

Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850



**GEORGE
LARDNER, Jr.**

&

**MARGARET
COLGATE LOVE**

George Lardner, Jr. has been a reporter with the Washington Post since 1963. He was awarded a Pulitzer Prize in 1993 for stories about the murder of his daughter Kristin. He is currently writing a history of the President's pardon power.

Margaret Colgate Love, formerly U.S. Pardon Attorney (1990–1997), practices law in Washington, D.C. She is a reporter for the ABA Justice Kennedy Commission.

This article reaches back in time to look at the way sentences were determined in the early years of the Republic, and in particular at the mitigating role of the President's pardon power. Using illustrations drawn from early pardon files, it shows that federal judges were, then as now, sometimes required by law to impose punishments they considered unjust. It also shows that in such situations judges might recommend the case to the President for a grant of clemency. They did so more frequently than they do today, and with greater expectation of success.

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. The experience of these early years, as reflected in the President's pardon grants, underscores the importance of having a safety valve in any system of mandatory punishments, one that is both readily accessible and politically accountable.

I. Mandatory Sentences in the Early Nineteenth Century

The conventional wisdom is that federal judges in the early years of the Republic "were entrusted with wide sentencing discretion."² A contrary view is that "up until 1870, legislators retained most of the discretionary power over criminal sentencing," and that "the period of incarceration was generally prescribed with specificity by the legislature."³ The truth lies somewhere in between.

In the first years of the Republic, criminal punishments in the states tended to follow the so-called "flat-time" sentencing model of the 18th century, whereby a single penalty was established for each offense and judges could not avoid imposing it upon a guilty person.⁴ But Congress chose a somewhat more flexible approach when it enacted the first federal criminal statute. To be sure, half a dozen of the new federal offenses in the Crimes Act of 1790 required the death penalty.⁵ But for most of the remaining 16 offenses, courts were given discretion to fashion the

sentence within a relatively wide range of fines and prison terms and corporal penalties.⁶ For example, a person convicted of stealing or falsifying a court record or process "shall be fined not exceeding five thousand dollars, or imprisoned not exceeding seven years, and whipped not exceeding thirty-nine stripes." Perjurers were to be "imprisoned not exceeding three years, and fined not exceeding three hundred dollars," and made to "stand in the pillory for one hour."⁷ Most of the other offenses were similarly phrased. In a few cases, a fine was "at the discretion of the court," but only in the case of bribery of a judge was the court permitted to forego both fine and prison ("fined and imprisoned at the discretion of the court").⁸

At the same time, while no minimum penalty was specified for non-capital offenses, it was generally understood that the "not to exceed" formulation required the court to impose at least some fine and some time in prison and some whipping. In other words, as the pardon archives make clear, federal judges in the early 19th century did not believe that they had any authority to remit fines or grant a permanent reprieve or suspension of sentence.⁹ Further, most judges applying a "not to exceed" statute during this period evidently believed that they were required to sentence the offender to something more than a token punishment. At least under the 1790 Act, the maximum terms of imprisonment were not long: in most cases the prison stay was capped at three or four years, and only three offenses exposed an offender to as much as seven years in prison. Later enactments would increase the minimum term of imprisonment and raise the cap as well.

The 1798 Sedition Act was the first to depart from the "not to exceed" formula in the 1790 Act, mandating imprisonment for "not less than six months nor exceeding five years" for conspiracy to oppose the government or impede government operations. The Logan Act followed shortly afterwards, imposing a fine and prison term of "not less than six months nor exceeding three years" on any individual who corresponded independently with a foreign country on a matter in dispute with the United States.

After the Republicans assumed office in 1801, as penal philosophy evolved away from death and toward the

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penitentiary,¹⁰ Congress enacted fewer capital penalties and placed floors in the sentencing range for a number of offenses. Though the “not to exceed” formulation remained the most common, four categories of offenses would make mandatory minimum prison terms a familiar feature of federal criminal law enforcement during the 19th century: trading in slaves, fraud on the Bank of the United States, theft of mail, and crime in the District of Columbia.

The earliest laws carrying mandatory minimum prison terms and fines were the laws against the slave trade. The first laws against the slave trade in 1794 included forfeiture but carried no criminal sanctions.¹¹ In 1800, Congress imposed a prison term “not to exceed” two years for anyone serving on board a slave ship traveling between foreign ports.¹² Then in 1807, anticipating the end of the constitutional moratorium on efforts to stop the slave trade,¹³ Congress added more crimes and ramped up the penalties: transporting a slave to the United States carried a minimum \$1,000 fine (maximum \$10,000) and a prison term of “not more than ten years nor less than five years,” and the captain of a vessel violating the law could be imprisoned “not less than two years, and not exceeding four years.”¹⁴

About a week before it enacted the 1807 Slave Trade Act, Congress had made fraud on the Bank of the United States a federal crime, establishing a fine of up to \$5000 and a minimum prison term of three years (maximum ten) for persons found guilty of counterfeiting or otherwise defrauding the Bank of the United States.¹⁵

The laws protecting the mails involved harsh penalties from the beginning: the first Post Office Act in 1792 made mail robbery a capital crime, and postal employees who stole from the mails were also subject to the death penalty if the stolen mail happened to contain money or other valuables. In the 1810 Post Office Act, the penalties had softened somewhat, with death reserved for robbers who injured the carrier or threatened his life, and recidivist robbers. Then, in the 1825 Post Office Act, Congress stiffened non-capital punishments, making robbery, employee mail theft, and some less serious crimes involving Post Office equipment subject to specified minimum prison terms.¹⁶ For example, robbing the mail brought a mandatory minimum prison term of five years (maximum ten) for a first offender who caused no injury, and lesser thefts carried a minimum of two years. Postal employees who opened or stole letters entrusted to their care were subject to a fine or up to six months in prison, or both (“according to the circumstances and aggravations of the offense”), unless the stolen mail contained valuables, in which case the penalty increased to a minimum of ten years in prison and a maximum of 21.

The final category of federal offenses carrying mandatory minimum punishments were those committed in the District of Columbia. Until 1831, ordinary crime committed in the District was punished in federal court applying Maryland or Virginia law, depending upon which part

of the District was involved. But a peculiar twist led to very different kinds of punishments being applied in the Maryland and Virginia sides of the District: crimes in Washington County and Georgetown were punished under the then-current law of Maryland, felony punishments in Alexandria County remained frozen in harsh pre-1796 Virginia law.¹⁷ The resulting disparity in penalties (including death in Alexandria for offenses that would merit only a fine and whipping in Washington) produced a number of pardons at the request of the circuit judges in the District.¹⁸ It was not until 1831 that Congress finally enacted a single comprehensive criminal code for the District, establishing a range of fines and imprisonment, from a minimum to a maximum, for each offense.¹⁹

In summary, the penalty structure under federal criminal law in the first half of the 19th century required courts to impose at least some fine and/or some prison term, and sometimes a whipping, in almost every non-capital felony offense. While the range of punishments for some crimes was quite wide, judges only rarely had discretion to impose no fine or prison term at all in felony cases. Many of the most frequently prosecuted categories of federal offenses carried mandatory minimum prison terms and fines, if not death.

As a result, the demand for a safety valve arose frequently, and a pardon offered the only means by which a stiff statutory punishment, once imposed, could be avoided.²⁰ As the cases discussed in the following section reveal, sentencing judges were not shy about pursuing their responsibilities in an executive forum.

II. The Judicial Role in Pardon Cases

Beginning in Thomas Jefferson’s administration, sentencing judges and district attorneys were routinely asked their views on pardon petitions submitted to the president through the secretary of state.²¹ The pardon archives indicate that if both judge and prosecutor recommended mercy, a pardon would generally issue.²² 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.²³ Such early judicial activism was particularly evident in District of Columbia cases prior to 1831, and in cases involving employee mail theft.

A. District of Columbia Cases

The peculiar legal situation in the District, described in the preceding section, was bound to produce the sort of harshness and disparity that has historically invited the exercise of the pardon power. The first judges of the D.C. Circuit did not hesitate to recommend clemency. Indeed, when these conscientious judges were confronted with harsh and unyielding laws, they didn’t always wait for the president to ask them. They asked him.

Three Alexandria Burglars. Samuel Miller must have been grateful that they did, especially since he turned out to be a bigger scoundrel than they suspected. He had been found dead drunk, between tiers of flour, on the floor of an Alexandria, Va., grocery store. A loaded pistol was found in his pocket along with a false key that seemed to explain why the alley door had been opened without any signs of violence. Since Miller hadn't taken anything, he was convicted of just simple burglary, but under the recondite laws prescribed by Congress for the Virginia side of the Nation's Capital, that was enough to earn him a death sentence. Judges Kilty and Cranch, who had presided at Miller's trial, had no choice but to sentence him to be hung on Aug. 20, 1803.

Prominent Alexandrians, including the grocery store owner, asked President Jefferson for clemency, but it was the sentencing judges who made the difference. In a notation at the bottom of Miller's clemency petition, they told the president they had no doubt of his guilt, drunkenness notwithstanding,

But they feel themselves justified in issuing an opinion that the punishment of death would be too severe for the crime which was committed and, altho[ugh] in their judicial capacities they are bound to declare the law, whatever it may be, they consider it strictly consistent with their duty to recommend to the President the exercise of that power of mitigating the severity of the law which the Constitution vests in him.²⁴

The judges were sensitive to the difficulty that in capital cases clemency was an all or nothing proposition: "It may be a matter of regret that there is not a provision for commuting the punishment of death in such cases for one more proportioned to the offense, which might be inflicted without any doubt of its justice or humanity," they said.²⁵ For Miller, "the alternative must be either an execution of the sentence or an entire pardon, and of course an exemption from any punishment, except what may have arisen from the imprisonment of the offender." The judges recommended a pardon, either immediately "or after such reprieves as may be judged necessary" to stretch out Miller's prison time. The president acted swiftly, granting Miller "a full, free and entire pardon" five days after the judges' letter.²⁶ It might have been better to keep him behind bars a while longer. Miller had said in his petition that the grocery store episode was his first offense, but it turned out, shortly after he was pardoned, that his real name was Smith, and that he had escaped from a New York state prison where he was serving a life sentence for burglary.²⁷

With the Miller case as precedent, few explanations were needed when the plight of "Negro Charles," a slave, was brought to Jefferson's attention in the spring of 1805. Charles had been convicted of having "burglariously broken and entered" an Alexandria home with intent to steal some of the contents, and was condemned to be hanged on May 10. Five prominent Alexandria lawyers,

joined by the clerk of the court, asked for a pardon, saying the evidence had been "barely sufficient" to justify a guilty verdict, much less a death sentence. This time, all three judges of the Circuit Court added their names to the petition "on the grounds therein stated." The U.S. Attorney and the U.S. Marshal for the District concurred. On April 23, Jefferson jotted a note at the bottom of the petition, directing the State Department to "let a pardon issue," adding that "its safe and speedy transmission to the marshal should be particularly attended to."²⁸

Fifteen years later, President Madison's pardon of Richard Hull showed that Alexandria's antiquated pre-1796 law, requiring death for burglars, was still in force. A career burglar who had broken into an Alexandria store, "stealing therefrom sundry goods" worth more than four dollars, Hull was sentenced to be hanged on the last Friday of July, 1820. Judge Cranch noted in a letter to the President dated July 6 that if Hull had burgled on the Maryland side of the District, his only punishment would have been a fine and whipping. Under then-current Virginia law, his punishment would have been confinement at hard labor or in solitude. Judge Cranch stated that a pardon of the instant offense would leave Hull subject to prosecution in Washington County, where he had been charged with other burglaries, and "may perhaps receive a punishment more appropriate to his offense than death." District Attorney Swann concurred in the recommendation.²⁹ President Madison's pardon warrant noted the "anomalous" legal situation in the District, as explained to him by Judge Cranch, and the fact that Hull would not have received such a harsh punishment elsewhere in the District or in Virginia itself.³⁰

Two Browns and Some Geese. No case was too insignificant for the president's review as long as the White House offered the only remedy. Some sentences were limited to the payment of a fine and the costs of prosecution, but the standard practice of the courts to order prisoners to "stand committed" until the money was paid often made it impossible for them to get out of jail without a presidential pardon. Sometimes the chief executive had trouble keeping track of them all. In November 1803 for instance, one Charles Brown, "an unfortunate black" with a bedridden wife in Georgia, was locked up in the noxious D.C. jail for stealing two geese. He was whipped 15 times as required by law, but was kept imprisoned for lack of a \$1 fine. Ten months later, he petitioned the court for a pardon. Judges Cranch and Fitzhugh sent his petition along to the President, saying "his punishment has been fully adequate to his offence" and recommending that "the residue of the judgment be remitted." Jefferson ordered a pardon issued.³¹

A week later, the President received another letter from the two judges asking him to pardon one Sepia Brown for stealing a goose. Jefferson approved the pardon as requested, but noted "Is not this the same which was directed last week?" It wasn't. Like Charles Brown, Sepia Brown had been convicted in D.C. Circuit Court

in December of 1803 for goose theft. He'd taken only one, not two, but drew a stiffer penalty: 15 stripes and a \$50 fine. The judges noted in their letter to the President that

The corporal punishment had been inflicted — but . . . as he is extremely poor and has remained a long time in confinement during which time we understand he has behaved himself in an orderly decent manner, we respectfully recommend that the residue of the judgment be remitted.

Sepia Brown hadn't asked for a pardon, but the judges said they "presumed" the fact that he had not presented a petition "will not be deemed essential, as we are informed he is an ignorant Negro & probably without friends."³² It seems clear that the judges remembered him and realized it wouldn't be fair to keep him locked up when they'd just secured a pardon for someone who had stolen twice as many geese and gotten a lighter sentence.

Two Soldiers and a Hog. The record reflects numerous instances of corporal punishment (a whipping or burning of the hand, perhaps a stint in the pillory) imposed by federal judges in the early years in the District of Columbia, as required by law. Usually these penalties were inflicted right away, before a pardon petition could be put to paper, but court officials sometimes managed to head them off until they could ask the President to intervene. At least in these early years, the President always did.³³

For example, in 1801 Circuit Judges Cranch, Marshall and Kilty wrote to the President about John Peden and Sam Morris, two young soldiers who had stolen a hog worth 400 pounds of tobacco, and who they had been compelled to sentence to punishment "of an infamous nature" — five stripes and fifteen minutes in the pillory. Noting that the offense "originated in sport or mischief and might not have been committed with an intent of stealing," they pointed out that the two men had an otherwise clear record and were very young. They did not suggest that the two be relieved of their obligation to make restitution for the stolen hog out of their pay, and asked only that the mandatory corporal punishment be cancelled, which it was.³⁴

A Case of Diminished Capacity. Sometimes a harsh result came about because some mitigating circumstance either had not been brought out at trial because of incompetent counsel, or was not recognized as a legal defense — both classic grounds for pardon.³⁵ The judges at William Davis's 1820 murder trial in Alexandria, Va., had noticed how insensitive he was to the charge against him, but thought it might reflect "a want of moral sense" as much as any mental incapacity. Judge Cranch remembered later that Davis's lawyers never raised the issue of incompetence. Judge James Marshall was also struck by Davis's "unusual degree of insensibility" and the lack of any adequate motive for his killing of Lambert Potter, but accepted the jury's guilty verdict and, with Cranch, condemned Davis to death.

Luckily for Davis, the judges were quite ready to believe post-trial affidavits from citizens who had known Davis since he was a child, who had tried to train him as a cooper, and who were struck by "his want of understanding." He was "near being an idiot," said a miller who had hired him in 1819. With Davis about to be hanged in late July of 1820, the judges wasted no time in bringing the case to the attention of President James Monroe. Diminished capacity had not been raised as a defense in the criminal case, but the judges felt it was grounds for a pardon. One of Davis's lawyers pointed out in a letter to the President that they had been engaged "only the day previous to his trial" and had been given no information "as to the state of his mind or intellect."³⁶

The President was inclined to set Davis free right away, directing the secretary of state to examine the papers and to "grant a pardon, if in his judgment, they will justify it." The President noted on the petition that even if an immediate pardon did not seem justified, the hanging should at least be postponed "for some months." It isn't clear why a pardon wasn't granted right away, but it appears some crucial papers were by some accident mislaid on the way to the State Department. Davis was granted a year's reprieve. In 1821, with the reprieve about to expire, Monroe was reminded of the situation. He found a shrewd solution.

In making his decision, the President was guided by the concerns of the jurors, who had all signed a statement to the President (submitted by Davis's lawyers). The jurors stated that they hadn't realized Davis was of unsound mind until after the trial and would not want him executed. On the other hand, they still considered him dangerous and would not want him set free. Monroe would have to find a way to avoid the rule that a death sentence could not be commuted to a prison term. On July 23, 1821, he granted Davis another respite of execution "without limitation of time" and directed the U.S. Marshal to hold Davis "in close and safe custody" until further orders from the President. Presumably the orders never came.

The Judges Draw the Line. The final District of Columbia case we discuss shows that the judges of the D.C. Circuit were far from easy marks, and that they could be as eloquent in refusing to endorse a pardon as in recommending one. The well-connected Eliza Peacock found this out to her dismay when she tried to win a conditional pardon for her husband, a prominent lawyer, after his conviction for perjury in 1805. She pleaded that, having been raised "in the lap of ease," she had no way of making a living for herself and her children, especially after their house had been sold. She offered to take her husband and family out of the country if a pardon conditioned on banishment were granted. Hundreds of people supported her petition, including "a great proportion" of the grand jurors who had indicted Robert Peacock and the jurors who had found him guilty.³⁷

But Mrs. Peacock was unsuccessful in obtaining the endorsement of Judges Cranch and Kilty. Judge Cranch told Mrs. Peacock that

As the punishment was within the discretion of the Court, I can not officially pray for the remission without subjecting myself to the charge of inconsistency or inconsideration. I fully concurred with the chief judge [Kilty] in fixing the degree of punishment, which I still think was mild and just [five years and a \$250 fine]. Lenity is not always mercy. And mercy ceases to be a virtue when it becomes inconsistent with justice.

Judge Kilty also told Mrs. Peacock why he could not support her petition:

I must either adopt the course of recommending all, or of discriminating as to the merits of the several cases and on these grounds the judges of the Court have added their recommendation to some applications and rejected others. The cases which they have recommended were either those in which they were obliged by law to pronounce a sentence disproportioned in their opinion to the offence, or in which a considerable part of the punishment have been sustained and they have lately rejected some applications which seemed at least to have as fair a claim to the President.

Peacock was not pardoned.

B. Mail Theft Cases

A Penny-Post and a Scoundrel. During the 1840's, federal judges on several occasions expressed concern in the context of a pardon recommendation about the stiff mandatory prison sentences in the 1825 Post Office Act for postal employees who took money from the mail. In 1840, Judge R.B. Gilchrist of South Carolina reluctantly imposed the minimum 10-year term on a 15-year-old mail carrier ("penny-post") who had taken \$260 worth of bank notes from a letter mailed at the Georgetown, S. C., post office. John J. Lamb was clearly guilty of the offense, but his jurors were convinced that he had been enticed to take the money by an older acquaintance, a post office printer who worked in the same building. They strongly recommended clemency,³⁸ and Judge Gilchrist joined them in endorsing Lamb's plea for relief. Gilchrist suggested to President Van Buren that a one-year term would be sufficient to "be of service to the petitioner himself and serve as a warning to deter others from the commission of similar offenses." On June 5, 1840, Van Buren decided that nine months would be enough, ordering Lamb released "on the first day of January next."

The printer who had put Lamb up to the theft, James Sanderlin, received a harsher 15-year sentence for aiding and abetting the boy, but he too eventually won a pardon. Sanderlin, 22, had been arrested in Charleston, S. C., as he was about to exchange the stolen bank notes for fresh certificates. Convicted in April 1840, he spent about a year in jail before asking for a pardon. President John Tyler turned him down twice but relented in November of 1842 after Judge Gilchrist and the U.S. Attorney for South Carolina, Edward McGrady, and a number of other influential South Carolinians, joined in the recommendation. Judge Gilchrist noted that Sanderlin had been in prison for

more than two and a half years, and that "his accomplice in guilt" (Lamb) had already been pardoned. President Tyler explained in a handwritten note that he was "very little inclined" to interfere in the case, but "I nonetheless yield my objections to the opinions of the District Attorney, the District Judge, the Attorney General of the State of South Carolina, the Visitors of the Penitentiary, and the representations of many respectable citizens."³⁹

In another case involving a guilty young penny-post who had been rather too curious about the contents of one of his mailbags, Judge Sam Betts of the Southern District of New York wrote to President Polk about a pardon even before sentence was pronounced. The judge had taken pity on "a lad of slender capacity" with "scarcely the intelligence ordinarily possessed by a child of 10 years old," and advised young James Bilyou's lawyer to plead him guilty to the one charge that did not carry a mandatory prison sentence "to avoid the necessity of pronouncing judgment against him until his case might be laid before the President." Judge Betts wrote to the President saying that he was reluctant to tarnish the admittedly slow-witted boy with a criminal record for the rest of his life ("if he in after life should acquire more maturity of mind and become of respectable standing, it could be desirable that he should not be subjected to the reproach of having been sentenced to the state prison"), and the President obliged by pardoning young Bilyou. The warrant recited the considerations mentioned by the judge verbatim.⁴⁰

An Aging Veteran. President Van Buren heard from the sentencing judges about another sympathetic mail thief, an impoverished aging former postmaster who had been sentenced to the 10-year mandatory minimum for stealing mail containing \$30. Arrested in February 1837, William C. Keen, a bemedaled veteran of the Battle of Lake Erie, had been forced to wait more than a year before prosecutors were ready for trial, and the expenses of repeated postponements had left him and his family almost destitute. In recommending a pardon in 1840, after Keen had spent two years at state prison "in close [solitary] confinement," Judge Jesse L. Holman told the President that he considered the sentence ("the lowest term allowed by law") too harsh: "Had the law authorized discretion, I, as a member of the Court, would have been in favor of a much shorter period of confinement." Judge Holman also pointed out that if Keen had been tried for grand larceny under Indiana law, which authorized jury sentencing, "he would not have been sentenced to more than two or three years."⁴¹

Subtle Indirection. Sometimes a judge was reticent about making a clemency recommendation directly to the President, but found another way to support a case he regarded as worthy. In 1844, when approached by the U.S. Marshal in the Western District of New York about the possibility of clemency for Hiram Gardner, a 22-year-old man who he had sentenced the year before for stealing a letter containing \$26 from the post office, Judge Alfred Conkling agreed that "it would be just and wise to pardon

him.” (Gardner had tried to put the money back, and in doing so had torn the letter.) However, the Judge went on to say that he was

of the opinion that my interference in the manner proposed would be impertinent and indiscrete . . . I cannot imagine that any inference unfavorable to the applicant be drawn from my silence, but if his friends suppose otherwise, I have no objection to their sending this letter to the President.⁴²

C. Unjust Convictions

Criminal procedure in the early days of the Republic offered judges only a limited opportunity to set aside jury verdicts or grant a new trial, and of course there was no appeal. In any event, it appears to have been easier for judges to take a sympathetic case to the president with a recommendation for clemency than to resort to the rigid machinery of justice. Thus presidents sometimes found themselves providing a kind of appellate review of sentences, using a standard that was not strictly a legal one. Sometimes the whole case was effectively retried in the pardon context, providing a snapshot of a legal system peculiarly unable to correct its mistakes.

A Case Retried. The 1827 pardon of Chester Ford by John Quincy Adams for manslaughter is a compelling example. Ford had been convicted of manslaughter in the District of Columbia for killing one Ambrose Ford⁴³ “in an affray,” and ordered to spend a month in prison and to pay a \$10 fine. Eleven of the jurors who found him guilty immediately recommended clemency in a petition to the president, saying they were acting “out of a sense of duty which the jury owed to the accused.” They said that Ford, “a colored man” who lived in Georgetown, had proved to them at trial “by the most respectable witnesses” that he was “an industrious and peaceable man.” The jury had recommended him “to the mercy of the court,” but “understanding that the discretion of the court is limited by law” once a guilty verdict had been returned, they addressed their petition to the President. U.S. Attorney Thomas Swann concurred in recommending clemency.⁴⁴

The sentence, to be sure, was light. However, the three judges for the District of Columbia (Cranch, Thruston and James Marshall), made it sound as though any sentence was excessive since Chester Ford had simply been defending himself. In a two-page statement to the president, the three judges of the D.C. Circuit explained in detail the facts of the case, including a characterization of the deceased as a “quarrelsome” man and a description of the crime scene that attested to a “severe combat” between the two men. Ambrose Ford had fled the scene to avoid arrest, and had died from his wounds two weeks later. A surgeon had opined that he would have lived had the wounds been attended to earlier. All three judges recommended mercy, and the President obliged, ordering Ford “discharged from prison.”⁴⁵

Newly Discovered Evidence. Supreme Court Justice Joseph Story said he had been “well satisfied with the

verdict of the jury” when it found Amos “Bill” Otis guilty of murder for the death at sea of his captain, James Crosby. But he had had reservations about the circumstantial evidence against the 22-year-old seaman, and he tried to instruct the jury in careful terms that their decision rested on the credibility it accorded to the government’s four witnesses. No one accused Otis of killing the captain. His co-defendant, the cook, did it. The question was whether Otis had aided and abetted in the crime. The evidence against him consisted largely of his allegedly incriminating conduct and conversations before and after the killing. Story’s confidence in the October 1834 trial in the U.S. Circuit Court at Boston was shattered when the chief government witness subsequently admitted that he lied and another key witness said material parts of his testimony were incorrect.⁴⁶

Still riding circuit after 23 years on the high court, Story was determined to see justice done. Nor did he want to wait for the State Department’s bureaucracy to ask him for his opinion. In a Dec. 4, 1834, letter to Secretary of State John Forsyth, the justice said he had heard “unofficially” that President Jackson wanted his views of the case. Story made plain he had no intention of standing on ceremony. “With the wish of the President, in whatever manner brought to my knowledge,” he wrote, “I take great pleasure in complying.”

Story enclosed a succinct account of trial, his instructions to the jury, and the belated admissions of the two crewmen who had testified against Otis. One, an American who accused Otis of saying the captain’s death was “nothing” and of suggesting the cook might murder the rest of the crew, said flatly after the trial that he had lied. The other, a Swede, who testified that Otis laughingly spoke of “slashing work” in store for the others, acknowledged after the trial that some of what he said was untrue.

If such declarations had been introduced as evidence at trial, Story said, they would “have shaken my belief in the credibility of their testimony” and dissuaded him from telling the jury that they could convict Otis on the basis of what they said. The Justice said he still was not entirely convinced of Otis’s innocence, but now had such “very considerable doubt as to his guilt” as to recommend him for a pardon.

The President did not hesitate. On Dec. 9, 1834, just five days after Story’s letter was written, he issued Otis “a full pardon for good and divers reasons.”⁴⁷

Mrs. Thornton Reconsiders. In early 1836, Mrs. Anna Maria Thornton begged the President for the life of her young slave, John Arthur Bowen, who had been convicted in the D.C. Circuit of attempting to kill her by entering her room with an uplifted axe, and sentenced to death. Apparently contradicting some of her own statements to witnesses immediately following the incident, she vowed that Bowen had not held the axe in a threatening manner, and that in any event he had been drunk and not responsible for his behavior. He had fallen into the bad company of “Negroes propagating notions of general abolition,”

and, if a pardon was granted, she would sell him and have him shipped to the West where he would be “separate from dangerous connections and corrupting influences.”

Bowen’s trial the previous December had stirred great attention, coming in the midst of racial tensions that had seized the city since Nat Turner’s rebellion four years earlier in southern Virginia. Tension was at a boiling point when Bowen, 19, entered his sleeping mistress’ room. He was stopped by his own mother and later taken to jail, reportedly telling his arresting officers that “he had a right to be free.”⁴⁸

Mrs. Thornton was the widow of William Thornton, the architect who designed the U.S. Capitol, and her repeated petitions to President Andrew Jackson on Bowen’s behalf won him two reprieves of execution. But Jackson’s Attorney General Benjamin Butler recommended against a conditional pardon as Mrs. Thornton had wanted. He cited the difficulties of enforcing conditions, and reaffirmed the principle that the President could not commute a death sentence without legislation from Congress. Until that happened, he said that the President could grant a series of reprieves extending imprisonment “to a period sufficiently long to meet the ends of justice,” and then grant a general pardon.

Judge Thruston of the D.C. Circuit wrote a four-page letter at the request of Mrs. Thornton, stating that in his view the verdict had been “against the weight of the evidence,” and “confessing” that he had “a great abhorrence of capital punishments.” Judge Cranch wrote an eight-page letter summarizing the facts of the case without making a recommendation. On June 23, 1836, Jackson ordered a pardon granted without conditions, to take effect on the Fourth of July, leaving Mrs. Thornton free to dispose of her slave however she wished.

Justice Story Gives a Hand. The final pardon in this section is a reminder of a time when judges were accustomed to advising presidents and no one thought the worse of it. In 1821 and 1822, President Monroe was repeatedly asked to pardon one Joseph F. Smith, who claimed to have been unjustly convicted of engaging in the slave trade, and also to have saved many American lives as master and commander of the schooner *Plattsburgh* in 1819. Attorney General William Wirt vehemently opposed clemency, telling the President there was “very little doubt of his [Smith’s] guilt” from the evidence at Smith’s 1820 trial, and scoffing at Smith’s attempt to win credit for preventing his crew from firing at U.S. seamen seeking to board the ship off the coast of Africa. All that did, Wirt argued on Nov. 7, 1821, was to spare Smith a charge of murder in addition to his indictment for violating the slave trade laws. The Attorney General urged Monroe “at most” to send whatever new evidence Smith provided — two exculpatory depositions from Cuba where the ship was outfitted as a slaver — to the U.S. attorney in Boston for review.⁴⁹

As it turned out, Smith was indeed guilty and he confessed in painful detail in a Feb. 21, 1822 letter to the

President, saying he had been promised \$8 a head for a cargo of 500 slaves that the *Plattsburgh* was planning to collect before it was intercepted. A young man, he said he yielded to the temptation of such a fortune and the blandishments of men who told him that even priests were involved in such traffic. In failing health after almost two years of a five-year term and facing even longer confinement for inability to pay a \$3,000 fine, he begged for a pardon so he could return to a “wretched wife - now sinking under the weight of poverty.”

President Monroe turned this time not to his prickly Attorney General, but to Justice Story, who had been the senior judge at Smith’s trial, for advice about what to do.⁵⁰ Monroe’s lengthy note at the bottom of Smith’s confession records his consultation with the Justice, and Story’s recommendations about how to handle the situation. Story thought that Smith’s confession was “a circumstance favorable to him, and that it might be useful if he would disclose all that he knew respecting the conduct of others.” He suggested that the President have the confession sent to the U.S. Attorney in Boston, with an instruction to obtain such disclosures from Smith and to present them along with the confession to the court. Story told the President that if the court (or he himself “while here” in Washington) were to receive a request from the Secretary of State for its opinion of the truth of the confession, and of Smith’s heroics in preventing “the discharge of cannon & musketry on our people,” that the Justice could confirm Smith’s account.

The pardon file on the case does not contain any follow-up report from either Story or the prosecutor, but a few months later, on Aug. 24, 1822, Smith was granted a pardon.⁵¹ The pardon warrant mentioned neither confession nor cooperation, but only Smith’s deteriorating health and the “utmost poverty and distress” of his “innocent family,” along with the standard “respectable testimonials” to his former good conduct and likely “future propriety of behavior.”⁵²

III. Conclusion

From the vantage point of the pardon archives, the federal justice system in the early 19th century seems in many respects a rigid one, with many penalties mandated by law and few opportunities to correct mistakes. At the same time, through judges’ easy access to the president’s pardon power, that system was usually able to reach a result corresponding to the moral judgment of the community, as the Framers of the Constitution intended. Court officials were evidently comfortable in invoking the President’s power to dispense “the mercy of the government”⁵³ where the outcome dictated by law seemed harsh or unjust. And the President was evidently comfortable in responding to their concerns.⁵⁴ On the whole and in the end, the system worked.

Notes

¹ THE 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.”). See also James Iredell, *Address in the North Carolina Ratifying Convention*, reprinted in 4 THE FOUNDERS’ CONSTITUTION 17 (P. Kurland & R. Lerner eds., 1987) (“[T]here may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. 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.”).

- ² KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 9 (1998).
- ³ Ilene Nagel, *Structured Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990). See TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* 16 (1976) (legislatively determined “flat-time” sentencing is a “throwback to the early 19th century”).
- ⁴ See Alan M. Dershowitz, *Historical Survey*, in *FAIR AND CERTAIN PUNISHMENT*, *supra* note 3, at 79 et seq. Dershowitz reports that “legislatively fixed” sentencing was the norm in colonial America, and that discretion was only gradually given to judges as the 19th century progressed. After imposition of sentence, the term of imprisonment could be reduced only through the clemency process. Dershowitz does not separately discuss the penalties provided in federal criminal statutes.
- ⁵ These offenses were treason, murder on United States property, piracy, accessories to piracy before the fact, forgery and counterfeiting, and “rescue” of a person convicted of a capital crime. 1 Stat. 112, 112–113 (1790).
- ⁶ Under the Judiciary Act of 1789, both district courts and circuit courts had criminal jurisdiction, the latter for more serious offenses. 1 Stat. 73–79. See DWIGHT F. HENDERSON, *CONGRESS, COURTS AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801–1829* 5 (1985) [hereinafter HENDERSON, *CONGRESS, COURTS AND CRIMINALS*]. At least two circuit judges generally sat as a panel for every serious felony, so if they divided in opinion, the case could continue to the Supreme Court. *Id.* at 9. See also DWIGHT F. HENDERSON, *COURTS FOR A NEW NATION* (1971).
- ⁷ 1 Stat. 112, 115–116. Corporal punishment was not formally abolished until 1839, 5 Stat. 322, though no federal offense enacted after 1790 included an element of corporal punishment. Because whippings generally took place immediately after judgment, judges (and marshals) could suspend imposition of sentence while the defendants sought presidential remission of this aspect of their punishment, though this rarely happened. *But see* application of John Peden and Sam Morris, *infra* note 34 and accompanying text.
- ⁸ 1 Stat. 117. The only “punishment” under the 1790 law that was left entirely to the discretion of the courts was dissection of executed criminals, a practice that had been used in England and the colonies to foster medical education. Congress embraced the rule primarily “as a way of signifying that some murderers deserved a greater punishment than others.” STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 78 (2002).
- ⁹ Stith and Cabranes state that “even when Congress specified a minimum term of imprisonment, federal courts could exercise authority not to incarcerate the defendant by either delaying imposition of sentence or by ‘suspending’ its imposition.” STITH & CABRANES, *supra* note 2, at 11. However, it is clear from the pardon files that federal judges in the first half of the nineteenth century did not believe they possessed

the power to remit a fine or suspend a sentence for anything but a short period of time, pending a clemency request for example. See, for example, the cases of John Peden and Sam Morris, *infra* note 34 and accompanying text; and of James Bilyou, *infra* note 40 and accompanying text. Later in the century, when some state courts began to exercise a common law power to suspend sentences and impose probation, some federal courts followed suit. The Supreme Court ended this practice abruptly in 1916, in *Ex Parte United States* (Killits), 242 U.S. 27, 51–52 (1916) (“we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things, amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution”).

- ¹⁰ See generally DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971).
- ¹¹ 1 Stat. 347–49 (civil penalties for embarking on the slave trade from the United States).
- ¹² 2 Stat. 70–71 (criminal penalties for any U.S. citizen or resident to serve on board a ship carrying slaves from one foreign country to another). See HENDERSON, *CONGRESS, COURTS AND CRIMINALS*, *supra* note 6, at 13.
- ¹³ See U.S. Const. Article I, Sec. 9, cl. 1 (“The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by Congress prior to the year [1808].”).
- ¹⁴ 2 Stat. 426, 427, 428. Amendments to this Act in 1818 modified the term of imprisonment for transporting or importing a slave to three to seven years, and added a term of imprisonment for equipping a slave ship. See 3 Stat. 450, 451. After struggling unsuccessfully to enforce the 1807 Act and its later amendments, Congress finally in 1820 made engaging in the slave trade an act of piracy, punishable by death. 3 Stat. 600. See HENDERSON, *CONGRESS, COURTS AND CRIMINALS*, *supra* note 6, at 166–189.
- ¹⁵ See 2 Stat. 423–24. Perhaps reflecting the uncertainty of a transitional stage of the law, the law incorporated both the new mandatory minimum term and the older “not to exceed” formulation: Persons found guilty of defrauding the Bank were subject to a prison term of “not less than three years, nor more than ten years, or shall be imprisoned not exceeding 10 years.” When this statute was reenacted in 1816, the “or shall be imprisoned” provision was deleted. See 3 Stat. 266, 274–75. In later reenactments in 1837, 1847, 1850, and 1858, the punishment range of three-to-ten years remained the same.
- ¹⁶ 4 Stat. 102, 107–108.
- ¹⁷ After initially providing that both counties should be governed by the law of the acceding state, Congress discovered that Virginia had changed its law in 1796 to establish a “penitentiary system,” and had accordingly eliminated many death penalty provisions. Four days after enacting the law that established the federal courts in the District, Congress amended it to provide that the pre-1796 Virginia law, which made almost every felony a capital offense, would apply to crimes committed in Alexandria County. See 2 Stat. 103; 2 Stat. 115.
- ¹⁸ See pardon applications of Samuel Miller, *infra* notes 24–27 and accompanying text and Richard Hull, *infra* notes 29–30 and accompanying text. The Circuit Court for the District of Columbia was established in 1801, and was composed of three circuit judges, two of whom generally sat as a panel in serious criminal cases. (In other jurisdictions, a circuit court panel was composed of the district judge and a Justice of the Supreme Court.)

- ¹⁹ See 4 Stat. 448–450. Many offenses carried their own specially tailored penalty ranges, which were relatively wide. The thresholds were quite low (usually one or two years except for aggravated offenses like rape), though they increased for second offenders. For all felonies not specifically provided for (except the capital offenses of murder, treason and piracy) the punishment was “imprisonment and hard labor in the penitentiary of said district, for a period not less than seven nor more than twenty years.” 1 Stat. 450.
- ²⁰ See *A Statement of Convictions, Executions, and Pardons*, 20th Cong., 2d Sess., House Doc. 146 (1829). Henderson reports, based on the information in this document, that 596 federal defendants were found guilty by circuit courts between 1801 and 1828 (excluding District cases), of whom 148 or about 25% were pardoned. He also notes that during this 27-year period the Presidents issued 1,098 pardons — and it seems from the State Department ledger books that this figure represents the number of people who received a specific grant of clemency, as opposed to the number of pardon warrants (codefendants or people with related convictions were generally pardoned by the same warrant). Of this number, 398 pardons went to criminals in the District of Columbia, 11 to criminals from the territories, and 53 to persons convicted by courts martial. In addition, there were 188 presidential discharges of debtors, 206 remissions of fine, forfeitures and penalties, 53 reprieves, and “20 miscellaneous.” Pardoning was a regular practice for the early Presidents, and the warrant books show that grants were made on a weekly and sometimes a daily basis throughout this period. The warrants were often drawn in detail to explain the circumstances of the offense, the recommendations received, and the reasons for the grant. See HENDERSON, CONGRESS, COURTS AND CRIMINALS, *supra* note 6, at 46 n. 94.
- ²¹ See Jefferson’s statement in National Archives and Records Administration (College Park, MD), *Petitions for Pardon — 1789–1860*, Record Group 59/893, box 2, file 104 (hereinafter NARA RG 59/893/___) (“No pardon is granted in any case but on the recommendation of the judges who sat on the trial & who best know & estimate the degree of the crime, & character and deportment of the criminal”). Until 1858, pardon petitions were processed by the State Department. In that year, 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.” HOMER CUMMINGS, *FEDERAL JUSTICE* 80 (1937). See 10 Stat. 99. Not until 1893 did the Justice Department assume complete responsibility for the administration of the pardon power. See Exec. Order of June 16, 1893 (on file at the Office of the Pardon Attorney). See also Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to Be Merciful*, 27 *FORDHAM URB. L. REV.* 1483, 1489 n. 25 (2000); Reed Cozart, *Clemency Under the Federal System*, 13 *FEDERAL PROBATION* 3 & n.1 (1959).
- ²² See HENDERSON, CONGRESS, COURTS AND CRIMINALS, *supra* note 6, at 47, citing Jefferson, Works XII at 254–55. Of course it is also true, as Stuart Banner has recently observed about clemency in the colonial period, “[I]n a world of unequals, connections mattered.” BANNER, *supra* note 8, at 55. But pardoning in the United States was from an early date brought under the management of the justice system, with the result that it was available to serve the goals of that system throughout the 19th and well into the 20th century. See 3 U.S. Dep’t of Justice, *The Attorney General’s Survey of Release Procedures: Pardon 295–99* (1939), reprinted in 13–14 *FED. SENT. REP.* 199–205 (2001) (hereinafter *Attorney General’s Survey*). See also Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton’s Last Pardons*, 31 *CAPITAL L. REV.* 185, 187–193 (2003).
- ²³ Judges occasionally asked the President to pardon punishments that they themselves might have mitigated under the governing statute.
- ²⁴ NARA RG59/893/2/61.
- ²⁵ From the earliest years of the Republic, it was believed that the President had no power to commute a death sentence to a period of incarceration, since that would involve substituting one form of punishment for another. See, e.g., 1 Op. A.G. 327 (1820). See also 4 Op. A.G. 274 (1843) (President has statutory power to “mitigate” court martial offense). In 1821 and again during the debates over the Crimes Act in 1825, attempts were made to give the President statutory authority to commute death sentences to life. It was not until 1855 that the Supreme Court made clear that the President had power to commute a death sentence to life. See *Ex Parte Wells*, 59 U.S. 307 (1855). For one successful effort to circumvent this obstacle in the case of a man judged mentally unbalanced and dangerous, see President Monroe’s open-ended “reprieve” of William Davis, accompanied by instructions to the Marshal that Davis should remain confined “until further orders from the President.” See *infra* notes 33–34 and accompanying text.
- ²⁶ National Archives and Records Administration, *Register and Indexes of Pardon Warrants, 1789–1893*, Record Group 59/897, book 1/page 69 (hereinafter NARA RG59/897/___).
- ²⁷ See NARA RG 59/893/2/63 (William Galloway, jailhouse informant, seeking pardon as reward for cooperation).
- ²⁸ NARA RG59/893/2/83. Some years later, when President Tyler was asked to commute another slave’s prison sentence, he asked his Attorney General whether a slave could properly be imprisoned since he was someone else’s property. Attorney General Nelson responded that the law made no distinction between slave and free, and that a slave could also be pardoned. The President ordered the slave’s release to his owner. See 4 Op. A.G. 237 (1843); NARA RG59/893/36/121 (pardon of slave named Pleasant, aka Daniel Jenkins, on condition of transportation from the District).
- ²⁹ NARA RG59/893/7/453. The unrelated case of William Davis, discussed in the text accompanying note 36, bears the same Archives file number, since both men were reprieved in the same warrant.
- ³⁰ NARA RG59/897/3/59.
- ³¹ NARA RG59/893/2/71.
- ³² NARA RG 59/893/2/75.
- ³³ See NARA RG 59/893/2/42; NARA 59/893/1/16 and NARA 59/893/10/603. Not a single case could be found where our first Presidents refused to cancel a whipping when they had the opportunity. It may be wondered, however, whether the prisoners might have preferred a straight whipping to the so-called “reform,” a stint in state penitentiary where breaking the rule of silence brought whippings but no freedom. See GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 44 et seq. (1833, reprinted 1970).
- ³⁴ NARA RG59/893/2/42. The law required the judges to order a punishment that included “putting in the pillory” and whipping “not exceeding forty stripes.” While the judges said that the court had no discretionary power except as to the number of stripes, it is noteworthy that they had assigned each man five stripes, something more than a token. In the pardon warrant sparing them the whip and pillory, the President noted that the two had been “recommended to mercy by the . . . court.” NARA RG 59/897/1/49.

³⁵ See *Attorney General's Survey*, *supra* note 22, at 295–96:

[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 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.

³⁶ NARA RG59/893/7/453. See also NARA RG59/897/3/58 and 112.

³⁷ NARA RG 59/893/3/unnumbered case.

³⁸ NARA RG 59/893/31/124.

³⁹ NARA RG59/893/35/98.

⁴⁰ NARA RG59/893/2/43.

⁴¹ NARA RG 59/893/31/152.

⁴² NARA RG59/893/37/196.

⁴³ The pardon file does not indicate whether the defendant and the victim were related, which suggests that they were not.

⁴⁴ NARA RG59/893/18/910.

⁴⁵ The word “pardoned” was crossed out in a draft of the warrant. By the time the President’s directive reached the jail on July 31, 1827, Ford had already served his month in confinement, and more.

⁴⁶ NARA 59/893/23/1260.

⁴⁷ NARA RG59/897/4/408.

⁴⁸ NARA RG59/893/25/1327. See also CONSTANCE McLAUGHLIN GREEN, *THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION’S CAPITAL* 35–36 (1967) (mentioning the Bowen

case as reflective of the racial tensions of the time).

⁴⁹ NARA RG59/893/11/624.

⁵⁰ Justice Story had also been asked to speak to the President about the case by Peter Little, a Maryland congressman sympathetic to Smith’s wife, who was then living in Baltimore.

⁵¹ Shortly after he received Smith’s confession in February 1822, President Monroe pardoned one of the seamen who had been under Smith’s command, one Adolphe LaCoste. Smith’s persistent wife Dorcas wrote to the President in early April noting the LaCoste pardon and pointing out that her own husband remained in prison. Monroe penned an undated note to the effect that LaCoste’s situation was different from Smith’s because he had been an underling in the operation and not the captain.

⁵² NARA RG59/897/4/22.

⁵³ THE FEDERALIST No. 74, *supra* note 1.

⁵⁴ In recent years, the President has rarely used the pardon power to commute prison sentences, even where the sentencing judge has urged him to do so. *But see* David S. Doty, *Clemency: A View from the Bench of Two Commutations*, 13 FED. SENT. REP. 161 (2001). In the summer of 2003, Supreme Court Justice Anthony Kennedy called upon the American Bar Association “to consider a recommendation to reinvigorate the pardon process at the state and federal levels.” The Justice noted that the pardon process seems to have been “drained of its moral force,” and that pardons have become “infrequent,” and opined that “A people confident in its laws and institutions should not be ashamed of mercy.” Speech at the American Bar Association Annual Meeting, Aug. 9, 2003 (revised Aug. 14, 2003).