

Looking for the President's Pardon Power? Try the Supreme Court.

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At a [recent oral argument](#) in a case involving the crack cocaine sentencing guidelines, Supreme Court Justice Anthony Kennedy asked Assistant Solicitor General Leondra Kruger, "Does the Justice Department ever make recommendations that prisoners like this have their sentence commuted?"

It was a question that stumped Ms. Kruger. The answer should have been "not very often."

On second thought, make that "hardly ever."

The prisoner was Percy Dillon, sentenced in 1993 to 27 years in prison for trafficking in crack cocaine. Dillon was asking the Court to decide whether the U.S. Sentencing Commission had acted properly in limiting courts' ability to modify previously-imposed sentences in the wake of Congress' 2007 reduction in the crack guidelines. If Dillon

lost his case, he would spend another three years in prison.

Dillon seemed to strike Justice Kennedy as a particularly appealing candidate for clemency: his sentencing judge had called his original sentence "unfair" and "entirely too high," and Dillon had spent 16 years compiling an impressive prison record of educational outreach to fellow inmates and at-risk youth in the community.

Getting no answer from the government to his question about the frequency of the Justice Department's clemency recommendations, Justice Kennedy observed that there had been no sentence commutations in 2009 and only five the year before. "Does this show that something is not working in the system?"

"I'm not prepared to speak to that question today," Ms. Kruger said.

But it spoke volumes about the deteriorated state of the Justice Department's clemency program that the otherwise well-prepared Ms. Kruger appeared not to know what Justice Kennedy was talking about. In fact, though Justice Kennedy was correct that President Bush granted five commutations during his last year in office, it appears that none of them was recommended to him by the Justice Department. Nor is there any sign that Justice has recommended any commutations to President Obama.

It is easy enough to blame politics for the atrophy of presidential pardoning, but Justice Kennedy put his finger on the real reason for the paucity of commutations: the Justice Department has all but stopped recommending them because they are perceived to be inconsistent with the interests of federal prosecutors. President Bush denied almost 8,000 prisoner petitions in the course of his eight years in office, many of them filed by prisoners like Percy Dillon with outstanding prison records, whose judges regretted the sentences they had been obliged to impose and undoubtedly would have supported clemency had they been asked.

Some judges haven't even waited to be asked, like the one who was frustrated at having to sentence Kenneth Harvey to life in prison when he was caught with crack cocaine in the Kansas City airport in 1989. The judge thought Harvey deserved no more than 15 years, and so he included a clemency recommendation as a part of his sentencing order. Harvey filed a clemency application in due course, which was opposed by Justice and denied by President Bush. Harvey is still in prison after 21 years.

Prisoners are not the only ones who suffer from Justice's policy of parsimony in making clemency recommendations. People convicted many years ago still labor under lifetime collateral consequences that only the President can remove through a pardon, and hundreds of them have filed applications with the Justice Department seeking this relief. While President Bush granted almost 200 post-sentence pardons, most went to people convicted decades earlier of offenses so minor that they never spent a day in jail. He might have made more than token use of his authority to relieve these disabilities if Justice had recommended more cases to him. To date there is no sign that anything will change under President Obama.

Another Supreme Court case decided late last month, [*Padilla v. Kentucky*](#), suggests another important use for pardon, which is to spare noncitizens with dated, minor convictions the ultimate penalty of deportation. Until now, lawyers have been under no obligation even to warn a longtime legal resident that pleading guilty to a misdemeanor may result in what the Court has called "the loss of all that makes life worth living." Seven Justices, including the Chief Justice, thought that unconscionable, and even the two dissenters thought it unfortunate. But for thousands of people the *Padilla* decision comes too late, and they have no recourse but to pardon. Many governors have made responsible use of their constitutional powers to help deserving people avoid this ultimate loss. Why should the president not do likewise?

A recent [piece](#) in the *National Law Journal*, by a lawyer responsible for staffing pardons in the most recent Bush White House, urges President Obama to make more generous of his pardon power to free prisoners and restore lost rights. While a bit ironic considering the source, the proposal is a good one. The one caveat, based on recent experience, is that the Justice Department cannot be counted on to smooth the president's way or even to protect him. As the author of the piece well knows, its "seasoned career lawyers who owe no loyalty to the president" have an agenda of their own.

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. In recent years 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. 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.

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