; Truman granted more than 1900 pardons (including 141 “to avert deportation”⁷¹) but only 118 commutations; Eisenhower granted 1100 pardons and 47 commutations. Later presidents also commuted few sentences.⁷²

⁶⁹ See 3 SURVEY OF RELEASE PROCEDURES, *supra* note 50, at 296].

⁷⁰ See Moore, *supra* note 10, at 86 (speculating that the abolition of federal parole could lead to “an expanded and crucial role for pardons”). Moreover, the Supreme Court has held that release on parole, like a commutation, is an exercise of executive grace.

⁷¹ See typescript Reports of the Pardon Attorney’s Office for the years 1946 through 1952, available from the Office of the Pardon Attorney. Between 1962 and 1993, the clemency rules specifically provided for a waiver of the eligibility waiting period “in cases of aliens seeking a pardon to avert deportation.” See 28 C.F.R. § 1.3 (1963), 27 Fed. Reg. 11002 (October 30, 1962); 28 C.F.R. § 1.2 (1985), __ Fed Reg. __ (May 5, 1983).

⁷² One notable exception was a rare systematic use of the pardon power in 1963-1965, when Presidents Kennedy and Johnson commuted the sentences of more than 200 drug offenders serving mandatory minimum

The administration of the pardon power also changed, becoming less transparent after Franklin Roosevelt directed the attorney general to stop publishing the reasons for his pardon recommendations. For the next 25 years, published reports of the pardon attorney contained only bare case statistics, and between 1941 and 1955 no reports were published at all.⁷³ In 1958 a new pardon attorney produced a detailed report confirming a simplified classification scheme for clemency grants: commutation was an “extraordinary” remedy for prisoners seeking reduction of sentence, while pardon was reserved for those who had served their sentence and were seeking “forgiveness for the purpose of restoring their good names, removing the stigma of conviction, or securing the restoration of such rights as may have been lost by virtue of the convictions.”⁷⁴ Also, during the 1950s a number of federal employees sought pardon to avoid losing their pensions under the Smith Act.⁷⁵ The pardon attorney reported that more than 400 petitions for pardon had been filed each year between 1954 and 1958, adding that “150 old cases [were] reactivated each

sentences under the Narcotics Control Act of 1956. *See* 1963 ATT’Y GEN. ANN. REP. at 62-63; 1964 ATT’Y GEN. ANN. REP. at 64. *See also* Shanor & Miller, *supra* note 11, at 142.

⁷³ Typescript reports of the pardon attorney from 1941 through 1955 are available from the Office of the Pardon Attorney.

⁷⁴ *See* 1958 ATT’Y GEN. ANN. REP. at 43-44. Only about 15 commutation applications were filed each year from 1953 through 1958, usually seeking release because of critical illness, or “some other extraordinary reasons why the President should be called upon to act rather than wait for statutory provisions to take care of the situation.” *Id.* at 43. As to pardon,

The majority of applicants for pardon give various reasons for seeking clemency. Some examples are: The substantial businessman who seeks a pardon of the offense committed more than 25 years ago in order to remove the stigma from the names of his grandchildren; the young man who robbed a bank during his teenage years, learned a dental technician trade while in prison, studied dentistry upon release, and needed a pardon to secure a professional dentist’s license; the real estate broker who moved from one state on account of his wife’s health and found that he needed a pardon in order to receive a broker’s license in the new state; the young man who felt he needed a pardon to help him secure employment; and elderly men and women who seek to clear their names before they die.

Id. at 45.

⁷⁵ *Id.* (“An increasing number of Government employees, with records of past convictions, apply for pardons necessitated by Public Law 769, 83rd Congress. This Act denied retirement annuity benefits to employees convicted of certain crimes, unless pardons are granted.”).

year.” Only about 25% of all petitions were sent forward to the president with the attorney general’s favorable recommendation, though all of these were evidently granted.

Clemency practice changed again during the Kennedy Administration, when revised clemency rules directed the attorney general to send a report and recommendation to the White House in every case filed with the Department of Justice.⁷⁶ This resulted in a lot more work for the pardon attorney’s small staff, and a higher grant rate for post-sentence pardons over the next 20 years: the percentage of pardon petitions acted on favorably by Presidents Kennedy, Johnson, Nixon, Ford and Carter varied between 30% and 40%, a significantly higher grant rate than under earlier presidents, when substantial numbers of petitions were being denied administratively by the Justice Department without ever being sent to the president.⁷⁷ While grants to prisoners were less frequent because of the availability of parole, an average of 150 post-sentence pardons were issued each year between 1960 and 1980. Still, pardoning remained a routine and relatively low-key activity of the presidency that took place largely unnoticed. Perhaps more than anything else, it was the regularity and accessibility of the administrative process that maintained a level of public confidence in pardoning, which in turn protected the president from being suspected of abusing his power.⁷⁸ That was all about to change.

⁷⁶ See 28 C.F.R. Part 1 (1963), 27 Fed. Reg. 11002 (October 30, 1962). These regulations also formalized the simplified grant typology announced in the 1958 report of the pardon attorney.

⁷⁷ See OPA Clemency Statistics, *supra* note 3. It is hard to be precise about the grant rate for post-sentence pardons before President Nixon’s first term, because the pardon attorney statistical reports do not break out petitions received and denied by type of relief until 1967. That said, Franklin Roosevelt granted 27.8% of all clemency petitions acted upon during his tenure, Truman granted 41.5%, Eisenhower granted 26.7%, and Kennedy granted 40.9%. (In light of the fact that Eisenhower commuted only 47 sentences in eight years, it is likely that his 1110 pardons represent more than 30% of the total number of pardon petitions acted on during his two terms.) Nixon granted 51% of the pardon petitions acted on during his tenure, and 26.3% of pardon and commutation petitions combined; Ford granted 39% of pardon petitions and 31.2% overall; and Carter granted 34% of pardon petitions and 21.6% overall.

⁷⁸ It is no accident that the president tended to get in trouble with pardons only when he failed to utilize the Justice Department’s pardon process. See Walter Trohan, *Bridges Seeks to End Secrecy in U.S. Pardons*, N.Y. HER.

II. Public Mercy in the Crime War: 1980 to the Present

D. *Pardon's Perfect Storm*

After 1980, presidential pardoning declined sharply. The retributivist theory of “just deserts” and the politics of the “war on crime” made pardon seem at the same time useless and dangerous. For retributivists, the “essentially lawless” exercise of mercy was seen as a “threat to society dedicated to the rule of law.”⁷⁹ The architects of the 1984 Sentencing Reform Act stripped all discretionary relief mechanisms out of the law, even the modest set-aside remedy of the Youth Corrections Act.⁸⁰ There was no place for pardon in such a system.

Contemporaneous with the ascendancy of retributivism in punishment theory, crime control became a central issue in American politics.⁸¹ It became conventional wisdom that appearing “soft on crime” could only get an elected official into trouble, and the Willie Horton

TRIB., Aug. 30, 1953, at 10 (President Truman accused of cronyism in pardoning seven current or former government officials on his way out of office, without Justice Department advice).

⁷⁹ Austin Sarat, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* 69 (Princeton University Press 2005) (2005). The retributivist philosophers whose ideas eventually triumphed in the 1984 Sentencing Reform Act took a dim view of unruly pardon, considering it an unprincipled and unwelcome intrusion in the law’s enlightened process. See Moore, *supra* note 10, at 28-34, 84. Utilitarian theory also had no use for pardon, believing that “clemency is a virtue which ought to shine in the code, and not in private judgment.” C.B. BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENT*, *quoted in* Moore, *supra* note 10, at 39. Moore herself espouses a retributivist view of pardon as “an act of justice rather than an act of mercy.” *Id.* at 129. See also *id.* at 213 (“a justified pardon is one that corrects injustice rather than tempers justice with mercy). Moore’s retributivist theory of pardon is compared with Jeffrie Murphy’s theory of “public mercy” in Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to be Merciful*, 27 *FORDHAM URB. L.J.* 1483, 1500-1509 (2000).

⁸⁰ Perhaps inadvertently, in ridding the legal system of discretionary relief provisions like parole, Congress left a key residual role for clemency as “fail safe.” *Herrera v. Collins*, 506 U.S. 390, 415 (1993), *quoting* Moore, *supra* note 10, at 131.

⁸¹ James Vorenberg, Executive Director of President Johnson’s Commission on Law Enforcement and the Administration of Justice commented on the growing threat of crime in a 1972 piece in *The Atlantic*, opining that “during the past five years the frustration of poor people and minorities with continued denial of opportunities to improve their lives by lawful means has made reliance on crime an increasingly acceptable alternative.” *The War on Crime: The First Five Years*, *THE ATLANTIC*, May 1972, available at <http://www.theatlantic.com/politics/crime/crimewar.htm>.

episode during the 1988 presidential campaign confirmed that pardoning could ruin a political career.⁸² As pardoning became less frequent, the inherent mystery of the pardon process reinforced in the public's mind the popular myth that pardon is available only to those with money and connections, a way for a president to reward intimates at the end of his term. This would soon become a self-fulfilling prophecy.

But perhaps the most important negative influence on presidential pardoning was the hostility of federal prosecutors, and a change in the administration of the pardon program at the Justice Department that allowed prosecutors to control clemency recommendations. Historically, the attorney general's clemency recommendations had reflected his dual role as political counselor and chief law enforcement officer. Attorney General Griffin Bell's decision in the late 1970s to delegate responsibility for making clemency recommendations to officials responsible for prosecution policy eliminated this institutional ambivalence, transforming the general tenor of the advice the president would receive from the Justice Department from the 1980s onwards. No longer did the Justice Department feel its old obligation "to accord to the convict all that he may be fairly entitled to have said in his favor."⁸³ Instead, it treated every clemency petition as a potential challenge to the law enforcement policies underlying the conviction.⁸⁴ Once pardon

⁸² See generally DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* (1995). Another danger was that a particular grant might be distorted and give a mistaken impression of the Administration's commitment to crime control. For example, after President Bush pardoned a particularly deserving and well-known individual who had been convicted of a minor marijuana possession offense thirty years before, the grant was characterized as "especially ironic, given the administration's current push to enact tougher penalties on drug offenders" Tom Watson, *In Rare Move, Bush Pardons Drug Offender; Civic Service, Campaign Win Forgiveness for Harlem Globetrotter*, LEGAL TIMES, Mar. 18, 1991, at 1; see also *Pardon Me*, LEGAL TIMES, Oct. 7, 1996, at __, quoting Rep. Curt Weldon, R-Pa. ("I don't know how you can champion yourself in the debate on drug use when you pardon drug dealers.").

⁸³ See *supra* note 30_.

⁸⁴ In the Reagan Administration, the pardon attorney described his office's more "exacting" scrutiny of pardon applications "to better reflect the administration's philosophy toward crime." Pete Earley, *Presidents Set Own Rules on Granting Clemency*, WASH. POST, Mar. 19, 1984, at A17. See also Larry Margasak, *Any Pardons Would Come*

policy became part and parcel of a tough-on-crime agenda, pardon practice served primarily to ratify the results achieved by prosecutors, not to provide any real possibility of revising them.

With very little independent interest at the White House in the routine work of pardoning, it was inevitable that the number and frequency of clemency grants would steadily decline through the 1980s.

B. The Clinton Meltdown

At the beginning of the Clinton Administration, the effects of mandatory sentencing and the abolition of parole swelled commutation filings.⁸⁵ Yet, President Clinton was disinclined to pardon: apart from the risk of making a mistake, he did not want to be outflanked on criminal justice issues.⁸⁶ Breaking from past practice, he issued no clemency grants at all in four of the first five years of his presidency, and allowed the Justice Department's clemency recommendations to pile up at the White House without action. During his second term, a number of high profile grants were handled by the White House Counsel, an unprecedented

After Election Day, Observers Say, ASSOC. PRESS, Jan. 18, 1988 ("the administration's use of career prosecutors to screen pardon requests has resulted in a natural inclination for tighter scrutiny"). All but a handful of the individuals officially responsible for approving Justice Department clemency recommendations since 1983 have been former federal prosecutors. See Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Practice of Pardoning*, 13 FED. SENT. REP. 125, 126 n. 23 (2001). As a practical matter, Justice Department pardon policy and practice has been controlled since 1997 by David Margolis, a career prosecutor on the staff of the Deputy Attorney General.

⁸⁵ To manage the caseload, the Pardon Attorney was directed by the Office of the Deputy Attorney General to prepare summary reports recommending denial of clemency in all cases except those in which a Member of Congress or the White House had expressed an interest. See Memorandum from Roger Adams to Margaret Love, October 23, 1993 (on file with author). While this directive was later retracted, its spirit continued to inform the Justice Department's administration of the pardon power. Of the 61 commutations granted by President Clinton during his eight years in office, no more than a handful were favorably recommended by the Justice Department. Several of these were requested by prosecutors to fix their mistake. See, e.g., Exec. Grant of Clemency to Johnny Palacios, Aug. 21, 1995 (on file with Office of the Pardon Attorney) (cooperator for whom prosecutor had neglected to timely file a sentence reduction motion); Exec. Grant of Clemency to Alain Orozco, July 5, 2001, discussed in David M. Zlotnick, *Federal Prosecutors and the Clemency Power*, 13 FED. SENT. REP. 168, 169 (2001) (same).

⁸⁶ See, e.g., Marc Mauer, *The Fragility of Criminal Justice Reform*, 21 SOCIAL JUSTICE 14, 21 (1994) (describing Clinton's effort to "take the crime issue away" from Republicans); Tony Poveda, *Clinton, Crime and the Justice Department*, 21 SOCIAL JUSTICE 73 (1994) ("in the Clinton era . . . ideas that are outside the scope of the current ideological hegemony of 'get tough' policies will be selectively ignored or silenced.").

public distancing from the Justice Department's pardon program.⁸⁷ As a result, President Clinton entered his final year in office having pardoned less generously than any president since John Adams. By that time, emboldened by the President's apparent lack of interest, the Justice Department had effectively stopped producing pardon recommendations.

As the time on his watch grew short, in the fall of 2000 another side of President Clinton emerged. He took every opportunity to talk to the press about pardons, lamenting how few he had granted, and signaling an intention to do more before leaving office.⁸⁸ For the first time in eight years, he expressed sympathy with nonviolent drug offenders serving long prison terms,⁸⁹ and articulated a generous policy of restoring civil rights to anyone who had completed his sentence.⁹⁰ At the eleventh hour, Clinton recognized how meager his overall pardoning record was compared to that of his predecessors, notably President Reagan, and resolved to make up for lost time. But by that time, despite repeated urging by White House staffers, the Justice

⁸⁷ See THE PARDON ATTORNEY REFORM AND INTEGRITY ACT, S. REP. NO. 106-231, at 8 (2000) (commutation of 16 Puerto Rican terrorists without Justice Department advice). See also Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251 (1999) (pardon attorney refusal to docket posthumous pardon application on behalf of first Black West Point graduate).

⁸⁸ See, e.g., President William J. Clinton, Remarks at the ceremony appointing Roger Gregory to an interim seat on the Fourth Circuit Court of Appeals (Dec. 27, 2000), reprinted in 13 FED. SENT. REP. 228 [hereinafter Gregory Remarks] ("I wish I could do more [pardons]. I'm going to try. I'm trying to get it out of the system that exists, that existed before I got here, and I'm doing the best I can"). Newsweek reported an incident in early January in which the President wandered into the press section of Air Force One on a trip to Arkansas and asked "You got anybody you want to pardon?" Weston Kosova, *Backstage at the Finale*, NEWSWEEK, Feb. 26, 2001.

⁸⁹ Jan Wenner, *Bill Clinton: The Rolling Stone Interview*, ROLLING STONE MAGAZINE, Dec. 28, 2000-Jan. 4, 2001, at 98 ("We really need a reexamination of our entire policy on imprisonment. . . . [A] lot of people are in prison today because they have drug problems or alcohol problems. . . . I think the sentences in many cases are too long for nonviolent offenders. . . . I think [mandatory minimum sentences] should be reexamined.").

⁹⁰ Gregory Remarks, *supra* note 88:

I have always thought that Presidents and governors should be quite conservative on commutations – that is, there needs to be a very specific reason if you reduce someone's sentence or let them out – but more broad-minded about pardons because, in so many states in America, pardons are necessary to restore people's rights of citizenship. Particularly if they committed relatively minor offenses, or if some years have elapsed and they've been good citizens and there's no reason to believe they won't be good citizens in the future, I think we ought to give them a chance, having paid the price, to be restored to full citizenship.

Department was either unwilling or unable to meet the President's desire for more pardon recommendations. In October of 2000, Pardon Attorney Roger Adams was directed to advise pardon-seekers to press their suits directly with the White House.⁹¹

With the clemency review process in the Justice Department effectively sidelined by its own choice, the President set up an ad hoc procedure in the White House Counsel's office to identify suitable candidates for pardon and commutation. He did not have to go far to find candidates after his intentions became public. Throughout the fall of 2000, pardon-seekers besieged the President and his staff for a final favor, so that pardon matters occupied the attention of even the most senior White House staff.⁹² Rumors flew about deals and promises involving pardons, influential insiders were retained to argue otherwise hopeless cases, and the press speculated about who was and who was not likely to be a beneficiary of Clinton's end-of-term largesse.⁹³ By their own account, during the final weeks White House staff at all levels

⁹¹ *Hearings Before the House Comm. On Government Reform on the Pardon of Marc Rich*, 107th Cong. 1st Sess. (2001), available at <http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/pardonshearingtext030101.htm> [hereinafter *House Hearings*] (testimony of Beth Nolan, Counsel to former President Clinton, describing unresponsive Justice Department pardon process at the conclusion of the Clinton Administration, and the ensuing frantic effort at the White House in the final weeks to process the hundreds of clemency requests coming directly to the White House). See also Margaret Colgate Love, *The Pardon Paradox: Lessons from Clinton's Last Pardons*, 31 *CAP. U. L. REV.* 185, 188-193 (2003) (describing run-up to final Clinton pardons, and the grants themselves).

⁹² *House Hearings*, *supra* note 91. Ms. Nolan reported that in the final weeks the White House was "inundated" with pardon requests, and importuned by influential people, including members of Congress, about particular cases:

They were coming from everywhere . . . We had requests from members of Congress on both sides of the aisle and both Houses. We had requests from movie stars, newscasters, former Presidents, former first ladies. There wasn't anybody--I refused to go to holiday parties because I couldn't stand being--nobody wanted to know how I was, thank you very much. They wanted to know about a pardon. So I just didn't go.

Id. A chart distributed by the Department of Justice to members of the press on February 13, 2001, reveals that upwards of thirty of the recipients of pardon or commutation on January 20 filed applications with the Justice Department in the final weeks (or even days) days of President Clinton's term, leaving no time for them to be considered in the ordinary course. A like number did not file applications with the Department at all. Chart on file with authors.

⁹³ See, e.g., Peter Slevin & George Lardner, Jr., *Rush of Pardons Unusual in Scope, Lack of Scrutiny; Back-Door Lobbying Had Large Role in Clinton's Decisions, Observers Say*, *WASH. POST*, Mar. 10, 2001, at A3; Don Van

worked around the clock compiling and revising lists of pardon applicants, fielding calls from influential supporters, and attending meetings at which the merits of pardon cases were debated, for the most part without input from the Justice Department.⁹⁴ All of the ordinarily applicable standards and procedures went by the boards in the frenzy of back-door lobbying by Clinton friends and family.⁹⁵ In his drive to create an entire legacy overnight, the President gave pardoning a place on his agenda alongside the Middle East peace negotiations and the Independent Counsel's inquiry into his own conduct. Relieved of the constraints imposed by the Justice Department's administration of the power, he enjoyed a final unencumbered opportunity to reward friends, bless strangers, and settle old scores.

As Clinton's final day in office approached, many in Washington were braced for some last minute surprises. But no one was quite prepared for the 177 grants announced on the morning of January 20 just before the new president was to take the oath of office, which were unprecedented in number and in kind. The Pardon Attorney, who had been up all night as the White House continued to add names to (or subtract them from) the list of beneficiaries, told a reporter that he didn't even know who many of the people were or how to reach them to inform

Natta Jr. & Marc Lacey, *Access Proved Vital in the Race to Secure a Pardon from Clinton*, N.Y. TIMES, Feb. 25, 2001, at A1; Kurt Eichenwald & Michael Moss, *Rising Number Sought Pardons in Last 2 Years*, N.Y. TIMES, Jan. 29, 2001, at A1. The atmosphere at the White House in the final weeks was likened by former Attorney General Dick Thornburgh to a "Middle Eastern bazaar."

⁹⁴See *House Hearings*, *supra* note 90. In the summer of 2002, the House Committee on Government Reform published a three-volume report on its investigation into the final Clinton pardons, which focuses on a dozen or so of the most controversial cases. See JUSTICE UNDONE: CLEMENCY DECISIONS IN THE CLINTON WHITE HOUSE: BEFORE THE HOUSE COMMITTEE ON GOVERNMENT REFORM, H. REP. NO. 107-454, 107th Cong. 2d Sess. (2002). See particularly *id.* at 1309-14 (describing White House staff handling of the Carlos Vignali petition); *id.* at 1195-1231, 1468-1471, 1686-1707 (charts prepared by White House staff noting support for particular clemency applicants).

⁹⁵For a colorful account by a member of the loyal opposition, including a representative sampling of the extensive contemporary press coverage, see BARBARA OLSON, THE FINAL DAYS 113-193(2001). More of the final grants are described in Love, *The Pardon Paradox*, *supra* note 91, at 188-193 (2003).

them of their good fortune.⁹⁶ Some of the grants were immediately identifiable as personal gestures to friends and family,⁹⁷ and some were evidently aimed at nailing shut the coffin of the Independent Counsel Act.⁹⁸ The pardons granted to fugitive billionaire Marc Rich and his partner Pincus Greene produced instant outrage from all quarters, focused on the key role of former White House Counsel Jack Quinn and his manipulation of the Justice Department advisory process.⁹⁹

But as the press parsed through the many less familiar names in the weeks that followed, it became apparent that numerous other grants had been secured outside official channels through the intervention of individuals with direct access to the President, and that at least some

⁹⁶ See Goldstein & Schmidt, *Clinton's Last-Day Clemency*, *supra* note 10. Mr. Adams reported that some requests from the White House arrived so late in the evening on Friday that his office did not have time to conduct record checks with the FBI. Among the names his office received for the first time on the night of January 19 were the President's brother Roger, and Richard Riley Jr., the son of Clinton's Secretary of Education. Three weeks later, Mr. Adams again described the harrowing final hours in testimony before the Senate Judiciary Committee three weeks later. See Testimony of Pardon Attorney Roger C. Adams before the Senate Committee on the Judiciary Concerning Recent Presidential Pardons, Feb. 14, 2001.

⁹⁷ The President pardoned his brother Roger Clinton's 1985 cocaine trafficking conviction, but did not pardon any of the individuals Roger Clinton had reportedly recommended. See JUSTICE UNDONE, *supra* note 94 at 709-831. See note 100, *infra*, for description of grants to long-time friends Fife Symington and Paul Prosperi.

⁹⁸ The morning after the pardons were issued, the Washington Post noted that "Clinton appeared to be tying up loose ends from many of the independent counsel investigations that had daunted him and several senior members of his administration virtually from the beginning of his tenure." Goldstein & Schmidt, *Clinton's Last-Day Clemency*, *supra* note 11. See also Stephen Braun & Richard Serrano, *Clinton Pardons: Ego Fed a Numbers Game*, L.A. TIMES, Feb. 25, 2001. The President pardoned four individuals convicted as a result of the Whitewater Independent Counsel investigation (Susan McDougal, Christopher V. Wade, Stephen A. Smith, Robert W. Palmer), his former Housing Secretary Henry Cisneros and Linda Medlar Jones; and he "wiped the slate clean" on the Independent Counsel's investigation of former agriculture secretary Mike Espy, commuting the sentence of Espy's former chief of staff Ron Blackley, and pardoning Richard Douglas, Alvarez T. Ferouillet, John J. Hemmingson, and James Lake. *Id.* (Archibald R. Schaffer III had been pardoned on December 22, 2000, shortly before his sentencing). The President reportedly struggled over whether to pardon his former close political associates Webb Hubbell and Jim Guy Tucker, both convicted as a result of the Whitewater investigation, but in the end did not.

⁹⁹ See, e.g., JUSTICE UNDONE, *supra* note 94 at 99-266.

of these individuals had been paid handsomely for their efforts.¹⁰⁰ Some of the grants involved uses of the pardon power that had not been seen in over a century.¹⁰¹

The verdict of history on President Clinton's pardoning is likely to be that he abused the power, by failing to use it at all for most of his time in office, and by using it excessively in the final days to benefit his family and friends. But the experience of Clinton's final months in office teaches another more general lesson: At some point during his term, the process for administering the president's power had come to serve the interests of Justice Department prosecutors, rather than those of the presidency. The extraordinary spate of irregular grants on Clinton's last day in office was as much the result of the Justice Department's neglect of its

¹⁰⁰ Commutation grants were made to Harvey Weinig, a New York lawyer convicted of money-laundering for a major drug organization, who had been privy to a murder-for-hire scheme, and whose commutation was vigorously opposed by the United States Attorney and the Justice Department, *see* Benjamin Weiser, *A Felon's Well-Connected Path to Clemency*, N.Y. TIMES, Apr. 14, 2001, at A1; four Hasidic Jews convicted of embezzling federal grant money intended to benefit their own small community, *see* Randal C. Archbold, *Behind Four Pardons, A Sect Eager for Political Friends*, N.Y. TIMES, Feb. 5, 2001; Dorothy Rivers and Mel Reynolds, both serving prison terms for fraud and both reportedly recommended for release by the Reverend Jesse Jackson. *See* Olson, *supra* note 89 at 156-58. *See also* Deborah A. Devaney, *A Voice for Victims: What Prosecutors Can Add to the Clemency Process*, 13 FED. SENT. REP. 163, 165-166 (2001). Pardon grants went to a number of well-connected Arkansas businessmen and lawyers who never filed an application with the Justice Department. *See* OLSON, *supra* note 89, at 156-67. One case that proved embarrassing to the President was that of A. Glen Braswell, whose 1983 conviction for mail fraud and perjury was pardoned even though he was then the subject of an FBI investigation for tax evasion and money-laundering. *See* Christopher Marquis with Michael Moss, *A Clinton In-Law Received \$400,000 in 2 Pardon Cases*, N.Y. TIMES, Feb. 22, 2001, at A1. It was reported in the press that he had paid Hugh Rodham \$200,000 to press his case at the White House. *See id.* In January 2003, Braswell was arrested and charged with tax evasion. *See Calif. Businessman Pardoned by Clinton Arrested for Tax Evasion*, ASSOC. PRESS, Jan. 14, 2003.

¹⁰¹ Clinton pardoned his friend J. Fife Symington, III, former Governor of Arizona, who was at the time awaiting retrial on charges of mail fraud, and John Deutsch, former Director of Central Intelligence, who had pled guilty only the day before of misusing classified information. *See* Bill Miller and Walter Pincus, *Deutsch had Signed Plea Agreement, Sources Say*, WASH. POST, JAN. 24, 2001. Howard Mechanic, a fugitive from justice for three decades who was faced with returning to prison, was granted a full pardon rather than the commutation he had sought. *See* Dennis Wagner & Brent Whiting, *Mechanic Receives Pardon*, ARIZ. REPUB., Jan. 21, 2001. In what may have been the most unusual use of the power, the President preemptively commuted the sentence of his college classmate Paul Prospero, a Florida lawyer who had been convicted of counterfeiting securities and tax evasion, and who on January 20 was awaiting resentencing. The warrant manifesting the Prospero grant stated: "I further hereby commute any total period of confinement that has already been imposed or could be imposed . . . that is in excess of 36 months, and I further commute any such period of confinement to be served in home confinement." Exec. Grant of Clemency to Paul Prospero, Jan 20, 2001 (on file with Office of the Pardon Attorney). *See* Leon Fooksman, *Embezzler gets House Arrest: Ex-Lawyer Stole \$1.8 million from Irish Client*, Fort Lauderdale Sun-Sentinel, March 3, 2001 at B1. Many of the pardon grantees, including those whose convictions been obtained by an independent counsel, were not eligible to apply for a pardon under Justice Department regulations, and some had apparently not even asked for clemency.

institutional responsibilities as it was of the President's disregard of his. By discouraging the President from pardoning responsibly earlier in his term, by refusing to respond to his interest in pardoning when it belatedly manifested itself, and by failing to object more forcefully to the more abusive final grants, the Justice Department abandoned both the President and its own obligation of stewardship.

C. George W. Bush Takes a Pass

President George W. Bush vowed to follow the advice of the Department of Justice in pardon matters, but he did nothing to rejuvenate its pardon program. Eight years later, bearing out the adage about those who do not study the past, well-connected clemency-seekers again bypassed the Justice Department and took their cases directly to the White House, where they received a friendly reception from Counsel to the President Fred Fielding. This time, however, the anticipated flood of irregular grants did not materialize, reportedly because the President was himself disgusted by the irregularity and unfairness of the pardon process.

Throughout his time in office, President Bush appeared entirely indifferent to pardoning, with two very conspicuous exceptions: former White House aide Scooter Libby, whose sentence he commuted in June 2007,¹⁰² and the two Border Patrol agents convicted of shooting a fleeing drug dealer, whose sentences he commuted the day he left office.¹⁰³ For the most part, Bush allowed his pardoning to be dictated by the Justice Department, which sustained him on a bland diet of inconsequential post-sentence pardons, seasoned with an occasional drug commutation.¹⁰⁴

¹⁰² See Statement by the President on Executive Clemency for Lewis Libby, available at <http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html>.

¹⁰³ See Dan Eggen and Carrie Johnson, *Bush Commutes Sentences of Ex-Agents*, WASH. POST, Jan. 20, 2009; Josh Meyer, *Bush Commutes Border Patrol Agents Prison Terms*, L.A. TIMES, Jan. 20, 2009.

¹⁰⁴ Bush's final grant tally was 189 pardons, most of them to individuals with convictions more than 20 years old who had served no prison time, and 11 commutations. Five of the commutations went to drug offenders

Such a dull and essentially meaningless record might be a welcome respite from the drama of Clinton's scandalous final grants, if it were not for the fact that so few were granted while so many were denied: Bush issued 200 clemency grants in eight years, and denied more than 10,000 petitions.¹⁰⁵ It is hard to tell what distinguishes the handful of lucky winners from the thousands of disappointed suitors, and the record establishes that the Justice Department pardon program under George W. Bush operated like a lottery.

Questions about the fairness of the pardon process took on a new urgency toward the end of Bush's tenure, with press reports about case backlogs at Justice and high-profile pardon-seekers.¹⁰⁶ By the fall of 2008, frustrated by the unresponsiveness of the Justice Department pardon bureaucracy, the White House again began accepting clemency petitions directly from people with personal and political connections to administration officials, evidently unconcerned about the problems this had caused for President Clinton.¹⁰⁷ The massive pardoning at the end of Bill Clinton's term had confirmed the popular (though historically inaccurate) notion that a lot

evidently recommended by Justice, three of whom were near the end of a long mandatory sentence. Of the other six commutations, two may have been granted over a denial recommendation from Justice (Forte, Harris), and the other four were granted with no Justice recommendations at all (Libby, Prior, Ramos and Compean). On the Forte grant, see Sara Netter, *From Grammys to Prison to Freedom*, ABC News, Nov. 26, 2008, <http://abcnews.go.com/TheLaw/Music/story?id=6333613&page=1>. On Prior, see Grant Schulte, *Pardoned by Bush, Iowan Returns Home*, Des Moines Reg. Oct. 18, 1008; Laird Rox, *One lawyer, then notable Iowans, then Bush saw sentence as unjust*, Des Moines Reg. Jan. 4, 2009. On Ramos and Compean, see press accounts at note 99 *supra*. One additional pardon was granted to Isaac Toussie without a recommendation from the Department, but it is not counted among the official grants because President Bush declared that it had been revoked. See Charlie Savage, *On Clemency Fast Track, Via the Oval Office*, N.Y. Times, Jan. 1, 2009, A1. The record of George W. Bush's pardoning is described in greater detail in my *Final Report Card on Pardoning by George W. Bush*, Mar. 13, 2009, available at <http://www.pardonlaw.com/materials/FinalReportCard.3.13.09.pdf>.

¹⁰⁵ In the fall of 2006, Bush's White House Counsel Harriet Miers reportedly urged the Justice Department to produce more favorable grants, much as Beth Nolan had done toward the end of the Clinton administration, but her request had no discernible effect on the production of favorable recommendations. Ms. Miers was shortly thereafter replaced by Fred Fielding as Counsel to the President, who took no interest in pardons until the final months of Bush's term.

¹⁰⁶ See, e.g., Charlie Savage, *Felons Seeking Bush Pardon Near a Record*, N.Y. TIMES, July 19, 2008, at ___.

¹⁰⁷ See Savage, *On Clemency Fast Track*, *supra* note 104 (describing pardons granted to clients represented by former lawyers in Bush White House Counsel's office).

of end-of-term pardoning was to be expected, and the Counsel to the President was visited by a parade of aspiring pardon applicants and their lawyers.¹⁰⁸ Bush's White House advisers made many of the same mistakes that Clinton's did, and were saved from greater embarrassment only by the President's own buttoned-up conservatism and general parsimony. A batch of pardons immediately before Christmas created a stir when the President tried to revoke one of them the day after it was announced,¹⁰⁹ but his final grants were decidedly anticlimactic. When it became clear at noon on January 20, 2009, that two sentence commutations issued the previous day¹¹⁰ were all Bush intended to grant, dozens of individuals whose hopes had been raised by an unusually accessible White House staff were bitterly disappointed.

The paucity of grants at the end of President Bush's term, like the torrent of grants at the end of Clinton's, can be attributed to a chronically dysfunctional pardon advisory system in the Justice Department, a system dominated by prosecutors that produces few favorable recommendations, and that serves its own institutional interest rather than that of the presidency. Clinton dealt with that problem by staffing pardons in the White House. Bush didn't deal with it at all. In both cases, at the end of the term there were very few favorable recommendations from the pardon bureaucracy for the president to act upon. The difference in the final production of pardons for the two presidents is attributable to their very different personal inclinations to

¹⁰⁸ *Id.* ("A huge backlog at the Justice Department's pardon review office combined with the relatively small number of clemency grants by recent presidents . . . encourages people to try to end-run the process — to try to cheat, for lack of a better word, to gain access to the White House directly," *quoting* pardon scholar P.S. Ruckman).

¹⁰⁹ *See* David Stout & Eric Lichtblau, *Pardon Lasts One Day for Man in Fraud Case*, N.Y. TIMES, Dec. 25, 2008, at __ (White House directed Pardon Attorney not to execute document conveying pardon to Isaac Robert Toussie, apparently because he had made substantial campaign contributions to the Republican Party). Questions about whether the Toussie pardon had already become effective and therefore could not be revoked were unresolved at the time President Bush left office.

¹¹⁰ *See supra* note 103.

dispense forgiveness, inclinations already in evidence during their respective days as governor. To his credit, unlike Clinton, Bush appears to have been genuinely offended by the undemocratic cronyism of the pardon end-game.¹¹¹ All the same, he was not much more responsible than Clinton in treating pardon as a political third rail throughout his presidency, which in the end became a self-fulfilling prophecy for both men.

III.. Prospects for Renewal

An authority on the pardon power suggested 20 years ago that the time might have come for pardon “silently to fade away--like collar buttons, [its] usefulness at an end.”¹¹² There is no question that pardon has faded, but it is not for lack of usefulness. Recent presidents have allowed their pardon to fall into disuse because they saw nothing to be gained by pardoning that was not outweighed by the possibility of making an embarrassing and politically damaging mistake. The final section of this paper argues that President Obama ought not wait to use his power, if only to avoid embarrassment in a final summing up. It then suggests some ways he can minimize the risk pardoning entails.

A. The Contemporary Usefulness of Pardon

Pardon remains relevant and useful today for three purposes:

- **To do justice in particular cases**

¹¹¹ Nancy Pelosi recounted her inauguration day conversation with the out-going President in an interview with CNN’s Larry King. She reported that Bush said he was “very proud” of not issuing pardons to the politically well-connected. “He said people who have gotten pardons are usually people who have influence or know friends in high places,” a route that is “not available to ordinary people,” Pelosi said. “He thought that there was more access for some than others and he was not going to do any.” Reports of intense lobbying by Vice President Cheney in behalf of Scooter Libby support this anti-inside-influence explanation of the paucity of final grants. See Massimo Calabresi & Michael Weisskopf, *Inside Bush and Cheney’s Final Days*, TIME, July 24, 2009, at __; Jim Rutenberg & Jo Becker, *Aides Say No Pardon for Libby Irked Cheney*, N.Y. TIMES, February 18, 2009, at __.

¹¹² MOORE, *supra* note 10, at 83.

- **To communicate the president’s priorities within the executive branch**
- **To advance the president’s policy agenda with Congress and the public**

History teaches that the demand for clemency increases when the legal system lacks other mechanisms for delivering individualized justice, recognizing changed circumstances, and correcting errors and inequities. Clemency is less necessary, and is therefore less justifiable, when mercy “shines in the code.”¹¹³ But in the 20 years since the federal sentencing guidelines system took effect, the president’s power to commute has been invoked frequently because of the severity of mandatory prison terms, because courts have very limited ability to individualize sentences or revise a sentence once imposed, and because statutory post-conviction early release mechanisms have either been repealed or fallen into disuse.¹¹⁴ Thus the president’s personal intervention in a prisoner’s case through the pardon power not only benefits the particular individual, it also reassures the public that the legal system is capable of just and moral application. While presidents “ought not invoke the pardon power to convert the Presidency into a legislature of one,”¹¹⁵ and while clemency is by its nature somewhat arbitrary, at least until laws are reformed and workable statutory relief mechanisms adopted, there is a place for clemency.¹¹⁶

¹¹³ See *supra* note 79.

¹¹⁴ See, e.g., Petition for Commutation of Sentence from Hamedah Hasan, <http://www.dearmrpresidentyesyoucan.org/> (documenting broad support for clemency request from woman who has served 16 years of a 27-year sentence for her role in a drug-trafficking scheme; request denied in 2005); *United States v. Kenneth G. Harvey*, 946 F.2d 1375 (8th Cir. 1991)(expressing support for trial judge’s recommendation that life sentence for drug trafficking be commuted after 15 years). Hasan’s first clemency petition was denied by President Bush in 2008, as was Harvey’s (he has not refiled).

¹¹⁵ Daniel J. Freed and Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT. REP. 119, 124 (2001).

¹¹⁶ See Hay, *supra* note 6 (Pardon was “erratic and capricious, but a useful palliative until Parliament reformed the law in the 19th century”). The American Law Institute is considering a recommendation that jurisdictions make provision for a “second look” at lengthy determinate sentences under certain circumstances. See Model Penal Code:

After the court-imposed sentence has been served, pardon plays an important role in offender reentry and reintegration. With the proliferation of collateral consequences and easy access to criminal history information, the overwhelming majority of people convicted of a crime in America have no realistic hope of ever satisfying their debt to society.¹¹⁷ The collateral consequences of conviction operate as continuing punishment, particularly in an era of pervasive background checking, and a just system must afford deserving individuals some way of alleviating them. In the federal system, pardon is the only way for a federal offender to overcome the legal disabilities and stigma of conviction, since there is no authority for judicial expungement or sealing of a criminal record even for a first offender. For example, pardon provides the only way federal felony offenders can regain firearms privileges, avoid deportation, and qualify for an array of licenses and benefits under state and federal law.¹¹⁸ Until some alternative way is found to give federal offenders a way to satisfy their debt to society, there is a place for pardon.

Sentencing, Preliminary Draft No. 7, §§ 305.6, 305.7 (September 25, 2009) ; Richard F. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT. REP. 194 (2009).

¹¹⁷ Particularly since 9/11, laws excluding people with a criminal record from jobs and other opportunities have proliferated, and decision-makers have become more risk-averse. Background checks have become the norm for employers, landlords, and other decision-makers: there are now more than 600 companies engaged in the business of backgrounding, and many states have begun to make their court records available for a fee on the internet. Surprising as it may seem, in some states a federal offender cannot exercise basic civil rights, including the right to vote, without a presidential pardon. As a result of this web of “invisible punishment,” most people convicted of a crime in America are deprived of the tools necessary to reestablish themselves as law-abiding and productive members of the free community. The fact that so many of this population are African-American only aggravates the phenomenon that has been described as “internal exile.” See Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 157 (1999). See also Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE SOCIAL COSTS OF MASS IMPRISONMENT* 16 (Meda Chesney-Lind & Marc Mauer eds., 2002).

¹¹⁸ See Kelly Salzman & Margaret C. Love, *Internal Exile: Survey of the Collateral Consequences of Conviction Under Federal Laws and Regulations* (Washington, D.C.: Am. Bar Ass’n, ABA Commission on Effective Criminal Sanctions, 2008), available at <http://www.abanet.org/cecs/internalexile.pdf>.

Within the executive branch, pardon can serve as a useful policy and management tool to help the president carry out his constitutional obligation to take care that the laws are faithfully executed, in two ways. First, the pardon caseload provides a unique birds-eye view of how the federal justice system is being administered, revealing where particular laws or enforcement policies are overly harsh, and where prosecutorial discretion is being unwisely exercised. In addition, a grant of clemency allows the president to intercede directly to change the outcome of a particular case, thereby sending a very direct and powerful message about how he wishes the law to be enforced by his appointees in the future. The “extraordinary potential for arbitrariness” that some see as an argument against pardon¹¹⁹ can be turned on its head: a clemency program administered rigorously at a national level, in which decision-making is structured and explained, may be the best corrective for the sort of systemic arbitrariness that can result from unchecked prosecutorial discretion. In this fashion, pardon can address the disparity and overreaching that many believe have compromised the integrity of the federal justice system in recent years. In turn, prosecutors can be challenged to regard clemency as something that can be useful to them, rather than a threat to their independence or a sign of weak resolve.¹²⁰ Clemency can be a useful management tool for prison administrators as well, rewarding good conduct and accomplishment by prisoners, and even easing the strain on prison budgets where prisoners are elderly or infirm, and can be taken care of more efficiently and effectively in the free community. A grant of executive clemency may be instructive to prison officials in interpreting their responsibilities under one or another of the early release mechanisms at their disposal.

As a policy tool, “systematic pardons or exemplary commutations [may] prompt debate or motivate a recalcitrant Congress.”¹²¹ By pointing out flaws in the legal system, pardon can

¹¹⁹ Freed & Chanenson, *supra* note 115, at 123.

¹²⁰ See Zlotnick, *supra* note 85 (analyzing five 2000 Clinton commutations where rationale for grant served prosecutors’ interests, including correction of a mistake).

¹²¹ Freed & Chanenson, *supra* note 115, at 124.

influence attitudes, and build consensus for change. In a very real way, pardon's highest purpose is to accomplish its own demise.¹²² If a particular grant illustrates some system-wide problem, as opposed to an exceptional situation not likely to recur, pardon's anecdotal approach can effectively demonstrate the need for reform, and encourage public support for it.¹²³ Even in the heyday of parole, "changed public opinion after a period of severe penalties" was recognized as a respectable basis for the use of the pardon power.¹²⁴ If a judicious use of commutations can draw out support for more flexibility in sentencing laws, post-sentence pardons can illustrate the need for administrative or judicial relief mechanisms to avoid or mitigate collateral legal penalties and the stigma of conviction.¹²⁵

Finally, apart from its role in encouraging law reform, pardon can educate the public about the justice system, and tell good news by recognizing and rewarding criminal justice success stories. When a drug addict turns his life around and becomes a productive member of the community, or a thief pays restitution to her victims and dedicates her life to serving others, a grant of pardon emphasizes the system's capacity to encourage rehabilitation, and its redemptive goals. Not since the nineteenth century has pardon been as relevant from both a moral and

¹²² The 1939 Justice Department survey of release procedures in the United States pointed out that pardon was the "direct or collateral ancestor of most [statutory release procedures]." In addition, pardon was "the tool by which many of the most important reforms in the substantive criminal law have been introduced:" 3 SURVEY OF RELEASE PROCEDURES, *supra* note 44, at 295.

¹²³ The Scooter Libby commutation is a reminder of how powerfully the president can speak from this bully pulpit. The fact that President Bush found Mr. Libby's 30-month sentence "excessively harsh" (even though it was entirely legal) may influence courts looking at other similar cases, embolden defenders arguing for leniency, and encourage the United States Sentencing Commission to rethink its guidelines. *See, e.g.*, Lyle Denniston, *Rita, Citing Libby Order, Seeks Rehearing*, SCOTUSBLOG, July 16, 2007, available at <http://www.scotusblog.com/2007/07/rita-citing-libby-order-seeks-rehearing/>. While the Libby grant itself is unlikely to persuade Congress or the courts that prison terms for nonviolent offenses should be reduced, a more systematic use of the power in less politically-charged cases might do so.

¹²⁴ 3 SURVEY OF RELEASE PROCEDURES, *supra* note 44, at 299.

¹²⁵ *See, e.g.*, Nina Bernstein, *Paterson Rewards Redemption with a Pardon*, N.Y. Times, March 7, 2010 (Governor Paterson describes pardon of highly-recommended Chinese immigrant as "the opportunity to make a forceful statement about the harsh inequity and rigidity of the immigration laws").

practical point of view, for those who make and apply the law, as well as for those convicted of breaking it. No one should be fooled into thinking otherwise by the fact that the power has in recent years been used so sparingly and irregularly.

B. Reinvigorating the Pardon Process

It is clear that the administrative process that facilitated presidential pardoning from the Civil War until the 1980s is broken. Assuming a desire by the president to make productive use of the power, the process for administering it must be reformed to make it:

- Accessible to ordinary people and guided by clear standards, in order to secure and maintain public confidence.
- Well-funded and competently staffed, in order to produce thorough and reliable advice; and
- Independent and authoritative, in order to command the respect of executive officials and Congress.

The legitimacy of the president's use of the pardon power has historically depended upon its regular administration and availability to ordinary people. This legitimacy may be called into question when grants are made outside of official channels to political allies whose cases are indistinguishable from those without the same special access,¹²⁶ or to people whose cases have fortuitously attracted media attention. Similarly, public confidence is shaken when those responsible for administering the power are seen as blocking access to it, or having an effective veto power over presidential actions. It is for this reason that some have questioned whether the pardon power can play a useful part in the justice system as long as it is controlled by the Justice

¹²⁶ See, e.g., Adam Liptak, *Bush Rationale on Libby Stirs Legal Debate*, N.Y. Times, July 4, 2007 ("In commuting I. Lewis Libby's 30-month prison sentence on Monday, President Bush drew on the same array of arguments about the federal sentencing system often made by defense lawyers — and routinely and strenuously opposed by his own Justice Department."). See also Statement by the President on Executive Clemency for Lewis Libby, available at <http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html> (Libby's 30-month prison term "excessive" for "a first-time offender with years of exceptional public service.").

Department, which is said to have a built-in conflict of interest.¹²⁷ Some have suggested that the White House should administer the power itself. Others have suggested that the president should be advised in pardon matters by an independent board like those in many states.¹²⁸

It is not clear that such a radical restructuring is necessary. History teaches that the Justice Department can excel at managing the pardon power notwithstanding its responsibility for prosecuting cases, and indeed that prosecutors need not fear that pardon will denigrate the results of their work. Ensuring a central role for those officially responsible for the underlying criminal case gives the president access to information about the case, helps insulate the president from political pressure and importuning, and maximizes the chances that pardon would advance the administration's law enforcement and criminal justice agenda.

At the same time, experience since the 1980s has shown that tying the pardon advisory function so closely to the interests of prosecutors has made it hard to provide the objectivity that the president needs to exercise the power wisely and responsibly. The president needs an advisor who has some degree of independence from those who prosecuted the underlying criminal case, who can bring to bear a different policy perspective and different values, and whose independent political accountability can provide the president a measure of protection from public criticism. For over a century that advisor was the attorney general, who combines the roles of chief law

¹²⁷ See, e.g., Daniel T. Kobil, *Reviving Presidential Clemency in Cases of "Unfortunate Guilt"*, 21 FED SENT. REP. 160, 163 (2009) ("Given the prosecutorial responsibilities of the Justice Department, there is a conflict of interest present when its attorneys must also serve as the gatekeepers for clemency."); Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse*, 13 FED. SENT. REP. 177 (2001) ("The pardon process seems to have been captured by the very prosecutors who run our inevitably flawed criminal justice system.").

¹²⁸ See Kobil, *supra* note 127, at 163 ("the president should look for advice to either a body of professionals charged with the sole task of reviewing clemency requests, or to a group of volunteers appointed because of their expertise"); Barkow, *supra* note 4, at 157 (administrative clemency boards can "take the heat for decisions that turn out badly"). A recent example is Michigan Governor Jennifer Granholm's use of a citizens advisory board in commuting prison sentences. See Leidel, *supra* note 4 ("Prisoner commutations have been rare and safe for public"). State clemency boards are described in LOVE, RESOURCE GUIDE, *supra* note 4, at 18-38.

enforcement officer and political counselor. Since the late 1990s, the Department's clemency advisory function has served the institutional interests of prosecutors rather those of the presidency.

One possibility going forward is for the president to restore the attorney general to a central role in the pardon process, and appoint his own pardon attorney.¹²⁹ Another possibility is to install a clemency advisory board similar to those used by Presidents Truman and Ford.¹³⁰ In any case, the president and attorney general need to encourage the U.S. Attorneys to regard pardon as helpful rather than threatening to their work, and invite them to support worthy pardon cases.

The president ought also to make public his clemency policy and the standards for favorable consideration of clemency applications, and return to a practice of prompt and generous pardoning: “[i]nactivity can be just as politically risky as granting a questionable pardon,” since “observers become more suspicious and skeptical of those lucky few who are pardoned.”¹³¹ Critics of pardoning have pointed to its reliance on “unstructured and unexplained discretion,”¹³² but this is not inevitable. The President could establish a policy of disclosure after

¹²⁹ See Brian M. Hoffstadt, *Guarding the Integrity of the Clemency Power*, 13 FED. SENT. REP. 180 (2001) (responsibility for staffing clemency cases should remain in the Justice Department, but program should be restructured so as to restore attorney general's role in process). The president might also choose to emulate President Cleveland in his second term, and work directly with the pardon attorney. See *supra* note ____.

¹³⁰ See Exec. Order 9814, 11 Red. Reg. 14,645 (1946) (board to consider pardons for convicted persons who fought in World War II); U.S. Presidential Clemency Board, Report to the President (1975) (administration of President Ford's Vietnam amnesty proclamation). See also Daniel Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEXAS L. REV. 569, 622 (1991) (recommending bifurcated system, involving appointed board to consider and make recommendations in “ordinary” pardon cases, leaving the president unconstrained to consider more “political” uses of the power).

¹³¹ CROUCH, *supra* note 8, at 24. Prior to the Reagan Administration, presidents acted favorably on at least 30% of the petitions filed. See *supra* text accompanying notes ____.

¹³² Freed & Chanenson, *supra* note 115, at 124.

a clemency case has been finally acted upon, to introduce a degree of accountability into the pardon process, and consider returning to the pre-1931 practice of giving reasons for each grant, as many governors do.¹³³ In order to divert some of the commutation caseload, he should direct the Attorney General to make maximum use of statutory alternatives to clemency.¹³⁴ Staffing may be a concern if a reinvigorated pardon power turns out to be wildly popular, though it is instructive to recall that for many years hundreds of clemency cases were capably handled each year by a very small staff.¹³⁵

Finally, the president should take advantage of clemency's strategic potential to advance his criminal justice policy agenda, by recognizing particularly harsh mandatory sentences, mitigating unwarranted disparity among codefendants, giving retroactive effect to changes in the law, sending home prisoners who are seriously ill or elderly, and restoring rights to individuals who have a need for relief from some specific collateral penalty. A senior attorney in the White House Counsel's office should be assigned to review the Justice Department's clemency recommendations and advise the president on pardon matters with larger policy goals in mind, and the president should schedule regular opportunities to review and act on clemency requests. Finally, the White House should publicize clemency grants and the reasons for each one, putting a human face on the individuals benefitting from the president's mercy.

¹³³ See, e.g., Virginia Governor's Annual Reports to General Assembly ("List of Pardons, Commutations, Reprieves, and Other Forms of Executive Clemency"), including reasons for granting pardon in each case, dating back to 1974 available at <http://leg2.state.va.us/DLS/h&sdocs.nsf/Search+All+Published/?SearchView&SearchOrder=4&query=clemency>.

¹³⁴ See, e.g., 18 USC 3582(c)(1)(A)(i) (court authority to reduce sentence on motion of the Bureau of Prisons for "extraordinary and compelling reasons"); 8 USC § 1231(a)(4) (authority to deport certain non-citizen prisoners prior to the expiration of their prison terms).

¹³⁵ See note __, supra. It has been customary since the early 1990s for the pardon attorney to prepare very cursory reports in cases deemed meritless and otherwise unworthy of the president's attention. It is obviously difficult for the president to reach an independent assessment in this regard without a full report.

Conclusion

Throughout our nation's history, the president's pardon power has been used with generosity and regularity, to correct systemic injustices and to advance the executive's policy goals. Since 1980, however, presidential pardoning has fallen on hard times, its benign purposes frustrated by politicians' fear of making a mistake, and subverted by unfairness in the way pardons are granted. Much responsibility for the desuetude and disrepute into which a once-proud and useful institution of government has fallen must be laid at the door of the Justice Department, which during the past two administrations failed in its responsibilities as steward of the power, exposing the president to embarrassment and the power to abuse. Another president should not be compelled to accept such poor service. That said, considering the criticism leveled against Bill Clinton's excesses and George Bush's parsimony, it is little wonder that Barack Obama has yet to take this constitutional power seriously. Yet pardon has important uses in the federal justice system, and recent experience has shown that a president who fails to pardon regularly during his term will have difficulty dealing with pent-up demand at its conclusion. And so President Obama would be well-advised to get curious soon about a constitutional power that is uniquely his, which promises so much but of late has delivered so little.