

Reinventing the President's Pardon Power*

The president's pardon power took center stage for the second time in this young century when, on July 2, 2007, President Bush commuted the prison sentence imposed on White House Aide I. Lewis "Scooter" Libby.¹ Libby, Vice President Cheney's former chief of staff, had been convicted the previous March of perjury and obstruction of justice in connection with the leak of CIA agent Valerie Wilson's identity, and sentenced to 30 months in prison. The President acted just a few hours after the court of appeals rejected Libby's request to remain free on bail while pursuing his appeal, bypassing entirely the Justice Department clemency review process. At the time, the President had commuted only three other prison sentences in more than six years in office, all grants to small-time drug dealers who had served many years in prison, and his overall pardoning record was far from generous.

In explaining his action, the President said that he "respected" the jury's guilty verdict, but considered Libby's 30-month prison term "excessive" for "a first-time offender with years of exceptional public service." He added that Libby had otherwise been harshly punished by the damage to his reputation and suffering of his family, and by the fine and period of supervision left in place.² But by these standards, scores—perhaps hundreds—of people doing hard time in federal prison are also worthy of the President's mercy. The only thing that distinguishes Libby is his unique access to the Oval Office. Like the final Clinton grants six years before, the Libby commutation in context seemed to confirm the popular view of pardon as a personal prerogative of the president, a remnant of tribal kingship generally reserved for the well-heeled or well-connected.

How is it tolerable, in a democracy, for the chief executive to be able to reach into the machinery of criminal justice to pluck out one of his close associates, particularly if ordinary people have no hope of similar favor? The answer is, it isn't. The president's constitutional pardon power was never supposed to be used the way it was in the Libby case, and in our country's history it rarely has been.³

The Framers did not subscribe to a notion of pardon as a species of high-level gift-giving. They were intensely practical men, who conceived of the pardon power as an instrument of statecraft, and would not otherwise have

given it to the president. They understood that the pardon power would be distrusted by the people and abused from time to time, but thought the risk worth taking. For them, pardon was a necessary and functional part of their carefully calibrated system of checks and balances, not a perk of office. Until quite recently that is how the pardon power was understood by our presidents, and they exercised it in a considered and meaningful fashion.

In the past twenty-five years we have lost touch with the rich history of presidential pardoning. Four successive presidents have allowed the pardon power to atrophy, not because there was no more use for it—certainly this is not true since the advent of determinate sentencing—but because they both misunderstood and feared it. The Department of Justice, pardon's trusted official custodian for more than a century, marginalized and compromised the power; the regrettable events at the end of the Clinton Administration were the direct result of this failure of stewardship.

And yet, even as pardon appears increasingly anachronistic and corrupt, its continued relevance in the federal justice system is suggested by the sheer size of the prison population and the array of collateral disabilities imposed on the growing population of people with criminal records. The fact is that the federal sentencing scheme assigns a central role to pardon, if only by default, because it provides no other way to take a second look at sentences that have become final, or to release a federal offender from the collateral consequences of conviction. No legal system should have to rely on executive clemency to do justice, but ours does.

The Libby commutation calls us again to consider whether pardon has a legitimate role in the criminal justice system, or whether it should be consigned by constitutional amendment to the dustbin of history where it can do no more mischief. This essay argues for a reinvigoration of the constitutional pardon power—a reinvention if you will—by a president who has the political courage to use that beneficent power as the Framers intended. It describes the historical use of the power, explains how pardon fell into disuse and disrepute late in the last century, and proposes that pardon can and should be restored to a useful and respectable role in our present-day justice system, and in our national politics.



MARGARET COLGATE LOVE

Formerly a U.S. Pardon Attorney, (1990–1997), practices law in Washington, D.C.

No legal system should have to rely on executive clemency to do justice, but ours does.

* This article was first released on October 7, 2007, as an Issue Brief by the American Constitution Society for Law and Policy, www.asclaw.org. My thanks to Rachel Barkow, Dan Kobil, and Marc Miller for their comments on an earlier version of this article.

Federal Sentencing Reporter, Vol. 20, No. 1, pp. 5–15, ISSN 1053-9867 electronic ISSN 1533-8363
©2007 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/fsr.2007.20.1.5.

I. Presidential Pardoning in Historical Context

When the Framers included a power to pardon in Article II of the Constitution, they did so with the understanding that there must be some ability to dispense “the mercy of government” in exceptional cases where the legal system fails to deliver a morally or politically acceptable result.⁴ When Alexander Hamilton described pardon as a “benign prerogative” in Federalist 74, he understood that term in the Lockean sense of “doing public good without a rule.” Congress would enact rules of punishment, but the decision about when to make exceptions to those rules would be entirely the president’s free choice, an act of grace perhaps, but not a private one.

In addition to mitigating “the rigor of the law” in individual cases, pardon also would have a more purely political function, to put down rebellions, reward spies and cooperators, and heal the wounds of war.⁵ Well aware of the historical abuse of the English king’s pardon, the Framers nonetheless determined to vest this great power in the president alone, because of the occasional need for speed and secrecy, and because (as Hamilton thought) “the sense of responsibility is always strongest in proportion as it is undivided.” They put the pardon power beyond the reach of Congress and the courts, trusting that a president would be restrained in its exercise either by the threat of reprisal at the ballot box, or by what James Iredell called “the damnation of his fame to all future ages.”

Pardon proved its practicality right away, in helping the president deal with a series of rebellions and invasions in the early years of the Republic: “The pardon could bring rebels back into the fold, or it could repopulate the army by restoring deserters to service.”⁶ President Lincoln issued pardons throughout the Civil War to deal with desertion and draft evasion on the Union side, and to undercut the rebellion in the Border States. Presidents Johnson and Grant used the power to clean up afterwards, as did Presidents Theodore Roosevelt, Coolidge, Harding and Truman in connection with later wars.⁷ More recently, Presidents Ford and Carter both issued amnesties to draft law violators and military deserters from the Vietnam era. Like the Nixon pardon, these amnesties represent classic uses of the power to reconcile national differences. Pardon was also used for reasons of state,⁸ and to override or preempt unpopular or inconvenient laws. For example, after the election of 1800, President Jefferson released those still imprisoned for violating the hated Alien and Sedition Act. Likewise, Presidents Harrison and Cleveland issued blanket pardons to Mormon polygamists in anticipation of Utah’s admission to statehood, and President Wilson expressed his opposition to Prohibition by pardoning more than 500 liquor law violators after his veto of the Volstead Act was overridden.⁹ In a more recent “systematic” use of the power evidently intended to send a message to Congress, Presidents Kennedy and Johnson commuted the sentences of more than 200 drug offenders serving mandatory minimum sentences under the Narcotics Control Act of 1956.

It is less well known that from the early days of the republic the pardon power was pressed into regular service as an integral part of the day-to-day operation of the federal justice system. At a time when the laws were relatively harsh and inflexible, pardon was virtually the only way that federal offenders could have their convictions reviewed, prison sentences reduced, and rights of citizenship restored.¹⁰ Many pardons and sentence commutations were issued each year to ordinary people convicted of garden variety crimes, often upon the recommendation of the prosecutor or the sentencing judge.¹¹ Far from being an “extraordinary” remedy, pardon was a very ordinary form of early release and restoration of citizenship rights.¹²

In 1854, presidents began to rely regularly on the attorney general for advice in clemency matters, and in 1898 President McKinley signed the first federal clemency rules, directing that all applications for pardon or sentence commutation should be submitted to the Justice Department’s pardon attorney for review. Those rules have remained essentially the same to this day. And, until the final years of the Clinton administration, with only a handful of exceptions, the president’s grants of clemency were made pursuant to a report and recommendation drafted by the pardon attorney and signed by the attorney general or his designee. The degree to which the president historically depended upon the attorney general’s advice in clemency matters is suggested by the fact that, until the Kennedy Administration, most applications that the attorney general did not support were not even sent to the White House, but were closed administratively without presidential action.

The attorney general’s central role in administering the constitutional pardon power reflected and reinforced the link between the pardon power and the ordinary operation of the federal criminal justice system. It also kept the federal pardoning power honest, if not always entirely regular. Directing all pardon applicants to the Justice Department gave the president a measure of protection both from unwelcome importuning and political controversy. The low-key routine of the Department’s pardon office, headed almost continuously since its establishment in 1891 by a career appointee, was “of such a character as not to attract wide attention.”¹³ Between 1953 and 1999, there were only three occasions on which the president did not follow the established Justice Department procedure for handling pardons, and all were controversial: President Ford’s 1975 pardon of Richard Nixon, President Reagan’s 1981 pardon of two FBI officials who had authorized illegal surveillance of radicals, and President Bush’s 1992 pardon of six Iran-Contra defendants. While the president did not always follow the advice of his attorney general, the practice of always consulting him gave the president full access to the facts of a case, to the law enforcement perspective on its merits, and to the counsel of a key member of his Cabinet. Through the attorney general’s mediation, pardon could

be counted on to assure a fair result in individual cases, to signal the president's law enforcement priorities, and to underscore the value of rehabilitation as a goal of the justice system.

By the end of the 19th century, the federal justice system had begun to develop a variety of judicial and administrative mechanisms for sentence mitigation, post-conviction review, and early release from prison, all of which reduced reliance on pardoning. Yet the Annual Reports of the Attorney General between 1885 and 1932 reveal that Justice continued to rely heavily on the pardon power as an early release mechanism even after the enactment of parole and probation statutes. And the published reasons for each clemency recommendation in these years are a sad commentary on how little progress had been made toward the humane and efficient justice system that the Enlightenment philosophers had expected would eliminate the need for pardon.¹⁴ In 1933, President Roosevelt directed the Justice Department to cease publishing the reasons for its clemency recommendations, ostensibly for reasons of efficiency, but the zeal for pardoning evidently continued unabated: during FDR's twelve years in office, he issued 3018 pardons and 557 commutations, while denying only 1574 petitions.

Until 1980, each president granted well over a hundred post-sentence pardons and sentence commutations almost every year, without fanfare or scandal. Grants were issued almost every month for much of this period, evidence that pardoning was considered part of the ordinary housekeeping work of the Presidency, not something reserved for holidays or departure from office.¹⁵ The percentage of clemency petitions acted on favorably remained high, approaching or exceeding 30% in every administration until Jimmy Carter's. While it would be naïve to suggest that special pleading outside of regular channels never entered into a decision to pardon or commute a sentence, irregular grants rarely gave rise to controversy as long as ordinary people were perceived to have access to the president's mercy. Sheer volume protected the president's ability to make an occasional grant for personal or political reasons that the public might otherwise not understand. In addition to the generous grant rate, it was the thoroughness and perceived fairness of the Justice Department's review that kept the pardon process from being cynically viewed as a lottery, and that protected the president's ability to exercise his discretion as he thought best.¹⁶

II. The Decline and Fall of Ordinary Pardoning

Presidential pardoning went into a decline during the Reagan Administration, more sharply during his second term. This is attributable primarily to two relatively new influences in the criminal justice system: the retributivist theory of "just deserts," and the politics of the "war on crime." The philosophers whose ideas eventually triumphed in the 1984 Sentencing Reform Act took "a dim view" of pardon, considering it an unprincipled and

unwelcome intrusion in the law's enlightened process.¹⁷ The retributivist view of punishment embodied in the 1984 Sentencing Reform Act made no place for clemency, and looked askance even at those who were simply seeking restoration of the right to vote or a gesture of forgiveness. In the rule-bound milieu of the federal sentencing guidelines, the Hamiltonian idea of pardon as prerogative was at once quaint and threatening.¹⁸

And yet, given the absence of other mechanisms to provide relief in case of some fundamental change in a prison's situation after sentencing, or for relieving collateral penalties after release from prison, the law itself implicitly recognized a place for the pardon power. That is, in stripping all relief mechanisms out of the law, Congress left clemency as the only "fail safe."¹⁹

At the same time, pardoning began to seem a very dangerous practice to be avoided by elected politicians if at all possible. The crime war of the 1980s transformed "just deserts" into "tough deserts." It became conventional wisdom that appearing "soft on crime" could only get an elected official into trouble, and the Willie Horton episode during the 1988 presidential campaign confirmed that pardoning could ruin a political career. Guidelines sentencing seemed to provide politicians useful cover, in obviating the need to take such risks. The inherent mystery of the pardon process and the infrequency of actual grants reinforced in the public's mind what had until then been only a popular myth, that pardon was a way for a president to reward intimates at the end of his term. At about the same time, for essentially the same reasons, pardoning went off the radar in most states where the power is exercised by the governor.

A third influence contributing to the decline in federal pardoning in the 1980s was the hostility of federal prosecutors. A change in the administration of the pardon power that allowed that hostility to gain control of the Justice Department's clemency recommendations. While prosecutors had always had a formal role in the pardon process, only in the 1980s did they begin to view pardon as inconsistent with their interests. It is no secret that retributivist sentencing did not eliminate discretion and disparity from the system; they simply migrated to the prosecutor's office, and were given effect through charging and plea bargaining decisions. Pardon threatened a degree of oversight and revision of prosecutorial decision-making that, from prosecutors' point of view, required its incapacitation. This was inadvertently facilitated by Attorney General Griffin Bell's decision in the late 1970s to delegate the clemency advisory responsibility to subordinate officials within the Department. This fateful decision, whose implications were apparently not fully appreciated at the time, had a transforming effect on the Department's clemency program, and on the general tenor of the advice in clemency matters the president would thereafter receive.

As a member of the president's cabinet, the attorney general enjoys a special status as political counselor that

It is ironic that a president who has stretched all other executive powers to the breaking point and beyond, has been so timid and unimaginative in using the one power that is indisputably his and his alone.

complements his primary role as chief law enforcement officer. Historically, in advising the president in clemency matters, the attorney general could be expected to bring to bear both of these perspectives, resolving on a case-by-case basis the tension between his duty to enforce the criminal law, and his duty to advise the president about when to dispense with that law, for political purposes or for mercy's sake. When the clemency advisory responsibility devolved within the Justice Department to officials whose duties were exclusively concerned with law enforcement, and whose backgrounds were almost exclusively as prosecutors, the animating spirit of pardon recommendations became more one-sided. This in turn had important consequences for the independence and integrity of the Department's pardon program, which soon became an extension of the "tough on crime" agenda of federal prosecutors. The possibility that pardon might actually help prosecutors do their job went largely unexplored. Without a predicate decision from the White House about what role (if any) pardon should to play in the administration's criminal justice agenda, and armed with a mandate to vigorously enforce the criminal laws, the Justice Department made fewer and fewer favorable clemency recommendations every year. By the time President Clinton took office in 1993, the pardon program was functioning primarily to ratify the results achieved by prosecutors, not to provide any real possibility of revising them.

Under President Clinton, the number of commutation applications soared as the pardon caseload began to reflect mandatory sentencing and stepped-up federal prosecution of drug crimes.²⁰ But Clinton continued the policy of parsimony that had informed pardoning in the 1980s, with a portentous departure from prior administrative practice: in spite of a steady stream of clemency recommendations from the Justice Department, Clinton issued no clemency grants at all in four of the first five years of his presidency.²¹ Justice Department clemency recommendations piled up at the White House without action, for senior political officials at Justice had little institutional incentive to try to interest the President in an activity to which he seemed so obviously indifferent. During Clinton's second term, several high profile grants were staffed directly out of the White House, an unprecedented public distancing that reflected the President's generally strained relations with Justice.²² As a result, President Clinton entered his final year in office having pardoned less generously than any president since John Adams.

As the time on his watch grew short, another side of President Clinton emerged. He began talking publicly about his interest in pardoning, lamenting how few pardons he had granted, and signaling an intention to do more before leaving office.²³ For the first time in eight years, he expressed sympathy with nonviolent drug offenders serving long prison terms,²⁴ and articulated a generous policy of restoring civil rights to anyone who had completed his sentence.²⁵ At the eleventh hour, Clinton

seems to have 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 the Justice Department was either unwilling or unable to meet his demands, and he was left to work around the problem using his own White House staff. Thus relieved of the constraints imposed by the Justice Department's administration of the power, President Clinton enjoyed a final unencumbered opportunity to reward friends, bless strangers, and settle old scores.²⁶ But the flawed decision-making that produced the spate of irregular grants on his last day in office is attributable at least as much to the Justice Department's decade-long neglect of its responsibilities, as it is to the President's disregard of his own.

President Bush entered office with the controversy over President Clinton's final grants ringing in his ears, and with a reputation from his days as governor of Texas that did not bode well for the rejuvenation of the federal pardoning program. He agreed at the beginning of his term to adhere to the Justice Department's review process, and until the Libby grant it appears that he had for the most part done so. But his meager grant rate shows him to be less generous and more risk-averse than any president in the last 100 years, including his father, and at the time of this writing a large backlog of cases awaits his consideration.²⁷ It is hard to discern any pattern or message from his pre-Libby grants, except that they appear calculated not to get him into any trouble. It seems unlikely that President Bush will make any radical course changes before the end of his tenure, at least insofar as the regular pardon caseload is concerned, for he does not appear to share Clinton's personal inclination to extend compassion towards strangers, or have an independent interest in criminal sentencing. It is ironic that a president who has stretched all other executive powers to the breaking point and beyond, has been so timid and unimaginative in using the one power that is indisputably his and his alone.

III. Does Pardon Have A Future?

Pardon has not played a meaningful role in the justice system for many years. Recent presidents have neglected or abused it (or both), criminal justice professionals have no respect for it, and the public understandably regards it with cynicism. Without anything to keep it busy, it has become the problem child in the president's nursery. Why then would any president want to reclaim this unruly power? Here are four reasons:

- Federal criminal law has produced a great deal of injustice for which only pardon provides a remedy
- Pardoning is the most immediate way for the president to communicate his law enforcement priorities to executive officials, including prosecutors
- Pardon allows the president to advance his criminal justice agenda with Congress and the public

- Pardon is susceptible to misuse, real and imagined, when it is not gainfully employed in the service of the justice system.

A. Doing Justice

History teaches that the demand for clemency increases when the criminal justice 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, where the law itself balances rule and discretion. It could therefore have been predicted that the enactment of the Sentencing Reform Act in 1984, with its abolition of parole, would reawaken interest in clemency. 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 other post-conviction early release mechanisms have either been abolished or allowed to atrophy. Pardon has become virtually the only way that a federal sentence, once final, can be reconsidered and, in appropriate cases, reduced. U.S. Supreme Court Justice Anthony Kennedy has urged that the pardon process be "reinvigorated" in response to "unwise and unjust" federal sentencing laws, stating that "[a] people confident in its laws and institutions should not be ashamed of mercy."²⁸ The president's personal intervention in a case through the pardon power not only benefits a particular individual, it reassures the public that the legal system is capable of just and moral application. At least until laws are reformed and workable post-conviction relief mechanisms are adopted, there is a place for pardon.

After the court-imposed sentence has been served, pardon should play an important role in offender reentry and reintegration by relieving legal disabilities and certifying good character. 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. 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."²⁹ The collateral consequences of conviction operate as continuing punishment, and a just system must afford deserving individuals some way of alleviating them. Until some alternative way is found to give federal offenders a way to satisfy their debt to society, there is a place for pardon.

B. Speaking to the Troops

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 case-load 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. It was hard to miss the message sent by Bill Clinton's rush to preside over the execution of Ricky Ray Rector during the 1992 presidential campaign. The "extraordinary potential for arbitrariness" that some see as an argument against pardon³⁰ can be turned on its head: a clemency program administered rigorously at a national level 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.³¹

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.

C. Advancing Law Reform

Historically, pardon has played a policy role in raising awareness of shortcomings in the law in the context of a particular case.³² If the case 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. The Libby case reminds us 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. While the Libby grant itself is unlikely to persuade Congress that prison terms for nonviolent offenses should be reduced, a more systematic use of the power in less politically-charged cases might do so. 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.³³ If a judicious use of commutations can draw out support for more flexibility in the sentencing laws, post-sentence pardons can illustrate the need for more generally available administrative or judicial relief mechanisms (such as certificates of good conduct or expungement) by which convicted persons may avoid collateral legal penalties and gain respectability in the community.

Finally, apart from its role in encouraging law reform, pardon can tell good news about the justice system, by recognizing and rewarding criminal justice success stories. Pardoning a former drug addict who has turned her life around and become a productive member of the community emphasizes the system’s capacity to encourage rehabilitation, and its redemptive goals.

D. Avoiding Infamy

Over the years, the practice of issuing pardons frequently and regularly has tended to keep the power generally honest, or at least apparently honest in the eyes of the public. While there have been many controversial pardons in our history, the president was never accused of using the power corruptly to reward friends or to conduct personal vendettas as long as they were issued at the request of the Justice Department. When ordinary pardoning became irregular and infrequent during the Clinton years, and the administration of the power was taken over by the White House itself, the perception of fairness and accessibility flowing from the Justice Department’s review process no longer protected him. Even plainly meritorious grants were suspect. Until the Libby grant, President Bush enjoyed the insulating effect of the Justice Department review process, though his small number of unremarkable grants gave rise to a different kind of criticism, that he was trivializing the power. In this case, failure to exercise the power may have much the same consequence as abusive exercise.

IV. Reinventing the Pardon Power

Our next president ought to identify the values pardon serves, define a clear role for it in the criminal justice system, it, and establish a system for administering the power that will maximize its potential for correcting injustice and encouraging reform. This process, long overdue in our jurisprudence, will likely suggest ways in which the law itself needs to be reformed. In rethinking pardon’s role, and the most efficient use of the power under present circumstances, here are three questions the president might ask:

A. Should executive clemency be available on a routine basis to ordinary individuals, or should it be rare and its beneficiaries extraordinary?

The concern for political risk that has informed pardoning for the past twenty years has become a self-fulfilling prophecy: as the power is exercised less and less frequently and produces fewer and fewer grants, it is increasingly regarded with suspicion and cynicism, and is harder and harder to justify. Happily, the process can work in the opposite direction: when pardons are issued generously and at regular intervals, as they were prior to 1980, the power appears more a function of government than a perk of office, and thus more legitimate in the public eye. Purely as a practical matter, in a substantial batch of pardons, people will not expect too much of any one recipient.

But more frequent and generous pardoning is not enough by itself to bolster public confidence in the power. Indeed, too much pardoning may indicate that there is something seriously wrong with the legal system, and thereby undermine confidence in the rule of law. Pardon must be perceived to advance rather than interfere with the just functioning of the legal system, which requires due respect for principles of comity with the other branches of government. Thus, the pardon power should not be used routinely to thwart clear legislative mandates or to revise the discretionary judgments of courts.³⁴ When the president intervenes in an area that is as elaborately regulated by statute and judicially-crafted guidelines as criminal sentencing, it is particularly important that he does so pursuant to clearly articulated standards, and a protocol of consultation with affected agencies and individuals. The generic criteria laid out in the United States Attorneys Manual (“disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government”) do not begin to exhaust the extraordinary circumstances in which commutation may be appropriate.³⁵ For example, commutation and early release may be appropriate where there has been a fundamental change in a prisoner’s situation unrelated to age or medical condition, such as exigent family circumstances, or some intervening event like a change in the law that has not been made retroactive. Commutation may also be warranted to remedy some act or omission by the prosecutor, or an error by the court. There may occasionally be cases outside these broad categories in which continued incarceration is deemed to be unjust or inappropriate. Finally, commutations may be used to signal a change in law enforcement priorities, or to suggest the need for reform of the law itself.

It is easier to justify frequent pardoning after the court-imposed sentence has been fully served, when the president has less competition from the other branches.³⁶ An individual who has fully satisfied the court-imposed penalty, accepted responsibility for the offense and made a reasonable effort to reconcile with those injured by it, and

lived productively for a period of time in the community, should ordinarily be considered favorably for pardon. Humble status and modest means should not be disqualifying. Indeed, reserving post-sentence pardons for those who have performed heroic acts or rendered extraordinary service to their communities may send a message that forgiveness is not a final closure to which ordinary people may aspire. At the same time, the gravity of the offense or notoriety of the offender may suggest the desirability of imposing a longer waiting period before favorable action, in consideration of the symbolic effect of a pardon. A specific need for a pardon (e.g., to qualify for a particular job or license, obtain a security clearance, or avoid deportation) may be a relevant factor in considering whether to grant clemency, but a simple desire for forgiveness should be sufficient.

In the end, favorable consideration for pardon or commutation will always involve a weighing of aggravating and mitigating factors in the particular case. Risk is inherent in the enterprise of pardoning, and it is not for the faint-hearted. This just underscores the importance of a vetting process that maximizes the chances that a grant will be well received in the community, for, after all, it is the public to whom the president is ultimately responsible in pardoning.

There is a fine line between using the pardon power to point out and remedy shortcomings in the law, and relying on it to compensate more generally for failures in the system. Pardon is not justice, and there can be no expectation that it will be “fair” in the same sense that an equitable justice system is.³⁷ Pardon cannot fix every case of “unfortunate guilt,” and should not be expected to. Because a popularly chosen president has been designated as the “dispenser of the mercy of government,” his decisions will be informed not just by what an individual morally deserves, but also by what serves the public welfare. He cannot be deterred by knowing that not all similarly situated individuals will have the benefit of his mercy.³⁸

B. How can the pardon power be most effectively administered to protect the president and reassure the public?

The question of who should be responsible for shaping federal pardon policy and for staffing individual clemency cases was squarely raised at the conclusion of the Clinton Administration, when the breakdown of the established process for vetting pardon cases stoked public outrage at some of the more unusual grants. But when President Bush took office, a decision was evidently made to go back to business as usual as if a hurricane had not just blown through. Presumably as this President wishes, that process has produced very little since he took office, and the Justice Department was entirely by-passed in the Libby case.

The pardon power has been administered by the Justice Department for many years, but it may be timely to

rethink this arrangement in light of the inherent conflict with the Department’s responsibility for prosecuting cases. The legitimacy of the president’s use of the power depends importantly on how accessible it is, and prosecutors should not be seen as having an effective veto power in this regard. Particularly in commutation cases, it is the prosecutor’s own discretionary decisions that are often at issue. While the views of the prosecutor and the sentencing judge should always be taken into account, as long as the pardon advisory function remains tied so closely to the interests of prosecutors it cannot 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 a different policy perspective and different values to bear on the matter, and whose independent political accountability can provide the president a measure of protection from public criticism. On the other hand, the obvious public comfort taken from Justice’s involvement in pardon cases, evidenced in the complaints heard about the lack of it at the time of the Libby grant, suggests a somewhat less radical restructuring may be in order.³⁹

In any reconsideration of how the pardon power is administered, questions of transparency and accountability must be considered. The states have developed a variety of arrangements for administering pardon under their own constitutions that include public hearings and reasoned justifications, which may produce greater accountability but have efficiency trade-offs when compared to the confidential Justice Department advisory process.⁴⁰ It is also essential to consider what to do about staffing if a reinvigorated pardon power turns out to be wildly popular, as seems likely after so long a dry spell. While any statutory regulation of the pardon power would require a constitutional amendment, there is no reason why the president himself could not put in place a system for administering the power that would enable him to use it more efficiently and purposefully than the present system permits.⁴¹

C. How can the president most effectively use the pardon power to provoke and shape a national conversation about criminal justice policy?

Both at a national and state level there is a growing concern that the crime control strategies of the past 20 years have yielded only broken minority communities, budget deficits, and a powerful prison-industrial complex that demands a steady stream of involuntary recruits. Long prison sentences and permanent collateral penalties are now generally recognized as inefficient and ineffective, particularly where no serious violence is involved, yet legislators and executive officials alike are reluctant to support law reform for fear of being labeled “soft on crime.” While we may not have reached a Hamiltonian “season of insurrection,” there is an urgent need for presidential leadership to

begin the work of reviewing laws and policies that have aggravated social and public health problems without yielding offsetting gains in public safety. The public is probably more prepared than are most legislators to welcome and support serious and sensible efforts to reduce federal prison sentences, and to encourage criminal offenders to turn their lives around, including pardoning them where they are successful. The president could weigh into this important domestic policy discussion using the tool the Framers put at his most immediate disposal.

Used wisely, the pardon power can reveal flaws in the legal system, influence attitudes, and build consensus for change.

Given the high level of dissatisfaction with federal sentencing laws and practices, the president will inevitably be called upon to decide particular clemency cases with a larger agenda in mind. With a clear vision of that agenda, and a reliable system of administration devised to accomplish it, the pardon power need not remain the one executive power whose leadership potential has gone entirely untapped in contemporary politics.

Used wisely, the pardon power can reveal flaws in the legal system, influence attitudes, and build consensus for change. Some of President Clinton's less controversial final grants highlight harsh drug sentencing laws, failure to give retroactive effect of changes in the law, unwarranted disparity among co-defendants, mandatory deportation of non-citizens convicted of minor and dated offenses, and unreasonably harsh collateral sanctions. As discussed above, there are sensible limits on the extent to which the president may want to rely on the pardon power if it puts him on a collision course with Congress or the courts. But the president is not so constrained where the reason for the grant relates to policies and practices that are under the executive's control, such as unwarranted disparity among co-defendants, unrewarded cooperation with the government, or some discretionary act or omission by the prosecutor that warrants correction. And there are many less institutionally threatening things that the pardon power can accomplish, like recognizing and rewarding rehabilitation, enabling prisoners to die at home with their families, or simply satisfying an individual's desire for an official gesture of forgiveness. Pardon can emphasize the redemptive goals of the justice system, just as front-end prosecution emphasizes its retributive goals.

Finally, to obviate the need to rely on the pardon power as a routine relief mechanism, the president should also consider developing alternative ways in which individuals can obtain reduction of court-imposed sentences in appropriate cases, and from the collateral consequences of conviction. Federal law now provides for judicial relief where there has been a fundamental change in a prisoner's situation since sentencing. This mechanism, controlled by the Bureau of Prisons, should be used more frequently in light of its purpose and usefulness, under guidelines promulgated by the United States Sentencing Commission.⁴² Consideration should be given to establishing an administrative mechanism for reconsidering prison sentences in light of changed circumstances, which would resemble a

parole system only insofar as it would permit early release from prison in appropriate cases. In addition, an alternative mechanism for recognizing and rewarding an individual's "rehabilitation," similar to the administrative and judicial certificates of good conduct now available in New York and Illinois,⁴³ could be developed to give people who have been convicted a chance to put their past behind them.

Conclusion

In the past 25 years, presidents have allowed the pardon power to atrophy as a remedy available to ordinary people. During all of this time there has never been a considered discussion of the role that pardon should play in the justice system, even after the transformation of federal sentencing to a determinate no-parole system. There have been few pardon grants in recent years, and no effort to make pardoning meaningful. Grants are rare and appear random, and the pardon process is confirmed in the public mind as arbitrary and untrustworthy. Without either a clearly defined role or a reliable system for management, pardon is susceptible to abuse, real and imagined, as evidenced by the public response to the final Clinton grants and by President Bush's Libby commutation. Recognizing the possibility that the power may be lost entirely unless it is brought under control and the public's confidence in it restored, it is best to start the discussion now.

Many doubt the relevance of old-fashioned unruly pardon to our streamlined modern-day justice system. But they are wrong. If there was little practical need or theoretical justification for pardon in an indeterminate sentencing system, its virtues shine now that the criminal justice system so often seems merciless. Rule-based sentencing has severely limited the courts' ability to dispense individualized justice, and created new possibilities for disparity and unfairness, the more pernicious because they are hidden within the prosecutor's office. With the proliferation of collateral penalties 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. Not since the 19th century has pardon been as relevant from both a moral and 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.

The Libby commutation will be redeemed if it marks the beginning of a discussion about the role of pardon in the justice system, and in our national politics. Any serious discussion of this venerable back-end remedy will feed into the conversation already underway about the utility and fairness of our front-end law enforcement and sentencing strategies. If pardon is revived only to set the scene for its own decent interment, that will be a lot. There are many who believe that the harsh criminal penalties put in place 20 years ago have done little to reduce crime and a lot to

produce injustice and burden poor communities. They are ready to turn the page and try something new. The pardon power can play a useful role in this reform effort, as it has in past eras, if public confidence in it is restored. This in turn requires perceived fairness and actual reliability in the pardon process, regularity and frequency of pardon grants, and above all a president's commitment to using the power in an intentional and generous manner.

Notes

- ¹ The term "pardon" refers both to the president's constitutional power under Article II § 2, and to a specific form of relief under that power, in modern times generally (though not always) a forgiveness after completion of sentence. "Commutation" is a form of clemency that reduces a prison sentence or converts a sentence to a less severe form. (Because President Bush's grant eliminated Libby's prison sentence in its entirety, it is technically styled a "remission.") "Clemency" is an umbrella term used to describe all forms of relief available under the pardon power. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEXAS L. REV. 569, 575-578 (1991), cited in *Herrera v. Collins*, 506 U.S. 390, 412, n. 12 (1993).
- ² July 2, 2007, Statement by the President on Executive Clemency for Lewis Libby, available at <http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html>.
- ³ The closest parallel to the Libby grant in recent history is President George H.W. Bush's pardon of six government officials prosecuted in connection with the Iran-Contra investigation. There the president was straightforward about his reasons for extending clemency, stating that all six were "patriots" with a "long and distinguished record of service to the country" who had been caught up in "the criminalization of policy differences." See Proclamation 6518, December 24, 1991, <http://jurist.law.pitt.edu/pardonsex5.htm>. See also President Reagan's pardon of two FBI officials convicted of authorizing illegal "black bag jobs," whose cases were still on appeal. Pardon for W. Mark Felt & Edward S. Miller, Statement of the President, 17 Weekly Comp. Pres. Doc. 437 (Apr. 15, 1981) (generosity due "two men who acted on high principle to bring an end to terrorism that was threatening our nation"). This same sentiment appears to have been behind the Libby grant, as evidenced by the complete remission of Libby's "excessive" prison sentence, rather than the more usual reduction of sentence accomplished by a "commutation." If Libby is given a full pardon at the conclusion of President Bush's term, as some predict, the remission of his prison sentence will likely be seen in retrospect as a temporary expedient to allow Libby's challenge to his conviction to go forward, and to retain his Fifth Amendment protection against testifying about the circumstances of his offense.
- ⁴ See, e.g., Federalist No. 74, at 422 (Alexander Hamilton) (Penguin Books ed., 1987) ("the criminal code of every country partakes so much of necessary severity that, without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel"); James Iredell, Address in the North Carolina Ratifying Convention, reprinted in 4 *The Founders' Constitution* 17 (P. Kurland and R. Lerner, eds., 1987) (Iredell Address) ("It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice."). For a discussion of the development and use of the pardon power in England and in the colonies, see William Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977); see also CHRISTEN JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* (1922).
- ⁵ See The Federalist No. 74, *supra* note 4 at 423 ("[I]n seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth, and which, if suffered to pass unimproved, it may never be possible afterwards to recall"); Iredell Address, *supra* note 4, at 18 (noting pardon's usefulness in time of "civil war," and the need to obtain the testimony of accomplices and to protect spies who have proved useful to the government.).
- ⁶ President Washington made the first use of the pardon power in 1795 by issuing an amnesty to quell the Whiskey Rebellion, and he later pardoned those of its leaders who were convicted of treason. Later presidents used the power freely as Commander-in-Chief:
 - President Adams pardoned the rebels of Fries Rebellion.
 - President Thomas Jefferson pardoned deserters from the Continental Army. In order to fill up the army ranks to fight to War of 1812, President James Madison pardoned deserters and, after the war, pardoned Lafitte's pirates. As the presidents well knew, 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 (Oxford University Press, 1989).
- ⁷ Roosevelt pardoned participants in the Philippine insurrection, Coolidge pardoned World War I deserters, Harding commuted the sentences of dozens of people imprisoned under sedition and espionage laws (including Eugene Debs and a number of Wobblies), and Truman pardoned people with convictions who had served honorably in World War II. See also Charles Shanor & Marc Miller, *Pardon Us: Systematic Pardons*, 13 FED. SENT. RPT. 139 (2001) (cataloguing historical instances in which the president has used his pardon power in a systematic way).
- ⁹ See e.g., Exec. Grant of Clemency to Adil Shahryar, (June 11, 1985) (son of aide to Indian Prime Minister Rajiv Gandhi, serving 35-year federal sentence for explosives and fraud offenses, freed as "goodwill gesture" on occasion of Gandhi's visit to U.S.); Exec. Grant of Clemency to Marian W. Zacharski, (June 7, 1985) (foreign spy's life sentence commuted in contemplation of a "swap" for several U.S. nationals imprisoned abroad), U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, *WARRANTS OF PARDON, 1935-1999*.
- ⁹ Wilson, who was an "ardent advocate of temperance," nonetheless felt that the government's attempt to regulate the morals of "a great cosmopolitan people" was "the wrong way of doing the right thing," P.S. Ruckman, Jr., "The Pardoning Power: The Other Civics Lesson." Annual Meeting of the *Southern Political Science Association* (November 2001), quoting from Joseph P. Tumulty, *WOODROW WILSON AS I KNEW HIM* (Doubleday, 1921). See <http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper5.pdf>.
- ¹⁰ "Clemency provided the principal avenue of relief for individuals convicted of criminal offenses . . . because there was no right of appeal until 1907." *Herrera v. Collins*, *supra* note 3 at 412, citing 1 L. Radzinowicz, *A HISTORY OF ENGLISH CRIMINAL LAW* 122 (1948). It was also "the only means by which one could challenge his conviction on the ground of innocence." *Id.*, citing United States Department of Justice, *THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES*, Volume III Pardon 73 (1939) (Wayne L. Morse, ed.) ("Attorney General's Survey"). Clemency not only recognized defenses unknown in the law (such as duress, incapacity, and self-defense), it functioned as the federal paroling authority until 1910. See Attorney General's Survey at 295-213.

- ¹¹ See, e.g., George P. Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT. RPT. 212 (2004).
- ¹² In his classic 1941 study of federal pardoning practices, W.H. Humbert reported that between 1860 and 1900, 49 percent of all applications for presidential pardon were granted. In 1896 there averaged 64 acts of pardon for every 100 prisoners, and in the next five years the ratio between acts of clemency and the federal prison population was, on average, 43 percent. W.H. Humbert, *THE PARDONING POWER OF THE PRESIDENT*, American Council on Public Affairs 111 (1941).
- ¹³ *Id.* at 5.
- ¹⁴ *Id.* at 124-33. Often the reasons for clemency involved doubt as to guilt, lack of capacity, or excuse; they also reflected the practicalities of a primitive prison system (fear of contagion was as likely as imminent death to qualify a prisoner for early release). Pardon was granted to avert deportation or to hasten it, to reward assistance to the government, and to immunize a witness. Sometimes the reasons seem hopelessly quaint: e.g., “to enable petitioner to catch steamer without delay,” “to enable farmer prisoner to save his crops,” “to encourage good conduct among other prisoners,” and “not of criminal type.”
- ¹⁵ Graphs and tables showing pardon grant patterns from 1900 through 2001, based on data from the 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), <http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf>. These figures show that almost every president from William McKinley to Lyndon Johnson issued pardons on a monthly basis (Eisenhower was the exception, disposing of dozens of cases at a time every three or four months with the “master warrant” introduced during his administration). From Nixon through Reagan, pardoning was less frequent but still fairly regular. In the first Bush administration pardoning became somewhat more erratic, partly due to management problems in the Justice Department that temporarily stopped the delivery of recommendations to the White House. But the Clinton Administration saw a qualitative change in the president’s approach to his pardoning responsibilities. See notes 20-25, *infra*.
- ¹⁶ The Justice Department’s clemency review process is described in Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 35-43 (2005). See also Abbie H. Erler, *Executive Clemency or Bureaucratic Discretion? Two Models of the Pardons Process*, 37 PRES. STUD. Q. 427, 437-38 (2007).
- ¹⁷ See Moore, *supra* note 6 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 7 at 39.
- ¹⁸ Austin Sarat, defending the legitimacy of a redemptive theory of clemency, points out that for the retributivists the “essentially lawless” exercise of mercy is a “threat to society dedicated to the rule of law.” Austin Sarat, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* 69 (2005). See also Samuel Morison, Book Review of Sarat, *MERCY ON TRIAL*, 1 Crim Law and Philos 327, 328 (2007) (“Mounting an effective defense on behalf of mercy turns out to be a daunting challenge in the current political climate, because a large majority of elected officials, like the most vocal segment of the electorate, are reflexively committed to the twin pillars of the prevailing theory of criminal justice, namely the retributivist theory of punishment and its close ideological cousin, the ‘victims rights’ movement.”).
- ¹⁹ Herrera v. Collins, *supra* note 1 at 415, quoting Moore, *supra* note 6 at 131.
- ²⁰ See Office of the Pardon Attorney, *Presidential Clemency Actions by Fiscal Year, 1945 to Present (July 1, 2007)* (“Pardon Attorney Statistics”).
- ²¹ *Id.* See also Ruckman, *supra* note 15. After George Washington’s first administration, until the Clinton presidency, the number of years in which an American president issued no clemency grants at all can be counted on the fingers of one hand: John Adams’ first year in office, Lyndon Johnson’s last year in office, and two years during the administration of George H.W. Bush.
- ²² See THE PARDON ATTORNEY REFORM AND INTEGRITY ACT, S. REP. NO. 106-231, at 8 (2000) (commutation of 16 Puerto Rican terrorists on recommendation of White House Counsel Charles Ruff); Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L. J. 1251 (1999) (first posthumous pardon); *President Pardons Veteran Convicted in 1944 Mutiny*, WASH. POST., Dec. 24, 1999, at A4 (racist wartime incident); Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to Be Merciful*, 27 FORDHAM URBAN LAW JOURNAL 1483, 1499 n 57 (2000) (“Collar Buttons”) (pardon of long-time fugitive).
- ²³ See, e.g., 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. R. 228 (“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.
- ²⁴ 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.” *Id.*
- ²⁵ See Gregory Remarks, *supra* note 23:
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
- ²⁶ For a discussion of the break-down of the Justice Department’s pardon process and the ensuing chaotic effort at the White House to compensate for seven years of indifference to pardoning, see Testimony of Beth Nolan, Counsel to former President Clinton, HEARINGS BEFORE THE HOUSE COMMITTEE ON GOVERNMENT REFORM ON THE PARDON OF MARC RICH, March 1, 2001. Some of the more unusual grants are described in my article *The Pardon Paradox: Lessons from Clinton’s Last Pardons*, 32 Capital Law Review 185, 188-193 (2002).

- ²⁷ At the time of the Libby commutation President Bush had denied 5,218 applications for sentence commutation and granted three, all from relatively minor drug offenders who had spent a decade or more in prison. He had granted 113 post-sentence pardons, and denied 1028 pardon applications. About 2500 applications for commutation and 1000 applications for pardon remained pending for consideration. See Pardon Attorney Statistics, *supra* note 20.
- ²⁸ Justice Anthony M. Kennedy, Speech before the Annual Meeting of the American Bar Association, August 9, 2003, http://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html. 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.").
- ²⁹ 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).
- ³⁰ Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT. RPTR. 119, 123 (2001).
- ³¹ See David M. Zlotnick, *Federal Prosecutors and the Clemency Power*, 13 FED. SENT. RPTR. 168 (2001) (analyzing five 2000 Clinton commutations where rationale for grant served prosecutors' interests, including correction of a mistake).
- ³² The 1939 Justice Department survey of release procedures in the United States described pardon as "a weapon to break the rigidity of law and custom and their resistance to progress and reform." Attorney General's Survey, *supra* note 10 at 53. It 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:" Attorney General's Survey, *supra* note at 10 at 295.
- ³³ *Id.* at 299.
- ³⁴ I do not mean to suggest that the president is in any way constitutionally constrained in exercising his pardon power. Whatever constraint there may be is purely one of politics. President Clinton's suggestion that "Presidents and governors should be quite conservative on commutations . . . but more broad-minded about pardons" reflects just such a commonsense political calculation. See note 25, *supra*.
- ³⁵ See §§ 1-2.112 (pardon) and 1-2.113 (commutation) of the U.S. Attorney's Manual, <http://www.usdoj.gov/pardon/petitions.htm>. U.S. Sentencing Commissioner John Steer offers an interesting perspective on the role of clemency in a guidelines system in his essay with Paula Biderman, *Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences*, 13 FED. SENT. RPTR. 154 (2001). See also U.S.S.G. § 1B1.13 (court may reduce a term of imprisonment where a prisoner is terminally ill, suffering from a permanent debilitating physical or medical condition, including from the aging process; death or incapacitation of the only caregiver of a minor child; or any other "extraordinary and compelling reason" identified by the Bureau of Prisons).
- ³⁶ While pardon does relieve collateral statutory penalties, this is an anticipated effect frequently written right into the law. See, e.g., 18 U.S.C. § 921(20) (2000)(firearms disability); 8 U.S.C. § 1251(a)(2)(A)(iv)(removal of criminal aliens). Furthermore, the executive has a degree of discretion in deciding whether to enforce legislatively mandated collateral penalties like removal of non-citizens, a ban on union office-holding or firearms possession.
- ³⁷ Philosopher Jeffrie Murphy argues that mercy is not constrained by principles of fairness in the same way that justice is, because it is entirely voluntary and, in the case of public mercy, because it has a political dimension. For example, mercy "is more likely to be needed by the poor and weak than by the rich and powerful." *Mercy and Legal Justice*, in Jeffrie Murphy & Jean Hampton, *FORGIVENESS AND MERCY* 182 (1988). Murphy points out that there is also a pragmatic reason why mercy is not constrained by a conventional obligation to be even-handed: "[I]f rational persons thought that once having shown mercy they would be stuck with making a regular practice of it, they might be inclined never to show it at all." *Id.* at 183.
- ³⁸ I have argued elsewhere that the president has a duty to pardon, not just where moral desert has been established in a particular case, but also as a more general obligation of office: "This latter aspect of the duty to pardon is neither grounded in nor limited by considerations of law or morality, but is essentially one of politics." See *Collar Buttons*, *supra* note 22 at 1506.
- ³⁹ Compare Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse*, 13 FED. SENT. RPTR. 177 (2001)(responsibility for administration of pardon power should be moved away from the influence of prosecutors into the White House) with Brian M. Hoffstadt, *Guarding the Integrity of the Clemency Power*, 13 FED. SENT. RPTR. 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).
- ⁴⁰ See Margaret Colgate Love, *RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE* at 18-38 (Wm. S. Hein 2006)(updated profiles of each state's pardoning practice accessible at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>).
- ⁴¹ See U.S. Presidential Clemency Board, Report to the President (1975)(describing system establishing for administering President Ford's Vietnam amnesty proclamation). Dan Kobil recommended years ago that an administrative board be appointed to decide most routine clemency applications, leaving the president free to consider more purely political uses of the power, but that interesting suggestion has never been seriously considered. See Kobil, *supra* note 1 at 622.
- ⁴² See 18 U.S.C. § 3582(c)(1)(A)(i); USSG § 1B1.13, submitted to Congress May 1, 2007, <http://www.ussc.gov/2007guid/may2007rf.pdf>.
- ⁴³ See Margaret Love & April Frazier, "Certificates of Rehabilitation and Other Forms of Relief from the Collateral Consequences of Conviction: A Survey of State Laws," prepared for the ABA Commission on Effective Criminal Sanctions, http://meetings.abanet.org/webupload/commupload/CR209800/sitesofinterest_files/AllStatesBriefingSheet10106.pdf. The National Conference of Commissioners of Uniform State Laws is developing a Uniform Act on the Collateral Consequences of Conviction that combines a certificate program with a nondiscrimination provision. See http://www.law.upenn.edu/bii/archives/ulc/ucsada/2007_amdraft.pdf.