

Pardon Power and Sentencing Policy

DANIEL J. FREED

FSR Editor; Clinical Professor Emeritus of Law and
Its Administration and Professorial Lecturer in Law,
Yale Law School.

STEVEN L. CHANENSON

FSR Editor; Assistant Professor of Law,
Villanova University School of Law



These observations have three goals. First, we open with a guided tour through the Issue's fourteen articles and seventeen appendix documents. Next, we examine the history of the pardon power, some relevant developments in the sentencing and correctional process since the late 19th century, and pardon's steep decline over the past hundred years. Finally, we suggest some principles to guide the relationship between pardon power and sentencing policy.

Many of the materials here take issue with, or draw lessons from, President Clinton's controversial pardons during his final year in office. While it is premature — because of pending investigations — to draw final conclusions about the wisdom or propriety of individual acts of clemency, we trust that readers will find much of value in the intriguing studies and spirited debate offered by our contributors.

I. READER'S GUIDE

A. Articles

The articles are grouped in three categories. The first, *Guidance for Pardons*, presents five essays that describe different conceptions of the role pardons have played through history, and competing philosophies that lead various authors to urge expansion, or limitation, of a president's power to mitigate punishment previously imposed. Introducing these essays is an article by Margaret Love, a former Pardon Attorney in the Justice Department, offering her own perspective on the pardon process. Love analyzes the evolving role of clemency in terms of tension between rule-based justice and discretionary mercy. She concludes that "our commitment to determinate sentencing ought...to make it easy to carve out a respectable role for pardon," which was intended by the Framers to provide necessary flexibility where the legal system is unable to take appropriate account of individual circumstances. She discusses the remaining articles in the context of her rule/discretion framework, and views President Clinton's pardons as the result of a breakdown of the rule-based pardon process.

David Tait, an Australian criminologist, offers an historical and comparative approach. He shows how clemency and forgiveness, like punishment, are found throughout the criminal justice system. The policy issue he identifies is "how to distribute the power to punish or pardon most appropriately between juries, judges, constitutional courts, legislatures and the executive." Emory law professors Charles Shanor and Marc Miller then tell of amnesties and pardons that presidents from Washington to Carter granted to "heal the wounds of war at home." Based on that history, the authors urge consideration of pardoning as a systematic policy tool to redress sentencing disparities flowing from the war on drugs. Quite an opposite perspective is suggested in Virginia law professor John Harrison's essay on prerogative. Believing that pardons ought to be confined to unusual situations that justify doing good in the absence of a rule, he urges that they not displace the general presumption that "govern-

ments do good through rules and not outside them.”

Dan Kobil of Capital University Law School examines both sides of the question whether the Constitution should be amended to require a president to give reasons for pardons, and explains why he thinks such a requirement would be counterproductive. Finally, Vice-Chair John Steer of the U.S. Sentencing Commission and Paula Biderman of the Parole Commission show how the sentencing guideline system provides “a detailed set of standards that may be helpful in evaluating clemency petitions.” In their view, “judicious use of the President’s commutation power...to achieve a more just sentence in exceptional cases” can be exercised compatibly with a “sentencing system that is designed to avoid unwarranted disparity in punishment.” They see a need for commutations in the sentencing reform era because of (1) limitations on guideline departure authority under present law; (2) “limitations in accounting adequately for post-sentencing developments;” and (3) distortions in sentences where mandatory minimum penalties “work at cross purposes with the goals of the Sentencing Reform Act.”

The second category of articles, *Reflections on the Clinton Pardons*, opens with the op-ed advice Kathleen Dean Moore, Oregon State University philosophy professor and author of a leading treatise on pardons, offered to President Clinton in the *Washington Post* six days before his final grants. Senior District Judge David Doty then discusses two cases involving drug offenders convicted in his courtroom who later had their sentences commuted: one whose post-sentence rehabilitation led the judge to support clemency; the other whom the judge and the United States Attorney deemed undeserving. Evan Schultz of Legal Times and Assistant U.S. Attorney Brian Hoffstadt debate the question whether the Justice Department should retain its central role in the clemency process. Deborah Devaney and David Zlotnick, both former federal prosecutors, describe actual cases and discuss the role they think prosecutors ought to play, and presidents ought to heed, when pardons are presented for consideration.

In the *Roads Less Traveled* category, New Mexico law professor Elizabeth Rapaport recounts how the State of Georgia pardoned more than 100 resident immigrants for state misdemeanors committed years before a federal statute retroactively exposed them to mandatory deportation as “aggravated felons” — defined as having been sentenced to 12 months, served or suspended. Mary Price of FAMM proposes (by a route that would lessen reliance on the pardon process) that the Sentencing Commission breathe life into 18 U.S.C. § 3582(c)(1)(A) by guiding judges to reduce sentences more frequently, upon motion of the Bureau of Prisons, for “extraordinary and compelling reasons.”

B. The Appendix

Beginning at page 192, the appendix section on *Rules of the Pardon Process* reprints Justice Department regulations relating to clemency, including procedures for clemency petitioners to follow, along with the Department’s policy guidance for United States Attorneys in situations where comments on a petition are solicited.

Section B, *Historical Snapshots*, begins with Alexander Hamilton’s 1788 explanation of the Constitution’s pardon clause. This is followed by an excerpt from Wayne Morse’s classic 1939 survey of pardons and other release mechanisms for President Roosevelt’s Justice Department; and four short excerpts from Pardon Attorney reports in the 1960s during the administrations of Presidents Eisenhower, Kennedy and Johnson. Of special interest in the 1939 Survey is Dean [later Senator] Morse’s analysis of the interrelationship between parole and pardon, the importance of keeping those functions separate, and the value of retaining parole supervision (rather than conditional pardon) as the primary avenue of early release. The concluding items in this section are Proclamations by Presidents Gerald Ford and George Bush granting pardons to Richard Nixon, and to Caspar Weinberger and others involved in the Iran-Contra affair. In each instance, the president spells out in detail the reasons underlying his controversial decision.

Section C, *Effect of a Pardon*, analyzes the sweep and limitations of pardons previously granted. In a Justice Department memorandum, Walter Dellinger concludes that pardons can bar deportation, remove a state firearm disability, and compel remission of court-ordered restitution. In the Abrams case, on the other hand, the DC Court of Appeals holds that a presidential pardon does not prevent the Bar from censuring an attorney who gave false testimony to congressional committees concerning the government’s role in the Iran-Contra Affair. Finally,

“...history demonstrates a transformation in the relationship between the pardon power and sentencing policy that holds important lessons for today’s system.”

Webster Hubbell, in a piece originally published by the *San Francisco Chronicle*, describes the collateral consequences of convictions that, if neither pardoned nor removed by statutory repeal, stigmatize a released offender for life.¹

The concluding section, *Clinton Era Cases and Comments*, juxtaposes [1] two short White House policy statements (1996 and 2000) and a 1999 letter by President Clinton explaining his commutations of FALN terrorists (a subject discussed from a different perspective by former FALN prosecutor Deborah Devaney in her *Voice for Victims* article), with [2] three press accounts in early 2001, from the *New York Times* and *Washington Post*, reporting on the circumstances surrounding the final Clinton pardons. This section also includes Judge Doty's letter to the President recommending clemency for Kim Willis, one of the defendants described in his Two Commutations article.

II. LESSONS FROM HISTORY: PARDONS, PROCESS, SUBSTITUTES

We think it worthwhile to examine the history of the pardon power and how it has evolved over the past two hundred years. That history demonstrates a transformation in the relationship between the pardon power and sentencing policy that holds important lessons for today's system.

A. Pardons Pro and Con

Throughout history, kings, princes, popes and presidents have been vested with power to grant clemency — for reasons of mercy, forgiveness, compassion, justice — to persons previously punished by the state. It is an honorable tradition (occasionally dishonored in the breach) in the eyes of persons awarded a second chance, and of members of the public for whom forgiveness and mitigation symbolize the sovereign's humanity or wisdom in providing a safety valve against convictions belatedly found to be erroneous or punishments deemed unduly oppressive.

Clemency provokes strong detractors as well. Similarly situated offenders (and their families) often feel disparately and inexplicably left behind. And more broadly, prosecutors, judges and ordinary citizens often fear that clemency has been bestowed on an undeserving or high-risk offender whose pardon or expedited release will endanger public safety or undermine respect for law.

For the lucky few who receive clemency, a second chance may take different forms — complete pardon with restoration of civil rights, commutation to a lesser punishment, reprieve, amnesty, remission of fines. Timing differs as well. On occasion, second chances have been awarded in advance to persons not yet tried or convicted (as with Richard Nixon, the Iran-Contra defendants, and draft-age citizens who fled to Canada during the Vietnam war). At other times the pardon process is significantly deferred: according to current rules of the Department of Justice, a petition for pardon may not be filed until “expiration of a waiting period of at least five years after the date of release of the petitioner from confinement.”

B. Flaws in the Pardon Process

A critical dimension in many clemency cases focuses on the facts and procedures on which decisions are based. Pardons are determined by the President, a single decisionmaker at the apex of government. There is no requirement to provide due process. Fact-finding takes place behind closed doors. Reasons for grants need not be stated and are seldom volunteered. The decision is not subject to judicial review. The potential for arbitrariness is high.

At the same time, because pardon was designed to be the ultimate safety net, the stakes are high, the pressure of time (as with reprieves) is often intense, and no other forum is available. Outcome on occasion is much more important than process.

Disturbing as the arbitrariness of the pardon process may be, observers need to acknowledge that pardons do not stand alone in the spectrum of low-visibility, unexplained, unreviewable decisions to mitigate the seriousness of a criminal charge. Low-visibility discretion pervades the criminal justice process. Accuracy or error, evenhandedness or disparity, justice or injustice — all occur from time to time in decisions by the police not to arrest; by juries to acquit if the penalty seems more severe than the crime warrants; or by prosecutors when they file lower charges than those on which the person was arrested, or decline prosecution entirely, or give discounts to secure some offenders' cooperation but not others'.

“[T]o rely more than sparingly on pardons runs the risk of adding a significant new layer of arbitrariness that is not justified by the view that justice for some is better than justice for none.”

Yet to rely more than sparingly on pardons runs the risk of adding a significant new layer of arbitrariness that is not justified by the view that justice for some is better than justice for none. This is especially so when the “some” seem to have back-room connections, political connections or financial connections. As we will see in the next section, various mechanisms introduced starting in the late 19th century significantly mitigated the use or severity of prison sentences and thereby facilitated a more parsimonious use of the pardon power.

C. 20th Century Substitutes for Pardons

In the early days of the Republic, a high proportion of federal prisoners -- tiny in number by today's standards -- secured release through pardons, often granted in 50-70% of all cases. Later, as federal crime became defined more broadly and prosecuted more expansively, the rate of pardons to prison population fell precipitously. During the period 1896 to 1936, for example, according to W.H. Humbert (who was among the first to carry out empirical work on the historical use of the presidential pardon power), the average daily federal prison population grew from 500 to 14,000 and the clemency rate fell from 64% to 2.7%.²

Humbert says many reasons were offered for pardon's decline during the early 20th century. Among these were the rise in serious federal crime, an increase in the prosecution of repeat offenders, and -- most significant for us today -- the proliferation of legislative and administrative mechanisms to provide for sentence mitigation, post-sentence review and early release from confinement.

Options that served to diminish the need for pardons included sentences of probation in lieu of prison, awards of credit for good behavior while in prison, and the use of furloughs and work release to enable prisoners to serve part of their sentences outside prison walls. Probably the greatest change was the establishment in 1910 of the federal parole system to conditionally release selected offenders under supervision, often well before expiration of their prison terms.

There was thus a transition in this country away from pardons. As crime and caseloads grew, there was a rapid movement toward the use of administrative agencies and correctional practices to expedite the release of offenders from prison, usually under supervision, or as a substitute for prison as an initial matter.

III. RECENT REFORMS IN SENTENCING

In the past quarter century, the thrust of sentencing reform has been directed more to the front end of the system where sentence is imposed than to the back end where the offender is released. Yet while the system was being redesigned to emphasize fairness and uniformity in the imposition of sentences, Congress chose to limit judges' discretion and to increase the severity of punishment in ways that created other disparities.

A. Structural Reforms

In the mid-1970s Congress began to study sweeping reforms to rationalize federal sentencing. Spurred by a desire to reduce the unwarranted disparity and uncertainty surrounding indeterminate sentences, it ultimately enacted the Sentencing Reform Act of 1984, establishing a commission to promulgate guidelines and structure judicial discretion.

To allow individualization of sentences but enhance the accountability of judges, Congress authorized judges to depart from guideline ranges when they encountered circumstances for which guidelines made inadequate provision. It directed judges to explain sentences with statements of reasons. And it established a system for appellate review of sentences. These measures took account of longstanding concerns about the unfairness of a process that provided no standards for sentencing judges and no review on appeal.

B. Severity Reforms

At the same time, a number of changes wrought by the new system increased severity and narrowed opportunities to mitigate penalties. Congress abolished parole. It slashed good time credits. The Sentencing Commission, in turn, curtailed by more than 50% the use of probationary sentences. It also discouraged resort to work release and other alternatives to incarceration that had matured over preceding decades.

"In the past quarter century, the thrust of sentencing reform has been directed more to the front end of the system where sentence is imposed than to the back end where the offender is released."

Of overwhelming impact, Congress began in 1986, only two years after the Sentencing Reform Act and before the first defendant was sentenced under the federal sentencing guidelines, to enact a series of severe mandatory sentencing laws, principally in relation to drug offenses. These laws curtailed the Sentencing Reform Act's emphasis on tailoring sentences to the "nature and circumstances of the offense and the history and characteristics of the offender." The combination of the mandatory sentencing regime and the sentencing guidelines has produced its own pernicious form of disparity and perceived unfairness, including, for example, substantial assistance departures below the mandatory minimum sentence for more culpable defendants, while less culpable co-defendants may not qualify for reduced sentences. The mandatory sentencing concept expanded throughout the 1990s and — with exceptions here and there — continued to grow harsher.

C. Mitigation Developments

Three species of sentence mitigation have tended to moderate the severity of the mandates just mentioned. In the process, they have slightly diminished the need for pardons. In 1994, Congress created a "safety valve" relieving certain low-level drug defendants from the strictures of otherwise-applicable mandatory minimum sentences. In 1996, departures from the guidelines were allowed to play a more significant role in individualizing particular sentences when the Supreme Court's decision in *Koon v. United States*³ encouraged district courts to depart more flexibly in appropriate cases. According to the Sentencing Commission's annual reports, there are soaring departure rates in many districts.

Finally, prosecutors and judges have been employing a range of techniques — of both high and low visibility — to mitigate punishments they perceive as being too severe.⁴ These techniques include explicit prosecutorial charge and plea bargaining and explicit judicial departures based on a fair factual record. These techniques also include more troubling behavior, such as fact bargaining. Furthermore, prosecutors know how to formally oppose departure motions while at the same time alerting the judge that no appeal will be forthcoming if she chooses to depart. Judges have also learned the low-visibility corners of the guidelines where their decisions to depart, or not to enhance a sentence, will rarely be disturbed, regardless of the prosecutors' views.

Overall, sentencing reforms of the past quarter century have achieved a measure of success in bringing rationality to the process of imposing sentences. However, along the way the severity of many sentences has increased markedly. We are thus left with a criminal justice system that cries out for selective relief from long sentences, yet devices such as parole, better suited to make individual decisions in an orderly way, are not available. The larger need seems to be not for more pardons, but for further sentencing reform.

IV. CONCLUSION

Pardons can be all things to all people. They can be justice finally delivered, or well-deserved forgiveness for an old aberrant transgression. They can be an undeserved or inexplicable break for unrepentant offenders with connections. They can be painful reminders of still tender wounds for victims who thought justice had already been done.

As a general matter, considerations of crime control are of vital importance whenever clemency is contemplated. There are many crimes for which lengthy prison sentences are appropriate. If offenders are released or pardoned without adequate scrutiny of their records, public safety may be jeopardized. Equally troubling is the diminished respect for the law that follows when pardons are granted without explicit regard for the gravity of the decision.

We agree that reasons for pardons ought not be required as a constitutional matter but they do perform a salutary function when used to explain why it is appropriate to upset the deliberate judgment of the courts. For the same reasons that judges are now required to explain punitive sentences, we believe a president should voluntarily explain pardons and commutations. Public information needs to be recognized as critical to public confidence in the administration of justice.

But what to do about areas of federal sentencing policy that need attention and adjustment? Despite the extraordinary potential for arbitrariness, some urge significant increases in individual grants of clemency. Others urge that Congress reconsider its severe limitation of

"As a general matter, considerations of crime control are of vital importance whenever clemency is contemplated."

administrative mitigation devices such as parole; its tacit prohibitions against individualized sentencing (e.g., through mandatory minimum penalty laws); and its requirement, of disproportionately high penalty levels for certain offenses without regard to circumstances of the crime or the offender.

Between these two choices, we favor the latter, more demanding road toward democratic reform. Wherever a rule can be structured to guide the discretion of judges or administrative agencies in determining — with reasons — whether to mitigate the sentences of similarly situated offenders, we think such a system should ordinarily be accorded priority over one that relies exclusively upon the unstructured, unexplained discretion of a president to grant or deny individual pardons or commutations. While presidents may wish to use systematic pardons or exemplary commutations to prompt debate or to motivate a recalcitrant Congress, they ought not invoke the pardon power to convert the Presidency into a legislature of one. As difficult as it may be to accomplish, completing the task of legislative sentencing reform is preferable to excessive — and often misunderstood — reliance on case-by-case pardons.

Notes

¹ FSR has already examined collateral consequences in depth in volume 12, issue no. 5. See, e.g., Nora V. Demleitner, *Stopping a Vicious Cycle: Release, Restrictions, Re-Offending*, 12 FED. SENT. REP. 243 (2000). We are not alone. In response to the controversy surrounding the November 2000 presidential election, the National Commission on Federal Election Reform, chaired by Presidents Carter and Ford, issued its final report in August 2001. The Commission noted that:

We believe the question of whether felons should lose the right to vote is one that requires a moral judgment by the citizens of each state. In this realm we have no special advantage of experience or wisdom that entitles us to instruct them. We can say, however, that we are equally modest about our ability to judge the individual circumstances of all the citizens convicted of felonies.

Therefore, since the judicial process attempts to tailor the punishment to the individual crime, we think a strong case can be made in favor of restoration of voting rights when an individual has completed the full sentence the process chose to impose, including any period of probation or parole. In those states that disagree with our recommendation and choose to disfranchise felons for life, we recommend that they at least include some provision that will grant some scope for reconsidering this edict in particular cases, just as the sovereign reserves some power of clemency even for those convicted of the most serious crimes.

National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* 45 (2001)

(http://www.reformelections.org/data/reports/99_full_report.pdf) (last visited August 5, 2001).

² W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 115 (1941)

³ 518 U.S. 81 (1996)

⁴ See, e.g., Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly A Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001) (noting that the decline in average federal drug sentences may be caused by discretionary decisions of prosecutors and judges, but observing that drug sentences are still longer than they were about a decade ago).

Fear of Forgiving:

Rule and Discretion in the Theory and Practice of Pardoning

The pardons issued by President Bill Clinton on his final day in office rival Gerald Ford's pardon of Richard Nixon as the most controversial exercise of the constitutional clemency power since the Civil War. Clinton's astonishing "Midnight Pardons" engrossed the media for weeks, became the subject of congressional hearings, and finally were referred for investigation to a federal grand jury in the Southern District of New York. The concern generally expressed was that in many cases the applicable Department of Justice administrative process had been by-passed, and pardons and sentence commutations secured instead through the personal intervention of individuals with direct access to the President, including members of his own family. In the circumstances, suspicion of impropriety was widespread.

Unusual as these pardons were, the more interesting issues raised by the episode relate not to President Clinton's peculiar notion of his pardoning responsibilities, but to the role that executive clemency plays in the modern day criminal justice system. It has seemed difficult to find a principled place for pardon in a regime of punishment where rules have all but displaced discretion. The articles in this volume explore the tension between rule-based justice and discretionary mercy, suggesting some ways of accommodating these two great principles of decision in a determinate sentencing system. In examining the theory and practice of pardoning in a contemporary setting, they offer some new perspectives on the balance of prescription and discretion that is the mark of a healthy legal system.¹

A. The Life and (Near) Death of Pardon

1. The System and its Breakdown

Pardon, that remnant of the royal prerogative tucked mischievously away in Article II of the Constitution, has been little studied and much misunderstood.² The Framers of the Constitution believed that pardon should be considered a public act of office rather than a private act of grace, and that the President alone should have the power to dispense with the laws because "the sense of responsibility is always strongest in proportion as it is undivided."³ As they saw it, pardon was the discretionary "fail-safe" that would temper the hard results sometimes produced by the rule of law. Pardon would also serve as a useful political tool, to reward spies, defuse rebellions, and heal the wounds of war. They put the pardon power beyond the reach of Congress and the courts, on the theory that a president would be best restrained in its exercise by the risk of what James Iredell called "the damnation of his fame to all future

ages."⁴ This *in terrorem* was from the beginning generally effective to keep the pardon power institutionally respectable, and the President cautious in its exercise.

Beginning in George Washington's administration, pardon was pressed into service as a regular player in the federal justice system, and from then on was used on a regular basis to cut short prison sentences or grant reprieves from execution, to restore civil rights or reward rehabilitation, and sometimes simply to extend a measure of official forgiveness. In the early years of the Republic pardon was even used to restore forfeited property. There were of course a number of controversial political grants during the 19th century, but the meat and potatoes of pardoning was the ordinary criminal case in which the legal system had produced too harsh a result. Pardon was kept regularly employed in the service of law enforcement, and this generally kept it out of mischief.⁵

Throughout most of the 19th century the pardon power was administered in a decentralized fashion, with dispositive recommendations in most ordinary cases coming from prosecutors and sentencing judges.⁶ In 1893, President Cleveland asked his Attorney General to assume full responsibility for administering the power and, by executive order that has never been withdrawn or modified, made him the President's principal advisor in clemency matters.⁷ In 1898, President McKinley issued the first federal clemency rules, directing all applicants for pardon or sentence commutation to submit their petitions to the Attorney General, and specifying how such applications would be processed within the Justice Department.⁸ The Attorney General's central role in administering the pardon power reflected and reinforced the link between pardon and the ordinary day-to-day operation of the federal justice system. Most pardon cases were considered and decided in accordance with the same sort of simple flexible standards that governed decisions to prosecute and to punish in the first place: that the offender be more or less morally deserving of forgiveness, more or less truly penitent and rehabilitated, and more or less likely to remain crime-free.⁹ In a justice system comfortable with discretion, pardon was an easy fit.

The pardon power was administered by the Justice Department efficiently and for the most part quietly for over a hundred years. Warrants effectuating a grant of clemency were prepared by the Pardon Attorney and signed by the President four or five times a year, and there was no bunching of grants at holidays or the end of an administration. Even after pardon's role in the justice system was largely taken over in the 1930's by



MARGARET COLGATE LOVE

Of Counsel, Brand & Frulla, Washington, D.C. The writer was U.S. Pardon Attorney from 1990 until 1997 and was invited to participate as a guest editor of this Issue of the *Federal Sentencing Reporter*.

parole and probation, and obviated by procedural improvements in the legal system,¹⁰ the practice of pardoning in the federal system remained vital through the 1970's. There were over a hundred grants of pardon and commutation almost every year between 1900 and 1980, most of them to ordinary individuals convicted of garden-variety crimes.¹¹ Pardon recommendations were often made on the basis of rather sketchy information,¹² and presidents were evidently neither surprised nor intimidated by the fact that pardon recipients sometimes proved embarrassing.¹³ Pardoning was a rather informal affair, and grants often reflected the personal predilections of those involved in the process.¹⁴ On the other hand, if grants were sometimes politically controversial, they were never personally scandalous. All in all, pardon was officially regarded as a useful adjunct of the legal system right through the 1970's.

Then, beginning with the first Reagan Administration, the number of pardons each year began to drop off. By the mid-1990's, what had once been a steady stream had become a constipated trickle of Christmas grants. Between 1960 and 1980, a pardon applicant had had a better than 30% chance of getting what he wanted; by the final year of the Clinton administration, those odds had dropped to about 3%.¹⁵ At the same time, the number of applicants for federal clemency each year after 1992 grew steadily, reflecting both the increase in the federal offender population and the absence of alternative mechanisms for relief from no-parole prison sentences and increasingly severe collateral consequences of a conviction.¹⁶

Finally, under these conflicting pressures, the administrative apparatus itself lost a sense of direction.¹⁷ By the time President Clinton came to consider his legacy in the final months of his second term, the Justice Department was not prepared to meet his sudden demand for favorable pardon recommendations.¹⁸ And so, because the Justice Department was unable (or perhaps unwilling) to deliver to him what he wanted, and because he evidently did not fully appreciate the insulating effect of Justice Department review, President Clinton decided simply to work around the problem by using his own White House staff.¹⁹ The result of this systemic breakdown was the very "damnation of his fame" predicted by James Iredell two hundred years before.

2. Why the System Broke Down

The decline of ordinary pardoning after the Carter Administration is attributable to two relatively new phenomena in the criminal justice system: the influence of politics and the growing dependence on rules to determine punishment. In this environment, it was predictable that pardon, the component most politically exposed and least subject to regulation, should be regarded with suspicion and avoided whenever possible. It became a commonplace that pardoning could

only get an elected official into trouble, and the law did not seem to contemplate the need to take such a risk. The inherent mystery of the pardon process and the infrequency of actual grants gave currency to the popular view of pardon as a way for a president to reward his intimates at the end of his term.

A third factor contributed to pardon's decline, more subtle but no less influential as a practical matter. This was the Attorney General's decision in the late 1970's to delegate his responsibility for advising the President in clemency matters to subordinate officials within the Department of Justice.²⁰ This decision, whose implications were apparently not fully appreciated at the time,²¹ 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 complements but is quite separate from his 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 mercy's sake.²² When the clemency advisory responsibility devolved within the Justice Department to officials whose duties were exclusively concerned with law enforcement, this brought to bear a perspective on pardoning that was necessarily more one-sided, reflecting that of the prosecutors who had long enjoyed an important but decidedly auxiliary role in clemency matters.²³ In turn, this had important consequences for the independence and integrity of the Department's pardon program, which before long became "an extension of the executive's 'tough on crime' agenda."²⁴ Pardon could command little respect in the unforgiving culture of the crime war, and the Justice Department's pardon advisory process came increasingly to be dominated by the perspective of federal prosecutors, who tended to regard pardon (to the extent they took it seriously) as an interference with their law enforcement responsibilities.²⁵ The possibility that pardon might actually help prosecutors do their job went largely unexplored. Nor, apparently, did it occur to any President after Jimmy Carter that the pardon power might be used to emphasize the rehabilitative goals of the justice system.

Without a predicate decision 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 pardon recommendations every year. In the White House Counsel's office, where review of pardon recommendations had once been as respected a part of its routine housekeeping

business as the selection of federal judges, responsibility for pardons was relegated to junior staffers who either had no appreciation of the larger significance of what they were doing, or insufficient stature to advocate for it. In short, pardon became an irritant in a justice system increasingly dependent on rules and uncomfortable with discretion, and anathema in a political system increasingly adverse to the risk of making a mistake.

In the end, therefore, it was as much the general disfavor into which pardoning had fallen over twenty years as any particular lack of discipline in President Clinton's pardoning practices, that sealed pardon's fate in the early hours of January 20, 2001. Had he made clear early in his tenure the generous philosophy of pardon he espoused in his final weeks in office,²⁶ or taken an interest in how the Justice Department was administering the power, this trend might have been reversed. As it was, he awoke to his responsibilities only to find the machinery of pardon that had protected his predecessors in shambles. Even if President Clinton sincerely believed (as he may well have) that every decision he made that day was "on the merits," and even if a case could be made (as of course it could) that every beneficiary was in some respect deserving, many of his grants will remain forever questionable precisely because of the irregularity of the process that produced them.

B. Pardon Theory and Practice

As a purely theoretical matter, unruly pardon has always been hard to accommodate to an orderly legal system.²⁷ It has seemed especially hard to reconcile with the calibrated idea of just deserts that is the philosophical underpinning of determinate sentencing.²⁸ In the sparse scholarly literature since 1980, pardon generally looks like just another opportunity for judicial review, or the rejected concept of parole.²⁹ And yet, in strict retributivist theory, pardon is justifiable, if at all, not as an extraordinary final step in a legal process but as mercy freely given. That is, pardon is not supposed to be bestowed according to legalistic guidelines even-handedly applied, or even by a process that purports to be fair.³⁰

The apparent contradiction between classical pardon theory and the aspirations of democratic institutions has historically been reconciled and made politically acceptable by the discipline of the federal pardon process: it was the regularity of the Justice Department's investigations and the reliability of the Attorney General's recommendations 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 for almost two hundred years. It is this intimate relationship between rule and discretion in the practice of pardoning that broke down at the end of the Clinton administration, and that provides the unifying theme of the essays in this issue.

1. Perspectives on the Role of Pardon

Five articles in this Issue explore the respective roles of rule and discretion in the theoretical justification for pardoning. John Harrison takes up the cause of pardon as a "prerogative" power, defined by Locke as "doing publick good without a Rule." He argues that pardon should not be used to deal with situations that are foreseeable, that can be dealt with through *ex ante* rules. Pardon was never supposed to act as a substitute for curative legislation, or as a final court of appeal. A system in which pardon is dispensed pursuant to rules that require only some relatively minor discretion in their application is "a square peg in the Constitution's round hole." He proposes that pardons should be "like lightning bolts," relatively rare and in principle hard to predict because they cannot be accounted for in advance by the sort of considerations on which a system of legal rules is based. It is up to Congress or the courts to deal with the systematic dispensation of mercy; the President should use the pardon power like a good chief diplomat or military commander would exercise judgment in the face of the unexpected, not as a "single-member legislature" or sentencing judge. Congress should legislate for those situations requiring the systematic dispensation of relief for humanitarian reasons: "the law and the courts can deal in a rule-bound way in atonement and forgiveness, just as they deal in judgment and retribution."³¹

Criminologist David Tait also espouses a theory of pardon that emphasizes its discretionary nature, and its roots in the fundamental social values of tolerance and co-existence. Arguing that the powers to punish and pardon cannot be separated in the justice system, he sees the key policy question as how to distribute those powers throughout the justice system. It may be possible to "domesticate" pardon, like sentencing guidelines have curbed judicial discretion, but this risks losing its deeper symbolic purposes as an expression of societal compassion. Tait illustrates this point with two cases involving the mercy killing of a severely disabled child by a parent, whose outcomes were radically different. In one, from France, the jury was entrusted with the full power of pardon, and was allowed to deliver the merciful verdict of the community. In the other, from Canada, the jury was permitted to rule only on guilt or innocence, and the trial court's creative attempt to fashion a relatively minor punishment was set aside on appeal. Tait contrasts a system in which the decision about penalty and pardon is based on "popular sentiment" as articulated by a community-based institution, the jury; and one in which it is rendered pursuant to written guidelines handed down by the legislature, subject to revision only by "the royal prerogative of mercy."

Three articles propose a normatively different role for pardon, one that is more systematic and concerned with doing justice, and less extraordinary and political.

Not surprisingly, such a role places a higher value on rules and regularity in the pardon process, than on the exercise of discretion. John Steer, whose long institutional association with the sentencing guidelines gives him a particularly good vantage point for commenting on their operation, points to a number of ways in which the President's power to commute sentences may advance the goals of the guidelines system. Indeed, he goes a step further to suggest that the guidelines themselves provide a detailed set of standards that may be helpful in evaluating the merits of clemency petitions. He describes three situations in which the President's extraordinary intervention may be appropriate: 1) circumstances where a court is either legally constrained or chooses not to exercise its power to depart downward from the guidelines; 2) cases in which a statutory mandatory minimum interferes with the ability of the guidelines to operate proportionately and uniformly; and 3) cases in which post-sentencing developments may warrant the reduction of a sentence that was appropriate and fair at the time of its imposition. Steer's vision of the operation of the pardon power contrasts with that of John Harrison, insofar as it would operate to correct outcomes of the legal system, offering in effect a second opportunity using the same criteria to arrive at a just result. While the President would have discretion to decide when to intervene, his pardons would have the same regularity as the guidelines themselves.

Marc Miller and Charles Shanor posit even more explicitly that pardon could be used by the President as a substitute for curative legislation, using as an example the elimination of penalty differentials between crack and power cocaine. They argue that it would be both constitutional and appropriate for the President to use the pardon power in a systematic way, applied to a class of offenders selected through consistent criteria and processes, and for reasons that reflect considerations of justice rather than mercy. They make their point by reference to historical precedent, noting in particular President Kennedy's commutation of over a hundred drug offenders serving no-parole sentences that were considered disparate. Pardon may be a desirable tool compared to other strategies available to the President (such as advocating changes in the law or directing changes in law enforcement policy) because of the opportunity it affords to generate a public dialogue about important issues of public policy, and to heal some of the wounds of our long domestic war on drugs. Acknowledging the practical difficulty of implementing a clemency policy for such a large class, they suggest some ways this might be done through the Justice Department or through an independent clemency board similar to the one President Ford established to deal with the national wounds created by the Vietnam War. Like Steer, they envision the actual operation of a

clemency process (as opposed to the decision to bestow it in the first place) as guided by consistent and principled standards — quite different from Harrison's "lightning strike" or Tait's "popular sentiment."

Elizabeth Rapaport describes a fascinating contemporary example of the Miller and Shanor thesis in action: the "mass clemency" granted by the Georgia Board of Pardons and Parole to 139 permanent resident aliens who found themselves suddenly subject to deportation based on misdemeanor offenses, sometimes committed many years before. Acting in response to extensive publicity presenting particular cases in a sympathetic light, the Board (five appointed officials with exclusive clemency power in Georgia) deployed its discretionary authority to provide systematic relief from "the indiscriminate and relentless operation of a draconian law," suspending the operation of its ordinary rules of practice and broadening the substantive grounds for pardon for this occasion. While Rapaport believes that clemency cannot substitute for genuine law reform, she shows how it performs the "exemplary function" of focusing public attention on a problem in the legal system.

2. Entre-Acte: The Clinton Pardons

Two essays and some of the materials in the Appendix are contemporaneous reactions to and descriptions of President Clinton's final pardons. Kathleen Dean Moore, whose 1989 study is the starting point for all consideration of pardon in a contemporary setting,³² sent some words of encouragement and caution to the President just one week before the end of his term, in a column published in the Sunday "Outlook" section of the Washington Post. She reminded him that the President has a moral duty to use his constitutional power to correct injustice, and urged him to base his final pardons on considerations of justice and mercy, not on political cronyism. "As someone who could write the book on the importance of forgiveness," she wrote, "[he] surely understands that his final pardons will give him a chance to display the highest human virtues, or the basest of political and self-serving motives."

Evidently the President did not see Professor Moore's column, or chose not to follow her advice. On the morning of January 20, 2001, shortly before his successor was to be sworn into office, President Bill Clinton signed pardon warrants for 141 individuals and commuted the sentences of another 36, including one person under a sentence of death. These last-minute pardons were not unexpected; they had been the subject of much speculation in the press during President Clinton's last weeks in office. What was unexpected, even by those who would ordinarily have been most closely involved in the Justice Department, was the nature of some of the grants and the identity of their recipients.

Most immediately controversial were the pardon of billionaire Marc Rich and his former partner Pincus Green.³³ But as the details of other less visible grants emerged in the ensuing weeks, new questions were raised about the substantive grounds for the President's decisions, and the fairness of the process by which they had been made. The President was criticized for purposely avoiding the Justice Department's winnowing process, and the Justice Department was criticized for not being more vigilant in its stewardship.³⁴

The articles from the *New York Times* and the *Washington Post*, reproduced in the Appendix, document the extraordinary events leading up to January 20, and capture the popular reaction to the pardons.³⁵ If these press pieces have a single overriding theme, it is that the President got himself into trouble because of his unwillingness to rely on the regular advice-giving function of the Department of Justice in deciding who to pardon. Stripped of the protection afforded by the regular administrative process, the President exposed himself to the very charges of cronyism and abuse of power about which Professor Moore had warned him the week before.

Offering another perspective on this issue, Evan Schultz, writing in *Legal Times* when the dust had just begun to settle, argued that President Clinton should not have been expected to rely on the bureaucratic rule-bound process of Justice Department review. That process had in any event been captured by prosecutors and was therefore of little help to the President in his last minute effort to correct "an overly harsh or misguided prosecutorial system." Schultz defended the President's decision to "yank the pardon power clear of the whole mess," and proposed as a long-term solution that White House appointees should evaluate and advise the President on all pardon applications.

3. The Administration of the Pardon Power

Following the theme introduced by Schultz, four other essays all deal with issues related to the process by which the President decides who should be pardoned. Not surprisingly, the interplay of rule and discretion is highlighted in these pieces. All assume the desirability of some degree of regularity in the pardon process, if only to protect the President's ability to exercise the power in a world where word travels fast and people tend to assume the worst. For precisely this reason, Brian Hoffstadt takes issue with Evan Schultz' proposal to remove the pardon advisory process from the Justice Department and place it in the White House. He argues that rules of eligibility and standards for decision actually enhance the pardon function by encouraging its more generous exercise in a variety of situations, and that the President would be better served by having his pardon advice come from some source outside his immediate circle of advisors, either the Justice Department or some independent advisory board.

Daniel Kobil, author of an influential 1989 article arguing for a more open and regular pardon process,³⁶ weighs the pros and cons of a requirement that the President justify each one of his clemency actions, ultimately concluding that it would be counterproductive and unrealistic to insist that he do so. While the giving of reasons may be an essential feature of a legal system, whose decisions are based on impersonal criteria and that aspires to fairness, a requirement of reasons would not enhance the quality of clemency decision-making or cause presidents to be more careful in their use of the power. To the contrary, he is concerned that it would be more likely to discourage them from using it at all. Kobil's conclusion is not inconsistent with Hoffstadt's, for it is possible to establish standards and administer them regularly, without requiring public justification for each discretionary decision made pursuant to them.

David Zlotnick and Deborah Devaney, both former federal prosecutors, explore different aspects of the prosecutor's role in the pardon advisory process. Zlotnick proposes a number of ways in which pardon can be helpful to prosecutors, using as examples five drug commutations granted by President Clinton in July of 2000. These cases illustrate how pardon can reward cooperation, adjust disparity, recognize subsequent changes in the law, and correct mistake — all desirable outcomes from the government's perspective. Devaney offers another prosecutorial viewpoint, arguing that Clinton's failure to follow the prosecutors' recommendations in two cases (the FALN terrorists and Dorothy Rivers) compromised the quality of his decision. Federal District Judge David S. Doty (D. Minn) offers the perspective of a sentencing judge on the clemency process, comparing the cases of two individuals sentenced by him to prison terms that were subsequently commuted by President Clinton (Kim Willis and Carlos Vignali). For Judge Doty, as well as for the two former prosecutors, the relative regularity and thoroughness of the pardon process is key to its legitimacy.

The final essay in the issue is by Mary Price, General Counsel of Families Against Mandatory Minimums. She describes a proposal recently made to the United States Sentencing Commission relating to an area traditionally dealt with through the clemency process: where "extraordinary and compelling" reasons, arising after the imposition of a sentence, justify its reduction. As noted by John Steer in his contribution to this clemency symposium, the statute authorizing such sentence reductions (18 U.S.C. § 3582(c)(1)(A)) has been used very sparingly by the Bureau of Prisons for cases of terminal illness, and the Sentencing Commission has not issued any guidance that might expand on the possibilities for its use. Price's article illustrates nicely the theme struck by a number of other authors: clemency cannot serve as a long-term curative for deficiencies in the law, although, like the Georgia immigra-

tion pardons described by Elizabeth Rapaport, it may be pressed into emergency service when law reform efforts have not yet been successful. By the same token, if a clemency mechanism is unavailable, this may give encouragement to law reform efforts: in fact, it was President Clinton's failure to grant clemency in several cases where an inmate was severely ill or disabled that was the genesis of the proposal Price describes. So we are brought full circle, to John Harrison's notion of pardon as "lightning strike" rather than simply another way of dealing with commonly recurring problems in the legal system.

C. The Future of Pardon

It remains to be seen what further legitimate use can be made of pardon, particularly now that its theoretical contradictions and practical shortcomings have been so mercilessly exposed. On the one hand, our commitment to determinate sentencing ought by all rights to make it easy to carve out a respectable role for pardon, as John Steer suggests. The power to pardon was incorporated into the Constitution at a time when the legal system was at least as inflexible as it is today (if in different ways), and pardon was specifically intended by the Framers for use when the justice system would otherwise "wear a countenance too sanguinary and cruel."³⁷ In fact, it could be argued that executive clemency is least necessary, and therefore least justifiable, where a sentencing system is discretionary and prison terms indeterminate.

On the other hand, as a practical matter the political dangers of pardoning, and the correlative official anxiety about discretionary decision-making, discourage pardon's regular exercise. So it may be that pardon will be left languishing by risk-averse politicians, a pale and toothless shadow of its former robust self, trotted out only on holidays and ceremonial occasions, useful only when the Justice Department needs to correct a prosecutor's error.

But, as the cautionary tale of Clinton's exit demonstrates, it may be dangerous to disrespect pardon while it still lives. Even if a president enters office with no intention of making much use of the power, it is wise to keep it readily available. In order to do this, the President must make some effort to clarify his theory of pardoning, and establish an appropriate balance of rule and discretion in its practice. Historically, responsibility for helping a president understand and manage his pardoning responsibilities has rested with his attorney general, and this seems as it should be if pardon is to complement rather than contradict an administration's law enforcement agenda. At the same time, an attorney general must ensure that those who administer the pardon power under his supervision are willing and able to look critically at the results of prosecutions, not merely ratify them.

The good news about the final Clinton pardons is that they have drawn attention to problems in the justice system that have been simmering for years. The evident need to rethink how pardon should be used and administered provides an early opportunity to consider these problems.³⁸ Recognizing the limits of pardon should encourage law reform efforts, and recognizing the limits of the law should identify a place for pardon. It may be that President Bush will in time decide to return to his predecessors' practice of pardoning frequently and generously, and perhaps even to use his constitutional power to address systemic legal problems. On the other hand, he may choose to take what appears the safer path, pardoning only where it presents no risk and carries no larger message — though this too has its own risks, not the least of which is that he will arrive at the end his term with little or no real experience of pardoning and a great many due bills demanding a response. Whatever use he intends to make of the power, even if it is no use at all, he has at least a responsibility to pass it along to his successor in better shape than he found it.

Notes

¹ See Frank Remington, *The Federal Sentencing Guidelines as a Criminal Code: Why the Model Penal Code Approach is Better*, 7 FED. SENT. REP. 116 (1994) (reporting on a colloquy between Herbert Wechsler and Jerome Michael at a 1951 meeting of the American Law Institute convened to consider preparing a model penal code).

² Nearly a century ago, President Taft related an experience in which a Congressman asked Attorney General Knox for a pardon for one of his constituents who had robbed a post office. When the Attorney General asked the ground for pardon, the Congressman reportedly replied that the convict was "a good fellow" who had been a great supporter of his. The Congressman was told that this was no reason. "But," he said, "I understand that each Congressman has a right to two pardons during his term, and I want this to be one of mine." WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 124 (Columbia U. Press, 1916).

³ A. HAMILTON, THE FEDERALIST, No. 74 (reprinted in Appendix).

⁴ James Iredell, *Address in the North Carolina Ratifying Convention*, reprinted in 4 THE FOUNDERS' CONSTITUTION 17 (P. Kurland and R. Lerner, eds. 1987).

⁵ In his classic 1941 study of federal pardoning practices, 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). Professor Kathleen Dean Moore points out that probation and parole were not widely available under the 20th century, and good conduct laws "were unheard of." Also, "federal offenses were far less serious and numerous than they are today," and federal offenders

were generally housed in state institutions along with “truly hardened” state prisoners. KATHLEEN DEAN MOORE, *PARDONS* 53 (Oxford University Press, 1989). Few penal institutions of the time had the capacity to care for the seriously ill, and infectious disease was reason enough for release.

⁶ HUBBERT, *supra* note 5, at 99–101. Until 1854 the paperwork associated with pardoning was handled by the Secretary of State; between 1854 and 1893 these ministerial duties were shared with the Attorney General, who in 1865 appointed a “pardon clerk” to assist him in administering the pardon power. In 1893, the Office of the Pardon Attorney was formally established and funded by Congress.

⁷ See Exec. Order of June 16, 1893 (on file with the Office of the Pardon Attorney.)

⁹ These rules were of course for the administrative convenience of the Justice Department, and did not—indeed *could* not—bind the President in the exercise of his plenary constitutional power. Reissued on several occasions over the next hundred years, the clemency rules in their current iteration are remarkably similar to and not much longer than McKinley’s, providing perhaps our most venerable and consistent framework for governmental decision-making. See 28 C.F.R. Part 1 (Executive Clemency) (reprinted in Appendix).

⁹ From 1885 until 1933, each favorable pardon recommendation, along with the reasons for it, was set forth in the annual reports of the Attorney General. See HUBBERT, *supra* note 5, at 124–133. Often the reasons involved doubt as to guilt, lack of capacity, excuse, or reward, a reflection of the relatively primitive state of the justice system of the day. Age, family situation, and ill health were often given as a reason for early release—and sometimes for a full pardon. Sometimes the reasons seem quixotic to the modern eye: “to enable farmer prisoner to save his crops,” “to enable petitioner to catch steamer without delay,” and “to encourage good conduct among other prisoners.” The practice of publishing the reasons for pardon recommendations ceased in 1933, reportedly at President Roosevelt’s direction.

¹⁰ United States Department of Justice, The Attorney General’s Survey of Release Procedures, Volume III Pardon 295–313 (1939) (“Attorney General’s Survey”) (portions reprinted in Appendix).

¹¹ See Office of the Pardon Attorney, Presidential Clemency Actions by Administration, 1945 to Present (June 1, 2001) (“OPA Statistics”).

¹² The Attorney General’s letter of advice to the President was often less than a page long, and he was occasionally forced to rely on the applicant’s version of the offense because no official records were available. It was evidently considered unnecessary to conduct extensive independent background checks on pardon applicants who had obtained character references from persons in their community, though this occasionally resulted in grants being made to unsavory characters.

¹³ President Taft recalled his chagrin when one of two men he had released from prison, thinking both close to death, “recovered at once, and seemed to be as healthy and active as anyone I know.” (The other “died and kept his contract.”) See TAFT, *supra* note 2, at 123.

¹⁴ See HUBBERT, *supra* note 5, at 122–23. For example, Attorney General Charles Bonaparte observed in

1908 that he particularly favored the pardon claims of “unenlightened and apparently friendless criminals, particularly those whose crimes might have been the fruits of sudden and violent passion, ignorance, poverty, or unhappy surroundings,” and was less inclined to recommend mercy for “offenders enjoying at the time of the crime good social position, material comforts, the benefits of education, and a happy domestic life.” 1908 Att’y Gen. Rep. 8.

¹⁵ See OPA Statistics, *supra* note 11. This trend toward fewer pardons and less regular pardoning was reflected in the states as well, at least where the power was exercised by an elected official. See Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENGLAND JOURNAL ON CRIMINAL & CIVIL CONFINEMENT 413 (1999). See also William Glaberson, *States’ Pardons Now Looked at in Starker Light*, NEW YORK TIMES, February 16, 2001.

¹⁶ Recent trends in the number of pardon applications received and acted on are shown in Marc Miller and Charles Shanor, “Pardon Us,” *infra*.

¹⁷ The first public sign of disarray in the pardon advisory process came in the 1999 FALN cases, when the President decided to reject the advice he had received from the Justice Department and rely instead upon the investigation and recommendation of his own White House Counsel. See H. R. Rep. No. 106–488, 59–60 (1999).

¹⁸ 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. In the weeks just before he left office, President Clinton voiced his dissatisfaction with the Justice Department’s administration of the pardon power on several occasions. See, e.g., President’s remarks at the ceremony appointing Roger Gregory to an interim seat on the Fourth Circuit Court of Appeals, December 27, 2000 (“I haven’t seen the final numbers, but before the last batch at least, I had done fewer than any President in almost 30 years. And part of that, frankly, is the way the system works, something I’m not entirely satisfied with.”) (reprinted in Appendix). See also P.S. Ruckman, Jr., “Federal Executive Clemency in United States, 1789–1995: A Preliminary Report.” Jurist, The Legal Education Network, <http://ednet.rvc.cc.il.us/~PeterR/Papers/paper3.htm> (last visited June 27, 2001) (noting that until his final months in office President Clinton had pardoned less generously than any president since John Adams).

¹⁹ A chart of January 20, 2001, pardon grantees distributed by the Department of Justice to members of the press on February 13, 2001, which includes the date each recipient applied, reveals that upwards of thirty recipients of pardon or commutation did not apply to the Department at all, several evidently filed ceremonial applications with the Department a few days before the end of the administration, and upwards of a dozen applied far too late to have had their applications fully processed in the ordinary course. A curious piece of evidence of the difficulty in identifying an adequate number of potential grantees is the inclusion of 17 individuals whose applications had been denied two years before and who had evidently not reapplied.

²⁰ In 1977 Attorney General Griffin Bell informally delegated responsibility for pardon matters, and supervisory responsibility for the Office of the Pardon Attorney, to the Deputy Attorney General, the chief operating officer of the Department responsible, *inter alia*, for oversight of the day-to-day operations of the 94 United States Attorneys offices. In 1983 the Attorney General formally delegated his pardon advisory responsibilities to the Pardon Attorney, a career official whose recommendations were to be made “through” the politically appointed Deputy (or Associate) Attorney General. 28 C.F.R. 0.36.

²¹ Interview with Terrence B. Adamson, Special Assistant to the Attorney General, 1977–1979, in Washington, D.C. (April 2, 2000), *cited in* Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URBAN L. REV. 1483, 1489 n. 26 (2000).

²² See Love, *supra* note 21, at 1489, 1496.

²³ Seven of the thirteen officials who were responsible for overseeing the Department's pardon program between 1983 and 2000 were themselves former United States Attorneys (Steven Trott, Frank Keating, Joe Whitley, Edward Dennis, Donald Ayer, George Terwilliger, and Eric Holder), and one (Lowell Jensen) had been an elected District Attorney. Two others (Rudolph Giuliani and Jo Ann Harris) had been line prosecutors. (Dennis and Harris signed the Department's clemency recommendations as Acting Deputy Attorney General for brief periods in 1989 and 1994, respectively, while simultaneously serving as Assistant Attorney General for the Criminal Division.) The three who had never been prosecutors (William Barr, Philip Heymann, and Jamie Gorelick), assigned responsibility for overseeing the pardon program to career prosecutors on their staff.

²⁴ Love, *supra* note 21, at 1497. In 1941, Humbert noted that “probably the most effective influence in checking growth in acts of clemency has been the determination of the officials, who administered the pardoning power, to aid in the proper enforcement of the law” HUMBERT, *supra* note 5, at 120.

²⁵ See Larry Margasak, ANY PARDONS WOULD COME AFTER ELECTION DAY, OBSERVERS SAY, Assoc. Press, Jan. 18, 1988 (quoting Deputy Associate Attorney General William Landers on the use of career prosecutors to screen pardon requests, which has “resulted in a natural inclination for tighter scrutiny”); Pete Earley, *Presidents Set Own Rules on Granting Clemency*, WASH. POST, Mar 19, 1984 at A17 (quoting Pardon Attorney David Stephenson on the Justice Department's “more exacting” scrutiny of pardon applications to “better reflect the administration's philosophy toward crime”).

²⁶ See President Clinton's remarks at the appointment of Roger Gregory, note 18 *supra*.

²⁷ “All in all, the law of pardon has been a neglected orphan, allowed to grow without benefit of careful grooming which has been accorded other branches of law. Small wonder then that it presents a somewhat disorderly spectacle and has picked up certain unfortunate attributes.” Attorney General's Survey of Release Procedures, *supra* note 10 at ix.

²⁸ See, e.g., Moore, *supra* note 5, at 213 (“a justified pardon is one that corrects injustice rather than tempers justice with mercy”).

²⁹ See, e.g., Daniel T. Kobil, *The Quality of Mercy Strained:*

Wresting the Pardoning Power from the King, 69 TEX. L. REV. 569 (1991). Kobil laments that the pardon power has been “trivialized,” having “failed to evolve with the rest of the judicial system.” If pardon is to play an active role as an “extrajudicial corrective” for unjust outcomes of the legal system, as he believes it should, it must be administered by “a professional board that is independent of the political pressures which inevitably distort the decisions of elected officials.” *Id.* at 613, 622.

³⁰ Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE MURPHY AND JEAN HAMPTON, *FORGIVENESS AND MERCY* 174–183 (1988). See also Love, *supra* note 21 at 1500–1506.

³¹ Harrison does not say whether he would approve the use of pardon in cases presenting commonly recurring humanitarian reasons for relief, where Congress could sensibly be expected to legislate but has not yet done so. I think it is safe to assume that he would approve the use of the pardon power in such cases as a practical matter, even if not as a theoretical one. Harrison's thesis seems consistent with the conclusions of the 1939 Justice Department Survey of Release Procedures, see note 10 *supra*, at 300: “[P]ardon should not be in any degree a regular release procedure, but should be restricted to the unusual case[] . . . All regular conditional releases should be under the parole law.”).

³² See Moore, *supra* note 5.

³³ Rich and Green, both fugitives from federal tax and racketeering charges, had been living in exile in Switzerland for more than 16 years, avoiding persistent efforts by the government to secure their return for trial. The Marc Rich pardon was highly unusual in several respects, not the least of which was the fact that Rich had been represented by a former Counsel to President Clinton, who had apparently been successful in persuading the President of the merits of the case without any independent investigation or recommendation by the Justice Department, and against the advice of the President's closest advisors in the White House.

³⁴ The Justice Department's abdication of its gate-keeping responsibilities was most famously exemplified by Deputy Attorney General Eric Holder's “neutral, leaning toward favorable” contribution to the last-minute deliberations in the White House over whether to pardon Marc Rich. However, White House Counsel Beth Nolan later testified that the Department had been unresponsive to repeated White House requests to expedite the pardon process, communicated at the highest levels on numerous occasions during his final year in office. See House Hearings, Testimony of Beth Nolan, *supra* note 18. Several months before the end of Clinton's term, the Department began advising persons hopeful of last-minute consideration to take their cases directly to the White House, which resulted in what Ms. Nolan described as an “avalanche” of pardon requests. Only three weeks before leaving office, the President gave vent to his frustration with the existing system of Justice Department clemency review, which he felt was not producing enough favorable recommendations for people “without money or power or influence.” Remarks at the appointment of Roger Gregory, *supra* note 18.

³⁶ See, e.g., Kurt Eichenwald & Michael Moss, *Rising Numbers Sought Pardons in Last 2 Years*, NEW YORK

TIMES, January 29, 2001; Don Van Natta, Jr. & Marc Lacey, *Access Proved Vital In Last-Minute Race For Clinton Pardons*, NEW YORK TIMES, February 25, 2001; Peter Slevin & George Lardner Jr., *Rush of Pardons Unusual in Scope, Lack of Scrutiny; Back-Door Lobbying Had Large Role In Clinton's Decisions, Observers Say*, WASHINGTON POST, March 10, 2001. All three articles are reprinted in the Appendix.

³⁷ See note 29 *supra*.

³⁸ The Federalist 74, *supra* note 3.

³⁹ It would seem a propitious time to update the conclusions and recommendations of the 1939 Department of Justice study of release procedures. See Attorney General's Survey, *supra* note 10, at 295–313. At that time, the role of pardon had been shrinking in light of broader opportunities for challenging convictions in court and for shortening prison sentences administratively. Now that this tide seems to have been reversed, it may argue for an expanded role for pardon.

Pardons in perspective: the role of forgiveness in criminal justice



DAVID TAIT

David Tait received his Ph.D. from the London School of Economics. He currently teaches criminology and sociology at the University of Canberra in Australia. This article is based on a graduate seminar he taught at the University of Chicago Law School. Thanks to Margaret Duczynski at the D'Angelo Law Library for her excellent support. Other related work includes *Popular sovereignty and the justice process: towards a comparative methodology for observing court rituals*, CONTEMPORARY JUSTICE REVIEW (forthcoming).

Introduction

'Pardon' is generally regarded in contemporary legal and criminological literature as a somewhat peripheral aspect of criminal justice. The most careful recent American scholars make cogent arguments for rationalizing and curbing pardons, making them fit into a retributive and equitable system of distributing justice to offenders (Murphy & Hampton 1988; Moore 1989). 'Pardon' is conceived narrowly by these authors to refer to the actions of the executive in modifying or overturning judicial decisions. In their view, pardon should be used rarely and only to redress manifestly unjust verdicts or outcomes. Anything further than such technical corrections would constitute constitutional impropriety: one branch of government dabbling in the proper sphere of another.

This paper proposes a different approach, drawing mostly on European sources. It argues that pardon, clemency and forgiveness—like punishment—are found right throughout the criminal justice system, not just with one branch of government. Punishment and pardon are intimate partners in the exercise of state authority over the bodies of subjects and citizens. The policy issue that arises is how to distribute the powers to punish or pardon most appropriately between juries, judges, constitutional courts, legislatures and the executive. Prosecutors sometimes decide not to prosecute (or to reduce charges), juries not infrequently acquit defendants despite strong evidence against them, and judges in many cases minimize punitiveness in imposing sentence. Meanwhile Parliaments decriminalize offenses such as public drunkenness or homosexual activities, while constitutional courts may overturn harsh laws or punitive executive actions.

Focusing narrowly on executive pardons of individuals also misses part of the crucial political significance of such acts (Muyot 1994). Pardons, like punishments, may play an important role in asserting the power of the sovereign (or the people), reaffirming the violent basis of the social contract and reminding us of the fragility of the social order (Garapon 1997). By depriving the subject of liberty, property or even life, the state shows the violence implicit in its exercise of power. By providing forgiveness, the state shows both its strength and its weakness: its authority extends to moderating or preventing violence, but its own survival depends in part on the selective withholding of force rather than its routine deployment. Amnesties in particular, as Muyot points out, have very little to do with providing individual justice and much to do with restoring political order.

Like punishment, pardon, mercy and forgiveness tap into the visceral, subliminal and non-rational side of public policy. They provide ways of responding to popular sentiments (such as sympathy for those guilty of infanticide), recognizing political injustices (such as invasion and its consequences for indigenous peoples), and re-affirming fundamental social values of tolerance and co-existence. Just as moral outrage finds its outlet in punishment, so compassion finds its expression in pardon.

It may be possible to domesticate pardon, just as sentencing guidelines appear to have curbed judicial discretion. But the one-dimensional justice that results may ignore the deeper symbolic purposes of punishment and pardon, and the pervasiveness of both dimensions of justice throughout the criminal justice system. This point can best be illustrated by way of a story of two apparently similar murder trials in France and Canada, illustrating two constitutional settings of pardon. But first a general historical overview and some definitions.

Pardons and punishment: a brief history

The linking of punishment and pardon is at least as old as the Code of Hammurabi, where the prescription of harsh penalties was balanced by rules to limit vengeance and specify mitigating circumstances (King 2000). Royal authority to take life was matched by executive prerogative to exercise mercy (Rolph 1978). Most famously, the execution of Jesus was accompanied by executive clemency for Barrabas. In Roman times the Triumph gave the returning war hero the status of Dictator for a day, with a right both to slaughter war captives and to pardon them. Coronations and national holidays provided suitable occasions for monarchs to proclaim their generosity (Rolph 1978). The two sides of justice were displayed most clearly in the extensive use of amnesties by Han emperors in China (McKnight 1981). 'Great acts of grace' were used regularly to clear the dockets of the over-stretched legal system, sometimes timed to coincide with particular astrological events. Additional 'special amnesties' were used to get workforces for drought relief or provide soldiers. 'The ruler', McKnight points out, 'held two handles, rewards and punishment, the power to cleanse or to chastise. He could not hope to govern well without employing both.' (119).

One contemporary understanding of pardon is that it is an executive intervention to thwart justice. This is the view of those who regard presidential pardons as

unfortunate interference in the business of the judicial arm of government. It was also the view of the French revolutionaries who abolished executive clemency altogether as part of a dismantling of the *ancien régime*. Royal clemency had worked in a capricious and arbitrary way, privileging the aristocracy and imposing suffering on the rest of the population. The new written codes would allow the sovereign people through their legislative representatives to fix clear and consistent penalties. This rational rulebook, that became the Napoleonic Code, would transform judges from agents of royal despotism to bureaucrats applying rules in a consistent and transparent way.

The abolition of executive clemency did not last long, as the new First Consul began to re-gather some of the old royal powers in his move towards an imperial role. However, more importantly, the separation of powers that had been introduced as part of the Revolution had also divided up the royal powers of pardon. The new judicial borrowing from England, the jury, allowed the sovereign people to exercise direct democracy as part of the judicial arm of government. In the early days, this mostly consisted of deciding whom to send to the guillotine. But increasingly the role of the jury was to decide when mercy should be exercised. Gruel's classic history of the French jury is titled simply *Pardons et Châtiments*, forgiveness/pardon and punishment (1991). Juries were the sovereign power in relation to acquittal, later determining which mitigating or aggravating factors were present, and later still (after 1941) ruling on penalty.

Were juries particularly indulgent with offenders charged with infanticide, abortion, or crimes of passion? Prosecutors certainly felt this was the case. One important consequence of the perceived tendency of juries to acquit so many defendants was the *correctionalisation* of justice, reducing the charges to the less serious matters heard in correctional courts by judges without juries. Sometimes this was done by the prosecutors, part of the executive branch of government. Sometimes it involved the legislature changing the definitions of offences or penalty ranges to facilitate this process. But for serious cases, particularly murder or other major crimes against the person, the jury had responsibility.

In a sense the institution of the jury was the complete opposite of the rationality implicit in the *Code Civile*. It was based on the feelings of lay people, on their *intime convictions*, their gut feelings, not on the dispassionate reasoning of professionals. The courtroom encounter therefore represented the contest between two sources of authority, the legislature represented by the written code laid down by the Assembly, and the judiciary represented (at least in part) by the jury (Taylor, 1996). Both, it should be noted, derived their legitimacy from popular authority. One

exemplified representative authority, the other direct democracy.

This story of curbing of executive pardoning powers has a parallel in the Common Law world. Danby, the chief minister of Charles II, was about to be impeached by Parliament, but the king stepped in with a royal pardon (Rolph, 21). As part of the establishment of constitutional monarchy that followed the departure of the Stuarts, it was prescribed that the royal pardon could never again be used to block impeachment (Kobil 1991, 587). By 1830 it was clear that the king had lost the rest of his pardoning power. In that year George IV ordered the Lord-Lieutenant to commute a death sentence, perhaps responding to a request from one of his mistresses (Rolph, 28). Peel, the Home Secretary, after consulting with Wellington, the Prime Minister, refused. After that it was the elected representatives of the people that managed the royal prerogative. Even then pardon was to be given only for legal reasons, such as an unsafe verdict (Rolph, 29). This practice of 'royal' pardons exercised by officials was transferred to the colonies, including New Zealand (Burnett 1977) and Canada (Strange 1996).

The United States, in developing a system of government with popular accountability for both the executive and legislature, could re-think the powers accorded each sphere. So the President was given far more extensive powers to pardon than the British monarch had generally enjoyed, while the Congress acquired widespread powers to grant amnesties. Lincoln made extensive use of this power, once dispatching a rider to halt a military execution with the handwritten message, 'Colonel Mulligan — if you haven't shot Barney D. — yet — don't. A. Lincoln' (Clark 1917). All but two states gave some pardoning powers to their governors, but most of them were more limited than the federal powers (Rolph 115).

Former California Governor Pat Brown (as recounted by Kobil) reported the political context of one unsuccessful applicant (Kobil 608). The case involved the killer of a six-year-old girl. Brown was convinced that the condemned murderer was mentally defective because of an injury *he had* suffered as a child. He believed that executing this criminal would amount to an act of societal vengeance rather than justice. However, while deciding whether to commute the sentence to life imprisonment, Brown learned that a legislator with the swing vote on an important piece of legislation for migrant workers was strongly in favor of the execution and would withhold his support if Brown granted clemency. The commutation was denied.

The real growth in executive involvement in managing mercy in the United States was not after sentence; it was in prosecutorial decisions, made in the context of plea bargains and mandatory sentencing.

Meanwhile, juries in the Common Law world developed in parallel to French juries, with juries con-

sidered overly sympathetic to defendants being replaced by judge-only courts, or in England and Wales and the colonies, by lay magistrates. What was different about the French jury system after 1941 was its authority to evaluate level of culpability, consider aspects of mitigation and aggravation, and determine sentence. The 'clemency movement' in North America, protecting the interests of women who had killed battering husbands, argues for juries to provide clemency through nullification (Ayyildiz 1995). For the most part (and this leads onto the later comparison) Common Law juries did not have the broad responsibility of French juries, and the opportunity to craft sentences to the situation.

Defining the terms

The terms 'forgiveness', 'pardon', 'mercy', 'clemency', 'indemnity' and 'amnesty' provide a fluid and largely overlapping set of terms to mark out an approach to transgression or deviance that stays the hand of vengeance.

A suspect could be declared immune from prosecution for certain offences, before guilt was formally established. Such a 'pardon' was granted to former U.S. President Nixon by his successor (Sirica 1979), while at least 16 'amnesties' were offered Filipinos who had taken up arms against their governments since the last days of Spanish rule (Muyot, 16). The South African Truth and Reconciliation Commission offered an 'amnesty' to those who were found to have provided a complete and truthful account of their involvement in political violence in the apartheid years (Tutu 1999), while in several Latin American countries, amnesty was one of the procedures used to allow military rulers to evade justice, at least for a while (Minow 1998). A classical definition of amnesty sees it as 'a sovereign act of forgiveness' for past crimes (Black 1991), though some reserve the word 'forgiveness' for a personal act of reconciliation that only the victim can provide, in which hostility is set aside (Wiesenthal 1997).

In nineteenth century America, presidential pardons were almost routine for federal prisoners. In 1869, Moore reveals, there were '64 acts of pardon for every 100 federal prisoners' (Moore 1998, 53). Prison 'amnesties' are regular features for certain categories of offenders in Turkey, Thailand and the Philippines (Muyot 1994). Gun 'amnesties' have been used in Australia to reduce the number of high-powered weapons in the community, while immigration 'amnesties' have been used by several nations to regularize the status of illegal immigrants (Storer and Faulkner 1977). 'Indemnities' from prosecution may be used to allow some suspects to testify against others, while one of the first acts of Charles II on the restoration of the monarchy in 1660 was to declare a 'free and general pardon, indemnity and oblivion' (12 Car.II.c.11.)

Pardons were not always 'free'. Charles II himself

sometimes sold pardons for two shillings (Hewitt 1978). Papal indulgences and letters of remission were other famous revenue-generating measures; the one attacked by Luther and his Reformers, the other by leaders of the Enlightenment. Pardon brokers were active in the Lincoln White House organizing pardons for former Confederate sympathizers, getting paid up to \$300 for a successful pardon (Dorris, 147). J. C. Walton sold hundreds of pardons during his term as Governor of Oklahoma (Kobil, 607). Two British nurses facing flogging or beheading for murder in Saudi Arabia had their fate linked to negotiations over blood money to be paid to relatives of the victim (O'Donnell, 1999).

'Mercy killing' and the compassionate jury: a comparison of two trials

Two rather similar trials, one on the Côte-d'Armor in France, the other in Battleford, Saskatchewan, dealt with 'mercy' in a double sense. They involved reportedly loving parents ending the suffering of severely disabled children — called 'mercy killings' — and courts being asked to show clemency to the perpetrators of these acts. Yet the cases produced radically different outcomes, illustrating quite different constitutional arrangements for the exercise of pardon.

Anne Pasquiou had three children (Le Monde, 5 March 2001; Internet Revue de Presse, 5 March 2001). One of them, Pierre, aged 10, had a particularly severe form of autism; he required constant supervision as his condition continued to worsen. So she took him to the end of a pier one winter morning and pushed him into the water. A three-day trial took place before a jury at the local *cour d'assises*. In his final address to the jury, Madame Pasquiou's advocate denounced the failure of French society to provide adequately for parents with children like Pierre. The prosecutor, part of the executive arm of government, acknowledged that the defendant was 'driven by love', but urged the jury to convict her to avoid the impression that 'death should be preferred to life'. The penalty, he submitted, should be sufficient to emphasize society's disapproval of murder, while reflecting goodwill and mercy to the defendant. He suggested a suspended sentence might be acceptable.

The jury — nine citizens selected randomly, the presiding judge and two assistant judges — retired to work out decisions for all the issues of the case — guilt, level of culpability, aspects of mitigation or aggravation, and sentence. They returned with a verdict of guilty, and a sentence of three years prison, wholly suspended. The presiding judge turned to the accused. The court, he reported, did not have the power to forgive her (*pardonner*), but she could put her life back together again only if she began by forgiving herself. The jury exercised its sovereign authority to impose punishment on a fellow citizen by crafting a sentence that combined a strong symbolic statement about the value of life with an

avoidance of future pain. Pardon was requested, clemency was given, forgiveness was foreshadowed. A statement was made, but it was made through ritual and language, rather than on the body of the offender.

The Canadian case involved Robert Latimer, whose 12 year old daughter, Tracy, had a severe form of cerebral palsy (Supreme Court of Canada, 2001). She was quadriplegic, could not walk, talk or feed herself, was in constant pain and was subjected to repeated surgical interventions. When yet another operation (considered by Mr. Latimer and his wife as mutilation) was planned, he placed Tracy in the cab of his Chevy truck and connected a hose from the exhaust to the cab. He had confessed the deed to the police and re-enacted it, so there was no question it met the formal criteria for murder—deliberate killing of another, with at least some evidence of planning. The Canadian Parliament had decided that murder should carry a mandatory life sentence. The jury at his 1994 trial duly found he was guilty of second degree murder and the judge passed the required life sentence, with parole possible after 10 years. The verdict was overturned in 1996 by the Supreme Court when it was found that the police had tampered with the jury. At the second trial in 1997, the jury again convicted, but the judge sought their advice on sentence. They recommended one year prison and an additional year home detention. The judge imposed that sentence, using the protection offered by the Charter of Rights and Freedoms against ‘cruel and unusual punishment.’

The nine year ordeal made its way up again to the Supreme Court, which in January 2001 decided to re-impose the mandatory life sentence, saying it was not grossly disproportionate to the offence. The court commented that it was not for it to ‘comment on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed’ (77). Further while the court recognized that Mr. Latimer had undergone seven years of legal action involving ‘publicity and consequential agony for him and his family’, the court could provide no redress for that agony. The answer had to come from the executive: ‘the royal prerogative of mercy’ they concluded was ‘the only potential remedy’ (89) for people in Mr. Latimer’s situation. This was a rather hollow suggestion: remissions of sentence were not available under the royal prerogative where this would merely substitute ‘the discretion of the Governor General, or the Governor in Council, for that of the courts’.

But the courts, the Supreme Court ruled, did not have discretion anyway in this situation. The policy manual for the use of pardons goes on that ‘there must exist clear and strong evidence of an error in law, of excessive hardship and/or inequity, beyond that which could have been foreseen at the time of the conviction and sentencing’ (National Parole Board, s. 4). The hard-

ship and inequity had been identified at the time of original sentence, which was why the mandatory sentence had not been passed at the time of trial. Within a U.S. constitutional framework, with equally balanced branches of government, this might appear to be the Supreme Court taking a conservative stance, refusing to examine whether the legislature had erred. Within a Westminster-style system, this was merely the court recognizing the traditional supremacy of Parliament; ‘separation of powers’ simply means preserving the independence of the judiciary not assigning them the same authority as Parliament. The reference to the Charter (as to the European Convention of Human Rights in Britain or other signatory countries) illustrates however the way Parliamentary sovereignty was increasingly becoming open to challenge.

While these two cases cannot be considered ‘typical’ of murder trials, let alone the style of justice, in the two jurisdictions, they do illustrate nicely different constitutional opportunities for pardon in the two systems. In the French case, full authority is exercised by the sovereign people, exercising direct democracy, sitting in judgment on the life and liberty of a fellow citizen. The jury is entrusted with power to weigh up all the evidence about social conditions, mitigating circumstances, extent of culpability, and then to determine sentence. Pardon was in the gift of the citizens acting through the institution of the jury. The institution closest to the evidence and the parties, and in the best position to form an *intime conviction*, was given the task of making that decision.

Executive clemency had been available in France in the last resort, and was extensively used in the post-war years. Indeed one of the reasons the guillotine had been abolished was that juries were passing too many death penalties, although the long campaign of civil liberties group also helped (Badinter 2000). An appeal system was also introduced against the decision of a jury in 2001, but to a 12-person jury (plus three judges) rather than the normal 9-person jury. Despite these controls, the jury was nevertheless was able to make authoritative decisions on the exercise of mercy.

In the Canadian case, the conclusion of the jury in the second trial was not dissimilar to that of the French trial. A relatively minor sentence should be imposed, they believed, certainly far less than the mandatory minimum. Their view was shared by the other independent person who had heard the evidence and was formally required to pass sentence, the judge. The difference between the two cases lay in the lack of authority given the jury (and indeed the judge) to weigh up and settle the issues. The identity of the killer was not an issue, but was the death (to use the Canadian sentencing judge’s words) a ‘compassionate homicide’, and if so, what sentence would be appropriate in the circumstances? The jury were not empowered to decide

this; they were told only to determine guilt or innocence, in other words ignore the only matter that was really at issue. So the choice for them was to nullify, by ignoring the overwhelming evidence of the defendant's guilt, or convict, producing what in their view would be a grave miscarriage of justice. Despite the attempt of the judge to produce a creative solution by relying on Charter rights, the Supreme Court ruled that neither the judge nor the jury had the power to make the relevant decisions about Mr. Latimer's future. The decision had already been made, in 1976, by Parliament, as part of a deal to abolish the death penalty.

Conclusion

Pardoning was the prerogative of the executive before the days of constitutional government, but so too was appointing and controlling the judiciary, and frequently summoning and dismissing legislative bodies. With a separation of powers came the possibility of providing an independent source of authority that could make its own decisions about the life and liberties of individuals. One key judicial decision is exercising clemency. Yet in many situations, the executive still clings to this apparently judicial power. Most commentators see better regulation of this power as the most appropriate policy option. This paper suggests that a greater sharing of that power is another option to be considered.

The difference illustrated in the case comparison involved the power of the jury to make binding adjudications on sentence. But it raises the more fundamental constitutional question of *where* pardon should be exercised. The first option (as in the Cote d'Armor) is to leave the decision about penalty and pardon in the hands of those who live in the community, hear the evidence, see the faces and gestures of witnesses, and hear both sides of the argument. The second option is to have clear written guidelines prescribed by the legislature, whether in the form of the Napoleonic Code or sentencing rules. This would ensure consistency and fairness between cases. The third option (to correct the defects of the second) is to rely on executive clemency to overturn unduly excessive sentences. So the issue comes down to the extent and form of popular sovereignty in the justice process. Is direct democracy (in the jury) the best way of achieving a just outcome in a criminal matter, is it fairer to rely on representative democracy (through the Parliament), and what role should the executive play in regulating the actions of the other two branches of government?

France, at least for major criminal trials, has selected the direct democracy route. This follows what Nils Christie refers to as local, intimate justice, in which punishment—and pardon—is 'applied between equals standing close to one another' (Christie 1981, 104). The Common Law world, on the other hand, has tended to choose the practices of 'distant democracy'

run by representatives, either in the legislature or the executive. Whichever approach is preferred, it is important to recognize the choices that are made in locating powers of pardon in the hands of presidents, parliaments or juries.

References

- Ayyildiz, E. (1995), 'When battered woman's syndrome does not go far enough: battered women as vigilantes', *American University Journal of Gender & the Law*, 4, 141.
- Badinter, R. (2000), *L'Abolition*, Paris, Fayard.
- Black's Law Dictionary, 1991.
- Burnett, R.I.M (1977), *Executive discretion and criminal justice: the prerogative of mercy: New Zealand 1840–1853*, Wellington, N.Z., Institute of Criminology, Victoria University of Wellington.
- Christie, N. (1981), *Limits to pain*, Oxford, Martin Robertson.
- Garapon, A. (1997). *Bien juger: Essai sur le rituel judiciaire*. Paris: Editions Odile Jacob.
- Grueel, L. (1991), *Pardons et châtements: les jurés français face aux violences criminelles*, Paris, Nathan.
- King, L. (translator, 2000), Hammurabis Code of Laws, <http://eqwc.evansville.edu/anthology/hammurabi.htm> [last accessed May 8 2001].
- Kobil, D. (1991), 'The quality of mercy strained: wrestling the pardoning power from the king', *Texas Law Review*, 69, 569–640.
- McKnight, B. (1981), *The quality of mercy: amnesties and traditional Chinese justice*, Honolulu, University Press of Hawaii.
- Minow, M. (1998), *Between vengeance and forgiveness: facing history after genocide and mass violence*, Boston, Beacon Press.
- Moore, K. (1989), *Pardons: justice, mercy and the public interest*, Oxford, Oxford University Press.
- Murphy, J. & Hampton, J. (1988), *Forgiveness and mercy*, Cambridge, Cambridge University Press.
- Muyot, A. (1994). *Amnesty in the Philippines: the legal concept as a political tool*, Quezon City, University of the Philippines Press.
- National Parole Board, Canada, *Policy Manual 14: clemency and pardons*, http://www.npb-cnrc.gc.ca/infocntr/policym/man_e013.htm, [last accessed May 8 2001]
- O'Donnell, M. (1999), *Mercy: in pursuit of the truth about the death of Yvonne Gifford*, Sydney, Harper Collins.
- Rolph, C. (1978). *The Queen's pardon*, London, Cassell.
- Sebba, L. (1977). 'The pardoning power: a world survey', *Journal of Criminal Law*, 78: 83.
- Sirica, J. (1979). *To set the record straight*, New York.
- Storer, D. & Faulkner, A. (1977). *Amnesty experience in Australia, 1976–77*, Melbourne, Centre for Urban Research and Action.
- Strange, C. ed. (1996), *Qualities of mercy: justice, punishment, and discretion* Vancouver, UBC Press.
- Supreme Court of Canada (2001), R vs Latimer, January 18 2001, 2001 SCC1 File No.: 26980
- Taylor, K. (1993), *In the theater of criminal justice*, Princeton, Princeton University Press.
- Tutu, D. (1999). *No future without forgiveness*, New York, Image.
- Wiesenenthal, S. (1997), *The sunflower: on the possibilities and limits of forgiveness*, New York, Schocken Books.

Pardon Us: Systematic Presidential Pardons

Shortly after the last presidential election, President-elect Bush and President Clinton both observed that the penalty differentials for possession of crack cocaine and powder cocaine are unjustified. They were not the first to do so.

The U.S. Sentencing Commission has studied and sharply criticized the disparate racial impact of the current crack versus cocaine sentencing rules.¹ Scholars have shown troubling differentials in the investigation and system selection for crack and cocaine offenders.² And now Hollywood has added its two cents, illustrating in the movie *Traffic* that some offenders use both crack and powdered cocaine, in which case differential sanctions may be a function of which was being used at the time of arrest.

A president who wants to address issues of proper cocaine punishment and punishment disparities might seek to have Congress and the American people reconsider this issue using the “bully pulpit” or proposing legislation to reduce or end the penalty differential. Another alternative would be to direct the attorney general, who sits as an ex officio member of the U.S. Sentencing Commission, to raise again the issue of crack/cocaine differentials.

Another tool exists: the President might use the pardon power to reduce sentences for a class of people incarcerated for possession of crack cocaine to the level of those imprisoned for possession of powder cocaine, or to some other level fully articulated and justified as principled policy.

Scholars, judges and commentators often emphasize the individualized and mercy-driven nature of the pardon power.³ The use of pardons as a systematic policy tool has not previously received scholarly attention. We consider whether it is constitutional and appropriate to use the pardon power in a systematic way, applied to a group of offenders selected through consistent criteria and processes, and for reasons that may reflect concerns of justice, equality, and wise policy, rather than mercy. We thereafter consider how a president might exercise the pardon power to equalize unjustified sentencing disparities.⁴

1. The Constitutionality of Systematic Pardons

One constitutional objection might be made to systematic use of the pardon power by a president to further a policy goal. If Congress passes a statute that directs differential penalties for two crimes, and the judiciary implements this law, even upholding its constitutionality in the process, does it violate the separa-

tion of powers to allow the president to undo what Congress and the courts have approved?

Of course, the president has an obligation to “take Care that the Laws be faithfully executed.” Art. II, § 3. However, we do not believe this obligation overrides, much less obliterates, the distinct constitutional power stating that the President “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.” Art II, § 2, cl. 1.⁵

Were the faithful execution duty extended so far, it would effectively remove the pardon power from the Constitution altogether.⁶ This power, explicitly given to the Executive responsible for enforcing the law rather than sharing with Congress, should be viewed as a limited exception to the general duty of the president to faithfully execute the laws.⁷ The pardon power qualifies the duty only in connection with enforcement of criminal statutes. It has no bearing on enforcement of regulatory statutes or on private civil actions established by Congress.

Moreover, even as to criminal law statutes, the pardon power operates only as a check on prosecutions or sentences; it in no way alters congressional criminalization of particular behavior. Indeed, because the pardon power is explicit in the Constitution’s text, it seems less vulnerable to criticism on separation of powers grounds than the authority of the executive branch, regularly exercised, to decline to prosecute particular cases or to plea bargain for lesser offenses than those recognized by Congress as applicable to particular behaviors.

The Supreme Court has used extremely broad language to describe the pardon power⁸ and has jealously guarded this power from congressional encroachment.⁹ As the most recent substantial Supreme Court case on the pardon power notes, “the pardoning power is an enumerated power of the Constitution and ... its limitations, if any, must be found in the Constitution itself.”¹⁰

At least a third of all United States presidents, including many of our greatest presidents, and from the earliest administrations, have used systematic pardons. This long history convinces us that even class-wide pardons, with the potential to dramatically limit the impact of federal criminal laws, are constitutional.” Though this article is not the proper forum for examining each of these pardons in detail, the following chart gives a striking demonstration of “a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned,



CHARLES SHANOR & MARC MILLER

Charles Shanor and Marc Miller are professors at Emory Law School. Shanor is the editor of the new law school casebook *American Constitutional Law: Structure and Reconstruction* (West 2001) and a former General Counsel of the United States Equal Employment Opportunity Commission. Miller is the editor (with Ronald Wright) of *Criminal Procedures: Cases, Statutes & Executive Materials* (Aspen Law & Business 1998), and a founding editor of and advisor to the *Federal Sentencing Reporter*. We thank Margy Love, Bill Mayton, Robert Schapiro and Ron Wright for their comments on a draft of this paper and Terry Gordon for advice and his extraordinary assistance with historical research.

engaged in by Presidents who have sworn to uphold the Constitution, making as it were such exercise of power a part of the structure of our government....”¹²

1795	Washington	Pardoned participants in the Pennsylvania Whiskey Rebellion.
1800	Adams	Pardoned participants in an insurrection in Northampton, Montgomery, and Bucks counties, Pennsylvania.
1801	Jefferson	Pardoned all persons convicted under the Alien and Sedition Acts.
1815	Madison	Pardoned the Barrataria Pirates who assisted the American Navy during the War of 1812.
1858	Buchanan	Pardoned Mormons involved in the Utah rebellion.
1862–1864	Lincoln	Granted amnesty to Confederate sympathizers.
1865–1868	Johnson	Granted amnesty to Confederate soldiers, officials, and sympathizers.
1893–1894	Harrison & Cleveland	Pardoned Mormon bigamists.
1902	Roosevelt	Pardoned participants in the Philippine insurrection.
1921	Harding	Pardoned dozens of persons jailed under World War I sedition and espionage laws.
1924	Coolidge	Pardoned persons who deserted from military or naval service on or after November 11, 1918.
1945	Truman	Pardoned pre-war convicts who served in the U.S. armed forces during World War II subject to review by presidential board.
1961–1963	Kennedy	Pardoned offenders sentenced under mandatory minimum penalties of Narcotics Act of 1956
1974–1975	Ford	Pardoned Vietnam-era violators of Service Act subject to review by presidential board
1977	Carter	Pardoned Vietnam-era violators of the Selective Service Act.

Pardons used to heal sectional wounds frequently have been conditioned on the loyalty of the pardonees to the United States and the Constitution. James Buchanan’s 1858 pardon of Utah settlers required those seeking pardons to “submit themselves to the authority of the federal government.” Lincoln’s 1863 and Johnson’s 1865 and 1867 proclamations required an oath to “faithfully support, protect, and defend the Constitution” and support all acts of Congress and proclamations of the President concerning emancipation of slaves. Theodore Roosevelt’s 1902 Philippines proclamation required an oath to “accept the supreme authority of the United States of America in the Philippine Islands.”

While a quick review of the historical record makes it difficult to determine the extent to which these were systematic pardons, this review does suggest a history of using the pardon power, not simply as an act of individualized mercy, or as a political tool to reward supporters, but as a tool to reconcile national divisions.¹³ We turn, therefore, to the wise or unwise use of this power.

2. Unpardonable & Irregular Pardons

We join with critics who have argued that the highly controversial pardons issued by President Clinton at the end of his presidency do a disservice to the pardon power with its solid constitutional foundations. Our focus, however, is upon a missed opportunity rather than an abused prerogative, a policy initiative rather than institutional aggrandizement. Idiosyncratic and anemic pardons, and difficulties in sorting out legitimate and illegitimate pardons, are a risk whenever pardons are not articulated and justified on the basis of broader principles.

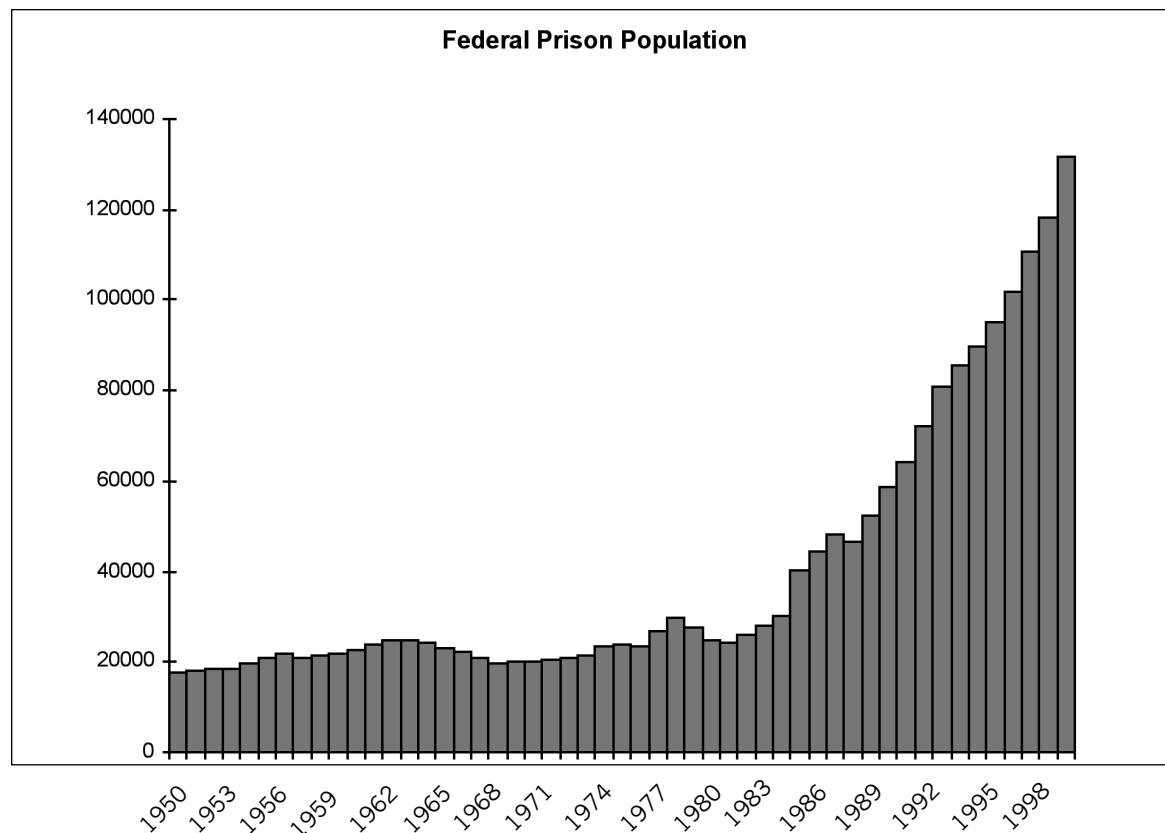
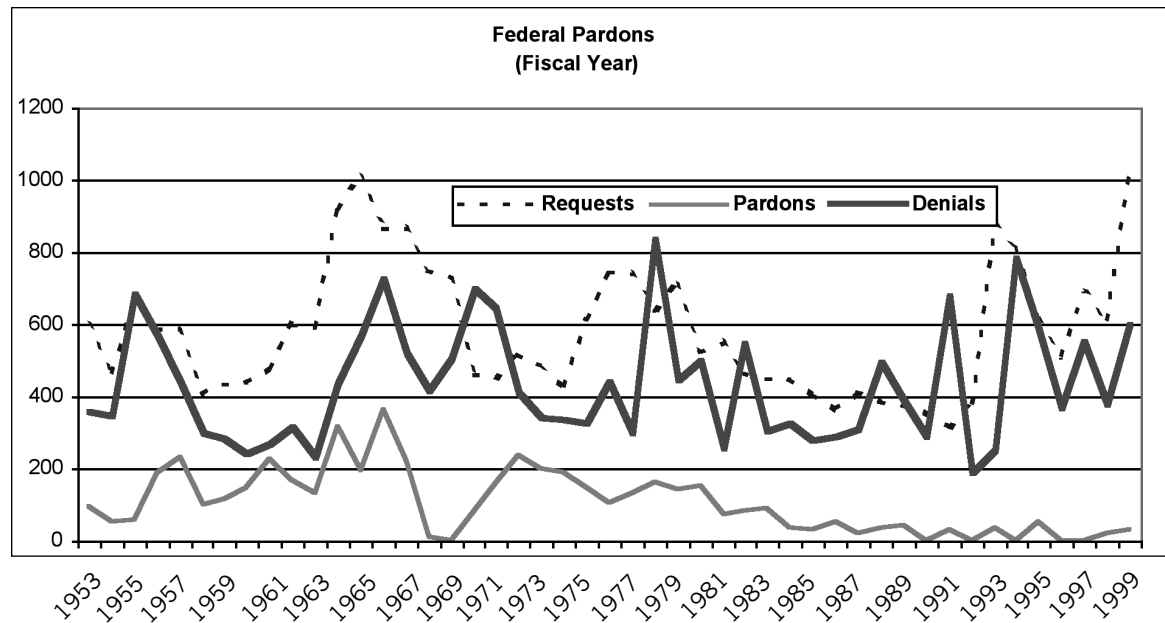
The recent focus on pardon abuse may arise in part from the fact that the federal pardon power has fallen into desuetude. There have been over 20,000 presidential pardons and commutations granted during the twentieth century, and many thousands of additional war-related amnesties falling within the pardon power. However, the vast majority of those pardons occurred before 1980, and the percentage of pardons granted to those sought has been declining steadily for the past 40 years.

Through 1999, President Clinton had issued only 144 pardons (around 3% of all requests through 1999).

PRESIDENT	PARDONS SOUGHT	PARDONS GRANTED	PERCENT GRANTED
Nixon	2,591	923	35.6%
Ford	1,527	404	26.5%
Carter	2,627	563	21.4%
Reagan	3,404	406	11.9%
Bush	1,466	77	5.3%
Clinton	6,622	456	6.9%

By the time he left office, including the 177 last minute pardons, the total number of Clinton pardons had risen to about 450 (around 7% of all requests). During the four years of the elder Bush Administration, 77 pardons were granted. During the eight years of the Reagan tenure, by contrast, 406 pardons were granted. The Carter administration granted 563 pardons, Ford 404 pardons, and Nixon 923 pardons. The preceding chart further elucidates the trend.

Looking back even further, around 1300 pardons and commutations were granted in Lyndon Johnson's five years in office (around 31% of requests), and around 600 pardons were granted during John Kennedy's three years (around 36% of requests). The following chart graphically tracks the use of the pardon power over the last 50 years, examining the relationship between requests for pardons, pardons granted, and denials of pardon requests.¹⁴



The combination of the recent controversial pardons and the highly sporadic use of non-controversial pardons has obscured two important dimensions of the pardon power.

First, when the numbers of pardons are insubstantial, the pardon power offers little possibility for more consistent and substantial executive assessments of sentences.¹⁵ The low and decreasing number of pardons is even more striking in light of size of the federal prison population, which stayed between 20,000 and 25,000 inmates from 1940 through 1980, and ballooned to 136,000 federal inmates by the middle of 2000, and around 150,000 at the present time.

The significance of the small numbers and percentages of pardons in recent years is magnified even further by the fact that, prior to the implementation of the guidelines in 1987, all sentences were subject to standardized executive review of the U.S. Parole Commission. It seems that the elimination of the Parole Commission should have led to an increase in the use of presidential pardons, since one of the two major forms of traditional executive post-conviction review and adjustment is no longer available.

Second, the irregular and seemingly random Clinton pardons obscure the possibility of presidents using the pardon power as a principled, systematic policy tool.

3. Some Modern Systematic Pardons

Presidents have sometimes issued multiple pardons on the same or different dates, and given the same reason for those pardons. Such pardons are not necessarily systematic, unless they are the product of articulated principles applied consistently to an identified group, so that all members of the group who satisfy the principles are pardoned or subject to a standard and reasonably structured process of review.

Wars. The most common form of systematic pardons in the twentieth century appear to be amnesty or clemency for those who avoided military service or even opposed the U.S. during a conflict. The most recent illustration of this type of systematic pardon was President Carter's decision to pardon Vietnam-era violators of the Selective Service Act.¹⁶

Just three years earlier, President Ford had established a nine person Presidential Clemency Board to review applications from among the 100,000 to 300,000 people who refused to register under the Selective Service Act, who otherwise resisted the draft, or who deserted during military service. Between 21,000 and 27,000 people eligible for clemency consideration petitioned the board, and around 90 percent of applications were granted.¹⁷

President Ford's Clemency Board was modeled on President Truman's grant of amnesty to World War II draft violators, who submitted applications for review by a presidentially appointed three person board.¹⁸

Drugs. An example of what may have been systematic, non-wartime, drug offense pardons appears, in brief form, in the Annual Reports of the Attorney General issued during the Kennedy administration. Those reports suggest that there was a large number of pardons or commutations reducing sentences under the Narcotic Control Act of 1956, though the reports must be read closely to see this pattern.

The Narcotics Control Act of 1956 was the policy predecessor to the mandatory drug penalties reenacted into federal law starting in 1986. The 1956 act included mandatory minimum sentences of five to thirty years for various drug offenses.¹⁹ Virtually all of the mandatory penalties in the 1956 act were repealed in 1970 under the leadership of then Representative George Bush.²⁰

The 1960 Report of the Attorney General includes a single page report from Pardon Attorney Reed Cozart. Cozart noted that there were a large number of requests for reduction of drug sentences, and that it "is the general policy not to ask the President to intervene" in cases involving first offenders sentenced to a five year minimum.²¹ A similar note appears in the 1962 report. The 1963 report offers the following revealing explanation of some of the commutations:

The commutations of sentences granted during the past year included many long-term narcotic offenders who, by statute, were not eligible for parole but whose sentences were felt to be considerably longer than the average sentences imposed for such offenses.²²

The 1964 report confirmed that "[a]s in the years preceding, the commutations of sentence granted included some long-term narcotics offenders who, by statute, were not eligible for parole but whose sentences were considerably longer than average." The 1964 report also explicitly refers to efforts to make review of pardons and commutations more systematic:

"During the year, the Director of the Bureau of Prisons was called upon to encourage the wardens of the federal prisons to review cases in their institutions and present to the Attorney General selected cases which they considered to be worthy of clemency and whose sentences could be considered disparate. For the first time there is a policy of attempting to systematically review cases which may be deserving of commutation. As a result, a very sizeable increase in commutations has resulted."²³

While it is not clear whether the Narcotics Act commutations were fully systematic in the sense we suggest, they do combine a statement of principle (disparity) and a suggestion of regularized review to identify similarly situated offenders. Drug offense

sentencing continues to pose problems for sentencing policy and, with respect to some aspects of current federal drug policy, there seems to be bipartisan support for further reforms.

4. Wise Use of Systematic Pardons

Even if systematic pardons are constitutional, are they a desirable tool for the president compared to other possible strategies available to the executive branch, such as advocating changes in the laws, or changing executive charging, plea, or sentencing policies?

A president might believe that a distinction made by a federal criminal law is unconstitutional. This was the basis for President Jefferson's pardons of those convicted of violating the Alien and Sedition Acts, which Jefferson believed to be unconstitutional. A paragraph omitted from the final draft of his message to Congress of December 8, 1801 stated bluntly:

"I do declare that I hold that act to be in palpable & unqualified contradiction to the Constitution. Considering it then as a nullity, I have relieved from oppression under it those of my fellow-citizens who were within the reach of the functions confided to me."²⁴

Under the oath of office, the president not only has the power but the duty to apply the commands of the constitution in the exercise of his office.²⁵

A president also might use systematic pardons when the constitutionality of the conviction and sentence is abundantly clear. The constitutionality of charges and convictions under the Selective Service Act were not at issue, following either World War II or the Vietnam War. Nevertheless, Presidents Truman, Ford, and Carter all believed that a process of amnesty would help to heal the many wounds of war at home. President Kennedy did not suggest that convictions under the mandatory minimum penalties of the Narcotics Act of 1956 were unconstitutional, but he did point to the excessive and unequal sentences imposed under those laws.²⁶

As a political matter, a president might hesitate to issue a series of class-wide pardons in the face of Congressional or public criticism. When Lincoln used the pardon power in 1865, he referenced not only his constitutional authority, but also Congressional support for pardoning a large class of southerners "guilty of treason." When Congress had passed laws calling for forfeiture of property by those in rebellion against the Union, it granted the President the authority to grant pardons or amnesty "on such conditions as he may deem expedient for the public welfare." The legislation was perhaps helpful to Lincoln, but it was also unnecessary, for Lincoln could have granted the pardons without it.

Systematic pardons would likely initiate reconsideration of punishment and incarceration policies by

Congress. Given the political difficulty of generating rich discussions of criminal justice policy, confident and wise chief executives may be in the best position to generate such debate.²⁷ Systematic pardons thus offer the chance for a visible and public dialogue about important legal issues. On the other hand, pardons cannot and should not supplant the legislative role on a continuing basis.

5. Clinton & Bush on Cocaine

On January 18, 2001, CNN's Candy Crowley interviewed President Elect George W. Bush. Crowley asked Bush about "the discrepancy in the sentencing for the use of powdered cocaine, assumed to be an affluent white drug, as opposed to crack cocaine," Bush responded:

Well, that ought to be addressed by making sure the powdered cocaine and crack cocaine penalties are the same. I don't believe we ought to be discriminatory. We ought to be sending a clear signal. My point on drug use is we ought to be doing a better job of helping people cure themselves of an illness. Addiction to alcohol or addiction to drugs is an illness...

Only three days earlier President Clinton issued a detailed statement about the need for reform of the federal penalties for crack, and the disparities created by the current system. In his January 15, 2001 message to Congress, which received little news coverage and is likely to be ignored, Clinton wrote:

We must re-examine our national sentencing policies, focusing particularly on mandatory minimum sentences for non-violent offenders.... One penalty I believe should be changed immediately is the 1986 federal law that creates a 100-to-1 ratio between crack and powder cocaine sentencing policies. This substantial disparity has led to a perception of racial injustice and inconsistency in the federal criminal justice system. Republican and Democratic Members of Congress alike have called for a repeal of this inequitable policy. Congress should revise the law to shrink the disparity to 10-to-1; specifically, the amount of powder cocaine required to trigger a five-year mandatory sentence should be reduced from 500 to 250 grams, while the amount of crack cocaine required for the same sentence should increase from 5 grams to 25 grams. This difference would continue to reflect the greater addictive power of crack cocaine, the greater violence associated with crack cocaine trafficking, and the importance of targeting mid- and higher-level traffickers instead of low level drug offenders.²⁸

It is clear that Clinton did not have these revelations about just federal punishment only in his final

few days in office. In a November 2, 2000 interview with *ROLLING STONE* aboard Air Force One, published after the election, he observed:

[T]he disparities are unconscionable between crack and powdered cocaine. I tried to change the disparities and the Republican Congress was willing to narrow, but not eliminate, them on the theory that people who use crack are more violent than people who use cocaine. Well, what they really meant was that people who use crack are more likely to be poor and, coincidentally, black or brown and, therefore, not have money. Whereas, people who use cocaine were more likely to be rich, pay for it and therefore be peaceable. ...

If President Clinton felt this way about the crack/cocaine sentences, why did he sign the bill in 1995 rejecting the Sentencing Commission's recommendations for reform and maintaining the 100:1 quantity ratio, while at the same time acknowledging the unjust disparity in sanctions?²⁹ Even at the end of his presidency, why didn't he allow his principles to inform his pardon decisions? Could Clinton have issued a class of pardons directed at users of crack cocaine designed to reduce or eliminate the disparity? Would this have been a more appropriate and powerful response than partisan complaints about "racial injustice" and "the Republican Congress"?

6. Preliminary Thoughts About Commuting Crack Cocaine User Sentences

A president who noted the substantial disparity in the treatment of crack and cocaine offenders, the issues of racial bias and sound policy raised by the current federal sentences, and the extensive judicial, scholarly and public commentary revealing the unfairness of the current system, might not merely join the chorus. The president might implement the widespread insight by granting a partial pardon or commutation to a defined class of incarcerated users of crack cocaine and might articulate a more principled policy, such as a 1:1 or 2:1 ratio of crack to powder cocaine user sentences. He might also distinguish offenders based on the extent of their prior record, use of a weapon, or harm to victims — factors relevant to guideline sentencing but sometimes obscured by long mandatory sentences.³⁰

Historical use of systematic pardons suggests the possibility of establishing procedures to review cases and make recommendations over time.³¹ The existence of the Office of Pardon Attorney in the Department of Justice might provide an administrative locus for more systematic procedural review. This office could examine what subclasses of crack cocaine users might receive the benefit of commutations and how to identify them.³² A special pardon or clemency board might be named to implement a carefully demarcated class-wide pardon,

similar to that used by President Ford to deal with national wounds created by the Vietnam War. Within the scope of its charge, the board would reflect the kinds of decisions made by parole and release authorities where that power and discretion remains.

Congress might also provide subsequent support for the exercise of class-wide pardons by adopting legislation consistent with exercise of the pardon power. Were Congress today to abolish or reduce the crack cocaine/powder cocaine disparity, a president might use the pardon power to provide retroactive benefits of such a change to those incarcerated at the time of the statute's passage. Systematic pardons may thus offer an executive remedy for difficult issues of retroactivity, so past offenders will be treated more like present offenders.³³

One of the most common uses of systematic pardons in U.S. history has been to heal the wounds of war at home. For many years in the United States, we have been engaged in a war on drugs. Whatever the judgments of history about the virtue, the wisdom, or the success of this war, it is has produced some laws and some sentences that are widely perceived to be unwise and unfair.

Perhaps, as with the Narcotics Act pardons in the early 1960s and the legislative reform of 1970, the mandatory minimum penalties that now define many federal drug laws will again come to be seen as unwise. Perhaps some systematic review and commutations of unequal and unfair sentences could again help to illuminate the nature of the underlying problem. As in the past, the president might make systematic use of the pardon power to again help to heal our wounds.

Notes

¹ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995). *Compare Amendments to the Sentencing Guidelines for United States Courts*, 60 Fed. Reg. 25,074 (May 10, 1995), with Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. No. 104-38, 109 Stat. 334 (1995).

² See, e.g., Julie Stewart, *The Effects of Mandatory Minimums on Families and Society*, 16 T.M. COOLEY L. REV. 37 (1999); Jefferson Fish, *Rethinking Our Drug Policy*, 28 FORDHAM URB. L.J. 9 (2000); Andrew Sachar, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149 (1997); David Angeli, *A "Second Look" at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211 (1997).

³ "The very essence of the pardoning power is to treat each case individually." Schick v. Reed, 419 U.S. 256, 265 (1974). But see Justice Holmes' description of the pardon power: "[A pardon] is not a private act of grace ... it is the determination of the ultimate authority that the public welfare will be better served...." Biddle v. Perovich, 274 U.S. 480 (1927).

⁴ The differences between pardon, commutation, clemency, and amnesty are slight and not important

for purposes of this paper. Clemency is an umbrella term encompassing pardons, commutations and amnesties. Pardons typically remove the consequences of criminal conviction, though the exact meaning and full impact of pardons has been the subject of debate. Pardons may come with conditions precedent or subsequent. Commutations are partial pardons, usually reducing a sentence but not erasing such consequences of conviction as voting bars, prohibitions from office-holding, restrictions on future gun ownership, and the like. Amnesty, a term used in the context of war or avoidance of military service, is simply a pardon for a war-related crime.

- ⁵ We are mindful of Justice Jackson's framework placing the president's power at its "lowest ebb" when taking "measures incompatible with the expressed or implied will of Congress." Nevertheless, Jackson realized there are situations in which executive power will still prevail. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (concurrence of Justice Jackson).
- ⁶ Congress' "resort to impeachment" was the remedy contemplated for presidential abuse of the pardon power. See *Ex Parte Grossman*, 267 U.S. 87, 121 (1925).
- ⁷ Of course, the law enforced may also be viewed as including the pardon power or as trumped by the constitutional pardon power.
- ⁸ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) ("The [pardon] power thus conferred is unlimited."); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) ("To the executive alone is intrusted the power of pardon, and it is granted without limit."). For example, pardons are regularly granted even after conviction and sentencing, despite the fact that the pardon undoes all or part of a court's final judgment of guilt and the sentence imposed in recognition of that judgment. Cf. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject only to review by superior courts in the Article III hierarchy.") As Chief Justice Burger wrote in *Schick v. Reed*, 419 U.S. 256, 266 (1974), "the plain purpose of the broad power conferred ... was to allow plenary authority in the President to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specific number of years, or to alter it with conditions which are themselves constitutionally unobjectionable." See also *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855) (upholding President Fillmore's pardon order that "the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington"). The breadth of the power is illustrated by the existence of substantial scholarly debate over whether the President could pardon himself. One school says there is no provision so limiting the power, the other that principles against self-dealing in the constitutional framework should bar self-pardons. Compare Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996) with Nida & Spiro, *The President as his Own Judge and Jury: A Legal Analysis of the Presidential Self-pardon Power*, 52 OKLA. L. REV. 197 (1999).
- ⁹ "Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders." *Ex parte Garland* 71 U.S. (4 Wall.) at 380; see also *United States v. Klein*.

¹⁰ *Schick v. Reed*, 419 U.S. 256 (1974).

- ¹¹ Even earlier, Alexander Hamilton recognized the possibility of systematic pardons, at least in a military context, when he wrote in THE FEDERALIST No. 74 that "... [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."
- ¹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (concurring opinion of Justice Frankfurter).
- ¹³ A review of state clemency policies would probably provide additional illustrations of systematic pardons.
- ¹⁴ SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, at 471.
- ¹⁵ See generally Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URBAN L. REV. 1483 (2000).
- ¹⁶ See Exec. Order No. 11,967, 42 Fed. Reg. 4393 (1977); Proclamation No. 4313, 39 Fed. Reg. 33293 (1974), reprinted in 88 Stat. 2504 (1974) (as amended by Proclamation No. 4345, 40 Fed. Reg. 4893 (1975), reprinted in 89 Stat. 1236 (1975)). See also Proclamation No. 4483, 42 Fed. Reg. 4391 (1977), reprinted in 91 Stat. 1719 (1977) (pardoning persons who may have committed any offense between August 4, 1964 and March 28, 1973 in violation of the Military Selective Service Act). See generally David Shichor & Donald Ranish, *President Carter's Vietnam Amnesty: An Analysis of a Public Policy Decision*, PRESIDENTIAL STUDIES QUARTERLY, at 443 (1980).
- ¹⁷ Cf. Clifford Dorne & Kenneth Gewerth, *Mercy in A Climate of Retributive Justice: Interpretations From A National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 413 (1999); Paul Verkuil, *A Study of Immigration Procedures*, 31 UCLA LAW REV. 1141 (1984). See U.S. PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT (1975).
- ¹⁸ Exec. Order No. 9814, 11 Fed. Reg. 14,645 (1946).
- ¹⁹ Narcotics Control Act of 1956, Pub. L. No. 84–728, 70 Stat. 651 (1956),
- ²⁰ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91–513, 84 Stat. 1236 (1970). See 116 Cong. Rec. H33314 (Sept. 23, 1970) (Rep. Bush), reprinted at 3 FED. SENT. REP. 108 (1990) ("The bill eliminates mandatory minimum penalties, except for professional criminals. Contrary to what one might imagine, however, this will result in better justice and more appropriate sentences").
- ²¹ Annual Report of the Attorney General, 1960, at 69.
- ²² Annual Report of the Attorney General, 1963, at 62–63.
- ²³ Annual Report of the Attorney General, 1964, at 63–64. In a newspaper interview in 1968, Kennedy Pardon Attorney Reed Cozart explained the Kennedy administration response to disparate sentences produced by the (then) new federal narcotics laws: "When Bobby Kennedy became attorney general in 1961, some commutations were granted to equalize this situation, to reduce the disparities. When the wardens told him (Kennedy) how tremendous this boosted prison morale, he ordered the whole process speeded up."

Executive Clemency Cases Growing Each Year, THE SUN-DAY STAR, Washington, D.C. Jan. 14, 1968.

²⁴ Jefferson, Jefferson MSS Lib. Cong., quoted in full as appendix A to Albert Beveridge, *THE LIFE OF JOHN MARSHALL*, VOL. III, pp. 605–606 (Houghton Mifflin Co.).

²⁵ See generally LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* (3d ed. 2000). A modern president might conclude, based on his own constitutional judgment, that cocaine punishments were, as President Clinton opined to *ROLLING STONE*, based on race rather than real differences between crack and powder cocaine. If so, he might subject such penalty differentials to strict scrutiny, and conclude that the sentencing differentials would not withstand such scrutiny.

²⁶ To return to the cocaine sentencing differentials, a President might conclude that the differentials were not race-based despite their disparate impact on poor urban blacks, and view the differentials as constitutional. See *Washington v. Davis*, 426 U.S.229 (1976)(no race discrimination when law has disparate impact but lacks intent to discriminate).

²⁷ The debate over the excessive, unequal and ineffective mandatory penalties under the Narcotics Act of 1956 may have helped to bolster the repeal of those mandatory penalties in 1970. Some memory of the lessons from that era might have helped to stem the new fondness for very similar provisions that emerged in 1986 and have haunted the federal system ever since.

²⁸ PRESIDENT WILLIAM J. CLINTON'S MESSAGE TO CONGRESS: THE UNFINISHED WORK OF BUILDING ONE AMERICA (Jan. 15, 2001).

²⁹ See Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074 (proposed May 10, 1995), rejected by Congress in Act of Oct. 30, 1995, Pub. L. No. 104–38, 109 Stat. 334 (1995), and signed into law by President Clinton.

³⁰ The president might note the disparate racial impact of current crack and cocaine policies as partial

justification for pardon review, but should not make race (African American) a factor in determining eligibility in any systematic pardon policy or process. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

³¹ The presidential clemency board report submitted to President Ford contains a very detailed explanation of that Board's decision-making processes. See U.S. PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT (1975).

³² Relitigation of sentences previously given is not a viable option. Perhaps wardens in federal penitentiaries could be asked to assess their prison populations for suitable clemency candidates, similar to the process used in the Kennedy administration, U.S. Attorneys could be asked to review their records relating to sentences given for certain classes of crack cocaine offenders, or petitions could be allowed whereby prisoners (and their lawyers) would request consideration for clemency.

³³ One such situation was created when Congress passed the "safety-valve" provision in the 1994 crime bill (18 U.S.C. § 3553(f)) to rectify an inequity in sentencing which allowed more culpable defendants who could provide information about drug sources to the government to receive lesser sentences than less culpable defendants who did not have such information. This legislation was not retroactive, so less culpable defendants sentenced prior to the effective date of the legislation did not receive its benefits. President Clinton could have used the pardon power to provide lesser incarcerations to prisoners sentenced prior to the safety-valve legislation, but did not do so. Families Against Mandatory Minimums (FAMM) identified 487 retroactive safety valve cases in the fall of 2000, so there are likely still a number of such offenders in federal prison today. See Memorandum from Julie Stewart, President of FAMM, to Bruce Lindsey, White House Counsel, Nov. 1, 2000.

Pardon as Prerogative

When the Federal Convention of 1787 set out to draw a republican projection of the British monarch, they eliminated almost all of the royal prerogative. Executive authority to dispense the laws, for example, was specifically denied through the Take Care Clause of Article II. Almost all the prerogative went out, but not quite. Indeed, the framers retained one part of the royal authority that most closely fits John Locke's definition of prerogative, the power of doing good without a rule.¹ Like British monarchs, American Presidents may pardon crimes and offenses against their government.

By and large, governments do good through rules and not outside them. Requiring that government operate through rules laid down in advance is a powerful tool for ensuring that those with power do what they are supposed to, and therefore a powerful tool for inspiring the kind of confidence that leads people to plan and invest for the long term. Discretionary decision after the fact undermines confidence and invites abuse of power. Discretion is dangerous. So far, however, no one has come up with a system of rules that can meaningfully be specified *ex ante* and call for no discretion in their application. No rule or set of rules captures practical wisdom. Hence one of the central problems for institutional and especially constitutional design is finding the best combination of rules and discretion.² Using while limiting prerogative is as much a problem for us as it was for the framers or for the British under the Stuarts.

Seeing the pardon power as a bit of the royal prerogative dropped into our generally law-bound constitutional system provides a perspective on the actual and possible functions of that power, a perspective that both furthers our understanding and provides a basis for policy. I will identify the main purposes to which presidential pardons have been and could be put and ask whether they are exercises of the prerogative in Locke's sense. Then I will suggest that the pardon power as our Constitution establishes it should be a prerogative power and should not be heavily legalized, and draw implications from that normative position.

Even after recent events, the most famous use of this power in American history remains President Ford's pardon of Richard Nixon. Ford's action falls into a category that *The Federalist* features prominently: pardons for reason of state. Hamilton, writing as Publius, explained that the President might be able to nip a treasonous conspiracy in the bud by timely offers of pardon.³ During the Constitution's great crisis President Lincoln sought to do just that, offering pardons for

Confederates who would return to federal allegiance. Once the war was over President Andrew Johnson, in similar fashion, made the pardon one of his principal tools for encouraging southerners to mend their ways.⁴ Hamilton's hypothetical case, and the real examples provided by Lincoln, Johnson, and Ford, all involve situations in which the President could decide that the ordinary operations of criminal justice should be suspended, not for reasons having to do with guilt or innocence or any other concern of the criminal law, but for overriding considerations of policy that could not have been foreseen when the law was made.

Hamilton mentioned another function that remains current: the pardon power as safety valve for guilt and innocence.⁵ Even the best systems of adjudication make mistakes, and their ability to correct mistakes is limited, not least by rules that reflect the need for finality in adjudication. But conviction of the innocent is a heavy price to pay, and execution of the innocent a nightmarish one. Where the demands of finality cut off reconsideration as of right, the pardon power can provide it as of grace.

Students of the pardon power know about a third function, one of which even lawyers may be largely unaware. For decades Presidents have granted prisoners relief on the basis of developments after their conviction that, while not foreseen by the sentencing court in any particular case, are sufficiently common over the range of cases to constitute identifiable categories. Presidents in the twentieth century often pardon offenders whose guilt was unquestioned and whose case raised no great policy or moral issue but who have atoned by accepting their punishment and going on to lead blameless lives. They also sometimes commute sentences for humanitarian reasons, such as age or extreme illness, or because the sentence turns out to be disproportionate compared to those of similar offenders. Such cases form the bread and butter of the pardon process and mainly occupy the Pardon Attorney and Attorney General. These are the situations contemplated by the Department of Justice's regulations on pardons.⁶

Fourth, the President can use this authority to influence federal criminal justice policy. At the retail level it is a way in which Presidents can control prosecutors. Although the President's other means of exerting such control may seem to make pardons unimportant in this connection, there is enough room for the pardon power to make a difference. President George H. W. Bush's pardon of Secretary Weinberger



**JOHN
HARRISON**

Professor of Law and
Class of 1966
Research Professor,
University of Virginia.

reflected a disagreement between the chief executive and a prosecutor over whom he had less-than-usual control. Presidents also may wish to use pardons to project their power backwards or forwards in time. President Jefferson pardoned defendants convicted of seditious libel under the Adams Administration because he thought the Sedition Act unconstitutional. President Clinton's pardon of Marc Rich locked in his decision, because while his successor could reverse a decision to drop the prosecution he could not undo a valid pardon. At the wholesale level, pardons can reflect the President's judgment about federal criminal policy. For example, a President who agreed with Congress' decision to criminalize certain conduct but thought the legislature's chosen punishment too severe could systematically commute sentences.

Some pardons will not fall into any of the preceding categories, so there is also a miscellaneous section, but I think that these four types capture the bulk of cases.⁷ As indicated at the outset, my perspective here centers on pardons as exercises of prerogative, as ways of doing good without a rule. The first two types are prerogative pardons: reasons of state override the normal concerns of the criminal law precisely in extraordinary circumstances not dealt with by those rules, and pardons of the unjustly convicted are likewise supplementary to elaborate rules designed to keep the innocent from being convicted in the first place. If the rules laid down in advance dealt properly with all possibilities, such pardons would not be necessary.

In the two latter categories, by contrast, it would be possible to capture the underlying considerations in a rule that could be specified in advance. With respect to pardons for the truly reformed, the Justice Department's pardon process under the regulations seeks to do exactly that, and the flow of pardons over the years has been large enough to show the rules in operation.⁸ In similar fashion, age and illness and other grounds of humanitarian commutation are all too predictable, and uniformity of sentencing is one of the principal goals of criminal justice policy. The fact that atonement or severe illness happens, or disparity is discovered, after conviction, does not mean that the possibility of such developments cannot be foreseen. On the contrary, those possibilities are well known. Most criminal justice policy pardons, in particular those that arise from disagreement over sentencing policy, likewise reflect considerations that could be captured in a rule. When the President pardons because he believes that Congress' sentencing mandates are too harsh, he is proposing to replace one rule with another.⁹

As a normative matter I favor the vision of pardons as exercises of prerogative. They should be like lightning bolts, relatively rare and in principle hard to predict because their incidence, although chosen on a reasoned basis, cannot be accounted for in advance by

the imperfect approximations of reality on which legal rules are based.

That normative preference is relative to our particular constitutional arrangement. The President is a single individual, politically selected and politically accountable. Such methods of selection and accountability will, we hope, yield Presidents who are capable of acting well in unpredictable circumstances and have incentives to do so.¹⁰ The same discretion that makes a good chief diplomat and good military commander should make a wise dispenser of pardons in circumstances that no rule could have dealt with in advance. It is the President's job to exercise judgment in the face of the unexpected.

But when the pardon power is used to deal with situations that are foreseeable, that can be dealt with through *ex ante* rules, it creates a form of legislation. The current Department of Justice pardon process is largely of that nature. Its offer of a pardon for the truly reformed is based on principles that will apply to crimes yet to be committed, and indeed criminals yet to be born. Those principles are not an effort to deal with unforeseen events. Granting significant legislative power to a single individual, even the President of the United States, is contrary to the genius of our Constitution. Collective deliberative bodies are not very good at responding quickly to sudden shocks, but they are the best mechanism we know for collecting conflicting views on important questions and producing solutions that most people can live with.

Moreover, a pardon system that is not limited to the exercise of prerogative-style discretion puts the routine application of those rules, which so resemble legislation, in the hands of the President and his executive subordinates. This too is anomalous. While the relative scope of the judicial and executive powers can be a maddening legal tangle, in most circumstances final decisions concerning the imposition of criminal sanctions are made by indirectly selected, politically unaccountable officers whose incentives are supposed to lead them to apply legal rules as impartially as frail human nature permits. To the extent that the pardon power involves a quasi-judicial function, that function is most naturally performed by actual judges.

Thus a system in which pardons are dispensed pursuant to *ex ante* rules that require only some relatively minor discretion in their application is a square peg in the Constitution's round hole. It has the President legislating and adjudicating, which is not what he is supposed to be good at, and not exercising the high political discretion in the face of the unexpected that is supposed to be his strong suit. Like many jury-rigged governmental systems, it can function reasonably well with good personnel, and largely has done so. Systematic presidential pardons, either as a form of early release or of more complete forgiveness than the law

usually allows, probably have not deviated far from the result Congress and the courts would have produced in creating and administering a formally rule-bound system. That may be true, however, only because the policy questions involved are relatively uncontroversial.

One class of possible pardons, however, very much puts the President in conflict with congressional policy. Many today believe that federal sentencing is too draconian in important areas. Should the President come to believe that, he could use the pardon power as a substitute for curative legislation. I find that possibility very troublesome. Although his nationwide constituency justifies the President's role in the legislative process, in broadly overturning congressional sentencing policy he would be acting as a single-member legislature, not just as part of the law-making process. One way to see how disturbing it would be for him to use the pardon power legislatively is to ask whether Congress could responsibly have conferred the authority it granted to the Sentencing Commission on the President alone. Most people, I expect, would find that grant excessive (and many find the grant to the Sentencing Commission excessive).

This is not to say that the third function I identified, mercy based on developments after conviction, should not be performed at all. Rather, in my view it is not a good use of the pardon power because it does not respond to ex post emergencies that require discretion. Congress could, and I think probably should, legislate for such situations. For example, with respect to absolution for the reformed, Congress could provide that after a stated number of years convicted criminals who satisfied specified criteria of reform were to receive from the sentencing court a form of relief that largely undid their conviction. It might press into service the old writ *coram nobis*, or could devise some new mechanism, perhaps one resembling the expungement of minors' convictions. In similar fashion, it could authorize sentencing courts to grant relief for humanitarian reasons, and provide post-sentencing review to even out disparities in punishment. The law and the courts can deal in a rule-bound way in atonement and forgiveness, just as they deal in judgment and retribution.

They cannot, however, deal in a rule-bound way with circumstances that the rules cannot foresee, and

therefore in my view they should not be in that business at all. Courts at their best possess technical expertise and considered legal judgment, but for the kind of political judgment that should guide the prerogative we should look elsewhere. When our Constitution vests the power of doing good without a rule, there is no better place to put it than in the hands of George Washington's successor.

Notes

- ¹ "For Prerogative is nothing but the Power of doing publick good without a Rule." JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 425 (P. Laslett ed., 1960) (Section 166 of the Second Treatise of Civil Government) (emphasis in original).
- ² "It is impossible to foresee, and so by laws to provide for, all Accidents and Necessities that may concern the Publick; or to make such Laws, as will do no harm, if they are Executed with an inflexible rigour, on all occasions, and upon all Persons, that may come in their way, therefore there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe." *Id.* at 422 (Section 160, Second Treatise of Civil Government).
- ³ ALEXANDER HAMILTON, THE FEDERALIST, No. 74.
- ⁴ The number of pardons involved in the Civil War and Reconstruction should not obscure their discretionary nature. Lincoln and Johnson were dispensing the law against treason for reasons not contemplated by those who forbade treason. They were dealing with an emergency that the ordinary law could not foresee (other than to say that emergencies happen and someone should be authorized to deal with them).
- ⁵ ALEXANDER HAMILTON, THE FEDERALIST, No. 74.
- ⁶ In the nineteenth century, the pardon power often was used for the early release of federal prisoners, thus performing the function of parole.
- ⁷ Pardoning one's siblings, for example, would fall into the miscellaneous category.
- ⁸ Early release, which at the federal level was often handled through pardons in the nineteenth century, later was institutionalized through parole and then through determinate sentencing.
- ⁹ Retail-level pardons that control prosecutorial policy are less likely to reflect decisions that could be formulated as rules.
- ¹⁰ Not the least of those incentives is fame. Although the framers did not use the term legacy in this context, they were very much concerned with their reputations, both in their lifetimes and among their posterity.

Should Clemency Decisions be Subject to a Reasons Requirement?



DANIEL T. KOBIL

Professor of Law,
Capital University Law
School, in Columbus,
Ohio, since 1987. Pro-
fessor Kobil is the
author of several arti-
cles and book chap-
ters on clemency,
including *The Quality
of Mercy Strained:
Wrestling the Pardoning
Power from the King*,
69 TEXAS LAW REVIEW
569 (1991).

Voltaire observed that “virtue debases itself in justifying itself.” This may account for why clemency, widely regarded as an officially sanctioned act of grace or virtue, is often said to be a power whose exercise need not be explained. Justice Brennan’s observation in *Connecticut Board of Pardons v. Dumschat*, is typical of this view: “the [Connecticut clemency] decision-maker can deny the requested relief for any constitutionally permissible reason or for no reason at all.”¹ Indeed, reasoned justifications for clemency decisions tend to appear superfluous because the president is vested with plenary discretion to grant or deny clemency, and this decision is usually not subject to review in any court, other than that of public opinion.

However, just because reasons for clemency decisions are not required does not mean that they are undesirable. In the wake of the controversy surrounding President Clinton’s eleventh hour pardons, some have suggested that accountability in the exercise of executive clemency would be enhanced by encouraging presidents to state reasons supporting specific uses of the power. Scholars such as philosopher K. D. Moore have argued that just as a system of punishment must be based on reasoned justifications, so too should the remission of punishment by means of pardons and commutations.² Dr. W. H. Humbert, in his landmark study of the pardoning power of the president, contended that success or failure in use of the clemency power depends entirely on the soundness of the reasons for granting clemency.³ Indeed, a few states have considered reasons for clemency to be so important that they have enshrined a reasons requirement in their constitutions.⁴

In this article, I examine the role reasons should play in the exercise of the federal clemency power. I look at the sorts of reasons that have historically been offered by presidents to justify clemency. Finally, I consider how adopting measures to require decision-makers to announce reasons justifying use of the clemency power might affect its exercise.

I. What reasons have been given for clemency decisions?

It has not always been easy to gain insight into the clemency decision-making process. In the past, grants of clemency were often made without any contemporaneous announcement to the public, let alone a recitation of reasons to support clemency.

More recently, grants of clemency have been treated as official governmental actions that are publicly

announced when they are issued. However, decision-makers only sporadically divulge the reasons that prompt them to grant or deny clemency. Presidents, as a rule, do not provide reasons for clemency decisions, though prior to 1931 the Attorney General’s official pardon records disclosed a range of factors that supported use of the power. The reasons given at that time ranged from standard legal justifications (doubts about guilt, suspected lack of capacity, or excuse), to pragmatic concerns (to prevent the communication of disease to other prisoners or to reward favorable testimony), to humanitarian reasons (to enable a farmer to save his crops or to avert deportation).⁵ Sometimes, the reasons seemed almost whimsical (“to enable the petitioner to catch steamer without delay”),⁶ or idiosyncratic, as when President Harding commuted the espionage sentence of activist Eugene Debs out of personal liking, and moved up Debs’s release date so he could “eat Christmas dinner with his wife.”⁷

Today, as President Clinton’s pardon of Marc Rich illustrates, detailed explanations for clemency have usually accompanied only the most controversial exercises of the power. On January 20, 2001, when Mr. Clinton announced the issuance of 177⁸ pardons and commutations, he provided no reasons for any of the grants of clemency. However, as details surfaced revealing that Rich was a wealthy fugitive from the law who had been granted a pardon without significant input from the Justice Department, a wave of criticism ensued.

A month after issuing the Rich pardon, as the controversy showed no signs of abating, Mr. Clinton took the unprecedented step of publishing an opinion piece in the *New York Times*. He identified eight “legal and policy reasons.”⁹ The explanation read like a truncated legal brief and included such reasons as the fact that others who committed similar tax offenses had been sued civilly instead of criminally like Rich; that two tax experts had concluded Rich had not violated the law; that Deputy Attorney General Eric Holder had been “neutral, leaning for” the pardon; that the pardon had been advocated by “three distinguished Republican lawyers;” and that many prominent Israeli officials and leaders supported a pardon for Rich owing to his philanthropic efforts on behalf of Jewish causes. The op-ed was widely viewed as a self-serving apologia: several people cited by Clinton as supporting the pardon denied doing so, and the op-ed failed to silence his critics.¹⁰

Controversial pardons issued by Clinton’s predecessor, George Bush, at the end of his term likewise prompted a detailed explanation for use of the clemency

power. After losing his reelection bid, President Bush issued pardons to Caspar Weinberger and others indicted or convicted in the Iran–Contra investigation. Whether the defendants should have received clemency had been a topic of intense national debate,¹¹ particularly because some believed that a trial might bring out information that would implicate Mr. Bush himself in wrongdoing.

President Bush issued a lengthy statement that justified clemency on the ground that the defendants had acted out of “patriotism,” and had already suffered enough considering their personal anguish and “depleted savings.”¹² President Bush also noted that the prosecutions represented the “criminalization of policy differences” that should have been addressed in the political arena rather than the courts. Finally, Mr. Bush characterized the pardons as being within the “healing tradition” of clemency, likening them to President Carter’s grant of amnesty to those who had avoided the Vietnam War draft, and President Andrew Johnson’s pardons of those who had fought for the Confederacy.

A statement of reasons also accompanied the most famous presidential pardon of all time, that of Richard Nixon by President Ford. Mr. Ford justified the Nixon pardon as necessary to prevent a lengthy trial of the former President that could threaten the recently restored tranquility of the nation. Ford argued that if a trial of Nixon occurred, it would foster “prolonged and divisive debate” and subject to “further punishment and degradation” a man who had “already paid the unprecedented penalty” of relinquishing the presidency.¹³

However, detailed explanations for clemency are certainly the exception rather than the rule. Most pardons and commutations are issued without comment. Moreover, denials of clemency are almost never explained by the president or the Pardon Attorney—a fact which sometimes prompts bitter complaints from those whose applications are not acted on.¹⁴ Would the quality of clemency decision-making be improved if presidents were required, or voluntarily chose,¹⁵ to issue reasons for each decision?

II. The advantages of a reasons requirement for clemency decisions.

If the Constitution were amended to impose a reasons requirement, little might be accomplished since it could simply elicit “cosmetic” justifications calculated to engender the least amount of opposition.¹⁶ The goals of such a requirement could likewise be frustrated if the decision-maker were to provide perfunctory statements, instead of legitimate reasons—checking off one in a list of prepared explanations, or stating “the interests of justice would [or would not] be served by granting clemency.” However, assuming that presidents provided candid explanations for their pardons and commutations, a reasons requirement offers several possible advantages.

First, public confidence in the quality of clemency decisions could be enhanced by the articulation of plausible, principled reasons for clemency. Thoughtful explanations for use of the power would serve a valuable civic function by focusing attention on the nature of punishments imposed under society’s laws. To the extent that clemency came to be understood as an integral, rationally defensible part of our system of justice, as opposed to a gift that is arbitrarily bestowed by presidents, public support for its exercise would presumably increase.

Second, a reasons requirement might facilitate the making of better clemency decisions. If a president contemplated justifying each grant of clemency, he would regularly be forced to assess and evaluate the strength and persuasiveness of those justifications. Moreover, clemency applicants would gain a sense of the criteria likely to be used in evaluating requests, thereby prompting the submission of petitions more likely to include pertinent information.

Third, a reasons requirement, particularly one imposed when clemency is denied, would fulfill a dignitary function by enabling applicants to feel that they have been considered as individuals, and not ignored or dealt with out of expediency.¹⁷

III. The disadvantages of a reasons requirement for all clemency decisions.

Despite these advantages, requiring that every clemency decision to be supported by an explicit statement of reasons could have unanticipated negative consequences. First, such a mandate could prove extremely burdensome to decision-makers by forcing them to spend a great deal of time documenting rationales in a multitude of individual cases. The goal of edifying the public regarding use of the clemency power might be better served by allowing presidents the flexibility to offer reasons in cases where an explanation would be most helpful to an understanding of the power, and to withhold reasons in unexceptional cases.¹⁸

Second, requiring such justifications in every case might create expectations of regularity that could never be satisfied, at least if clemency is to retain its status as a “fail-safe” that is unique by virtue of its flexibility. It is not difficult to imagine the disappointment that clemency applicants (and supporters) would experience if clemency were denied in their case, despite having been granted earlier on similar grounds to another individual. Moreover, mandating that all decisions be justified by reasons could discourage decision-makers from issuing clemency in deserving cases out of a desire to maintain consistency of justifications.¹⁹

Decision-makers might also come to fear that by providing reasons for clemency, they would be deemed by the courts to have created a presumption of regularity that would subject clemency to significant due

process constraints. The Supreme Court has held that because of the broad discretion historically accorded to clemency decision-makers, only “minimal requirements” of due process apply.²⁰ If reasons were required, courts might view a request for clemency based on reasons that had often previously supported a grant of clemency as being subject to more stringent due process constraints, thereby creating a disincentive for the president to grant clemency and offer such justifications in the first place.

Finally, even if a reasons requirement were imposed by constitutional amendment, it would be difficult to enforce. If the President refused to comply, prevailing standing and justiciability jurisprudence would make judicial review and enforcement of the provision against the President unlikely.²¹ This prediction comports with what has happened in Ohio, where an express provision in the state constitution requiring the governor to communicate his reasons for granting clemency to the legislature has long been ignored without any challenge.²²

IV. Conclusion

Upon reflection, I do not favor disparaging the clemency power by mandating a “reasons requirement.” While the goal of improving the quality of clemency decision-making is a worthy one, I am not convinced that implementing a requirement that presidents provide reasons for all of their clemency decisions would markedly enhance use of the power.

In practice, when justifications of clemency are most needed, they have been forthcoming. History has shown that public dissatisfaction with use of the power has not been pervasive, but rather has tended to focus on a handful of divisive grants of clemency and these typically have been accompanied by explanations from presidents. Moreover, many of the most controversial exercises of the power have been vindicated with the passage of time,²³ suggesting that any problems with the clemency power are isolated and temporary, rather than systemic in nature.

In addition, I do not believe that requiring a statement of reasons would cause presidents to be more careful in their use of the power or give the decisions attention that is allegedly lacking. The overwhelming majority of clemency requests are extensively reviewed by the office of the Pardon Attorney, as well as by members of the White House staff. It is doubtful that a reasons requirement would contribute a great deal to this already comprehensive review process.

Finally, although enhancing the dignity of clemency applicants through a reasons requirement is commendable, this end could be furthered only if presidents were willing to provide reasons for each denial of clemency (since grants of clemency already vindicate the dignity of the applicant). It seems unrealistic to

expect presidents to prepare detailed, specific reasons for every denial of clemency, because in most cases the “reason” will be nothing more than that the applicant did not carry the burden of showing that their case is deserving of this exceptional remedy.

In the end, I think the greatest danger posed by the Clinton clemency controversy is not that undeserving pardons will be given by future presidents, but that the clemency power will not be exercised out of fear of political fallout. A spokesperson for then-Governor of Texas George W. Bush alluded to this possibility in 1995 when Bush was embarrassed by a pardon he issued to a police constable who later pleaded guilty to stealing cocaine from a drug bust: “Governor Bush is very leery about granting pardons anyway, and cases such as this obviously make him more leery.”²⁴

A reasons requirement would do little to alleviate this danger. As the previous discussion suggests, requiring grants of clemency to be supported by detailed reasons could well cause presidents to be more hesitant to use the power in deserving cases. Our best safeguard in the clemency process remains that which was identified by the framers of the Constitution more than 200 years ago: entrusting the power to a person “of prudence and good sense” who is fitted “in delicate conjunctures, to balance the motives which may plead for and against the remission of punishment.”²⁵

Notes

¹ 452 U.S. 458, 467 (1981).

² K. MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 90–92 (1989).

³ W. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 124 (1941).

⁴ OH. CONST. art. III, § 11 (“He shall communicate to the General Assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reasons therefor”).

⁵ Margaret Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 *FORD. URBAN L. J.* 1483, n. 29 (2000) (summarizing reasons).

⁶ HUMBERT, *supra* note 3, at 131.

⁷ H. DAUGHERTY & T. DIXON, *THE INSIDE STORY OF THE HARDING TRAGEDY* 115–21 (1932).

⁸ Although many newspaper reports (including Mr. Clinton's own op-ed piece defending the Rich pardon, *My Reasons for the Pardons*, *NEW YORK TIMES* (Feb. 18, 2001) incorrectly reported that 176 grants of clemency had been issued on January 20, 2001, examination of the official warrants of pardon reveals that 141 pardons and 36 commutations were issued by President Clinton on that date.

⁹ William Jefferson Clinton, *My Reasons for the Pardons*, *N.Y. TIMES*, Feb. 18, 2001.

¹⁰ Richard Sisk & Kenneth Bazinet, *He Brought it on Himself*, *N.Y. DAILY NEWS*, Feb. 20, 2001, at 5 (“But the results [of the article] were disastrous—as Clinton failed completely to silence his critics with the lengthy Op-Ed page piece.”)

¹¹ Cf. Schorr, *Pardon North, Poindexter and the Rest*, N.Y. TIMES, Apr. 23, 1990, at A19 (asserting that President Bush, “out of concern for the country rather than the culprits,” should pardon all those associated with the Iran–Contra conspiracy) with Broder, *The Leaders We Deserve*, WASH. POST, Apr. 29, 1990, at D7, col. 1 (arguing that “crimes of such magnitude call out for severe punishment” and moral sanctions from society).

¹² Statement of President George Bush, 1992 WL 5331211 (Dec. 24, 1992) (reprinted in the Appendix).

¹³ Proclamation of President Gerald Ford No. 4311 (Sept. 8, 1974) (reprinted in the Appendix).

¹⁴ Federal prisoner and Indian activist Leonard Peltier complained bitterly that President Clinton, without explanation, had failed to act on his application for clemency. Peltier characterized Clinton’s actions as “cruel,” and noted that Clinton “never even told us what the decision was,” despite having promised to make a decision in Peltier’s case. Letter of Leonard Peltier circulated by Leonard Peltier Defense Committee (March 2001) (on file with author).

¹⁵ Since the clemency power of the President is expressly granted in Article II of the Constitution, and the courts have made clear that Congress cannot abridge this plenary power, a “reasons requirement” could only be imposed if the Constitution were amended.

¹⁶ HUMBERT, *supra* note 3, at 124 (“It is very difficult to determine from available data the actual reasons why clemency was recommended in individual cases because officials favoring the granting of clemency probably give as their reasons only those that will evoke least opposition to use of the power.”)

¹⁷ See generally Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should be Required to Issue Written, Publishable Opinions*, 4 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. 285, 314 (2000) (discussing dignity interests served by requiring that reasons be given for decisions of public law arbitrators).

¹⁸ For an example of an unexceptional grant of clemency, consider President Clinton’s 1994 commu-

tation that shortened by 5 days the 5 month perjury sentence of Ernest Krikava, an elderly farmer from Nebraska who lied about selling some pigs during a bankruptcy proceeding. Mimi Hall, *Other Clinton Clemency Cases Dodge Controversy*, U.S.A. TODAY, Sept. 27, 1999, at 8A.

¹⁹ For instance, commutation of a death sentence because of mental illness might be denied even in a compelling case out of a reluctance to open the door a crack for every mentally ill individual who might thereafter seek clemency on the same grounds.

²⁰ *Woodard v. Ohio Adult Parole Authority*, 523 U.S. 272, 289–90 (1998) (where five Justices—O’Connor, Souter, Ginsburg, and Breyer, concurring, as well as Justice Stevens in partial dissent—agreed that at least “some *minimal* procedural safeguards apply to clemency proceedings.”) (emphasis in original).

²¹ See *United States v. Richardson*, 418 U.S. 166 (1974), in which the Court held that a citizen taxpayer lacked standing to litigate a claim that the CIA’s secret budget secrecy violated the Constitution’s requirement for a regular statement and accounting of all expenditures. By the same reasoning, even if the president violated a clemency “reasons requirement” adopted by amendment of the Constitution, violation of the requirement would probably be deemed a “generalized grievance” common to all citizens that could not be remedied by the courts.

²² Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L. J. 655, 674 (1991).

²³ For example, President Ford’s pardon of Richard Nixon was initially so unpopular that it probably cost him the 1976 presidential election. However, with the passage of time, many have come to be persuaded by President Ford’s contention that the pardon was in the best interests of the country, culminating in his being given the 2001 John F. Kennedy Profiles in Courage Award. Amy Pagnozzi, *Real Heroes Stand Test of Time*, HARTFORD COURANT, at A3 (May 8, 2001) (noting that former Senator Lowell Weicker and others came to favor the pardon after being bitterly opposed to it).

²⁴ *Pardoned Officer Arrested: Ex-drug offender Jailed in Cocaine Theft*, THE FT. WORTH STAR TELEGRAM, 1995 W.L. 9308288 (Dec. 15, 1995).

²⁵ ALEXANDER HAMILTON, THE FEDERALIST, No. 74.

Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences



**JOHN R. STEER
& PAULA K.
BIDERMAN**

John R. Steer: Member
and Vice Chair, United
States Sentencing
Commission.

Paula K Biderman:
Attorney, United
States Parole Commis-
sion; formerly Special
Counsel, United States
Sentencing Commis-
sion.

The views expressed
herein are those of the
authors individually
and do not necessarily
reflect the views of the
U.S. Sentencing Com-
mission or the U.S.
Parole Commission.

The United States Constitution gives the President virtually unlimited discretion to grant clemency by way of pardon, reprieve, remission of fine, or commutation of sentence. The President may exercise this authority for any reason, but historically, the availability of commutation has provided a last opportunity to achieve a more just result in extraordinary cases where the established system of justice has fallen short. In 1788, James Iredell explained the importance of entrusting the President with the power to grant clemency:

It is the genius of a republican government that the laws should be rigidly executed, without the influence of favor or ill-will — that, when a man commits a crime, however powerful he or his friends may be, yet he should be punished for it . . . [T]he law is superior to every man, and no man is superior to another. But, though this general principle be unquestionable . . . there ought to be exceptions to it; because there may be 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 cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.¹

How does this Presidential power to achieve a more just sentence fit with the landmark Sentencing Reform Act of 1984 (SRA),² which sought to ensure a federal sentencing system that was more consistent in its application but also that remained sensitive to important individual case circumstances? The current sentencing system has gone a long way towards achieving the goals of the SRA, but even a full attainment of those goals would not completely obviate all need for judicious use of the President's commutation power. To the contrary, the President's constitutional power to achieve a more just sentence in exceptional cases is compatible with a sentencing system that is designed to avoid unwarranted disparity in punishment.

Commutations continue to be appropriate due to (1) the manner in which sentences are determined and imposed in the federal courts today and (2) system limitations in accounting adequately for several important post-sentencing developments that may significantly alter the appropriate punishment in particular cases. Further, the SRA and the guidelines in particular have relevance to the commutation power and process because they provide a detailed set of standards that

may be helpful in evaluating clemency petitions. Guideline factors relating to offense conduct, the defendant's criminal history, and the defendant's post-offense attitude (e.g., whether she accepted responsibility or obstructed justice) are relevant circumstances that a conscientious Chief Executive surely would want to take into account when weighing the merits of a clemency petition.

This is not to suggest that the President's clemency power, unfettered as it is, should be exercised only when consistent with the SRA and the sentencing guidelines. The SRA and the guidelines, however, do provide relevant law and potentially useful guidance that previously did not exist.

Congress enacted the SRA to promote uniformity and proportionality in sentencing and to avoid unwarranted sentencing disparity that had been attributed to a largely unregulated, indeterminate sentencing system.³ The SRA set forth the purposes of sentencing, which include just punishment, deterrence, and incapacitation and established a determinate sentencing system. The SRA created the United States Sentencing Commission as a permanent agency to promulgate sentencing guidelines based on the nature and circumstances of the offense and the history and characteristics of the defendant, with the goal of ensuring that similarly situated defendants convicted of comparable offenses would receive like sentences.⁴

The system of federal sentencing guidelines is far more detailed than any extant state guideline system and, often in response to directives from Congress, has grown even more so over the last decade. Nevertheless, like any guideline system, the federal system is inherently limited in its ability to account and weigh adequately all of the factors that may be important to determining a just sentence in every individual case.⁵ A system using a finite number of categories provides the uniformity necessary to reduce unwarranted disparity, but may sometimes not provide the proportionality required for individualized sentencing in exceptional cases. Moreover, even standards perfect in their design would risk inconsistent results because of the numerous judgment calls required to apply those standards in the difficult factual context of individual cases. Thus, although the guidelines have achieved substantially the goals of the SRA in a great majority of cases, executive clemency may further advance these goals by addressing extraordinary cases in which it becomes clear to the Chief Executive that a sentence greater than necessary has been imposed.

1. Limitations of Guideline Departure Authority

Congress, of course, recognized the potential difficulties that even a comprehensive guideline system might encounter in ensuring justice in every case. In 18 U.S.C. § 3553(b), it called for further individualization of sentences by authorizing sentencing courts to impose a sentence outside the guideline range if a factor relevant to the determination of punishment in a particular case was not adequately addressed by the Commission. As the Commission pointed out in executing this statutory design, each offense conduct guideline is drafted to cover the “heartland,” a “set of typical cases embodying the conduct that each guideline describes.”⁶ If the facts take a case out of that heartland, a departure is permissible. Departures thus allow flexibility necessary for individualized sentencing in an atypical case.

The availability of downward departures, however, does not obviate the need for clemency, for several reasons. For one thing, the overall sentencing scheme created by Congress in certain classes of cases may through mandatory constraints (*e.g.*, mandatory minimum imprisonment sentences, prohibitions on probation) limit both the ability of sentencing guidelines and sentencing judges to achieve a just and appropriate sentence for individual defendants. Additionally, a sentencing court is not required to depart, even if valid grounds and authority for departure exist. As long as the court recognizes that it has the authority to depart, its determination not to exercise that authority is unreviewable on appeal.⁷ If the circumstances of a particular case clearly indicate that a departure is warranted, but a court either is legally constrained by statute or chooses not to depart, the executive power to commute a sentence may provide the only avenue of relief. In making this decision, the President may take into consideration those factors the Commission has identified as comprising the typical case as well as specific factors identified as grounds that may warrant a departure.

2. Statutory Mandatory Minimum Penalties and the Guidelines

The SRA called for a guidelines-based sentencing system, and the accompanying legislative history regarded statutory mandatory minimums with disfavor.⁸ Soon after the SRA was enacted, however, Congress returned to its former practice of enacting mandatory minimum penalties. Ironically, these penalties, by interfering with the ability of the guidelines to operate proportionately and uniformly, sometimes work at cross purposes with the goals of the SRA.⁹ Clemency may provide an avenue to ensure a more just result, when the sentencing system cannot otherwise adjust an unnecessarily severe sentence produced by a mandatory minimum penalty.

The guidelines are designed to provide a just sentence by taking into account in a sophisticated manner a wide range of factors related to the harm caused by

the offense and the defendant’s culpability. Statutory mandatory minimum penalties, in contrast, typically focus on only one or two factors, such as the type and quantity of drugs involved in a trafficking case, and ignore other factors that may be relevant to a just sentence. This limited focus may render it impossible for the court to achieve the individualized consideration and proportionality the SRA envisioned. When the applicable mandatory minimum sentence is higher than the more individualized sentence called for by the guidelines, the statute necessarily controls and renders the relevant mitigating factors inoperative. Also, some mandatory minimums complicate the sentencing process by employing different terms and different methods to determine what qualifies as a prior conviction that may result in a required sentence increase.¹⁰ Finally, the application of statutory mandatory minimum penalties typically is much more subject to manipulation through charging and plea practices than are the provisions of the sentencing guidelines.¹¹

Congress has provided two limited statutory avenues through which a defendant can avoid mandatory minimum penalties: substantial assistance departures¹² and, for certain drug offenses, the “safety valve” for low-level, non-violent offenders without any substantial prior criminal history. Because both mechanisms are purposefully limited, there may be deserving cases outside the margins of these escape categories that could warrant use of the President’s clemency power.

a. Substantial Assistance Departures

The substantial assistance departure by its very nature is of limited utility as a means to promote even-handed justice. Unlike individualized departures contemplated under 18 U.S.C. § 3553(b), a substantial assistance departure is a tool for law enforcement, designed to reward cooperation and provide an incentive for a defendant to cooperate; culpability is largely irrelevant.

Perhaps the most frequently criticized feature of the substantial assistance departure is the requirement of a government motion before a court may consider cooperation as grounds for departure.¹³ There are no nationwide, uniform standards that govern the exercise of prosecutorial discretion to file a motion. Nor has the Sentencing Commission or the Department of Justice issued any guidance on the appropriate extent of departure for particular types of substantial assistance. In general, neither the government’s refusal to file a motion, the extent of the departure if the motion is made and granted, nor the court’s refusal to depart is subject to meaningful appellate review.¹⁴ It is not surprising, therefore, that the rate and extent of substantial assistance departures varies considerably from district to district.¹⁵

b. The Safety Valve

The second way Congress provided for avoiding a mandatory minimum is the “safety valve” provision in 18 U.S.C. § 3553(f). In response to concerns about the sometimes anomalous effects of drug trafficking mandatory minimum penalties, Congress enacted a “safety valve” to provide relief for offenders who by guideline definitions are among the least culpable, but who often would receive the same mandatory minimum sentence as their relatively more culpable counterparts.¹⁶ A defendant who meets the criteria in 18 U.S.C. § 3553(f) must be sentenced under the guideline system “without regard to any statutory minimum sentence.” This provision allows the guidelines to take into account certain mitigating factors to provide a proportionate reduction in sentence, and also opens the opportunity for a further judicial downward departure in exceptional cases.

Although a growing number of apparently deserving defendants have benefitted from the safety valve, certain defendants of comparably low culpability are beyond its reach. For example, the statutory requirement that the defendant have only one criminal history point “under the guidelines” may in exceptional cases disqualify defendants who deserve relief. A defendant with more than one criminal history point cannot qualify for the safety valve even if the sentencing court determines under § 4A1.3 that the defendant’s criminal history is overstated and more comparable to those with no more than one criminal history point. This eligibility requirement again indicates that well-intentioned categories cannot accommodate every conceivable circumstance. Congress wanted to ensure that only the most deserving qualify for the safety valve, and the seriousness of a defendant’s criminal record clearly is a reasonable factor to consider in determining whether the person deserves relief from a harsh sentence. Limiting the eligibility to those with one criminal history point guarantees that those with more serious criminal records will be excluded, but also can occasionally disqualify someone whose actual criminal history is clearly overstated by the applicable criminal history category.¹⁷

The safety valve legislation represents systematic progress in advancing the goals of the Sentencing Reform Act. Because the criteria for safety valve eligibility provide relevant mitigating factors useful in identifying less culpable offenders, these same factors may be employed to assist in identifying the exceptional case that may warrant clemency by way of commutation. Clemency may thus serve to ensure justice for the deserving defendant who nonetheless was unable to receive the equitable treatment advanced by the safety valve, perhaps including some of those still in prison who apparently would have met safety valve criteria but for the fact of being sentenced prior to that provision’s September 24, 1994, effective date.

3. Post-Sentencing Developments

A defendant has limited opportunities to seek a modification of a sentence to account for post-sentencing circumstances that may affect the justness of the sentence imposed.¹⁸ The limitations on the system’s ability to account for extraordinary post-sentencing circumstances may in exceptional cases warrant intervention by way of executive commutation.

a. Post-Sentencing Rehabilitation

A post-sentencing development that historically has provided a basis for altering the punishment imposed is recognition of extraordinary defendant initiatives that convincingly demonstrate rehabilitation. Today, however, a defendant’s opportunity to shorten a prison sentence through post-sentence rehabilitative conduct is quite limited. With its abolition of parole, restrictions on post-sentence motions for a reduced sentence under Rule 35, and tight limits on good-time credits to reduce the term of imprisonment required to be served, the SRA clearly shifted from a rehabilitation philosophy (insofar as a purpose of imprisonment) to an approach emphasizing certainty of punishment and other sentencing purposes.¹⁹ This was underscored in the 1999–2000 guideline amendment cycle when the Commission responded to a circuit conflict on the propriety of post-sentence rehabilitation as a basis for a downward departure.²⁰ The Commission determined that, in the context of resentencing a defendant initially sentenced to imprisonment, such a departure would be inconsistent with SRA policies and, importantly, would inequitably benefit the few defendants fortunate enough to secure a resentencing opportunity.²¹

These restrictions notwithstanding and, indeed, perhaps in recognition of them, Presidential commutation of sentence remains a mechanism for reducing a prison sentence in the very extraordinary case in which an inmate’s post-sentence conduct conclusively warrants a reduction. Additionally, the avenue of Presidential commutation, though perhaps tightly limited, can be equally available regardless of whether the defendant exercised the statutory right to appeal the sentence or was successful in such an effort.

b. Downward Adjustment of Guideline Range

Another post-sentencing circumstance that may warrant a reduction in previously imposed sentence stems from a guideline amendment that would have resulted in a lower guideline range had the amendment been in effect when the defendant was sentenced. Again, the SRA speaks to this development, describing it in the legislative history as a circumstance allowing for modification of a term of imprisonment after imposition of the sentence.²² Specifically, under 18 U.S.C. § 3582(c)(2), the sentencing court is granted discretionary authority to reduce a previously imposed prison

sentence if an amendment promulgated after the defendant has been sentenced would result in a lower guideline range and the Commission has determined that the amendment should apply retroactively.²³

Over the years the Commission has amended the sentencing guidelines relatively frequently, and a good number of these amendments have resulted in a lower guideline range. For a variety of reasons, however, the Commission has been sparing in its decisions to make defendant-beneficial amendments retroactive.²⁴ Among the factors traditionally considered by the Commission in weighing retroactivity are the purpose of the amendment and the relative difficulty of applying it retroactively in a context where necessary facts may not have been fully developed and evidence may have grown stale.²⁵

A similar situation arises when the Commission promulgates a “clarifying” amendment, but does not make the amendment retroactive. A majority of circuits have held that a post-sentencing clarifying amendment will be given retroactive effect on direct appeal.²⁶ If the time for filing an appeal or petition for habeas corpus has run, however, a defendant will not receive the benefit of the clarifying amendment.

The structural limitations of statutes or the Commission’s implementing policy statements consequently may create a situation where an inmate, perhaps deserving of a sentence reduction when his particular sentence is evaluated against subsequently revised guidelines, nevertheless may not qualify for or obtain relief from the sentencing court. In such circumstances, the only recourse may be to seek clemency from the Chief Executive. In considering the merits of a particular case that perhaps may be predicated in whole or in part on post-sentencing policy action of the Sentencing Commission, the President need not necessarily be swayed by procedural concerns that may have led the Commission to decide against retroactivity for an affected category that includes the defendant.

Further, a court’s decision not to grant a sentence reduction under 18 U.S.C. § 3582(c)(2) is discretionary and largely unreviewable. Clemency is available if the President’s evaluation of the merits of a particular applicant differs from that of a sentencing judge who declined to grant a sentence reduction.

c. “Extraordinary and Compelling Reasons”

In 18 U.S.C. § 3582(c)(1), Congress recognized that post-sentencing “extraordinary and compelling circumstances” may warrant a prisoner’s early release. Upon motion of the Director of the Bureau of Prisons, the court may reduce a sentence if the reduction is consistent with “applicable policy statements issued by the Sentencing Commission.” Congress left for the Commission the task of “describ[ing] what should be considered extraordinary and compelling reasons ...

including the criteria to be applied and a list of specific examples.” The single statutory caveat is that “[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.” 28 U.S.C. § 994(t). Thus far, the Commission has not responded to the directive.

The Bureau of Prisons has interpreted the provision narrowly. The few motions filed each year have been on behalf of inmates who are terminally ill, with a prognosis of having less than a year to live. The Bureau takes into account the nature of the defendant’s criminal activity and a proposed written release plan. Before the Director of the Bureau considers whether to file a motion, a request for compassionate release is subject to multiple levels of review; the warden, the regional director, the General Counsel, and then a Bureau medical professional must approve the request.²⁷

Because the statute grants absolute discretion to the Director, the decision to file a motion is not subject to review. If a motion is filed, there is no meaningful review of a court’s refusal to grant the motion, because, at least at this time, there are no policy statements applicable to modification of a sentence under 18 U.S.C. § 3582(c)(1).

Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section. It is not unreasonable to assume, however, that Congress may have envisioned compelling and extraordinary circumstances to encompass more than a terminally ill individual with a nonviolent criminal record. The Chief Executive’s discretion to grant clemency, whether based on theories of mercy or to ensure a just sentence, may appropriately address other extraordinary cases that warrant compassionate release.

Conclusion

As envisioned by Congress and the Sentencing Commission that issued the initial set of sentencing guidelines in 1987, the guideline system is evolving and hopefully will continue to be improved with the benefit of carefully measured and evaluated sentencing experience. Yet, because no guideline or statutory system can perfectly address all individual circumstances, the President’s power to commute a sentence in exceptional, deserving cases continues to be an appropriate mechanism for advancing the idealistic principles of the SRA in a society that strives to temper the exercise of punishment with mercy when appropriate.

Notes

¹ Address by James Iredell, North Carolina Ratifying Convention (July 28, 1788), *reprinted in* 4 THE FOUNDER’S CONSTITUTION 17 (P. Kurland & R. Lerner ed. 1987).

² Pub. L. No. 98-473, 98 Stat. 1987 (1984).

³ See S. Rep. No. 225, 98th Cong., 1st Sess. 38 (1983);

see also *Mistretta v. United States*, 488 U.S. 361, 363–70 (1989).

⁴ See 28 U.S.C. §§ 991(b), 994.

⁵ See generally Ch. 1, Pt. A; William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990); Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

⁶ Ch. 1, Pt A 4(b). See also §5K2.0, comment.

⁷ See JEFRI WOOD, GUIDELINE SENTENCING: OUTLINE OF APPELLATE CASE LAW ON SELECTED ISSUES 448 (Sept. 2000) (citing cases).

⁸ See S. Rep. No. 225, 98th Cong., 1st Sess. 90, 175 (1983).

⁹ See U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991); John R. Steer, Statement before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources (May 11, 2000), available at <http://www.ussc.gov>; William W. Wilkins, Jr, et al., *Competing Sentencing Policies in a “War on Drugs Era,”* 28 WAKE FOREST L. REV. (1993); Stephen G. Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, CRIM. JUST., Spring 1999, at 28, 33.

¹⁰ See SPECIAL REPORT TO CONGRESS, *supra* note 9, at 20–34 (describes how application of sentencing guidelines differs from application of mandatory minimums.)

¹¹ Unlike the guidelines, mandatory minimums are dependent on a defendant being charged and convicted of a specified offense under the statute. See *Id.* at 53–89 (discussion of data indicating lack of uniform application of mandatory minimums sentences¹² 18 U.S.C. § 3553(e).

¹³ See, e.g., Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reining in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50

RUTGERS L. REV. 199 (1997).

¹⁴ See GUIDELINE SENTENCING, *supra* note 7, at 372–89.

¹⁵ See U.S. Sentencing Comm’n, 1999 Sourcebook of Federal Sentencing Statistics tbl. 26 (1999), available at <http://www.ussc.gov>.

¹⁶ See H. Rep. No. 460, 103d Cong., 2d Sess. 5 (1994).

¹⁷ See THOMAS W. HUTCHISON, ET AL., FEDERAL SENTENCING LAW AND PRACTICE 1242, 1249 n. 16 (citing cases) (2001).

¹⁸ The SRA severely restricted the sentencing court’s ability to modify a sentence. Under Fed. R. Crim. P. 35(a), a court can resentence a defendant following a remand from an appellate court. A post-sentencing departure for substantial assistance is available in very specifically limited circumstances under Fed. R. Crim. P. 35(b). A court’s ability to apply a guideline amendment retroactively is restricted under 18 U.S.C. § 3582(c)(2). The Anti-Terrorism and Effective Death Penalty Act strictly limited the availability of habeas corpus remedies under 28 U.S.C. § 2255.

¹⁹ See, e.g., S. Rep. No. 225, *supra* note 3, at 119.

²⁰ App. C, Amend. 602.

²¹ *Id.*

²² S. Rep. No. 225, *supra* note 3, at 121.

²³ See 28 U.S.C. § 994(u) (directing the Commission to issue policy statements guiding court decisions under 18 U.S.C. § 3582(c)(2)) and USSG § 1B1.10, p.s. (implementing that directive).

²⁴ See § 1B1.10(c), p.s. (listing 23 amendments available for retroactive application under 18 U.S.C. § 3582(c)(2)).

²⁵ *Id.*, background commentary.

²⁶ See GUIDELINE SENTENCING, *supra* note 7, at 24–26.

²⁷ 28 CFR §§ 571.61–571.63 (2001) (BOP Compassionate Release (Procedures for Implementation of 18 U.S.C. § 3582(C)(1)(A) and 4205(G))).

Mr. President, Misusing This Power Is Unpardonable

With less than a week remaining in his administration, President Clinton still has at least one major announcement to make: who else shall receive presidential pardons.

Clinton announced 62 pardons and commutations on Dec. 22, bringing his total while in office to 280. He promised one last round of pardons before he leaves office. Speculation about possible recipients has centered on Susan McDougal of Whitewater fame; Michael R. Milken, released from prison in 1993 after doing hard time for securities fraud; Native American activist Leonard Peltier, imprisoned for killing two FBI agents; and Jonathan Pollard, convicted of spying for Israel. Hundreds of others have also sought the president's forgiveness. The pardons Clinton chooses to grant will leave the last lingering taste of the moral character of his presidency. He should choose based on forgiveness rather than favor.

The president's pardoning power is widely misunderstood. "Clemency," the broadest term, includes the various kinds of relief available under the pardoning power. A president can commute an offender's sentence, substituting a lesser for a more severe sentence. Or he can grant a reprieve, which postpones execution of a sentence for a specified period of time. Or he can grant a full and unconditional pardon, relieving the offender of almost all the legal consequences of the offense.

Since the start of the Carter administration in 1977, 95 percent of all those granted clemency have received post-sentence pardons, which go to people who have been tried and convicted, served their full sentences and lived productive, law-abiding lives for at least five years. While a post-sentence pardon obviously can't reduce the term of punishment, it provides offenders some measure of self-respect and public recognition of their rehabilitation, and helps them reclaim civil rights they lost when they were convicted — the right to vote, to get certain types of jobs and licenses, to adopt a child, to carry a weapon, to sell alcohol, to race cars or horses, etc.

A routine part of the extra-legal operation of the justice system, these pardons generally go unnoticed. Who remarked on Clinton's Dec. 22 pardon of Alfred Whitney Brown III of Covington, La., who had served his full sentence for the illegal sale of wildlife? Too often, a rare case in which a prosecution is abruptly shut down or prison doors swing open — like the pardons of Richard Nixon and Jimmy Hoffa — hits the headlines and is mistaken for the typical case.

President Clinton's decisions are made more difficult by historical circumstance. When he came into office, the use of the pardoning power was in a steep decline. From Franklin D. Roosevelt's presidency through Jimmy Carter's, an average of more than 200 people each year were granted some form of presidential clemency. President Ronald Reagan, however, pardoned only about 200 each term. And President George Bush pardoned even fewer: a measly 77 in four years. Clinton has done nothing to restore the routine use of this power, pardoning or commuting the sentences of only 35 people a year, on average. Now, with so few pardons issued, the chances are much higher that each will be closely scrutinized.

As someone who could write the book on the importance of forgiveness, President Clinton surely understands that his final pardons will give him a chance to display the highest human virtues, or the basest of political and self-serving motives. More than 200 years ago, philosopher Immanuel Kant warned that the pardoning power is the "most slippery of all the rights of the sovereign." By exercising the pardoning power, the sovereign can "demonstrate the splendor of his majesty," or by the same act, "wreak injustice to a high degree." Clinton should grant pardons that can be justified as acts of mercy or acts of justice — the two greatest virtues of a ruler.

Remember that the pardon traces its lineage, through the European monarchs, straight back to the idea of divine grace. To forgive is — weary as we are of being reminded — divine. Forgiveness puts the past behind and goes forward. These are not just sweet-sounding words to the hundreds of people who apply for post-sentence pardons every year. Having served their sentences and returned to useful lives in their communities, a pardon for these petitioners recognizes their rehabilitation and offers a fresh start. By honoring their petitions, Clinton can demonstrate the quality of mercy, the greatest of human virtues.

But if a pardon is a gift, it should not be a quid pro quo. Using a pardon to pay for something given in return is corruption — pure and simple.

And there's a notable history of that practice. The great number of papal indulgences sold in the Middle Ages was a scandal. A shame of the European kings was the routine sale of pardons for prices ranging from 2 shillings to 16,000 pounds sterling. Giving pardons to reward political loyalty or encourage campaign donations or express gratitude for personal favors differs only in degree. Clinton will need to be very cautious, in



KATHLEEN DEAN MOORE

Kathleen Dean Moore is professor of philosophy at Oregon State University and the author of "Pardons: Justice, Mercy, and the Public Interest" (Oxford University Press).

This article appeared in THE WASHINGTON POST on Sunday, January 14, 2001, at B2. Reprinted with permission.

his next round of pardons, to avoid even the impression that he is using this most splendid of all powers to reward his friends and gratify his political allies.

Perhaps Clinton could begin by explaining how the pardon of ex-representative Dan Rostenkowski, a Democratic party stalwart convicted of mail fraud in 1996, was a justifiable use of the pardoning power. Or maybe he could explain why, of the 62 people pardoned last month, seven are from Arkansas.

Not all pardons are acts of mercy. Some of the most compelling pardons are acts of justice. Our legal system is imperfect. There are bad laws and bad judges, overzealous prosecutors and vengeful law-enforcement officers, and a vast, unpredictable array of human motives and mistakes. The pride of the legal system is its internal self-correcting devices that identify and eliminate injustices when they occur. But these systems are imperfect, too. When the legal system perpetrates an injustice and is unable to correct it, then a president should correct it with an act of clemency. "The criminal code of every country partakes so much of necessary severity," Alexander Hamilton wrote, "that without an easy access to exceptions in favor of unfortunate guilt, justice would bear a countenance too sanguinary and cruel." Clinton is well advised — no, more than that, he has a moral duty of justice — to grant pardons to correct the most grievous miscarriages of justice. Generally, these injustices fall into one of three major categories:

1. A basic principle of justice is that no one should be punished unless guilt has been established beyond a reasonable doubt. If the president is persuaded that someone's guilt is in doubt, he may grant a pardon. Leonard Peltier's case is a contemporary example, his supporters say. In a trial they contend was notable for the absence of hard evidence, Peltier was

convicted of the 1975 murder of two fbi agents on the Pine Ridge reservation in South Dakota.

2. When someone has broken the law, but has committed no wrong-doing, he is morally innocent and a pardon is justified. Clinton was right to pardon 80-year-old Freddie Meeks in December 1999, for example. Meeks was convicted of mutiny when, as a World War II sailor, he refused a blatantly racist and effectively murderous order — a courageous and, one could argue, morally correct violation of the law.
3. Federal mandatory sentencing guidelines and mandatory minimum statutes in drug cases are wreaking havoc on the principle that the punishment should fit the crime by requiring sentences that are extraordinarily harsh or disproportionate to the seriousness of the offense. Where laws prevent judges from making the fine discriminations that justice requires, presidential clemency can remedy some of the worst injustices — and at the same time draw attention to the shortcomings of the laws. Thus, Clinton had good reason to commute the drug-trafficking sentence of Kemba Smith on December 22. Smith — a non-violent accomplice in a crack cocaine ring — had served 6 years of a 24 1/2 year sentence, longer than the average state sentence for murder.

These considerations of justice and mercy, rather than political cronyism, should guide Clinton's last pardon decisions. Deliberately positioned above the statute law and beyond judicial review, the pardoning power should be governed by the moral law. Whether Clinton uses the power well or abuses it, the final appeal will be to the peoples' sense of justice and benevolence, or to their sense of smell.

Clemency:

A View From the Bench of Two Commutations—Vignali and Willis

In the early 1990s, I sentenced three offenders — Serena Nunn, Kim Willis and Carlos Vignali — to long prison terms following convictions for dealing drugs. In July 2000 and January 2001, all three received commutations. Under the Constitution it is clear that the president had the absolute power to do what he did.

I wrote letters to President Clinton supporting the clemency petitions of Nunn and Willis at their requests. Both had limited involvement in a large drug conspiracy and I thought my view of their cases might contribute to the president's exercise of discretion. The sentence of the third dealer, Carlos Vignali, was commuted without any advance knowledge on my part² and I reacted as might any judge who had the sincere belief that the action was unwarranted. I was disappointed, believing that justice had not been served. Following the publicity surrounding the Vignali commutation, and in light of my involvement in the other two cases, guest editor Margaret Love invited me to share my experience with readers of the *Federal Sentencing Reporter*.

A comparison of the Willis and Vignali commutations will illustrate my views. Both young men were involved in large-scale drug distribution conspiracies, stood trial and were found guilty by a jury. I sentenced both of them to Guideline sentences, Willis to 188 months and Vignali to 175 months. Both of their sentences were commuted on January 20, 2001, and both were set free after serving a substantial time in prison — Willis after serving 132 months, Vignali after serving 73 months. From my point of view as the sentencing judge, the Willis commutation was a textbook example of how and why it should be done.

1. Kim Willis

a. The criminal case

Kim Willis was nineteen years old when he was indicted in 1989 for participation in a large drug conspiracy headed by a notorious St. Paul drug dealer named Plukey Duke. Willis had no previous convictions, was a life-long resident of St. Paul, had a strong family background and was a “fourth tier” participant, that is, he was at the bottom of the organization. The evidence against Willis was sparse, but sufficient for a jury to find him guilty. The amount of drugs attributed to him through the conspiracy gave him a criminal offense level of 36 and, with a criminal history category of I, resulted in a sentencing range of 188 to 235 months. In April 1990, I sentenced him to the bottom of the guideline range.

The biggest problem Willis had was that he was so far down the organization hierarchy that he knew little

and could not swing a deal with the government. The result was that he stood trial and could not receive a motion for a downward departure. As all federal sentencing judges know, under the scheme of sentencing statutes and guidelines that factual combination spells disaster for a peripheral defendant. The only outcome is a straight sentence within the guidelines, which with a drug offense is usually draconian. At the sentencing hearing I told Willis I thought he had received an unfair sentence compared to his fellow conspirators.³

b. Willis's post-conviction conduct

Even before sentencing, Willis indicated to the probation officer that he was going to make constructive use of his time while incarcerated. At the sentencing hearing he told me the same thing. He impressed me with his genuine remorse and concern for what he had done to himself and his family. He expressed a belief that he would return to society a better man because of what had happened to him.

What he did during the eleven years he was incarcerated proved his sincerity. He got his GED. He studied and earned certificates in blueprint reading and welding. He took advantage of other educational opportunities, including courses in self-improvement. As promised, he maintained a positive attitude and worked his way up to the Federal Prison Camp in Duluth, Minnesota. There he started taking college courses at Lake Superior College where he attained a 3.7 cumulative GPA and was on the dean's list. While at the Duluth camp, Willis took part in the Youth Awareness Program. That program allows selected prisoners to leave the prison to talk to young people about the dangers of becoming involved with drugs. In his discussions he took full responsibility for the choices he had made. He did not blame poverty, his family or racial discrimination for his incarceration. All in all, Willis illustrated in a dramatic way that he was deserving of a commutation.

c. Sam Sheldon's representation

The most important thing that happened to Willis in his quest for mercy was connecting with Sam Sheldon. The connection came through Willis's friendship with Serena Nunn, whose case had earlier caught the attention of Sheldon, a recent law school graduate. After representing Nunn *pro bono*, and obtaining her commutation of sentence and release by President Clinton in July 2000, Sheldon learned that Willis, one of Nunn's codefendants in the conspiracy, had a similar background. Sheldon investigated and determined to



DAVID S. DOTY

Senior United States
District Judge, District
of Minnesota

try for the nearly impossible goal of one additional commutation. Again he acted without a fee, and again he supported his petition for clemency with powerful facts and impressive endorsements, including letters from the sentencing judge and from Eighth Circuit Judge Gerald Heaney, who had participated in the review of Willis's appeal and had written often about the unfairness of the drug laws and the sentencing guidelines. Sheldon also persuaded the prosecutor to indicate no opposition to Willis's petition for commutation. It is a testimonial to Sheldon's work and determination that Willis too had his sentence commuted.

Willis was granted clemency because he deserved it, because he had a fine *pro bono* lawyer who followed the rules, and because factual justifications for clemency supported the grant.⁴ He had been a minor player in a large drug conspiracy which resulted in a very long sentence. He had been sentenced under a scheme of statutes and guidelines that deserved criticism and reexamination, and he had applied his time wisely during a long period of incarceration.

2. Carlos Vignali, Jr.

The case of Carlos Vignali, Jr. had some similarities to that of Kim Willis. Vignali was a young man with a strong, supportive family when he was found guilty of participating in a large drug conspiracy. The scheme of statutes and guidelines was basically the same as that applied to Willis and led to a long sentence. The need to criticize and reexamine those laws was, and is, certainly present and Vignali had served a portion of his long drug sentence.

Significant differences between the Vignali and Willis cases and commutations existed, however. Vignali was not a low level operator in the conspiracy. He played a major role in the financing, transport and procurement of the drugs. The amount of drugs attributable to Vignali by the pre-sentence investigation report was between 15 and 50 kilograms. That quantity was reduced by the sentencing judge's interpretation of the trial evidence, and led to a finding of responsibility for between 5 and 15 kilograms of cocaine. On July 17, 1995, after adding an adjustment for obstruction of justice, a base offense level of 34 led the sentencing judge to impose a sentence of 175 months, at the upper end of the guidelines, but lower than that sought by the prosecutor.

Vignali showed no signs of remorse and took no responsibility for his role in the crime prior to or during sentencing. I thought that the sentence Vignali received was fair when compared to his fellow conspirators. To the court's knowledge, Vignali made no post-sentencing effort to accept responsibility or to show rehabilitation.

Even if all the facts that favor Vignali are given credence, the manner in which his petition was presented differed from Willis's case. Little is known about the

contents of Vignali's petition or about how it reached the President, though this has been the subject of speculation in the press.⁵ It is clear that the petition for clemency was not supported by a letter from the sentencing judge or the prosecutor. The judge was not asked by anyone to respond. When the prosecutor was asked, he responded in a strongly worded letter to the effect that a commutation should not be given.

Conclusion

Of course, the Constitution does not require that the sentencing judge or the prosecutor weigh in on behalf of a petitioner before clemency is granted. In the clemency matters of Willis and Nunn, where the judge wrote a letter in support and the prosecutor indicated no opposition, it appeared to make a difference. In Vignali's case, however, where the judge was not contacted and the prosecutor strongly recommended against clemency, it did not appear to make a difference.⁶

Should the President have been influenced by the fact that the prosecutor and the judge did or did not support a particular act of clemency? Should it matter that, in the Vignali case, the prosecutor was outraged and the judge was astonished and thought that justice was not done? I do not think so, because of the distinction between justice and mercy. Prosecutors take an oath to enforce the law and judges take an oath to do justice, and that is what they should do. The pardon power of the Constitution may be exercised by the President without regard to their views about a case because his is an act of mercy.

Notes

¹ *United States v. Serena Nunn*, Criminal No. 4-89-94, (commutation granted July 7, 2000); *United States v. Kim Willis*, Criminal No. 4-89-94 (commutation granted January 20, 2001).

² *United States v. Carlos Vignali, Jr.*, Criminal No. 4-93-166 (commutation granted January 20, 2001).

³ Serena Nunn had a similar background to Willis, was also a co-conspirator in the Plukey Duke gang and, for similar reasons as those affecting Willis, received a 188-month sentence. For information as to what happened to Serena Nunn, see articles appearing in the *Minneapolis Star Tribune*, July 10, 2000, July 11, 2000 and January 21, 2001. Other conspirators pleaded guilty and cooperated with the government thereby reducing their sentences.

⁴ For a discussion of clemency, its history and justifications, see Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 *FORDHAM URBAN LAW JOURNAL* 1483 (2000).

⁵ Richard A. Serrano & Stephen Braun, *Drug Kingpin's Release Adds to Clemency Uproar*, *L.A. TIMES*, Feb. 11, 2001, at A1.

⁶ See, e.g., Stephen Braun & Richard A. Serrano, *More Clemency Lobbying by Rodham Alleged*, *L.A. TIMES*, Feb. 26, 2001.

A Voice for Victims: What Prosecutors Can Add to the Clemency Process

We should have seen President Clinton's Inauguration Day 2001 pardons and commutations coming. They were foreshadowed by the clemency that he granted to 16 Puerto Rican terrorists, primarily members of the FALN terrorist group, in August 1999. That was the first indication that President Clinton would entertain the requests of people with direct access to the White House and essentially circumvent the line prosecutors. By Inauguration Day 2001, President Clinton did not even ask prosecutors for their views in many cases. One of those cases involved Dorothy Rivers, a politically-connected defendant convicted of multiple fraud and tax violations whose sentence the President commuted on Inauguration Day.

As a former federal prosecutor in Chicago who helped prosecute some other FALN terrorists as well as Dorothy Rivers, I am alarmed by the President's failure to fully listen to line prosecutors, the people most familiar with the crimes and the interests of the victims. Unlike most cases prosecuted by state authorities, victims in many federal cases may be unidentifiable or considered to be only "indirect victims" without an effective means to contribute to the process. The prosecutors may be their only voice in the clemency process—a voice that deserves to be heard. The Inauguration Day pardons generated strong negative reaction, with pundits suggesting that the pardons undermined Clinton's credibility, politicized the Office of the Presidency and lost the public's confidence in the criminal justice system. It is the last point that is of particular concern to me.

I do not in this article debate the merits of the clemency decisions in these cases. Instead, my concern is the one-sided process employed by President Clinton that effectively foreclosed consideration of victims' interests, as filtered through the line prosecutors most familiar with the cases. The result in each case, sadly, was the appearance of injustice. And the appearance of injustice can quickly corrode the public's confidence in the criminal justice system. The process used in granting clemency in these two different kinds of cases—the FALN terrorism and the Dorothy Rivers fraud—illustrates the shortsightedness of circumventing the prosecutors.

The FALN Terrorists

On August 11, 1999, President Clinton agreed to commute the sentences of 12 FALN terrorists who had been prosecuted in Chicago.¹ These defendants had been sentenced to prison terms ranging from 35 to 90 years, and by August 1999 had served between 16 and 19

years in prison. One defendant refused the conditions imposed by President Clinton to win his freedom and remained incarcerated. Thus, 11 FALN members were released.

Some historical context is needed to put these commutations in perspective. The FALN (*Fuerzas Armadas de Liberación Nacional Puertorriqueña* [Armed Forces for Puerto Rican National Liberation]) is a clandestine organization dedicated to liberating Puerto Rico from U.S. control. The group's members claim that armed struggle is the only vehicle through which independence can be achieved.² The FALN, which elected to stage its violent struggle on the U.S. Mainland, was responsible for at least 120 bombings and incendiary attacks, armed takeovers and a series of armed robberies. Attacks by the FALN have resulted in five deaths and numerous injuries.

On December 11, 1974, the group used a false report of a dead body in a New York City apartment to induce police into a location which contained a booby trapped explosive device that detonated, leaving a young policeman maimed and permanently disabled. On January 24, 1975, the target was the historic Fraunces Tavern in New York City, where the FALN set off a bomb during the busy lunch period, killing four and injuring 60. On August 3, 1977, a powerful bomb exploded inside the Mobile Oil Company office in New York City during the busy morning rush hour period, killing one man and injuring several bystanders.

Investigations following these bombings revealed that the FALN had developed an intricate underground operation with "safe houses" that members used in various cities, including Chicago. The clemency recipients were linked to the operations of the Chicago-area branch of the FALN. They were convicted in three separate prosecutions of crimes ranging from weapons violations to seditious conspiracy.

In the first case, several members who were granted clemency were involved in the armed takeover of the Carter/Mondale Presidential Campaign Headquarters in Chicago, the armed robbery of an armored truck in Milwaukee, Wisconsin and an attempted armed robbery of an armored truck at Northwestern University. They were captured moments before the planned robbery at Northwestern University, hiding in a van loaded with weapons, disguises and false identification. The defendants were convicted of seditious conspiracy, armed robbery and various weapons offenses and sentenced to terms of incarceration ranging from 55 to 90 years. Later, additional FALN defen-



DEBORAH A. DEVANEY

Deborah A. Devaney is a former Assistant U.S. Attorney for the Northern District of Illinois and a partner in the law firm of Sonnenschein Nath & Rosenthal.

dants were arrested. One of them was a leader of the FALN, Oscar Lopez-Rivera, who turned down President Clinton's conditional offer of clemency in 1999. Lopez-Rivera's residence was found to contain dynamite and blasting caps.

In the second case, court-ordered electronic surveillance revealed a plot to plant bombs at military installations, rob Chicago Transit Authority fare collectors, harbor a fugitive and break Oscar Lopez-Rivera out of prison. Three of the terrorists granted clemency were videotaped cleaning weapons and handling bomb paraphernalia in a Chicago safe house. Armed with a warrant, federal law enforcement agents searched the Chicago safe house in the middle of the night and found thousands of rounds of ammunition, 24 blasting caps, detonating cord, dynamite, weapons and a schematic drawing of the drainage system of Leavenworth Prison, where Oscar Lopez-Rivera was imprisoned. The agents disabled the weapons and substituted dummy explosives. Later, the FALN defendants were videotaped making what they thought were real bombs and preparing a communiqué to take responsibility for the intended bombing of a military installation. Those three FALN members were convicted in 1985 of seditious conspiracy and various weapons violations and sentenced to 35 years of incarceration.

In the third case, in December 1987, Oscar Lopez-Rivera (who was still incarcerated) and several others were convicted of a multi-faceted conspiracy to again break him out of prison, transport explosives intending them to be used to kill and injure people and to use the explosives to destroy government buildings and property. The evidence at trial showed that certain of the conspirators transported what they believed to be 40 pounds of C-4 explosives across the country. The sentences in that case ranged from 3 years to 15 more years for Lopez-Rivera.

The commuted FALN terrorists never admitted their crimes, showed remorse or cooperated in finding their co-conspirators. Nor did they even sign their own petition for clemency. When supporters filed a petition on their behalf, the U.S. Attorney's Office in Chicago, and at least initially, the Department of Justice, vigorously opposed it. The petition sat without resolution for more than five years. Our efforts in the field to learn the status of the clemency petition were rebuffed, ostensibly in accordance with the Department of Justice regulations recommending that the Office of the Pardon Attorney not share reports with anyone except officials concerned with the consideration of the petition.³

To the line prosecutors' surprise, on August 11, 1999, President Clinton announced that the FALN conspirators would be freed on certain conditions, including compliance with conditions of release imposed by the Parole Commission. Subsequent Congressional hearings revealed that the grants of clemency followed

intense lobbying efforts by the FALN's supporters who held personal meetings with White House and senior Department of Justice officials in Washington.⁴ No prosecutor from the field was present at any of those meetings or was asked to evaluate the arguments made to these key government officials by the FALN's supporters.⁵ Following those meetings, the Department of Justice apparently changed its recommendation against clemency and sent a second report to the White House in which it reportedly offered no recommendation.⁶

All the while, the U.S. Attorney's Office in Chicago knew nothing of what was going on. Those people with the best knowledge of the crimes and of the true interrelationship of the Chicago FALN operation with the rest of the FALN organization were effectively closed out of the part of the process that mattered.

When President Clinton ignored the trial prosecutors, he ignored more than the intended violence of the crimes. He also ignored the injured victims of FALN violence arising from the same overarching conspiracy that was charged in the Chicago cases. After the grants of clemency, I heard from three victims of the FALN bombing at the Fraunces Tavern in New York City in 1975. I spoke with the son of a businessman who was killed when the bomb exploded next to his father's table. A survivor sitting at the father's table, who to this day bears debilitating wounds from the bomb blast, also contacted me. And I heard from a business school graduate who was at the tavern interviewing for his first job and who somehow survived with only emotional scars. They all sounded the same theme: the petitioners were members of the same terrorist group (with the same violent goals) that had hurt them. With each victim, the anger and frustration with the clemency process boiled over. Why, they asked, had *their* interests not been considered? I had no good answer.

President Clinton explained his decision to grant conditional clemency to the FALN terrorists in a September 21, 1999, letter to Congressman Henry Waxman.⁷ In his letter, the President alluded to "[p]ress reports" of the U.S. Attorneys' and FBI's opposition to clemency. Yet the President claimed that he "carefully weighed" that opposition. The President claimed that he "recognize[d]" and "appreciate[d]" that there were victims of FALN-related violence who opposed clemency, but did not explain the nature of that recognition or appreciation. Furthermore, President Clinton wrote that the petitioners' lengthy sentences were out of proportion to the crimes, citing references by others to the petitioners' "virtual life sentences." Contending that similar sentences of such magnitude would rarely occur under the now-controlling sentencing guidelines, Clinton also noted that the petitioners "were not convicted of crimes involving the killing or maiming of any individuals."⁸

If President Clinton had consulted the trial prosecutors, he would have learned (or been reminded when

it mattered) that his proffered reasons for granting clemency were baseless. He would have learned that these were, indeed, violent crimes, and that the larger conspiracy in which these defendants participated did result in deaths and maimings. He would have learned that these defendants intended to kill and maim and the only reason that no one was killed or maimed was that dedicated federal agents nabbed the petitioners before they could shoot their weapons and detonate their bombs.

President Clinton also would have learned that their pre-guideline sentences were not out of proportion to their crimes. As Timothy B. McGrath, Interim Staff Director of the U.S. Sentencing Commission, wrote in his October 29, 1999, submission to the House Committee on Government Reform, application of the federal Sentencing Guidelines to the 12 FALN members who were offered clemency could have resulted in sentences of life imprisonment, or the functional equivalent of life imprisonment, by imposing consecutive sentences on several counts:

[I]t is not at all clear that the FALN sentences were disproportionate to the seriousness of the crimes ... we estimate that the federal sentencing guidelines generally would call for sentences as long as or longer than those actually imposed, if the defendants had been sentenced under current law.⁹

Some people claimed that the President's explanation was a knowing subterfuge and that he granted the clemencies for political purposes.¹⁰ President Clinton was particularly vulnerable to such charges because line prosecutors were frozen out of the end game of the clemency process. He had little defense to those charges because White House officials met with the FALN's supporters, and did not include the line prosecutors who would have then been able to directly address the concerns of the key people in the White House, and attempt to rebut opposing arguments. Unlike the line prosecutors and the victims for whom they are a voice, the FALN's supporters were not limited to a mere paper submission.

No one knows what President Clinton might have done if he had had all the facts. He might still have granted the commutations. Yet he would have been able to credibly claim that he had heard and evaluated all views before acting.

In the FALN case, the line prosecutors' opportunity to be heard was limited, and, by the time President Clinton decided to act, their response was stale. Irrespective of whether justice was actually served, there was an appearance of injustice. In many of the Inauguration Day 2001 pardons and commutations, the opportunity for line prosecutors to make their case at all was nonexistent. The Dorothy Rivers commutation was one of those cases.

Dorothy Rivers

Dorothy Rivers was a prominent Democratic fundraiser from Chicago with political connections. She was the Director of the Chicago Mental Health Foundation, which housed homeless shelters and a teen center for pregnant wards of the state, and she was President of the Pritzker-Grinker School, a school for children with severe behavioral disorders. These programs received millions of dollars in city, state and federal grants. In 1997, Rivers pled guilty, through an *Alford* plea, to (1) fraudulently obtaining millions in federal grant monies by forging matching-fund commitment letters; (2) misappropriating \$1.5 million of the grant monies to pay for her five fur coats, extravagant parties, a luxury car and a friend's recording company; and (3) concealing the misappropriation from the U.S. Department of Housing and Urban Development auditors. She also pled guilty to tax evasion and failing to file any income tax returns for more than ten years.

After Rivers's crimes were exposed, the programs ended and the shelters closed. The sentencing judge, Robert W. Gettleman, a Clinton appointee who had been active in prison reform and disability rights issues before his appointment to the bench, was incensed with Rivers's crimes. Describing her actions as "probably the most egregious conduct of any criminal defendant I've had before me," the judge eloquently captured the impact on her victims:

[B]ut the programs are dead now. They're gone. There are no beds. There are no homeless living there any more. There are no teenaged mothers, unwed mothers and their children and mentally disturbed youth being served by these organizations. They're dead, and they were killed by your misconduct.

The entire way this scheme was executed has yet to be acknowledged by you. You talk about the appearance of evil ... you had two organizations meant to serve the neediest of our citizens that have been destroyed by this. To me, that's not the appearance of evil. That's evil itself.¹¹

Judge Gettleman rejected Rivers's diminished capacity downward departure motion. Yet, in consideration of the fact that she was 66 years old, the Judge sentenced Rivers to 70 months in prison, the lowest possible sentence within her guideline range of 70 to 87 months.¹² Unhappy with her low-end sentence, Rivers fought her conviction and sentence. After Rivers lost a direct appeal, she filed a collateral attack, claiming that she had been duped by her attorneys into pleading guilty. Her petition for collateral relief was rejected by Judge Gettleman, who praised Rivers's lawyers and told Rivers to accept responsibility for her actions.¹³ Rivers's request to appeal was pending before the Seventh

Circuit when President Clinton commuted her sentence from 70 to 50 months on Inauguration Day. The Seventh Circuit rejected Rivers's request to appeal in February 2001. Rivers is set to be released in October 2001.

President Clinton's clemency action appears to have been prompted, at least in part, by a November 27, 2000, letter from Democratic Illinois Congressman Bobby Rush to the White House—a letter that was not available to the prosecutors until after the commutation. Congressman Rush did not address the crimes to which Rivers had pled guilty. Nor did he explain why the President should exempt Rivers from the Department of Justice regulations making a defendant who is pursuing an appeal ineligible for clemency.¹⁴ Describing her as “an educator and a humanitarian,” Congressman Rush emphasized Rivers's political connections as justification for her clemency. He cited her “great personal assistance” to his office and other noted politicians, her “loyal and hard-working” membership in the Democratic Party and her service “as an alternate delegate to the 1992 Democratic National Convention.” Expressing his belief, in one sentence, that her prosecution was “fundamentally unfair, her defense ineffective, and her punishment excessive,” Congressman Rush asked for Rivers's early release from prison.¹⁵

In the Rivers case, there was evidently no petition for clemency and no Department of Justice investigation. Nor was there an opportunity for the prosecutors to be heard and to respond to the claims made by Rivers's supporters. There was no opportunity for any prosecutor to inform the President of the facts of the case, Rivers's lack of remorse or the impact on the unknown homeless and helpless victims who were shut out of the shelters and programs that Rivers single-handedly destroyed. Not only were these victims denied the shelters and services the government was supposed to provide them, but by this one-sided commutation process, they were denied even the appearance of justice that our system of criminal laws was supposed to provide them. As a result of the President's decision not to consult the line prosecutors, there was no one to show him the heartfelt remarks of the sentencing judge, to inform him that Rivers's sentence was the lowest sentence possible, or to describe the typically nameless, faceless group of vulnerable citizens to whom crucial services were supposed to be delivered.

A Voice for Victims

Both of these cases illustrate the need to hear out and involve the line prosecutors—prosecutors who can provide the facts and present the views and the interests of victims, known or unknown. Critics of this position argue that making prosecutors advocates for victims personalizes the prosecution and attaches a vendetta quality to a process that is driven by considerations dif-

ferent from those that dictate the decision to prosecute.

Allowing prosecutors an opportunity to fully and effectively weigh in on the clemency process, however, does not equate to vigilante justice. As with the initial prosecution, the clemency process contemplates that the prosecutors will faithfully execute their duties. This call for full participation by the line prosecutors is consistent with the U.S. Attorneys' Manual. The Manual requires that the views of the U.S. Attorney be given considerable weight in determining what recommendations the Department of Justice should make to the President on clemency matters. The Manual contemplates that the U.S. Attorney can contribute significantly to the clemency process by providing “factual information and perspectives about the offense of conviction that may not be reflected in the pre-sentence or background investigation report or other sources, e.g.,... when appropriate, the victim impact of the petitioner's crime.”¹⁶

Giving line prosecutors the opportunity to participate fully and to represent victims' interests offers several benefits. First, indirect victims like the bombing victims in the FALN case and unidentifiable victims like the homeless victims in the Rivers case will have a chance to be heard. Doing anything less cheapens even the worthy grants of clemency. Second, prosecutors will do what they often do—filter the victims' views to temper the passions of the moment and provide some emotional distance. Third, seeking the views of the line prosecutors keeps society's bargain that the criminal justice system will take care of victims and in return, victims will not take matters into their own hands.

Following the clemency for the FALN terrorists, the Department of Justice Executive Clemency Regulations were amended to allow for notification of victims, if the Attorney General concludes that it is warranted.¹⁷ Those regulations, however, reach only victims who have suffered direct harm as a result of the crime for which clemency is sought and who have a request for notice on file. Those regulations would not reach the FALN bombing victims or the homeless victims in the Rivers case. This is all the more reason why prosecutors must be fully involved in the process.

In a forward to the Victims' Rights issue of the United States Attorneys' Bulletin, former Attorney General Janet Reno wrote: “For crime victims, however, your [prosecutors'] efforts are far more personal. Often, you are the only voice the victim has in the courtroom.”¹⁸ There are precious few victims' voices that can be heard when the President opens back-door channels to dole out pardons and commutations. When consideration of clemency petitions is seriously undertaken, however, it should not be done without the full input of the prosecutors and the victims they represent.

Notes

- ¹ On the same day, President Clinton also commuted the sentences of four members of the Los Macheteros (translated as the “machete wielders”), another terrorist group whose goal is the independence of Puerto Rico from the United States. H.R. Rep. No. 106–488, at 26 (1999).
- ² *Id.* at 11–12, 74.
- ³ 28 C.F.R. § 1.5.
- ⁴ H.R. Rep. No. 106–488, at 49–50, 57 (1999).
- ⁵ In her testimony before the House Committee on the Judiciary, former U.S. Pardon Attorney Margaret Love warned of the risk of relying on the White House advisors to the exclusion of the Department of Justice. (“In the end, in making those controversial [FALN] grants the President avowedly relied entirely upon the advice of his White House Counsel, advice that in turn was based upon a White House investigation of the cases. This evidently deprived him ... of a full picture of the law enforcement implications of the grants and the likely public reaction to them.... The FALN grants foreshadowed the endgame.”) Committee on the Judiciary, Subcommittee on the Constitution, Oversight Hearing on the Presidential Pardon Power, February 28, 2001.
- ⁶ H.R. Rep. No. 106–488, at 59–60 (1999).
- ⁷ Reprinted in this Issue in the Appendix.
- ⁸ *Id.*
- ⁹ H.R. Rep. No. 106–488, at 132 (1999).
- ¹⁰ See David A. Vise & Lorraine Adams, *FALN a Threat, Reno Says; Hatch Faults Justice Dept. as Clemency Report is Released*, WASHINGTON POST, October 21, 1999, at A27 (1999 WL 23309933); Deborah Orin & Marilyn Rauben, *Prez’s Aide Saw Faln Pardons Helping Gore*, NEW YORK POST, November 9, 1999, at 16 (1999 WL 27655691).
- ¹¹ *United States v. Rivers*, 96 CR 275, Nov. 17, 1997, Sentencing Tr. at 494.
- ¹² *Id.* at 503–05.
- ¹³ *United States v. Rivers*, 98 C 7827, May 15, 2000, Hearing Tr. at 1–10.
- ¹⁴ 28 C.F.R. § 1.3.
- ¹⁵ November 27, 2000 Letter from U.S. Rep. Bobby L. Rush to President Clinton (on file with author).
- ¹⁶ USAM 1–2.111.
- ¹⁷ 28 C.F.R. § 1.6(b)(1).
- ¹⁸ January 1999 USA Bulletin, Vol. 47, No. 1 at 1.

Federal Prosecutors and the Clemency Power



DAVID M. ZLOTNICK

Associate Professor of Law, Roger Williams University School of Law, J.D., Harvard Law School. Professor Zlotnick was an Assistant United States Attorney for the District of Columbia from 1989 to 1993 where he prosecuted many drug cases in both U.S. District Court and D.C. Superior Court. He later served as the first Litigation Director for Families Against Mandatory Minimums and currently serves on the Litigation Project Advisory Board for that organization. Professor Zlotnick wishes to thank Diana Hassel and Margaret Love for their helpful comments, and Christian Frey and Lucy Holmes for their research and editing assistance.

On July 7, 2000, President Clinton commuted the prison sentences of five federal inmates convicted of drug crimes. In contrast to the January 2001 Marc Rich pardon debacle or the controversial 1999 *FALN* commutations, these cases generated little opposition and went relatively unnoticed by the press. Nevertheless, these cases are important to the debate over clemency because each reflects the positive role that clemency can play in the run-of-the-mill cases that make up the bulk of the federal criminal docket. These commutations are also significant because in four of the five cases, the prosecutors either supported or at least chose not to object to the petitions. This article discusses these July 2000 commutations and argues that there are sound reasons for federal prosecutors to support clemency petitions in a variety of circumstances.

I. Clemency, the Prosecution Function, and Mandatory Minimum Sentencing

A. Rationales for the Clemency Power

"Why should we go to the expense and effort of investigating, convicting, and sentencing an offender and then release him by commuting his sentence?"¹ So commented a long-time federal narcotics prosecutor about the appropriateness of the January 2001 Clinton pardons of a dozen or more non-violent drug offenders. Contrary to this stereotypical prosecutorial reaction, there are sound reasons for federal prosecutors to support commutation petitions.² To understand why prosecutors might want to support certain kinds of clemency petitions, one must examine three things: the rationales that have been advanced for the clemency power, the fundamental precepts underlying the prosecution function, and lastly, certain features of the current federal criminal justice system which produce an unfortunately large number of disparate and unduly harsh sentences for which there is currently no remedy but clemency.

A variety of rationales have been advanced for the exercise of the clemency power. For example, one vein of clemency theory uses hindsight to examine the fairness of the original sentence. Historically, in this tradition, clemency could be used to raise doubts about the validity of the conviction itself.³ Today, the more prevalent use of hindsight is to examine whether individual sentences now seem disproportionate, either vertically, as compared to co-defendants, or horizontally, compared to similarly-situated offenders.⁴

A second vein of clemency theory looks forward from the conviction, focusing on the rehabilitative efforts of the inmate. In this model, the original sen-

tence was fair, both in some absolute sense and comparatively, but subsequent extraordinary efforts by the individual have demonstrated an unusual degree of rehabilitation that warrant release.⁵ Clemency in this sense can be seen as an exceptional form of parole.⁶

Finally, some commentators view clemency in a political context. When exercised on behalf of a prominent individual, as when President Ford pardoned President Nixon, the clemency power is a way to bring political stability by circumventing a painful and divisive trial.⁷ When exercised on behalf of groups of similarly-situated individuals, the clemency power can be used by the President as a means of setting or advancing policy goals, as when President Carter pardoned certain individuals who failed to register for the draft during the Vietnam War.⁸ While each model is theoretically distinct, elements of each justification can be detected in the July 2000 commutations.

B. The Prosecution Function and Clemency

ABA Standard for Criminal Justice 3-12 asserts the well known maxim that "[t]he duty of the prosecutor is to seek justice, not merely to convict."⁹ With regard to sentencing, the ABA Standards state that "[t]he prosecutor should not make the severity of sentences the index of his or her effectiveness" and should seek "to avoid unfair sentence disparities."¹⁰ For the typical line Assistant U.S. Attorney, a case generally ends when the defendant is sentenced, the appeal is resolved, and the case file closed. An evaluation of the fairness of sentencing practices, however, is dependent upon the concept of inter-temporality—the consideration of the impact of a decision both now and in the future.¹¹ Thus, an effort to truly focus on the fairness of sentencing requires prosecutors to significantly shift their frame of reference. With this longer time horizon, clemency can be the only tool that prosecutors have at their disposal to function as a hindsight device to account for developments over the entire length of a defendant's imprisonment. This is true whether the new developments are defined as rehabilitative efforts by the inmate, shortened sentences for co-defendants, or because of a legal or policy shift that impacts similarly-situated offenders. For prosecutors who take this long-term view of sentencing fairness, an appropriate use of clemency should not, therefore, be seen as a "get out of jail free card" for the lucky (or politically-connected) defendant, but as a small but important tuning mechanism in which prosecutors can play a supporting rather than an adversarial role.

C. Prosecutorial Power under the Mandatory Minimum Sentencing Regime

The need for an active exercise of long-term prosecutorial oversight of sentencing, which might include supporting clemency in appropriate cases, has been made all the more necessary by certain features of current federal criminal law. This is particularly true in narcotics cases, where statutory changes have dramatically increased prosecutorial power to create disparate and unduly harsh sentences.

Beginning in 1986, and continuing to the present, ever-increasing mandatory minimum penalties tied solely to ever-decreasing amounts of drugs has increased lengthy sentences for low-level and first-time offenders.¹² These mandatory minimum penalties tied to drug quantity have also tremendously increased the power of federal prosecutors over sentences since they completely control charging decisions and largely control the terms of plea bargains.¹³ Moreover, because only federal prosecutors can initiate substantial assistance motions,¹⁴ the courts, with one limited exception, are powerless to independently sentence defendants below the applicable mandatory minimums.¹⁵ The interaction of these changes has led to specific kinds of disparities and disproportionate sentences that rarely existed in the era of discretionary sentencing and can be directly tied to the increase in prosecutorial discretion and power. Therefore, in these kinds of cases, prosecutors should be open to exploring whether the exercise of the clemency power can address these injustices. In fact, that is exactly what seems to have happened in several of the July 2000 commutations.

II. The July 2000 Commutations

A. Cooperation Cases: Promises Made, Promises Kept

The least controversial class of clemency cases for prosecutors to support flow from the prosecutor's exclusive power over substantial assistance. Included in the July 2000 clemencies was the case of Alain Orozco. After Orozco was arrested, he was willing to cooperate and testify against a bigger fish, but because of other charges pending against him, as well as false statements he had made to the police, prosecutors felt the case would be too weak if based on his testimony alone. Later, when additional evidence corroborating Orozco became available, Orozco testified for the government.¹⁶ By that point, however, more than a year had passed, and under the terms of Federal Rule of Criminal Procedure 35(b), the government could no longer file a substantial assistance motion. Rule 35(b) limits the time period within which the government can move for a sentence reduction based on cooperation to one year after sentencing, unless the information the defendant provides was discovered after this period. Here, Orozco gained this information before his arrest and therefore

his post-sentence cooperation did not fall within the time allowed under the rule.¹⁷

Faced with this situation, the U.S. Attorney for the Northern District of Georgia filed the petition for commutation on behalf of Orozco. This was not the first "substantial assistance" clemency granted during the Clinton administration. In 1995, President Clinton had commuted the sentence of another inmate under similar circumstances.¹⁸ In the context of clemency theory, these clemencies can be justified as rehabilitative or under the hindsight fairness rubric. If one views cooperation as an effort to ameliorate the harm caused by one's participation in a criminal enterprise, the focus is on the defendant and therefore rehabilitative. Under the fairness concept, one could say that these pardons were necessary because all defendants who provide substantial assistance should receive the benefit of their cooperation and be treated similarly. Clemency was necessary because the strictures of Rule 35 frustrated this fairness goal. Lastly, one could also view these pardons from a policy perspective: shedding light on an overly restrictive Rule 35 and hopefully spurring a movement to amend the rule to account for this type of case.¹⁹

B. Vertical Disparity and Horizontal Disparity

The combination of quantity-based mandatory minimums together with the tremendous advantages conferred by substantial assistance agreements also results in a variety of disparities that can be addressed by prosecutorial support for clemency. As anyone familiar with federal narcotics prosecutions knows, the theory for taking down a trafficking ring is to flip lower-level participants against their higher-up co-conspirators. Facing lengthy mandatory minimums, many defendants agree to cooperate. Unfortunately, this prosecution strategy is not always implemented according to theory, and sometimes works to the detriment of certain classes of defendants.

For example, the lowest level participants, especially drug couriers and street distributors, usually have the least amount of information. When their one contact in the operation, usually just above them, decides to cooperate first, the typical drug courier or street distributor is left with no one to cooperate against. In addition, sometimes the more naive participants, or those involved more because of relationships than because of the profit motive, are often unwilling or just too slow to act in their self-interest and cooperate. This is often true of intimate partners, usually women, who are involved with major traffickers. Moreover, because their romantic partners are high up in the narcotics distribution operation, even limited acts by these women that assist the operation lead to their legal responsibility for huge quantities of drugs and severe sentences. Meanwhile, their more culpable partners are often able to negotiate

lesser sentences through cooperation based on information unknown to the women. While during the investigation and indictment process prosecutors may not be able to ensure equitable sentences due to timing and the need for cooperating witnesses, when the dust has settled and all the sentences are known, clemency can even out the worst injustices created by the cooperation lottery.

The Amy Pofahl clemency can be seen as partially falling into this category.²⁰ Pofahl's husband ran an international ecstasy ring that manufactured and imported an enormous amount of the drug into the United States. She went to trial and was found guilty of conspiracy to manufacture and distribute ecstasy and of money laundering. She was sentenced in 1992 to 292 months in prison. In contrast, her husband served less than five years in Germany,²¹ and due to his cooperation was not sentenced to any additional time in this country. According to the government, Pofahl played more than a minimal role in her husband's operation. She allegedly traveled to Guatemala and continued to deal drugs after her husband's incarceration. The U.S. Attorney's Office in San Antonio that prosecuted the case did not "support or recommend the commutation" that Pofahl received in July 2000, after serving nine years of her sentence, although the chief of the criminal division of that office stated that it did "lay out a sentencing argument favorable to Ms. Pofahl" in its submission to the pardon attorney.²²

Another July 2000 clemency could also be characterized as a sentencing disparity case. Louise House pled guilty in 1990 to a continuing criminal enterprise charge relating to a heroin-distribution ring. House provided testimony that helped convict her more-culpable supplier and was sentenced to fifteen years (which was a reduced term because of House's cooperation). When a successful appeal reduced the supplier's sentence to about the same term as House received, the prosecutor reportedly said that her sentence no longer seemed fair.²³ However, the fact that House was 63 and in poor health may also have contributed to the decision to release her.²⁴ Thus, the House clemency should be seen both as a disparity case and a mercy/compassion case in which the punishment exacted no longer seems necessary.²⁵

C. Horizontal Disparity and Changes in the Law

A more controversial class of clemency cases involves inmates whose sentences were proportionate at the time of sentencing but now appear to be disproportionate to defendants sentenced more recently due to changes in the law, sentencing guidelines, or prosecutorial policy.

The only beneficial statutory change for low-level narcotics offenders in recent years was the passage in 1994 of the so-called "safety valve."²⁶ For the first time

since the 1986 mandatory minimum drug laws took effect, federal judges were granted the power, without the requirement of a substantial assistance motion from the government, to sentence certain drug offenders to shorter prison terms than the otherwise required mandatory penalties would dictate. Unfortunately for many inmates, while there seemed to be bipartisan support to make the safety valve retroactive,²⁷ the final conference bill that was passed omitted this provision. Thus, low-level, non-violent drug offenders sentenced before 1994 were, and in some cases still are, serving disproportionately longer sentences than similarly-situated defendants sentenced after passage of the safety valve.²⁸

The kind of horizontal disparity presented by this situation seems to have played a role in the July 2000 clemency of Shawndra Mills. Mills was arrested after narcotics officers found over 5,000 grams of cocaine in her checked luggage at the Cincinnati/Northern Kentucky Airport. Before her arrest, the police noticed another individual, Johnny Jackson, who was displaying great interest in the encounter between Mills and the agents. Jackson was questioned but allowed to board another plane. While still at the airport, Mills identified Jackson as the owner of the drugs and he was arrested when his connecting flight landed. However, he, too, immediately decided to cooperate and thereby, in the view of the United States Attorney's Office, deprived Mills of the opportunity to provide substantial assistance, as she had only served as courier once before and for the same person.²⁹ Although she clearly would have qualified for the "safety valve," her sentencing took place a year too early and therefore she was sentenced to 188 months in prison.³⁰

The United States Attorney for the Eastern District of Kentucky supported Mills' clemency petition and asked that her sentence be reduced to reflect the low end of her guideline sentence (87 months), because that is the term she likely would have received had the safety valve existed at the time of her sentencing. While in his letter the U.S. Attorney also noted her low level of culpability, the disparity between her sentence and her more culpable co-defendant, and her inability to enter into a cooperation agreement because of her co-defendant's immediate decision to cooperate, the stark disparity between her sentence and the post-safety-valve defendants seems to have played a very significant role in his decision to support her petition.³¹

D. Rehabilitation and Opposition to Quantity Based Mandatory Minimums

The final July 2000 clemency case shares some of the issues already considered but it raises two more that are even more controversial to the prevailing prosecutorial mind-set: the value of rehabilitation and generalized hostility to mandatory minimum penalties.

In 1989, when Serena Nunn was 19 years old, she was indicted for her participation in her boyfriend's father's massive cocaine conspiracy. After a multi-defendant trial, she was convicted and sentenced to 188 months in prison. Although Nunn was one of the less culpable members of the conspiracy, there was evidence that she drove her boyfriend to meetings and made telephone calls to tell different people that they owed him money. In addition, a combined total of about ten grams of powder and crack cocaine were found hidden in her bedroom.

Nunn's clemency petition contained a letter from one of the two prosecutors, who was by then in private practice. In this letter, he stated that he had no objection to a commutation nor did three of the main law enforcement agents who had worked on the case.³² In a conversation with the judge, the former prosecutor allegedly went further and encouraged the judge to support her efforts to be released.³³

While the prosecutor's letter certainly helped, Judge David S. Doty's letter to the President was likely the key ingredient in her successful clemency application. His letter proffered two grounds. First, he believed there was an uncorrectable legal error that could only be addressed by clemency. Briefly stated, Nunn's guideline range was increased two levels for obstruction of justice based upon allegedly threatening statements she made to a witness who was contemplating cooperating with the government. Six years later, Nunn's new pro bono counsel filed an ineffective assistance of counsel motion that included an attack on the performance at sentencing of the original defense attorney, who had not forced the "threatened witness" to testify.³⁴ Although he felt trial counsel probably erred, Judge Doty found that the error did not rise to the high level required by current ineffective assistance of counsel doctrine.³⁵

While this first ground would clearly fall within the fairness rationale with which many prosecutors might concur, the judge raised another, more sweeping issue. This second argument advances a broad-based attack on the fairness of the mandatory minimum and sentencing guidelines as applied to Nunn. Initially, Judge Doty argued that her sentence was unjust in light of the deals given to more culpable co-defendants who played a more significant role in the operation but who cooperated with the government.³⁶ However, Judge Doty then went on to note his general opposition to mandatory minimum penalties, citing the well-known statements of opposition from the bench and bar, and the hardship Nunn has suffered through her incarceration, including the death of many close family members. Lastly, he placed great emphasis on Nunn's rehabilitation. He cited her acceptance of responsibility, her substantial educational achievements, and her need to be released to continue her education due to the residency requirements of four year colleges.³⁷

Certainly the disparity between her sentence and her co-defendants', as well as the uncorrectable legal error, are within the realm of reasons with which prosecutors might legitimately concur. However, the additional grounds articulated by the judge, including her youth, prior clean record, and substantial rehabilitation efforts, coupled with the court's strong philosophical opposition to mandatory sentencing, are not criteria most prosecutors are likely to support.

First, under the prevailing retributivist view of clemency, despite the sympathy of a particular case, rehabilitation of an offender is not a legitimate consideration, given Congress' decision to end federal parole. Prosecutorial support for clemency for prisoners who undertake to reform themselves in prison undermines this clear legislative choice and could lead to an even more ad hoc and arbitrary form of parole by clemency. Second, even more at variance with a prosecutorial mind-set would be advocacy of clemency based on hostility to the length of the statutorily-prescribed penalties for drug offenses. To the extent that a federal prosecutor believes at the inception of a case that a mandatory minimum is not appropriate for a defendant, the office can decline prosecution and shift the case to the state system.³⁸

However, I am not convinced that even on the issues of rehabilitation and cases involving particularly harsh results of mandatory minimum statutes that a prosecutor's vote on a clemency petition should be an automatic "no." To support this argument, I return again to a discussion of the prosecution function and the purposes of clemency to determine whether there are any principled grounds for prosecutors to support the rehabilitative and criminal justice policy aspects of clemency petitions like that of Serena Nunn.

III. Prosecutors and Clemency as a Policy Tool

The Commentary to A.B.A. Standard 3-1.2 states that "as the public official in constant contact with the day-to-day administration of criminal justice, the prosecutor occupies a unique position to influence the improvement of the law."³⁹ Because of their institutional continuity and credibility with Congress, federal prosecutors play a unique role in recognizing and advising on reforms to the criminal justice system. The prosecutor's role has been further enhanced over the last twenty years as the war on drugs and the overall politicization of crime policy has driven rehabilitation and offender rights issues almost out of the system.

The questions that remain, however, are (1) to what extent federal prosecutors who believe that some grave injustices have resulted from the decisions of the Congress to eliminate parole, raise drug penalties, and alter the allocation of discretion between judges and prosecutors, should act on these concerns by supporting clemency petitions, and (2) to what extent, such

actions should be based on the hope that they might bring greater public and legislative attention to the injustices created by these structural changes.

First, with regard to clemency petitions based solely on rehabilitation, my inclination is to generally advise individual prosecutors and U.S. Attorneys' Offices against taking an active role. While prosecutors are quite knowledgeable and competent to evaluate legal issues and horizontal and vertical sentencing equity, they rarely have much contact with defendants during service of their sentences. Thus, prosecutors are not in the best position to evaluate the extent or extraordinariness of the inmate's rehabilitative efforts.⁴⁰ To the extent that rehabilitation is considered by the President to be a valid basis for clemency, the Office of the Pardon Attorney is probably in the best position at the Department of Justice to have the expertise necessary to make the comparative and qualitative judgments required. Nevertheless, individual prosecutors or offices should be allowed to provide whatever information about the surrounding circumstances they feel is appropriate to help evaluate a rehabilitation-based petition.

For those prosecutors generally unhappy with the larger issues, such as mandatory-minimum sentences and the abolition of parole, the ultimate protest is to transfer to the civil division or leave for private practice (or academia). However, short of those drastic steps, clemency in particular cases can still serve to ameliorate those unjust aspects of the mandatory minimum sentencing regime that are more clearly the product of prosecutorial decision-making than the statutes or power allocation changes themselves.

One example of an issue ripe for evaluation by prosecutors as a basis for supporting clemency petitions, and which was not raised by any of the July 2000 pardons, is the pockets of horizontal sentencing disparities that have been created by significant changes in charging criteria between administrations. During Bush the Elder's Presidency, some United States Attorneys' Offices, such as the District of Columbia, brought almost all eligible crack distribution cases in federal court to take advantage of mandatory minimum penalties. If these five gram crack cases had been brought in D.C. Superior Court by the same office, these defendants would have received much lower sentences and even probation in some cases.⁴¹ With the transition in 1992 to a Democratic administration, prosecutorial policy changed in the District of Columbia as well as in other offices. Instead of taking any drug case that qualified for a mandatory term, the U.S. Attorney in the District shifted the federal narcotics unit's focus to larger quantity cases or cases involving violence and gangs. With this prosecutorial policy change, similarly-situated offenders in Washington, D.C. convicted before President Clinton's appointee took office clearly received much longer sentences than those whose

cases were referred to the D.C. Superior Court system after the transition. Different changes in policy at other offices may have caused similar pockets of horizontal sentencing disparity as earlier charging decisions came to be seen as excessive or at least unwarranted by a new U.S. Attorney.⁴² Including earlier defendants in this policy change would only be fair and is certainly consistent with an inter-temporal approach to the ABA Standards for Prosecution.⁴³

Another area, already mentioned, in which line prosecutors could use clemency as a policy tool involves cases similar to that of Shawndra Mills, involving the so-called "safety-valve" inmates. As of November 1, 2000, there were approximately 487 defendants still incarcerated who would have been eligible for the safety valve had it been made retroactive at passage in 1994.⁴⁴ Although many similarly-situated people filed clemency petitions at the end of Clinton's term, only a handful more were granted commutations. Like Shawndra Mills, many of these 487 non-violent, first time offenders were given substantially longer sentences for their offenses than their more culpable co-defendants who had more information to trade because of their deeper involvement in drug trafficking. Thus, on both vertical disparity and change of law/horizontal disparity grounds, federal prosecutors should consider the example set by the Eastern District of Kentucky and consider supporting clemency petitions by members of this group.⁴⁵

The difference between the safety-valve cases and the change-in-charging-criteria cases discussed above is that horizontal sentencing disparities in the safety-valve cases are the result of Congressional action rather than prosecutorial discretion. Nevertheless, based on Congressional approval of the safety valve, the largely bipartisan support for the provision, and basic notions of fairness, it seems within reason that prosecutors could take this factor into consideration when determining their position on a clemency position.

Nevertheless, one could argue that prosecutorial support for safety-valve defendants starts prosecutors down a slippery slope that encourages undermining of legislative policy. Ultimately, though, this argument rests on two flawed premises. First, it fails to account for the reality that prosecutorial discretion over charging decisions plays the most significant role in all of these cases. It was true, even at the height of the war on drugs, that not every narcotics bust that had sufficient quantity for a federal mandatory minimum was brought in federal court and it is true now. In my experience, federal prosecutors who declined federal prosecution of small, yet qualifying cases as part of office priority-setting were not, and are not now, generally accused by the media or the public-at-large of undermining the legislative agenda. Therefore, to the extent that prosecutors are willing to look at sentencing equity

over the course of an inmate's sentence, it can also be argued that fairness requires that clemency be available to reduce sentences if similarly-situated defendants are no longer receiving equivalent terms.

This explanation blends into a second, broader constitutional, separation of powers argument. While it is correct to say that the legislature passes the criminal law but the prosecutor is responsible for enforcing it, the Framers recognized that each branch of government could act as a check upon the excesses of the others. Executive clemency is part of this constitutional scheme and has always been seen as having a political component. To the extent a President is ultimately willing to act on the Attorney General's recommendation to grant clemency petitions to advance the goals of consistency and fairness in sentencing or to highlight policy differences with Congress, it seems fair game for line federal prosecutors to use their advisory role in clemency petitions to do the same.⁴⁶

Conclusion

Sentencing fairness is a prosecutorial obligation. Given the dramatic increase in prosecutorial power at the expense of judges and defense attorneys over the past fifteen years, prosecutors have an even greater duty at both the individual and policy level to seek fair and just sentences for those they choose to prosecute in the federal system. Because fair and just sentencing must incorporate the concept of inter-temporality, consideration of both hindsight, including an evaluation of horizontal and vertical disparity, and subsequent developments, such as rehabilitation and policy changes, is necessary to evaluate sentencing practices properly. Because of the length of many federal sentences, and because important changes can take place years later, clemency is sometimes the only tool that can address and adjust the equities of individual cases and bring public and legislative attention to important sentencing issues. This article has suggested, therefore, that prosecutors embrace their advisory role over clemency petitions and be willing to endorse (or at least not oppose) a variety of clemency categories. Using the lesser-known July 2000 commutations, I hope to have provided some examples of thoughtful and courageous federal prosecutors whose examples will be followed.

Notes

¹ Related to author by an Assistant United States Attorney, April 4, 2001 (the speaker asked to remain unidentified in this article).

² This article begins with the premise that although the President can exercise (and recently has exercised) the pardon power against the wishes of, or without consulting the original line prosecutors, in the run-of-the-mill federal criminal case, the views of line prosecutors are likely to carry significant weight with the Office of the Pardon Attorney and the President. Moreover, particularly after the Marc Rich case, in

which the prosecutors in the Southern District of New York complained they were not consulted, it is even more likely, except in the most political of cases, that future Presidents are likely to give great weight to the opinions of the original prosecutors and are less likely to grant a pardon over their strong objections. See, e.g., Josh Getlin, *Clinton Pardons a Billionaire Fugitive, and Questions Abound*, L.A. TIMES, January 24, 2001, at A1.

³ See Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 572-79 (2001) (suggesting that clemency in the past acted as fail safe for catching mistakes in lower court proceedings but claiming that such a role, while still possible, is less necessary now due to improvements in representation and appeal procedures).

⁴ See *id.* at 583-88; Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1521 (2000).

⁵ See Rapaport, *supra* note 4, at 1524-29 (discussing the benefits of rehabilitative clemency in context of the sympathetic case of Precious Bedell, a mother who accidentally killed her child and who underwent a dramatic personal transformation while incarcerated, but who was repeatedly denied clemency). Rehabilitation can take many forms. It can be personal rehabilitation through education, good behavior and expression of remorse and personal responsibility, or less frequently, through selfless acts of heroism such as protecting a guard from injury or attack. See *id.* at 1523-24 (noting clemency for doctor arrested in Lincoln assassination based upon his willingness to treat patients in jail at great risk to himself). The current Pardon Attorney regulations clearly contemplate this rehabilitative clemency by including among other requirements, a five year waiting period. See Hoffstadt, *supra* note 3, at 580.

⁶ See Rapaport, *supra* note 4, at 1531. This view has taken on a greater urgency given the absence of parole in the federal system.

⁷ See Hoffstadt, *supra* note 3, at 590. The pardon of John Deutsch also could be considered in this category. John Deutsch, a former C.I.A. Director, was widely accused of having stored classified intelligence materials on his home computer. See, e.g., CBS *Evening News With Dan Rather*, (CBS television broadcast, January 20, 2001) (transcript on file at 2001 WL 6115080); *Clinton OKs Stack of Pardons Before Exit; Frees Cash to Put Last of 110,000 Cops on Streets*, SAN DIEGO UNION & TRIB., January 21, 2001, at A9.

⁸ See Hoffstadt, *supra* note 3, at 590.

⁹ A.B.A. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2(c) (3d ed. 1993).

¹⁰ See *id.* at § 3-61.

¹¹ Inter-temporality refers to the impact of decisions on participants in a system both currently and over time. Particularly for inmates and their families, those perceptions are formed over the entire length of a sentence, if not beyond. Peter Margulies argues that incorporating the concept of inter-temporality into policy decisions would require state actors to "situate themselves not merely in the moment, but over time." This would help ensure that "the state be accountable for the ways in which its own policies ... play out in practice." Peter Margulies, *Surviving the State: Transition, Discretion, and Membership in Domestic Violence*

Law at 8 (manuscript on file with author); see also Jon Elster, *Myopia and Foresight*, in NUTS AND BOLTS FOR THE SOCIAL SCIENCES 42, 44 (1989) (analyzing the tendency of people to discount the future); Amartya Sen, *Rational Fools*, in BEYOND SELF INTEREST 25, 37–38 (Jane J. Mansbridge, ed. 1990).

¹² See Hoffstadt, *supra* note 3, at 584. Although disparities in federal sentencing were supposed to be addressed by the Federal Sentencing Guidelines, the addition of mandatory minimum sentences for drug crimes before the first set of Guidelines was ever finished dramatically limited the Guidelines as a positive independent influence on drug sentencing equity because statutorily determined drug quantities establish the floor for all sentences.

¹³ See Paul M. Secunda, Note, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1268–69 (1997).

¹⁴ The statute requires a defendant to provide substantial assistance in the investigation and prosecution of another person who has committed an offense. See 18 U.S.C. § 3553(e); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. Only the government can initiate a substantial assistance motion, and its failure to do is virtually unreviewable. *Id.*

¹⁵ The exception is the so-called “safety-valve” statute, which permits sentences lower than a mandatory minimum for certain low level, non-violent offenders. See 18 U.S.C. § 3553(f) (2000).

¹⁶ In Orozco’s case, the United States Attorney himself initiated the clemency petition so that Orozco could reap some sort of benefit for the “substantial assistance rendered in the investigation and prosecution of another.” Petition for Commutation of Sentence on Behalf of Alain Orozco, aka Allen Jean Velasquez, by Richard H. Deane, Jr., United States Attorney (N.D. Ga.), April 26, 1999 (petition on file with author).

¹⁷ Rule 35(b) states as follows:

(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant’s subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant’s substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant’s pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.

Fed. R. Crim. P. 35(b) (2001).

¹⁸ Johnny Palacios was sentenced in 1991 to 71 months imprisonment for marijuana offenses. It appears that the passing of the one-year deadline prevented prosecutors from seeking to reduce his sentence through Rule 35. Michael D. Goldhaber, *And Now, the Rest of Clinton’s Clemency Story*, NAT’L LAW JOURNAL, August 7,

2000 (Internet version of article) (www.nlj.com/2000/back/0814.html) (last visited June 16, 2001); see also Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1493, n. 38 (2000) (citing U.S. Dep’t. Of Justice, Office of the Pardon Attorney, Warrants of Pardon, 1935–1999).

¹⁹ Rule reform, like many changes in the criminal justice system, can have its genesis in the story of a single, compelling case. Although the best chance for reform of Rule 35 would come from the Justice Department in response to these cases, widespread discussion in the press and academic literature could also spur a proposal from the bench or defense bar.

²⁰ Pofahl’s petition also argues that she was unfairly convicted due to errors of trial counsel and that she would have benefitted from a modification of the definition of relevant conduct. See Petition for Commutation of Sentence On Behalf of Amy Pofahl, by David Parker, Attorney for the Petitioner, 4–6 (on file with author); U.S. SENTENCING GUIDELINES MANUAL, Appendix C, Amend. 439 (2000). Nevertheless, much of the support she received from public figures was based on the disparity between her sentence and her husband’s. See Letter from Senator David Pryor to Roger C. Adams, Pardon Attorney, at 1 (July 20, 1999) (on file with author).

²¹ Amy Pofahl’s husband, Sandy Pofahl, financed and ran an international manufacturing and distribution operation for ecstasy. Initially, Mr. Pofahl selected Guatemala and Germany as the manufacturing countries because he believed the drug was still legal in those countries. When this assumption proved incorrect in Germany, he was prosecuted and convicted in that country. See Pofahl Petition, *supra* note 20, at 1–3.

²² Goldhaber, *supra* note 18. Pofahl’s clemency petition likely was aided by a public relations campaign that flowed from a story about her in Glamour Magazine. See David France, *You Be the Jury: Does this Woman Deserve to be Locked Up for 24 Years?*, GLAMOUR, June 1999, 224–27 & 290–91. Given her substantial role in the offense and the size of her husband’s operation, her case did seem less appealing than the other July clemencies, despite the clear disparity between her sentence and her husband’s.

²³ See Deborah Saunders, *Clinton Shows Mercy for Heroin Kingpin*, S.F. CHRON., July 25, 2000, at A1.

²⁴ See Goldhaber, *supra* note 18 (After the commutation was granted, the prosecutor on the case told a reporter that “poor health was also a factor.”).

²⁵ At age 63 and in poor health, House was clearly no threat under any conception of her role in the offense for which she was convicted. Theoretically, programs like compassionate release should cover this aspect of House’s case but here too, the Justice Department and Bureau of Prisons have interpreted this provision as nothing more than a right to die outside of prison (and cynically, a way for someone else to cover the final medical costs and death expenses of terminal inmates). See 18 U.S.C. § 3582(c)(1) (1988) (outlining a means for a court, upon motion of the Director of the Bureau of Prisons, to reduce an inmate’s sentence “if it finds that extraordinary and compelling reasons warrant such a reduction ...”); see also Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure*

Worse than the Disease?, 3 WIDENER J. PUB. L. 799, 817 (1994) (reporting that Title 18 U.S.C. § 3582(c)(1) is being utilized by the Bureau of Prisons to effectuate compassionate releases for terminally ill prisoners). Margaret Colgate Love distinguishes a mercy based theory of clemency from the school which tries to place clemency entirely within the prevailing retributivist philosophy of punishment. See Love, *supra* note 18, at 1503–05. See also Kathleen Dean Moore, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 84 (1989). Love looks to Jeffrie Murphy to define this concept, arguing that mercy is distinct from justice and fairness concepts. As an “autonomous moral virtue,” clemency is granted out of compassion for the good of both the individual and the community rather than because individual in some sense deserves the pardon. Love, *supra* note 18, at 1503 (citing Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 175 (1988)).

²⁶ The “safety valve” provision is contained in 18 U.S.C. § 3553(f), and provides:

f) Limitation on applicability of statutory minimums in certain cases—withstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant as truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 3553(f) (2000).

²⁷ See Letter from Julie Stewart, FAMM President, to Bruce Lindsay, White House Counsel, November 1, 2000 at 2 (noting that Representatives Barney Frank, John Conyers, Henry Hyde, and Bill McCollum were

original signatories on a letter to Attorney General Reno urging retroactivity) (letter on file with author).

²⁸ And of course, these sentences are often much higher than the sentences of defendants serving time for either drug or violent offenses in state prisons.

²⁹ Under these facts, the U.S. Attorney's Office's decision that she was not entitled to a 5K1.1 substantial assistance motion is curious and might represent a crabbed interpretation of what cooperation may entail. Mills appears to have been the reason the government was able to arrest Jackson, her supplier, at all. The fact that Jackson, too, decided to cooperate, simply makes Mills' by-then-already-completed cooperation more valuable. Certainly, the experience of this author and other former AUSAs suggests some offices would have viewed Mills' decision to finger Jackson at the airport sufficient to warrant a substantial assistance reduction.

³⁰ Mills' clearly more culpable co-defendant received just 30 months due to his cooperation.

³¹ See Letter from Joseph L. Famularo, United States Attorney (E.D.KY.), to Margaret Colgate Love, Pardon Attorney, U.S. Dep't. Of Justice, 2–3 (December 31, 1996) (on file with author).

³² See Goldhaber, *supra* note 18.

³³ See Chris Graves, *Clinton Commutes Minneapolis Woman's Drug Sentence*, MPLS.-ST. PAUL STAR TRIBUNE, July 10, 2000, at B1.

³⁴ Attached to the motion was a supporting affidavit from the “threatened witness” which denied that he had interpreted her comments at the time as a threat. Based on this affidavit and his own review of the transcript of the audiotape of the conversation, the judge was satisfied that he had incorrectly increased her Guideline level.

³⁵ See Letter from David S. Doty, Senior Judge, United States District Court for the District of Minnesota, to William J. Clinton, President, United States of America, 3–5 (March 14, 2000); reprinted in the Appendix.

³⁶ While this scenario is typical, this case might have been more extreme because it appears that some co-defendants were allowed to plead to pre-Guideline offenses, and therefore avoid both the mandatory minimum and no parole conditions of the current sentencing regime. See *id.* at 6–7.

³⁷ See *id.* at 7–8.

³⁸ Even during the heyday of the war on drugs, this was occasionally done. In 1992, I prosecuted a woman who had been indicted on a federal weapons charge for a sawed-off shotgun that belonged to her drug-trafficking boyfriend. The defendant had been a crack addict and admitted to knowledge and control over the weapon in her bedroom dresser. After extensive negotiations (mostly within my own office), and with the judge's strong encouragement, we allowed her to plead to a non-mandatory weapons charge under the D.C. Code which allowed probation and continued drug treatment rather than incarceration. This kind of disposition, however, was extremely rare in my experience.

³⁹ A.B.A. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 9, at § 3–1.2, commentary at 6.

⁴⁰ Allowing individual prosecutors to play an active role in rehabilitation based clemency petitions also opens the door to the influx of highly personalized criteria and therefore the operation of stereotypes and prejudice.

⁴¹ See 21 U.S.C. § 841(b) (1987) (requiring a mandatory minimum sentence of five years for possession of five grams of crack cocaine); *but see* D.C. CODE §§ 33–541(c)(2), 33–549 (setting the mandatory minimum sentence for a comparable amount of cocaine at four years, but providing first time addicts with treatment, and allowing “attempt” pleas for first time offenders which are not subject to mandatory minimum penalties). Charging disparities also existed between U.S. Attorney’s Offices during the same administration. Even during the war on drugs, some U.S. Attorney’s Offices in source cities could only take high quantity cases because of the volume of cases being brought to them by various federal and state law enforcement agencies.

⁴² Sentencing entrapment cases are another area where horizontal sentencing disparity could exist. The basic premise of the sentencing entrapment defense is that while the defendant may have been predisposed to commit a comparatively minor crime, such as the sale/purchase of a small amount of drugs, it was the conduct of governmental agents that persuaded the defendant to commit a more serious offense, such as the sale/purchase of a large amount of drugs or a more-severely punished type of drug, and the defendant’s sentence should not be increased because of that governmental conduct. *See, e.g. Jeff LaBine, Sentencing Entrapment Under the Federal Sentencing Guidelines: Activism or Interpretation?* 44 WAYNE L. REV. 1519 (1998). Although only a few courts have recognized this sentencing mitigation defense, some prosecutors no longer counsel law enforcement officers to encourage suspects to manufacture or obtain narcotics or quantities of narcotics they were not initially inclined to traffic.

⁴³ Peter Margulies suggests that an inter-temporal perspective allows for “feedback between the legal norms and the individual or popular preferences that norm seeks to govern.” The country’s decision to elect a president with a different approach to sentencing and punishment of non-violent drug offenses, for example, would provide a democratic rationale for using clemency to achieve consistency in the treatment of offenders convicted under different administrations. Margulies, *supra* note 11, at 34. *See* A.B.A. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 9.

⁴⁴ *See* Memorandum from Julie Stewart, President of Families Against Mandatory Minimums (FAMM) to Bruce Lindsey, White House Counsel, 1 (November 1, 2000) (on file with author).

⁴⁵ Of course, the best way to address this issue would be for Main Justice, perhaps through the Pardon Attorney, to issue a policy paper on this issue. In the absence of such action, it is in some sense perhaps unfair and ad hoc for a few people to win the commutation lottery based upon an individual prosecutor’s sympathy. Nevertheless, in the larger scheme, to the extent that horizontal sentencing disparities have been created by prosecutorial and statutory changes, justice for some via commutation is better than justice for none.

⁴⁶ Obviously, in the policy area, U.S. Attorneys and their assistants are as a practical matter likely to follow the broad criminal justice policy goals of the President and his Attorney General. Nevertheless, individual Offices can play a role in setting policy from the bottom up by the positions taken on clemency petitions.

Does the Fox Control Pardons in the Henhouse?

So which one do you believe — Hamilton or Burton? That is, Alexander Hamilton, the brilliant framer of the Constitution who helped pen the *Federalist Papers*? Or Dan Burton, the Republican representative from Indiana chairing an inquisition into former President Clinton's clemency chaos who — well, he's no Alexander Hamilton.¹

Take Burton first. At his congressional hearings, Burton deplored the fact that "the normal review process at the Justice Department was completely bypassed."² Which is to say, our famously unruly former president couldn't follow the rules.

But if you listen to Hamilton, the whole *point* of the pardon power is to break the rules. Look at *Federalist* No. 74. There he wrote that 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."

That is, the president's power to pardon serves to ameliorate the merciless — or mindless — application of criminal process. As Chief Justice William Rehnquist has written: "Executive clemency has provided the 'fail safe' in our criminal justice system," for it is an "unalterable fact" that our justice system and those who administer it are "fallible."³

It's not just partisans like Burton who have a backward conception of the pardon process. Roger Adams, the Justice Department's current pardon attorney, stated to a Senate committee that, "With respect to the pardon of Marc Rich and Pincus Green, none of the regular procedures were followed."⁴ And when asked on a news show, "How did we get into this mess?" Margaret Love, who used to hold Adams' job, responded, "I think if I had a single explanation, it would be not following the rules."⁵

So let's look at those rules.

First rule: the Constitution. It states, "The President ... shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."⁶ That's it, as far as the Constitution is concerned. Pardoning is a power that is the president's alone. If he wants to sit around flipping coins all day — heads, you're out of jail; tails, you're out of luck — so be it.

That said, nothing in the Constitution prohibits the president from making rules for pardoning. And so he or, at least, his predecessors have done just that. The Code of Federal Regulations has a bunch, generally regarding who is eligible to file for a pardon.⁷ The crux

is this: "No petition for pardon should be filed until the expiration of a waiting period of at least five years after the date of the release of the petitioner from confinement or, in case no prison sentence was imposed, until the expiration of a period of at least five years after the date of the conviction of the petitioner. Generally, no petition should be submitted by a person who is on probation, parole, or supervised release."⁸ Mind you, that's just to get through the door.

To actually get a pardon, according to the United States Attorneys' Manual, the applicant needs to be judged on the basis of several criteria, including "post-conviction conduct, character, and reputation," "seriousness and relative recentness of the offense," and "acceptance of responsibility, remorse, and atonement."⁹ In considering specific cases, investigators should contact the prosecuting attorney, the sentencing judge, and, sometimes, the victims of the crimes.¹⁰ All the rules are advisory only¹¹ — in theory.

But back up for a moment. Note the sort of crime that the Constitution allows the president to pardon: "Offenses against the United States." That is, the pardon power covers crimes violating federal law. That means crimes prosecuted by the Justice Department and its U.S. attorneys.

And back up again. Adams is the pardon attorney not within the White House and not within an independent agency — but in the Justice Department.

That means the same Justice Department that advocates a war on drugs and a tough-on-crime stance is in charge of screening pardon applications. It means that an organization with a vested interest in prosecuting and convicting people is in charge of recommending whether those convictions should be put aside.

As former Pardon Attorney Love testified in writing to Congress, "Over the past 20 years, [Justice's pardon program] has gradually come to reflect the unforgiving culture of federal prosecutors, and now is perceived primarily as a conduit for their views."¹² If she's right that prosecutors have captured the pardon process, that means the fox is guarding the henhouse.

Inside a Captured Process

With that in mind, take another look at the pardon rules.

They're geared toward pardoning those who have accepted guilt and are rehabilitating themselves. According to the United States Attorneys' Manual, "As a general matter, in clemency cases the correctness of the underlying conviction is assumed, and the question of guilt or innocence is not generally at issue. ... In



EVAN P. SCHULTZ

Associate Legal Editor,
Legal Times. B.A.,
Columbia College.
J.D., M.A. University of
Virginia.

© 2001 NLP IP Company. All rights reserved. Reprinted with permission. For more information, contact *Legal Times*, 1730 M Street, NW, Suite 802, Washington, DC 20036. (202) 457-0686.

This piece (with minor modifications and without footnotes) originally appeared in the March 12, 2001 edition of *Legal Times*.

I would like to thank Elizabeth Engdahl for all of her help with this commentary and with my other writings.

cases involving pardon after completion of sentence, the United States Attorney[] is expected to comment on the petitioner's post-conviction rehabilitation, particularly any actions that may evidence a desire to atone for the offense."¹³ And "[a] petitioner should be genuinely desirous of forgiveness rather than vindication."¹⁴

To be sure, rehabilitation is a worthy goal. But it's also one that exalts the Justice Department and its lawyers, by vindicating their efforts to restore order to society through prosecutions.

What about the rationale for the pardon power given by Hamilton and Rehnquist—to correct an overly harsh or misguided prosecutorial system? "Persons seeking a pardon on grounds of innocence or miscarriage of justice bear a formidable burden of persuasion," states the manual. Does that mean pardon investigations fail to consider the overall wisdom of the prosecution? So much for the original intent of the Framers.

These rules, which today Clinton is being flogged for ignoring, have not bound past presidents. Ronald Reagan in 1981 pardoned two FBI agents convicted for illegal break-ins.¹⁵ *The New York Times* reported back then that "Reagan once told an aide that he thought the agents were being penalized unfairly because they believed they were acting according to law." Today, the U.S. Attorneys' Manual discounts precisely that excuse as a basis for issuing a pardon.¹⁶ (And while the current version of the federal regulations governing pardons did not exist in 1981, Reagan's administration instituted an earlier version of them in 1983.)¹⁷

Presidents Andrew Johnson, Harry Truman, and Jimmy Carter all pardoned rebels and draft dodgers,¹⁸ many of whom, no doubt, did not "evidence a desire to atone for the offense"¹⁹ that the U.S. Attorneys' Manual today calls for. The first President George Bush pardoned Casper Weinberger and others, in part, because, as Bush said, "In recent years, the use of criminal processes in policy disputes has become all too common."²⁰ Does that explanation meet the "formidable burden of persuasion" for individuals basing their claims on a "miscarriage of justice"?²¹

And don't even try to fit Gerald Ford's pardon of Richard Nixon²² into the rulebook—even though it was one of the wisest uses of the power in living memory.

Outside Justice

To sum up, there are three problems with the current state of granting pardons. First, rules meant to be an advisory guide to the president are now being treated by critics as binding. Second, those rules fail to encompass the full purpose of pardoning, a purpose that includes correcting failures of the criminal justice system as well as acknowledging rehabilitation. And third, the pardoning process seems to have been captured by the very prosecutors who run our inevitably flawed criminal justice system.

If you were the president and saw all these restrictions on your discretionary power, what would you do? You'd probably exercise your constitutional prerogative and yank the pardon power clear of the whole mess.

That's exactly what Clinton did. As former Pardon Attorney Love testified in writing to Congress, "[I]t appears that the Justice Department advisory process was bypassed at least in part because it was not delivering the kind of advice the president wanted."²³ She also testified that "the President considered the Justice Department only one of many potential sources of advice"²⁴

And that, of course, is as it should be. The Justice Department and its prosecutors should have a voice in the pardon process. But they should not control it.

If presidents are to exercise the pardon power with full flexibility, they can't be bound by bureaucratic regulations. This isn't necessarily to attribute ill will to Clinton's critics. Love, for instance, has made clear that she fully endorses wide use of the pardon power. As a solution, though, she offers a prescription bound to fail: further entrenching the pardon program within the Justice Department—though with an increased role for the attorney general personally.²⁵

The real solution is removal of the process from Justice. Let the president appoint people inside the White House to help him. Let these appointees take a broad view as to who merits pardons—one that goes beyond rehabilitation.

And let them bear in mind that they will be the ultimate fail-safe, as the Framers intended, to a criminal justice system that is inherently fallible.

Notes

¹ Burton chaired hearings by the House Committee on Government Reform on Feb. 8, 2001 and on March 1, 2001. See "The Controversial Pardon of International Fugitive Marc Rich" <<http://www.house.gov/reform/hearings/rich.pardon/index.htm>> (downloaded April 19, 2001) and "The Controversial Pardon of International Fugitive Marc Rich—Day 2" <<http://www.house.gov/reform/hearings/rich.pardon/index2.htm>> (downloaded April 19, 2001). Also in the House, Rep. Steve Chabot on Feb. 28 chaired hearings by the Subcommittee on the Constitution of the Committee on the Judiciary. See "Constitution Subcommittee Holds Pardon Hearing" <www.house.gov/chabot/pardon.html> (downloaded April 23, 2001). On the other side of Congress, Sen. Arlen Specter chaired separate hearings by the Senate Judiciary Committee on February 14, 2001. See James G. Grimaldi & Dan Eggen, *Criminal Probe of Pardon Begins; Gifts from Ex-Wife are Focus*, WASHINGTON POST, Feb. 15, 2001, A01.

² "U.S. Representative Dan Burton (R-IN) Holds Hearing on Presidential Pardons: House Committee on Government Reform Holds a Hearing on President Clinton's Pardons," March 1, 2001, (opening statement of Rep. Dan Burton), FDCH Political Transcripts (available on Lexis).

³ *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

- ⁴ “February 14, 2001 Recent Presidential Pardons Roger C. Adams Pardon Attorney before the Committee on the Judiciary, United States Senate” at <<http://www.usdoj.gov/pardon/testimony/adams1.htm>> (downloaded March 3, 2001) (written statement of Roger C. Adams).
- ⁵ The NewsHour with Jim Lehrer, Feb. 14, 2001, Wednesday Transcript #6963.
- ⁶ U.S. Const. art. II, § 2.
- ⁷ See 28 C.F.R. §§ 1.1–1.10; 28 C.F.R. §§ 0.35–0.36.
- ⁸ 28 C.F.R. § 1.2.
- ⁹ United States Attorneys’ Manual §§ 1–2.111(1)–(3) (at <http://www.usdoj.gov:80/usao/eousa/foia_reading_room/usam/title1/2mdoj.htm#1-2.110>)(downloaded April 19, 2001) [hereinafter “USAM”] Reprinted in Appendix.
- ¹⁰ USAM § 1–2.111.
- ¹¹ See 28 C.F.R. § 1.11.
- ¹² “Testimony of Margaret Colgate Love concerning the President’s Power to Pardon before the Subcommittee on the Constitution Committee on the Judiciary[,] United States House of Representatives Wednesday, February 28, 2001” at <<http://jurist.law.pitt.edu/love2.htm>> (downloaded March 6, 2001) [hereinafter “Love Written Testimony”]. (Or, as Love verbally told the committee, “Within the Department of Justice, the pardon program lost its independent voice and pardon recommendations came to reflect the unforgiving culture of federal prosecutors. Fewer and fewer cases were recommended for favorable presidential action and pardon grants became correspondingly rare.” See “U.S. Representative Steve Chabot (R-OH) Holds Hearing on Presidential Pardon Power: House Committee on the Judiciary Subcommittee On the Constitution Holds Hearing on Pardons, Feb. 28, 2001” (testimony of Margaret Love), FDCH Political Transcripts (available on Lexis) [hereinafter “Love Oral Testimony”]).
- ¹³ USAM § 1–2.111.
- ¹⁴ USAM § 1–2.112(3).
- ¹⁵ Lou Cannon & Laura A. Kiernan, *President Pardons 2 Ex-FBI Officials Guilty in Break-Ins; Two Former FBI Officials are Pardoned by Reagan*, NEW YORK TIMES, April 16, 1981, at A1.
- ¹⁶ USAM § 1–2.112(3) (stating in part: “In this regard, statements made in mitigation (e.g., “everybody was doing it,” or “I didn’t realize it was illegal”) should be judged in context. Persons seeking a pardon on grounds of innocence or miscarriage of justice bear a formidable burden of persuasion.”) (emphasis added).
- ¹⁷ Ruth Simon, *Justice Dept. Issues Tougher Clemency Rules*, NATIONAL LAW JOURNAL, June 6, 1983, at 4.
- ¹⁸ See Testimony of Allan J. Lichtman, Chair, at Department of History Before the Subcommittee on the Constitution, February 28, 2001. <http://www.house.gov/judiciary/lichtman_022801.htm> (downloaded March 6, 2001) (on President Andrew Johnson’s pardons); *The Pardons: Text of President Bush’s Statement on the Pardon of Weinberger and Others*, NEW YORK TIMES, Dec. 24, 1992, A22 (referring to pardons made by Presidents Andrew Johnson, Harry Truman, and Jimmy Carter).
- ¹⁹ USAM § 1–2.111.
- ²⁰ *The Pardons: Text of President Bush’s Statement on the Pardon of Weinberger and Others*, NEW YORK TIMES, Dec. 24, 1992, at A22.
- ²¹ USAM § 1–2.112(3).
- ²² See *President Gerald Ford’s Pardon of Richard Nixon, September 8, 1974* <<http://www.cnn.com/ALLPOLITICS/1997/gen/resources/watergate/ford.speech.html>> (downloaded April 23, 2001).
- ²³ Love Written Testimony, *supra* note 12. Or, as Love told the committee verbally, “On several occasions, President Clinton publicly voiced his dissatisfaction with the general approach to clemency cases being taken by his own Justice Department. And in the end, he decided simply to work around it, relying instead on his own White House staff and any other sources of advice he found useful.” See Love Oral Testimony, *supra* note 12.
- ²⁴ Love Written Testimony, *supra* note 12.
- ²⁵ See, e.g., Margaret Colgate Love, *Rescuing the Pardon Power*, WASHINGTON POST, Jan. 25, 2001, at A19 (“More recently, however, the pardon process has been conducted largely through the deputy attorney general, which in practice has given prosecutors a great deal of influence over pardon decisions.... Giving the attorney general exclusive responsibility for recommending pardons would be a step back in the right direction, and would help underscore the relative importance of justice and politics in pardon decision-making.”); Love Written Testimony, *supra* note 12 (“If I had one recommendation to make to President Bush in this regard, it would be that he ask his Attorney General to resume personal responsibility for providing advice in pardon matters.”).

Guarding the Integrity of the Clemency Power



BRIAN M. HOFFSTADT

Assistant United States Attorney, Central District of California, U.S. Department of Justice; author of *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561 (2001). The views expressed in this paper are the author's own, and do not necessarily reflect the views of the U.S. Attorney's Office or the U.S. Department of Justice.

In his article “Does the Fox Control Pardons in the Henhouse?” Evan Schultz makes a compelling argument that the federal clemency power needs to be restructured. Schultz starts from the premise that “the president’s power to pardon serves to ameliorate the merciless—or mindless—application of criminal process,”¹ and goes on to argue that the current process for evaluating and granting clemency has two major flaws. First, Schultz argues that the pardon power is constrained by binding rules that limit clemency to little more than a reward for rehabilitation. Second, he contends that the pardon process is dominated by—and hence “captured” by—federal prosecutors because the President’s designated pardon advisor, the Pardon Attorney, is employed by the Justice Department. Schultz surmises that the flurry of pardons granted by President Bill Clinton in January 2001, and which were evaluated largely outside of the established process, was a direct result of what Schultz views as a flawed process. Schultz urges that we get rid of the “bureaucratic regulations,” let White House lawyers figure out when to use the power, and take a broader view of the power—far beyond rehabilitation.

Schultz’s perception of the problem, and his proposed solution warrant a closer look, as he hits on many of the key issues that were bubbling below the surface of the pardon reform debate long before the issue jumped to the front page in January. As discussed below, the rules governing the clemency power should be expanded to allow for the use of clemency to correct egregious errors and to better ensure fairness. Yet, with the narrow exception of political uses of clemency, clemency should continue to be governed by rules and the President’s clemency advisor should continue to be housed outside the White House, either at the Justice Department or in an independent commission.

The Role of the Pardon Power

Before addressing either of Schultz’s two criticisms of current clemency procedures, it is critical to have a shared vision of what functions the federal clemency power should serve; it is, after all, difficult to evaluate the “means” without a clear conception of the “ends” they are designed to serve. Schultz contends, as noted above, that the pardon power should be used to “ameliorate the merciless—or mindless—application of criminal process.” On this point, he is correct. Clemency can and should be used: (1) as a “fail safe” for correcting egregious mistakes made by the courts²—for instance, when an innocent man is convicted or when a

defendant’s most fundamental constitutional rights are ignored; (2) as an instrument to ensure a fair and just outcome in a criminal case by mitigating a sentence that, although rightly imposed by the criminal justice system, might nevertheless be viewed as unacceptably harsh or unfair; (3) as a tool for political ends to be used “in seasons of insurrection or rebellion . . . [at] critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth”³; and (4) as a reward for rehabilitation.

Of course, it is critical to keep in mind that clemency’s operation as an exception to the usual application of the country’s criminal laws must not become an exception that swallows the rule. Only through such a general presumption of regularity and propriety can the legislative policies embodied in the nation’s criminal laws and in the usual procedures for review of convictions and sentences be maintained. With these basic functions of the clemency power in mind, it is now possible to turn to Schultz’s arguments that the current clemency process does not serve those functions properly.

Too Many Rules?

Schultz levels two major criticisms at the rules that currently govern the regular exercise of the federal clemency power—that the rules only authorize pardons as a reward for rehabilitation and that the rules are binding, when they should be advisory.

Schultz is correct that the Attorney General’s regulations governing clemency are too narrow, though they are not as narrow as Schultz implies.⁴ It is true that pardons—which give relief from the judgment of conviction as well as any prison sentence—may now be granted “on the basis of the [applicant’s] demonstrated good conduct for a substantial period of time after conviction and service of sentence” and may be entertained only if five years have elapsed since the applicant was sentenced or released.⁵ In this respect, *pardons* are limited largely to serving as a reward for rehabilitation.

But pardons are not the only form of clemency. The President may also commute (or reduce) sentences, remit fines, or grant amnesty.⁶ The United States Attorney’s Manual sections that advise prosecutors on the standards applicable to clemency petitions contemplate grants of commutation in cases for “disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner.”⁷ Even considering commutations, however, the current regulations still take a narrow view of “fairness” grants and do not have any provision for two of the

functions of clemency — namely, error correction and political uses.

Schultz's related criticism — that binding rules are inappropriate — is only partially valid. At one level, Schultz has a compelling point that no rule should — or, for that matter, can — absolutely bind the President's discretionary exercise of the federal clemency power. Any rules would be binding solely on the President's pardon advisor, whose advice the President would usually follow. In this respect, rules would serve as an aid to the President's use of the power, but would not preclude him from exercising the power in exceptional cases notwithstanding any rules that might bind his advisor. Rules binding on the Pardon Attorney or the President's designated pardon advisor may be good public policy in some situations, though some functions of the clemency power are admittedly more suited to rules and regulations than others. That is because the trade-offs between the advantages of rules (rational and consistent decision making and accountability, to name a few) and their disadvantages (less flexibility and the danger of creating new entitlements) can vary depending upon the function they are to serve.⁸

It makes little sense, for instance, to establish rules to govern the exercise of the pardon power when it is used to ensure "political tranquility" or for other political ends because it would be nearly impossible to formulate such rules in the first place, and such rules would be discarded more often anyway, as these grants would typically be "exceptional." Arbitrary use (or abuse) of the power for this purpose would be checked, not by rules, but by the President's accountability to the people — and may affect whether he, or his party, get re-elected. Thus, Schultz is right that binding rules would probably be inappropriate for "political" pardons.

However, it might make sense to establish rules that spell out, in advance, the procedures to be followed, and the relevant considerations to be weighed, when a clemency applicant argues that his sentence is unacceptably unfair or harsh. Rules have their limits here, too, as hard and fast rules dictating precisely *when* a sentence is too harsh or too unfair would be impractical to create and unwise to use. Moreover, rules that are too narrow would discourage and perhaps effectively preclude this function of the clemency power, as they may currently be doing.

A second danger of more substantive rules in this context is that a clemency decision based on one factor in one case may, because of the substantive nature of the rules, be extended by the courts to all other similarly situated applicants having the same factor in their cases. This might result in the *de facto* repeal or nullification of valid statutes or sentencing rules through a pattern of pardon and subsequent judicial extension of that pardon to others. In such a situation, the President might rather abstain from granting

clemency at all, thereby gutting this function of clemency.

Lastly, it makes eminent sense to have rules and regulations for pardons aimed at correcting factual and egregious legal mistakes because consistency and regularity are good when the goal is to correct mistakes — society wants *all* mistakes fixed when they keep an innocent man in prison, though the courts should be given the first chance to correct their mistakes through existing judicial remedies such as appeal and *habeas corpus*.

Thus, Schultz is correct in arguing that the Attorney General's rules need to be expanded to provide for clemency when an applicant can demonstrate egregious error.

Who Should Watch the Watchers?

Schultz is also correct in his view that the clemency process should not be "captured" by prosecutors, but his solution — moving the process completely outside the Justice Department — may not be necessary. Who implements and interprets the clemency rules, as Schultz notes, is nearly as (if not more) important than the rules themselves.⁹ It is indeed true that the use of the federal clemency power has waned precipitously in the past 40 years — from an average of 246 pardons and 17 commutations per year under President Harry Truman to an average of 22 pardons and 2.4 commutations per year under President Clinton.¹⁰ What is the cause? Schultz claims that it is largely the placement of the pardon-review authority within the Department of Justice, where the very prosecutors who put the clemency applicants behind bars hold the sole key to letting them out — a key, Schultz posits, they have a vested interest not to use. As Schultz would undoubtedly concede, the true cause is likely far more complex, involving shifts in societal attitudes regarding law and order and the political unpopularity of taking actions inconsistent with those attitudes. Regardless of the cause, however, the identity of the clemency power's gatekeeper surely has some effect on how that power is exercised and thus warrants a closer look.

Schultz's primary contention is that the simple placement of the clemency review decision-maker — currently, the Pardon Attorney — in the Justice Department has resulted in the improper "capture" of the process by those line prosecutors, who also call the sprawling Justice Department home. To be sure, the location of the clemency review decision-maker is one factor influencing how the power is exercised. But it is not the only factor — who staffs that decision-maker, who they report to, and who participates in the decision-making process aside from staff are equally influential factors. It is important to examine each factor in turn.

Location. Housing the clemency-review authority

in the Justice Department does not mean that the power will necessarily be “captured” by prosecutors. It is helpful to note, at the outset, that the word “capture” is slightly misleading; all it appears to mean, as Schultz uses it, is that the perspective of prosecutors, which he seems to concede is a valid one, is the dominant perspective to the near-exclusion of others. But there are several components within the Department — the Office of Legal Counsel, the Office of Policy Development, and the Office of Professional Responsibility, to name just a few — that are not dominated by the prosecutorial perspective, as it is their role to provide a different perspective to the Department’s actions. Even without this “precedent,” other factors — where in the Department the clemency-review authority is located, who staffs it, who they report to — can guard against “capture.”

But why take this risk? To begin with, there are advantages to having the power within the Justice Department. The Department is charged with executing the nation’s criminal laws, has expertise in that area, and clemency is part of the criminal justice system. On a more practical level, the Department is a well-established bureaucracy adept at following rules and regulations. Those functions of the clemency power suited to rules — error correction, rehabilitation, and to a lesser extent ensuring fairness — would be well-served if entrusted to an entity with expertise at following rules. To place review of *those* clemency applications, as Schultz suggests, with lawyers at the White House — the archetypal political location — is to open up these exercises of the power to claims of political favoritism. Of course, “political” pardons *would* be well served by direct handling by White House staff, as political considerations are paramount to those applications. On the whole, however, there are good reasons to leave initial consideration of all but the comparatively few political pardons with the Justice Department.

To the extent this risk is still deemed too great, the President might alternatively consider creating an executive pardon board outside of the Justice Department, but able to call upon its expertise. This may diminish the danger of “capture” as well as the perception of it, though, for the reasons noted above, the danger and perception can be effectively guarded against.

Staffing, Stakeholders, and Supervision.

Should the power be left within the Justice Department itself (or, to a lesser extent, with an independent board), there are ways to minimize “capture.” As noted above, the staff of the clemency decision-maker — that is, the people responsible for evaluating clemency applications — should be balanced by including persons other than prosecutors. While prosecutors clearly have an important role to play in ensuring the enforcement of the criminal laws Congress enacts and a valuable perspective to share in that regard, prosecutors should not

monopolize the staff. They should, however, be an active part of the staff. A second way to guard against “capture” is to mandate, via regulation, the participation of various stakeholders to an application — judges, victims, law enforcement officers, prosecutors, and the applicant’s family and friends — who will provide the staff with a more balanced picture of the applicant’s claims. This is particularly important to clemency applications aimed at ensuring fairness because the question “is this fair?” is a more subjective question than “is this error?” and the danger of greater subjectivity must be mitigated.

Lastly, the placement of the clemency-review authority within the Justice Department is critical. If the clemency review decision-maker has someone looking over his proverbial shoulder who favors one point of view over another, or does not take the process seriously, that may influence the recommendations of the decision-maker. Former Pardon Attorney Margaret Colgate Love has suggested that the Pardon Attorney report directly to the Attorney General — instead of the Deputy Attorney General as is currently the case or others — because the Attorney General holds a quasi-political post and is more likely to be sensitive to the broader implications of a clemency grant.¹ Thus, there may be ways to partake of the advantages of placing review of clemency applications in the Justice Department while mitigating any inherent dangers of such placement.

The Next Steps

As this very brief discussion indicates, Schultz accurately identifies three of the key issues at the forefront of the clemency reform debate — the scope of clemency, how rules affect the clemency process, and who should act as the President’s clemency advisor. While Schultz is absolutely correct that the scope of federal clemency relief needs to be broadened beyond its current reach, he may be underestimating the usefulness of rules (except as to political uses of the power) and overstating the perils of leaving the President’s clemency advisor within the Department of Justice. Schultz’s views are valuable ones, and highlight that there is still much work to be done as clemency reform takes hold: Precisely how should the rules be reformed? Where, exactly, should the clemency power be located? Who should staff it? Which stakeholders should be given a voice, and how much of a voice? These questions cannot be addressed definitively in this piece, but the emerging consensus — to which Schultz and many others subscribe — is that now is the time for a hard look at, and thoughtful reform of, the federal clemency power.

Notes

¹ Schultz’s article originally appeared on the Internet as *Pardoning Around (Outside of) the Rules*, *Legal Times* (Mar. 13, 2001). The published version in *Legal*

Times and as reprinted in slightly modified form in this Issue, is titled "Does the Fox Control Pardons in the Henhouse?" 13 FED. SENT. REP. 177 (2000–2001).

² *Herrera v. Collins*, 506 U.S. 390, 415 (1993) ("Executive clemency has provided the 'fail safe' in our criminal justice system").

³ See ALEXANDER HAMILTON, *THE FEDERALIST*, No. 74.

⁴ See 28 C.F.R. §§ 1.1–1.11 (2000); reprinted in the Appendix.

⁵ 28 C.F.R. § 1.2 (1998); reprinted in the Appendix.

⁶ Although the Pardon Clause only mentions "Reprieves and Pardons," see U.S. CONST. art. II, § 2, the Supreme Court has held that the power also encompasses commutations of sentence, see *Schick v. Reed*, 491 U.S. 256, 264 (1974); remissions of fines and penalties, see *Osborn v. United States*, 91 U.S.

474, 478 (1875); and amnesty, see *Knote v. United States*, 95 U.S. 149, 153 (1877).

⁷ U.S. Attorneys' Manual, § 1–2.113; reprinted in the Appendix.

⁸ For a fuller discussion of the advantages and disadvantages of rules, see Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 596–608 (2001).

⁹ This is especially true since the people who administer the rules usually have a hand in drafting them.

¹⁰ Office of the Pardon Att'y, U.S. Dep't of Justice, *Presidential Clemency Actions by Administration: 1945 to Present* (Nov. 2000).

¹¹ See Testimony of Margaret Colgate Love, Subcomm. on the Constitution, Comm. on the Judiciary, U.S. House of Representatives (Feb. 28, 2001).

The Georgia Immigration Pardons: A Case Study in Mass Clemency



ELIZABETH RAPAPORT

Professor of Law,
University of New Mexico. I would like to express my gratitude to Gabriel J. Chin, Cary Copeland, and Barbara Schwartz for generously sharing their knowledge of immigration law, and to Margaret Love for her deft editing. I am also grateful to the University of Iowa College of Law, and especially to Eric G. Andersen, for their hospitality to me, a teacher-visitor in the summer of 2001, during which this article was written. I would also like to thank Michelle Hurley for research assistance in the preparation of this article. Credit for any errors or infelicities is my own.

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) enlarged the class of aliens subject to mandatory deportation as “aggravated felons” under the Immigration and Nationality Act.¹ Included in IIRAIRA’s expansive definition of an “aggravated felony” are misdemeanor thefts and assaults, when they result in a 12 month sentence, served or suspended.² Both the Clinton and Bush administrations pushed the position that persons convicted before the law’s enactment are subject to its penalties because its effect is retroactive.³ Before IIRAIRA took effect, alien misdemeanants could seek waiver of deportation from immigration judges, appeal adverse decisions to the Board of Immigration Appeals, petition for review to the Attorney General, and ultimately challenge their deportation in federal district court.⁴ But under IIRAIRA as administered by the Clinton and Bush Justice Departments, there is no provision for making exceptions, and no right to review in any forum. There is only one way of avoiding deportation where a non-citizen has at any time in the past been convicted of an offense triggering removal, and that is to obtain a pardon.⁵

Over the 15-month period ending in June of 2001, the Georgia Board of Pardons and Parole granted 138 pardons to permanent resident aliens who had suddenly found themselves subject to deportation under IIRAIRA.⁶ Recipients of these pardons included people who had lived in the United States for many years, were married to U.S. citizens, and who had U.S. citizen children. Some of them had been convicted of very minor offenses years before IIRAIRA’s enactment.

The 5-member Georgia Board that stepped in to prevent IIRAIRA from wreaking havoc in the lives of alien misdemeanants has exclusive clemency authority in Georgia.⁷ It has been unanimous in support of its decision to extend relief on a class-wide basis. Thus far it appears that no other state clemency authority has responded to IIRAIRA deportations with systematic relief similar to that provided by the doughty Georgia Board. Yet the Georgia experience provides some interesting insights into the function of pardon in a contemporary setting that may have more general application.

Genesis and Scope of the Georgia Immigration Pardons

The education of the citizenry of Georgia to the dire immigration consequences of a misdemeanor conviction under IIRAIRA began in January 2000 when the Atlanta Journal and Constitution published a story about the threatened deportation of a lawful permanent resident alien named Mary Anne Gehris.⁸ Gehris was a

German-born 34-year-old married mother of two U.S. citizen children. She originally came to the United States with her adoptive parents before her second birthday. It was Gehris’s application for U.S. citizenship in 1999 that precipitated the threat of deportation based on a 12-year-old misdemeanor conviction for pulling another woman’s hair in a fight over a man. In her early twenties at the time of conviction for simple battery, Mary Anne Gehris had been sentenced to a suspended 12-month sentence and placed on probation.⁹

The Atlanta newspaper followed its report on the Gehris case with extensive coverage of the plight of other comparatively innocuous alien misdemeanants caught up in the inexorable machinery of IIRAIRA.¹⁰ Georgians learned that hundreds of people from across the nation had been deported for minor crimes as a result of IIRAIRA.¹¹ They learned that fellow Georgians facing deportation included an Ethiopian who had stolen a chicken sandwich, a Nigerian who had stolen two boxes of donuts, and a second Nigerian convicted of stealing a \$15 baby outfit. These stories were retold in the newspaper along with those of an English teenager threatened with deportation for underage drinking and a Laotian man who was convicted of shoplifting a pair of blue jeans when he was a teenager.¹² Some of these cases involved people who, like Mary Anne Gehris, had been brought to this country as young children, could not speak the language of their native countries, and had no relatives or friends to whom to return. Some faced very difficult choices about the futures of their own citizen children.

In response to this publicity, the Board took the initiative to inform the immigrant community that it would entertain pardon applications from aliens who would otherwise be deported because of their misdemeanor convictions. Within hours of reading a newspaper account of Gehris’s unhappy attempt to become a US citizen, the Assistant Director of the Board’s Clemency Division telephoned Gehris’s attorney to convey this news.¹³ The message to Gehris — and by extension to the entire Georgia immigrant community — was that a misdemeanant with an otherwise clean record was eligible for a pardon to avert deportation.

In the months that followed, the Board deployed its discretionary authority decisively and creatively to provide systematic relief to lawful resident aliens who had been convicted of minor offenses but were otherwise productive and law-abiding members of the community.¹⁴ The Board’s major procedural innovations were to open its pardon process to misdemeanants, and

to waive the otherwise applicable eligibility waiting period.¹⁵ Its actions proved popular with the media and public.¹⁶ Cases like that of Mary Anne Gehris were portrayed as visiting absurd and frightening consequences on law-abiding residents and their families.

Of 139 immigration pardons granted by the Georgia Board during the 15 month period between March 2000 and June 2001, 138 went to misdemeanants.¹⁷ The story of the single felon to be pardoned is also instructive. Dong Jin Park was a respected Korean businessman in his mid-40s, a deacon in his church, and a twenty-year resident of Georgia.¹⁸ His three teenage daughters had been born in the United States. In 1996 Park had been convicted of aggravated assault upon an employee, perpetrated during a brawl after a night of heavy drinking. He had been sentenced to three years in prison and served his time. The Korean community in Georgia, approximately 50,000 persons strong, engaged in unprecedented political activism in its eventually successful drive to see Park pardoned.¹⁹

At the same time, other Board policies affecting aliens remained unchanged, and it continued to cooperate fully with the Immigration and Naturalization Service (INS) to accomplish the deportation of alien offenders. Nor was the Board willing, with the exception of the Dong Jin Park case, to waive its otherwise applicable procedural rules by which felons seeking a pardon must have completed their sentences and lived crime-free for five years thereafter.²⁰ As a result, only one or two alien felony offenders have been able to avoid deportation through the routine operation of Georgia's clemency procedures.²¹

Related Responses to IIRAIRA

While the Georgia Board was adapting its pardon procedures to accommodate alien misdemeanants, efforts were underway in the legislative and judicial branches of the state to alleviate the impact of IIRAIRA's mandatory deportation provisions on immigrant communities. The Georgia legislature enacted a statute requiring a judge to warn alien offenders who are considering a guilty plea that one consequence of conviction may be deportation.²² Not long thereafter, the Georgia Supreme Court upheld a superior court judge's grant of habeas relief to a Romanian shoplifter who had not been so warned.²³ Some Atlanta judges began to sentence permanent resident aliens to 11 months and 29 days, rather than impose a 12-month sentence that would trigger deportation.²⁴ The Georgia delegation to Congress was also active in efforts to moderate IIRAIRA.²⁵

While its pardons provided the most immediate form of relief for individuals threatened with deportation, the Georgia Board also played an active role in the law reform effort. In March of 2000, in a letter signed by all five of its members, the Georgia Board took the unusual step of writing to Senator Max Cleland, urging

him to work to bring just standards and procedures into immigration law.²⁶ The Board's support for reform of IIRAIRA was evidently motivated not simply by humanitarian considerations, but also by a desire to ease the administrative burden of its unsought role as the routine arbiter of the fate of non-citizen misdemeanants.²⁷

Meanwhile, the Bush Justice Department, like its Clinton predecessor, committed to a policy of prompt and certain deportation of criminal aliens, continued to press interpretations of IIRAIRA that close off any avenue of administrative or judicial relief.²⁸ The government has remained steadfast in this policy commitment despite public antagonism to IIRAIRA deportation policies in Georgia and elsewhere.²⁹

Lessons of the Georgia Immigration Pardons

The Georgia Board enters a small company of executive clemency authorities who have granted "mass clemency" in response to laws regarded as overly harsh or otherwise unjust.³⁰ Early in the twentieth century, Governor Donaghey of Arkansas pardoned hundreds of convicts because he opposed the convict labor system.³¹ In the early 1960s, President John Kennedy pardoned more than one hundred drug offenders serving mandatory minimum sentences.³² More recently, Governor Toney Anaya commuted the sentences of all five persons on death row in New Mexico before leaving office in 1986.³³ Governor Richard Celeste of Ohio commuted the sentences of eight death row inmates at the end of his term.³⁴ Several states, including Ohio and Florida, instituted comprehensive clemency reviews and releases for women prisoners who killed their batterers, but were legally barred from mounting battered woman defenses at the time of trial.³⁵

For those who believe that the traditional discretionary clemency has outlived its usefulness, the Georgia immigration pardons should occasion further reflection. Discretionary authority allowed the Board to correct manifest injustice not otherwise subject to redress. To avoid the indiscriminate and relentless operation of a draconian law, the Board suspended its ordinary rules of practice. It used its discretionary pardon power in an expansive and creative way to avert a severe legal penalty, and not simply to restore individual reputation and civil rights as had been its normal past practice.³⁶

The Georgia immigration pardons probably represent something close to the outer limits of the capacity of clemency to rectify the effects of an unjust law. Clemency cannot substitute for genuine law reform, and can at best perform a holding action until comprehensive and permanent relief is forthcoming from the legislature. The relief offered convicted misdemeanants by the Georgia Board has — with one exception — not been extended to perhaps equally deserving felons, who must satisfy the ordinary criteria for eligibility regardless of the nature of their crimes, subsequent rehabilita-

tion, length of residency in the United States, or impact on family and dependents.

One could speculate about whether lodging the clemency authority in an elected official or in an appointed board relatively insulated from electoral politics would be more likely to produce an authority willing to use its power liberally in response to circumstances like the IIRAIRA deportations. Would a governor be more able to expand a program like the Board's to include deserving felons? He or she would be better positioned than a board to educate public opinion. Or would a governor be less likely to offer the mass relief the Board has granted to misdemeanants? He or she would be less insulated from possible adverse political consequences of such action. In any event, in no other state has the clemency authority asserted its power to spare immigrants as has the Georgia Board, regardless of constitutional variations in the allocation of clemency authority.

Conclusion

The number of mass clemencies in this country is not large, and the history of such executive actions has yet to be written. Mass clemencies, like all uses of the clemency power, have the potential to serve the exemplary function of focusing the attention of the public and legislators on the case for law reform. The most enduring effects of the Georgia immigration pardons, beyond their immediate effects on those whose deportations have been averted, may be made known through the actions of the Georgia congressional delegation and other agents of immigration law reform. Another possible result of great significance would be realized if other state clemency authorities were to join the Georgia Board of Pardons and Parole in systematically pardoning immigrants whose deportation would work grave injustice.

Notes

¹ The IIRAIRA provides for the "removal" of aliens convicted of certain offenses, in an Orwellian avoidance of the more familiar term that might otherwise evoke sympathy in a nation populated by waves of immigrants. I will use the term "deportation" as well as the neologism "removal," out of respect for American language and traditions. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. no. 104-208, Div. C, 110 Stat. 3009-546.

² See 8 U.S.C. § 1101(a) 43 (2001).

³ Div. C. of the Illegal Immigration Reform and Immigrant Responsibility Act. After this article was submitted, the Supreme Court rejected the stance of the Bush and Clinton administrations that IIRAIRA imposed automatic and retrospective deportation on such immigrants in *INS v. St. Cyr*, No. 00-767, 2001 WL 703922 (U.S. June 25, 2001, and *Colcano-Martinez v. INS*, No. 00-1011, 2001 WL 703993 (U.S. June 25, 2001).

⁴ See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 Harv. L. Rev. 1936 (2000) for a detailed comparison of IIRAIRA and the regime it

superseded.

⁵ See *supra* note 3 *infra* note 28. Div. C. of the Illegal Immigration Reform and Immigrant Responsibility Act.

⁶ Office of Public Information, Georgia Board of Pardons and Parole, May 31, 2001, facsimile communication to the author. During all of 1999, the Georgia Board granted only one pardon to a permanent resident alien.

⁷ Georgia's clemency authority is lodged exclusively in a five member Board appointed by the governor to serve seven-year terms subject to confirmation by the state senate. See Ga. Const. art. IV, § 2. The transfer of clemency power from the governor to the Board was accomplished in 1943 by a constitutional referendum. See State of Georgia Board of Pardons, *History* (June 1, 2001), available at www.pap.state.ga.us/history.html. This institutional reform was a response to questionable pardon practices in some past gubernatorial administrations. Governor Ellis Arnall was the chief architect of the reform, aimed at insulating clemency decisions from political pressures. Telephone Interview with Walt Davis, Assistant Director, Clemency Division of the Georgia Board of Pardons and Parole (June 11, 2001).

⁸ Mark Bixler, ATLANTA JOURNAL AND CONSTITUTION, *Past's Pull: Old Incident Threatens Deportation*, Jan. 10, 2000, at 1B. The Gehris story had been the subject of a column by Anthony Lewis in the New York Times the previous day. See *'This has Got Me in Some Kind of a Whirlwind,'* NEW YORK TIMES, Jan. 8, 2000, at A13.

⁹ Mark Bixler, *'I pledge allegiance...; She Goes From Deportation List to Citizenship'*, ATLANTA JOURNAL AND CONSTITUTION, February 10, 2001, at 1A.

¹⁰ Between January 10, 2000, the date on which the Atlanta Journal and Constitution carried its first story about Mary Anne Gehris, and February 10, 2001, the date on which it announced she had become a citizen, the newspaper carried at least 14 stories or opinion pieces detailing and deploring the impact of IIRAIRA on immigrants convicted of minor crimes and on rehabilitated felons.

¹¹ The INS estimated that, "the number of people deported nationally for petty crimes such as shoplifting is 'in the hundreds.'" Mark Bixler, *Deportation Threat May Be Near End*, ATLANTA JOURNAL AND CONSTITUTION, Jan. 11, 2001, at 1B.

¹² Mark Bixler, *Global Atlanta: Easing up on Deportation: Every Monday, a Look at Our Changing Communities*, ATLANTA JOURNAL AND CONSTITUTION, Aug. 28, 2000, at 1B, and Milo Ippolito, *State High Court's Ruling May Aid Immigrants; Judges Have Leeway to Avert Deportation*, ATLANTA JOURNAL AND CONSTITUTION, Jan. 23, 2001, at 1JJ.

¹³ Mark Bixler, *Covington Hair Tugger Pardoned*, ATLANTA JOURNAL AND CONSTITUTION, Mar. 3, 2000, at 1A; Telephone Interview with Walt Davis, Assistant Director, Clemency Division of the Georgia Board of Pardons and Parole (June 1, 2001).

¹⁴ From January 1, 2000 to June 1, 2001, the Board received 257 applications for pardons to avert deportation. There were 139 grants and 98 denials. Additionally, 16 applicants are pending and 4 are being held until necessary documentation is received. Of the 98 applicants denied relief, the number who were felons rather than misdemeanants is uncertain. Office of Public Information, Georgia Board of Pardons and Parole, June 4, 2001, facsimile communication to the

author. Other than explaining its policy of granting pardons to misdemeanor immigrants with otherwise clean records, the Board has not made public its reasons for grants and denials. Interview with Walt Davis, *supra* note 13.

¹⁵ The Board does not ordinarily consider granting pardons to misdemeanants because a misdemeanor conviction does not deprive a person of any civil rights. Interview with Walt Davis, *supra* note 13. The purpose of the eligibility waiting period is to give a pardon applicant time to show that he can remain law-abiding, and to demonstrate his rehabilitation and good character.

¹⁶ See *supra* note 10.

¹⁷ Office of Public Information, Board, facsimile communication to author, May 31, 2001.

¹⁸ Mark Bixler, *Unified Front; City's Korean Residents Rally to Fight Man's Deportation*, ATLANTA JOURNAL AND CONSTITUTION, Feb. 17, 2000, at 14A ("United Front"); Mark Bixler, *Forgiven Felon is Now Free to Stay*, ATLANTA JOURNAL AND CONSTITUTION, April 25, 2000 at 1A.

¹⁹ Park was technically ineligible to apply for a pardon in the ordinary course because he had not satisfied the Board's 5-year waiting period. But the Korean churches and business community circulated petitions calling upon the Board to pardon Park. His victim, although he had been deprived of partial sight in one eye as a result of being kicked by Park, forgave Park and wrote to the Board asking that Park be pardoned. See Bixler, "United Front," *supra* note 18.

²⁰ State of Georgia Board of Pardons, *Other Forms of Executive Clemency* (June 1, 2001), available at <http://www.pap.state.ga.us/history.html>.

²¹ See Interview with Walt Davis, *supra* note 7.

²² Mark Bixler, *Law Tells Immigrants Guilty Plea Can Mean Deportation*, ATLANTA JOURNAL AND CONSTITUTION, May 9, 2000, at 5B. The law became effective on June 1, 2000. Fourteen other states and the District of Columbia have enacted similar laws.

²³ State v. Colack, 273 Ga. 361, 541 S.E. 2d 374, (2001). The Gwinnett County judge ruled that Calvin James Colack's guilty plea was not entered voluntarily because he was not advised of the collateral consequence of deportation. Colack's sentence was reduced to avoid deportation.

²⁴ See Bixler, *supra* note 22.

²⁵ Interview with Walt Davis, *supra* note 7.

²⁶ Letter From Walter S. Ray, Bobby K. Whitworth, Garfield Hammonds Jr., Dr. Betty Ann Cook, & Dr. Eugene P. Walker, State Board of Pardons and Paroles, to Senator Max Cleland (March 4, 2000).

²⁷ Interview with Walt Davis, *supra* note 7.

²⁸ In April 2001, the government argued before the Supreme Court in two cases originating in the Second Circuit that an alien subject to removal had no right to review in any forum. While the Attorney General retains the discretion under IIRAIRA to waive deportation, he need not consider such appeals. The government argued that the power of the Attorney General to relieve an alien of the consequences of an order of deportation was akin to the President's pardon power, an act of grace. Transcript of Oral Argument before the Supreme Court, *Calcano-Martinez v. Immigration and Naturalization Service*, 2001 WL 469078. Transcript of Oral Argument before the Supreme Court, *Immigration and Naturalization Service v. St. Cyr*, 2001 WL 469077. See also Brief for the Petitioner,

Immigration and Naturalization Service v. St. Cyr, 121 S.Ct. 848 (mem) (229 F. 3d 406) (No. 00-767) and Brief for the Respondent, *Calcano-Martinez v. Immigration and Naturalization Service*, 121 S. Ct. 849 (232 F. 3d 328) (No. 00-1011).

On June 25, 2001, the Supreme Court handed down *INS v. St. Cyr*, No 00-767, 2001 WL 703922 (June 25, 2001), and *Calcano-Martinez v. INS*, No. 7039433 (June 25, 2001). The Court affirmed the Second Circuit's judgment in both cases that district courts may hear habeas petitions from aliens seeking relief from final orders of removal. *INS v. St. Cyr* also affirmed that aliens who pled guilty before the 1996 amendments took effect remain eligible for discretionary relief from an order of deportation available at the time of the plea.

²⁹ The INS has affirmed that its officials have prosecutorial discretion not to initiate removal proceedings in cases involving minor crimes and/or substantial hardships. Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, U.S. Department of Justice, to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel (Nov. 17, 2000) (on file with the author). Although the INS confirmed that its estimate of the number of permanent resident misdemeanants deported in FY 2000 was on the order of several hundred, the Office of Public Affairs had no information about the impact of Commissioner's Nov. 17, 2000, Memorandum on the number of deportations of misdemeanants. Telephone interview with Bill Strassberger, INS Office of Public Affairs (June 12, 2001).

³⁰ There are of course instances of federal mass pardons and amnesties of the "political" variety, granted to heal social divisions and conflicts, such as President Carter's amnesty of Vietnam War draft evaders. These avowedly "political" uses of the clemency power are distinct from the kind of mass clemencies discussed in this article, although surely the distinction between political and nonpolitical uses of the clemency power can be overdrawn and even illusory.

³¹ James D. Barnett, *The Grounds of Pardon*, 17 J. CRIM. L. & CRIMINOLOGY 490, 514 (1927). Donaghey was governor of Arkansas from 1909-13.

³² Stuart Taylor, *All the President's Pardons: The Real Scandal*, NAT'L J., Oct. 30, 1999, at 316.

³³ Toney Anaya, *Statement of Toney Anaya on Capital Punishment*, 27 U. RICH. L. REV. 177 (1993).

³⁴ See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569,629 (1991).

³⁵ Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 3-4 (1994).

³⁶ Technically removal proceedings are not criminal; removal is a civil correction of an ongoing violation of immigration law. Yet these deportation pardons function like commutations of sentence because they relieve the grantees of a severe collateral consequence, penal in all but name, and evocative of the ancient punishment of banishment. See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. (forthcoming 2002) (criticizing current legal doctrine regarding the distinction between direct and collateral consequences of a guilty plea).

The Other Safety Valve:

Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)



MARY PRICE

General Counsel,
Families Against
Mandatory Minimums
Foundation (FAMM).

While many people are familiar with the Guidelines safety valve, a lesser-known provision tucked away in the federal criminal code has the potential to be an even more powerful way to relieve the incarceration pressure. Title 18, Section 3582(c)(1)(A) allows a court, upon the motion of the Director of the Bureau of Prisons, to reduce a sentence for “extraordinary and compelling” reasons. The Sentencing Commission has an important, but unfilled, role to play in this process. If it follows Congress’s intent, the Commission can breathe life into § 3582(c)(1)(A) and make it a meaningful safety valve in a wide range of cases.

On June 25, 2001, Families Against Mandatory Minimums (FAMM), urged the Sentencing Commission to promulgate a policy statement, pursuant to 28 U.S.C. § 994(t), to guide judges considering sentence reduction motions based on “extraordinary and compelling reasons” under 18 U.S.C. § 3582(c)(1)(A). FAMM took this action after learning that such sentence reduction are quite rare, and are generally made only when the prisoner is close to death.

Today, the absence of a guided post-sentencing safety valve means that many cases presenting compelling reasons for sentence reduction are not brought to the courts, but funneled, if pursued at all, through the executive clemency process. Reliance on the President’s commutation power to handle such cases is no longer necessary since Congress established in § 3582(c)(1)(A) a method by which the Bureau of Prisons and the courts can address them. That section authorizes courts, with guidance from the Commission, to grant relief in appropriate cases. FAMM’s proposal that the Commission provide such guidance is appended to this article.

A. Authority for Post-Conviction Sentence

Modification under the SRA

The Sentencing Reform Act (SRA) and the guideline sentencing system it established are premised upon the view that judicial sentencing discretion should be structured and not eliminated. Congress was not seeking to establish a mechanical system devoid of human judgment, but a system in which the exercise of discretion was guided and controlled. While one of Congress’s goals was to ensure the finality of sentences, Congress also recognized that sometimes other considerations are important enough to warrant changing a sentence that has otherwise become final.

The SRA provides several ways of modifying an otherwise final sentence. It amended Rule 35 of the Federal

Rules of Criminal Procedure to authorize the court, upon motion of the government, to reduce a sentence to reflect substantial assistance to the government rendered by a defendant after imposition of sentence. It also provides two methods for modifying an otherwise final sentence requiring some action by the Commission. One, set forth in § 3582(c)(2), authorizes the court to reduce a sentence where the Sentencing Commission has reduced the guideline range applicable to the defendant. The motion for reduction of sentence may be made either by the defendant or by the Director of the Bureau of Prisons (BOP), and any reduction must be “consistent with applicable policy statements issued by the Sentencing Commission.” The Commission is independently required to issue such guidance by 28 U.S.C. § 994(u), and it has complied with that mandate by promulgating and from time to time amending § 1B1.10.¹

The second method for modifying an otherwise final sentence that involves the Commission is set forth in § 3582(c)(1)(A). That provision authorizes the court, upon motion of the Director of the Bureau of Prisons, to reduce a sentence if the court finds that “extraordinary and compelling reasons warrant such a reduction.”² As under its companion provision (c)(2) discussed above, the court must find that the reduction is consistent with “applicable policy statements issued by the Sentencing Commission.” The Commission is similarly directed to issue such guidance by 28 U.S.C. § 994(t). To date, the Commission has not done so.

B. Criteria for Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)

Although 18 U.S.C. § 3582(c)(1)(A) speaks of “extraordinary and compelling reasons,” in practice the Director of the Bureau of Prisons has moved for a reduction only on behalf of terminally ill prisoners, or, in recent years, on behalf of some whose “disease resulted in markedly diminished public safety risk and quality of life.”³ We believe that Congress intended a broader application than that. The plain language of 28 U.S.C. § 994(t) and the legislative history of 18 U.S.C. § 3582(c)(1)(A) evidence a congressional intent that the statutory term “extraordinary and compelling” should embrace a variety of circumstances arising after a sentence becomes final, including not simply changes in an inmate’s circumstances but also changes in the law.

The congressional mandate in 28 U.S.C. § 994(t) calls for a policy statement that must contain “the criteria to be applied and a list of specific examples.” The

only limitation placed upon the Commission by this section is that “rehabilitation alone shall not be considered an extraordinary and compelling reason.” Clearly Congress intended that rehabilitation was a legitimate consideration to be taken into account in deciding whether a case presented extraordinary and compelling reasons, even if it had to be combined with some other factor or characteristic. There is nothing to suggest that the other factor had to be a terminal illness, or indeed illness of any sort.

The Senate Judiciary Committee’s Report on the SRA — the authoritative source of legislative history for the SRA — states:⁴

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.... The bill ... provides ... for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.

The distinction in the Senate Report between “severe illness” and “other extraordinary and compelling reasons” demonstrates that non-medical considerations may constitute appropriate grounds for release, consistent with the overall congressional goal that these provisions act as a safety net held by the court.

The value of the forms of “safety valves” contained in this section lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for “extraordinary and compelling reasons” and to respond to changes in the guidelines. The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.⁵

C. Bureau of Prisons Policy and Practice under 3582(c)(1)(A)

Despite the broad authority contemplated by Congress, in the absence of guidance from the Commission, the Bureau of Prisons, as noted above, has generally limited motions under § 3582(c)(1)(A) to cases where the death of the prisoner is imminent.⁶ There is no requirement, however, in the BOP’s own policies and regulations that such motions be so limited.

In 1994 the BOP revised its internal guidance to

executive staff, expanding the classes of cases eligible for early release consideration.⁷ The Bureau had previously confined its motions to those on behalf of terminally ill inmates within six months of death. In the memorandum, Director Hawk advised the staff that the BOP had extended the outer limit of life expectancy to twelve months. Of greater significance, she noted that estimated life expectancy was “a general guideline, not a requirement.”

As we have further reviewed this issue, it has come to our attention that there may be other cases that merit consideration for release. These cases still fall within the medical arena, but may not be terminal or lend themselves to a precise prediction of life expectancy.

The BOP Memorandum sets forth factors to consider when evaluating which cases to present to the court (*i.e.*, nature and circumstance of the crime, inmate characteristics and propensity to reoffend, the inmate’s age, risk to the public, etc.). It also presents some guidance based on the nature and severity of the prisoner’s illness and sets out three, presumably non-exhaustive examples. They include prisoners with debilitating diseases that clearly limit daily activity and for which conventional treatment is insufficient, those whose condition is terminal but not calculably so, and those who require organ transplantation. This more expansive reading of the power, while still narrower than Congress intended, is consistent with congressional intent as revealed in the legislative history of § 3582(c)(1).

Bureau of Prisons published regulations contemplate that sentence reduction motions may be brought in cases not involving medical considerations. The Bureau of Prisons regulation setting out the procedures for seeking and submitting requests under § 3582 and its “old law” predecessor, 18 U.S.C. § 4205(g), discusses grounds other than the prisoner’s health for seeking a BOP motion to reduce sentence for extraordinary and compelling reasons. For example, under 28 C.F.R. § 571.61, entitled “Initiation of request — extraordinary and compelling circumstances,” the Bureau directs that the prisoner’s request include, *inter alia*, proposed plans upon release, including the proposed residence, how the prisoner will support him or herself, and “if the basis for the request involves the inmate’s health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.” The regulation thus assumes that some extraordinary and compelling circumstances warranting a motion need not be based on the prisoner’s health. The BOP process for handling such motions seems to confirm that sentence reduction motions under § 3582(c)(1)(A) may be made on non-medical grounds. The applicable regulations provide for the review of

such motions by the Warden, the Regional Director, the General Counsel, “and either the Medical Director for medical referrals or the Assistant Director, Correctional Programs Division for non-medical referrals”⁸ Clearly, if medical and terminal considerations were the only permissible bases for sentence reductions, the specific provision for alternative routing of “non-medical referrals” would be superfluous.

D. Conclusion

The legislative history and the plain language of the SRA amply demonstrate that Congress intended the courts to entertain motions under 18 U.S.C. § 3582 (c)(1)(A) for a variety of circumstances considered so extraordinary and compelling that they warrant a reduction of sentence. The BOP regulations recognize that, despite current practice, such extraordinary and compelling reasons are not limited to medical concerns. But a policy statement from the Commission is needed to provide courts considering motions for sentence reduction with the guidance that Congress directed. That policy statement should embrace a definition of “extraordinary and compelling” flexible enough to account for a variety of post-sentence developments that merit relief. That is what Congress intended.

Notes

¹ § 1B1.10, p.s. authorizes a reduction in the term of imprisonment when the Commission has determined that a particular amendment to the Sentencing Guidelines is retroactively applicable. Such retroactive amendments are listed in subsection (c), and only those listed amendments can be the basis for a motion seeking a reduction in sentence under 18 U.S.C. § 3582 (c)(2).

² 18 U.S.C. § 3582 (c)(1)(A) also authorizes a sentence reduction motion for a prisoner who is at least 70 years old, has served at least 30 years on a sentence imposed under 18 U.S.C. § 3559(c), and the Director of the Bureau of Prisons has determined that the prisoner is no longer a danger to the safety of any other person or the community. This provision, specifically applicable only to “three strikes” offenders, was added to § 3582(c)(1)(A) in 1994 by Pub. L. 103–322.

³ See Chart: Bureau of Prisons Compassionate Releases, 1990–2000 (attached as Exhibit II), prepared by the Bureau of Prisons Office of Congressional Affairs (on file with the author.)

⁴ “The most important legislative history for the Act [SRA] is found in the report of the Senate Judiciary Committee on the Comprehensive Crime Control Act of 1983 [S.Rep. No.225, 98th Cong., 1st Sess. 37–150, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220–3373].” Criminal Div., U.S. Dep’t of Justice, Prosecutors Handbook on Sentencing Guidelines and Other Provisions of the Sentencing reform Act of 1984, at 83 (Nov. 1, 1987), reprinted in THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE SUPPLEMENTAL Appendix 11 (1989). The quote in the text appears at page 55 of the Senate Report.

⁵ *Id.* at 121.

⁶ As John Steer & Paula Biderman point out in their article: “[w]ithout the benefit of any codified standards, the Bureau [of Prisons], as turnkey, has understandably chosen to file very few motions under this section.” John Steer and Paula Biderman, *Impact of the Federal Guidelines on the Presidential Power to Commute Sentences*, 13 FED. SENT. REP. 155 (2001).

⁷ Memorandum from Kathleen M. Hawk, Director, Federal Bureau of Prisons (July 22, 1994) (BOP Memorandum) (on file with author).

⁸ 28 C.F.R. § 571.62 (a) (emphasis supplied). See also 28 C.F.R. § 571.62 (a)(3) (directing that the General Counsel “solicit the opinion of either the Medical Director or the Assistant Director . . . depending on the nature of the basis of the request”) and 28 C.F.R. § 571.62 (c) (stating that “[i]n the event the basis of the request is the medical condition of the inmate, staff shall expedite the request at all levels.”)

Exhibit I

FAMM Proposal for Policy Guidance under 18 U.S.C. § 3582 (c)(1)(A)

§ 1B1.13

Reduction in Term of Imprisonment as a Result of Motion by Director of the Bureau of Prisons (Policy Statement)

- a Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if the court determines that —
 - (1) either —
 - (A) an extraordinary and compelling reason warrants the reduction; or
 - (B) the defendant (i) is at least 70 years old, (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(e) for the offense or offenses for which the defendant is imprisoned, and (iii) the Director of the Bureau of Prisons has determined, after considering the factors set forth in 18 U.S.C. § 3142(g), that the defendant is not a danger to the safety of any other person or to the community; and
 - (2) such reduction is consistent with this policy statement and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).
- b An “extraordinary and compelling reason” is a reason that involves a situation or condition that —
 - (1) was unknown to the court at the time of sentencing;
 - (2) was known to or anticipated by the court at the time of sentencing but that has changed significantly since the time of sentencing; or
 - (3) the court was prohibited from taking into account at the time of sentencing but would no

longer be prohibited because of changes in applicable law.

An “extraordinary and compelling reason” may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.

Commentary

APPLICATION NOTE:

The term “extraordinary and compelling reason” includes, for example, that —

- (A) the defendant is suffering from a terminal illness that significantly reduces the defendant’s life expectancy;
- (B) the defendant’s ability to function within the environment of a correctional facility is significantly diminished because of a permanent physical or mental condition for which conventional treatment promises no significant improvement;
- (C) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;
- (D) the defendant has provided significant assistance to the government to a degree and under circumstances that was not or could not have been taken into account at the time of sentencing or in a post-sentencing proceeding;
- (E) the defendant would have received a significantly lower sentence had there been in effect a change in applicable law that has not been made retroactive;
- (F) the defendant received a significantly higher sentence than other similarly situated codefendants because of factors beyond the control of the sentencing court;
- (G) the death or incapacitation of family members capable of caring for the defendant’s minor children, or other similarly compelling family circumstance, occurred.

Rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason.

Background: Under 18 U.S.C. § 3582(c)(1)(A), the court, upon motion of the Director of the Bureau of Prisons, can reduce the term of imprisonment if the court determines that (1) the reduction is warranted by extraordinary and compelling reasons or (2) the defendant is at least 70 years old and has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(c) for the offense for which the defendant is imprisoned and the Director of the Bureau of Prisons has determined that the defendant is not a danger to the safety of another person or the community. The Commission is directed by 28 U.S.C. § 994(t) to “describe what should be con-

sidered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A), including the criteria to be applied and a list of specific examples.” This policy statement implements 28 U.S.C. § 994(t).

Exhibit II

Bureau of Prisons Compassionate Releases 1990–2000

Year	Number	Summary of Releases of Releases Granted
1990	11	Inmates with life expectancy less than twelve months
1991	10	Inmates with life expectancy less than twelve months
1992	16	Inmates with life expectancy less than twelve months
1993	28	Inmates with life expectancy less than twelve months
1994	23	Inmates with life expectancy less than twelve months
1995	22	Inmates with life expectancy less than twelve months
1996	23	Inmates with life expectancy less than twelve months
1997	13	Inmates with life expectancy less than twelve months
1998	22	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. Significant Mental Impairment secondary to attempted suicide)
1999	27	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. advanced cirrhosis of the liver, total care stroke patient)
2000	31	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. Alzheimer’s Disease, Significant Mental Impairment)

APPENDIX: TABLE OF CONTENTS

A. Rules of the Pardon Process

<i>Justice Department Clemency Regulations</i>	193
<i>Guidance for United States Attorneys in Clemency Matters</i>	195

B. Historical Snapshots of the Process

<i>Alexander Hamilton, The Federalist, No. 74 (1788)</i>	198
<i>The Attorney General's Survey of Release Procedures (1939)</i>	199
<i>Annual Reports of the Pardon Attorney (1960, 1963–65)</i>	205
<i>President Gerald Ford's Pardon of Richard Nixon (1974)</i>	207
<i>President George Bush's Pardon of the Iran-Contra Defendants (1992)</i>	209

C. Effect of a Pardon

<i>Effect of a Pardon on Authority to Deport, Firearms Disability, and Remission of Restitution (1995)</i>	211
<i>Memorandum from Walter Dellinger, Asst. Attorney General, Office of Legal Counsel</i>	
<i>Effect of a Pardon on Bar Discipline (1997)</i>	
<i>In re Elliot Abrams, 689 A.2d 6 (D.C. Court of Appeals, en banc)</i>	217
<i>Without Pardon: Collateral Consequences of a Felony Conviction</i>	
<i>Webb Hubbell, The Mark of Cain, San Francisco Chronicle, June 10, 2001</i>	223

D. Clinton Era Cases and Comments

<i>President Clinton's Executive Clemency Policy (1996)</i>	
<i>Jack Quinn, Counsel to the President, to Jamie Gorelick, Deputy Attorney General</i>	225
<i>President Clinton's Explanation of the FALN Clemency Grants (1999)</i>	
<i>Letter to Congressman Henry Waxman, House Committee on Government Reform</i>	226
<i>President Clinton's Statement of his Pardoning Philosophy (2000)</i>	
<i>Remarks at ceremony appointing Roger Gregory to interim seat on the Fourth Circuit</i>	228
<i>Sentencing Judge's Recommendation in Support of Commutation</i>	
<i>Letter from Judge Doty to President Clinton about Kim Allen Willis</i>	229
<i>Rising Numbers Sought Pardons in Last 2 Years</i>	
<i>Kurt Eichenwald & Michael Moss, The New York Times, January 29, 2001</i>	233
<i>Access Proved Vital in Last-Minute Race for Clinton Pardons</i>	
<i>Don Van Natta, Jr. & Marc Lacey, The New York Times, February 25, 2001</i>	236
<i>Rush of Pardons Unusual in Scope, Lack of Scrutiny; Back-Door Lobbying Had Large Role in Clinton's Decisions, Observers Say</i>	
<i>Peter Slevin & George Lardner, Jr., The Washington Post, March 10, 2001</i>	239

Justice Department Clemency Regulations

§ 1.1 Submission of petition; form to be used; contents of petition.

A person seeking executive clemency by pardon, reprieve, commutation of sentence, or remission of fine shall execute a formal petition. The petition shall be addressed to the President of the United States and shall be submitted to the Pardon Attorney, Department of Justice, Washington, DC 20530, except for petitions relating to military offenses. Petitions and other required forms may be obtained from the Pardon Attorney. Petition forms for commutation of sentence also may be obtained from the wardens of federal penal institutions. A petitioner applying for executive clemency with respect to military offenses should submit his or her petition directly to the Secretary of the military department that had original jurisdiction over the court-martial trial and conviction of the petitioner. In such a case, a form furnished by the Pardon Attorney may be used but should be modified to meet the needs of the particular case. Each petition for executive clemency should include the information required in the form prescribed by the Attorney General.

§ 1.2 Eligibility for filing petition for pardon.

No petition for pardon should be filed until the expiration of a waiting period of at least five years after the date of the release of the petitioner from confinement or, in case no prison sentence was imposed, until the expiration of a period of at least five years after the date of the conviction of the petitioner. Generally, no petition should be submitted by a person who is on probation, parole, or supervised release.

§ 1.3 Eligibility for filing petition for commutation of sentence.

No petition for commutation of sentence, including remission of fine, should be filed if other forms of judicial or administrative relief are available, except upon a showing of exceptional circumstances.

§ 1.4 Offenses against the laws of possessions or territories of the United States.

Petitions for executive clemency shall relate only to violations of laws of the United States. Petitions relating to violations of laws of the possessions of the United States or territories subject to the jurisdiction of the United States should be submitted to the appropriate official or agency of the possession or territory concerned.

§ 1.5 Disclosure of files

Petitions, reports, memoranda, and communications submitted or furnished in connection with the consideration of a petition for executive clemency generally shall be available only to the officials concerned with the consideration of the petition. However, they may be made available for inspection, in whole or in part, when in the judgment of the Attorney General their disclosure is required by law or the ends of justice.

§ 1.6 Consideration of petitions; notification of victims; recommendations to the President.

(a) Upon receipt of a petition for executive clemency, the Attorney General shall cause such investigation to be made of the matter as he or she may deem necessary and appropriate, using the services of, or obtaining reports from, appropriate officials and agencies of the Government, including the Federal Bureau of Investigation.

(b)(i) When a person requests clemency (in the form of either a commutation of a sentence or a pardon after serving a sentence) for a conviction of a felony offense for which there was a victim, and the Attorney General concludes from the information developed in the clemency case that investigation of the clemency case warrants contacting the victim, the Attorney General shall cause reasonable effort to be made to notify the victim or victims of the crime for which clemency is sought:

- (i) That a clemency petition has been filed;
- (ii) That the victim may submit comments regarding clemency; and
- (iii) Whether the clemency request ultimately is granted or denied by the President.

(2) In determining whether contacting the victim is warranted, the Attorney General shall consider the seriousness and recency of the offense, the nature and extent of the harm to the victim, the defendant's overall criminal history and history of violent behavior, and the likelihood that clemency could be recommended in the case.

(3) For the purposes of this paragraph (b), "victim" means an individual who:

- (i) Has suffered direct or threatened physical, emotional, or pecuniary harm as a result of the commission of the crime for which clemency is sought (or, in the case of an individual who died or was rendered incompetent as a direct and proximate result of the commission of the crime for which clemency is sought, one of the follow-



Department of Justice
Regulations Concern-
ing Executive
Clemency, 28 CFR,
Judicial Administra-
tion, Chapter I, Part I.
66 FR 27554 (current
through May 17,
2001)

ing relatives of the victim (in order of preference): the spouse; an adult offspring; or a parent); and

- (ii) Has on file with the Federal Bureau of Prisons a request to be notified pursuant to 28 CFR 551.152 of the offender's release from custody.

(4) For the purposes of this paragraph (b), "reasonable effort" is satisfied by mailing to the last-known address reported by the victim to the Federal Bureau of Prisons under 28 CFR 551.152.

(5) The provisions of this paragraph (b) apply to clemency cases filed on or after September 28, 2000.

(c) The Attorney General shall review each petition and all pertinent information developed by the investigation and shall determine whether the request for clemency is of sufficient merit to warrant favorable action by the President. The Attorney General shall report in writing his or her recommendation to the President, stating whether in his or her judgment the President should grant or deny the petition.

§ 1.7 Notification of grant of clemency.

When a petition for pardon is granted, the petitioner or his or her attorney shall be notified of such action and the warrant of pardon shall be mailed to the petitioner. When commutation of sentence is granted, the petitioner shall be notified of such action and the warrant of a commutation shall be sent to the petitioner through the officer in charge of his or her place of confinement, or directly to the petitioner if he/she is on parole, probation, or supervised release.

§ 1.8 Notification of denial of clemency.

(a) Whenever the President notifies the Attorney General that he has denied a request for clemency, the Attorney General shall so advise the petitioner and close the case.

(b) Except in cases in which a sentence of death has been imposed, whenever the Attorney General recommends that the President deny a request for clemency and the President does not disapprove or take other action with respect to that adverse recommendation within 30 days after the date of its submission to him, it shall be presumed that the President concurs in that adverse recommendation of the Attorney General, and the Attorney General shall so advise the petitioner and close the case.

§ 1.9 Delegation of authority.

The Attorney General may delegate to any officer of the Department of Justice any of his or her duties or responsibilities under §§ 1.1 through 1.8.

§ 1.10 Procedures applicable to prisoners under a sentence of death imposed by a United States District Court.

The following procedures shall apply with respect to any request for clemency by a person under a sentence of death imposed by a United States District Court for an offense against the United States. Other provisions set forth in this part shall also apply to the extent they are not inconsistent with this section.

(a) Clemency in the form of reprieve or commutation of a death sentence imposed by a United States District Court shall be requested by the person under the sentence of death or by the person's attorney acting with the person's written and signed authorization.

(b) No petition for reprieve or commutation of a death sentence should be filed before proceedings on the petitioner's direct appeal of the judgment of conviction and first petition under 28 U.S.C. § 2255 have terminated. A petition for commutation of sentence should be filed no later than 30 days after the petitioner has received notification from the Bureau of Prisons of the scheduled date of execution. All papers in support of a petition for commutation of sentence should be filed no later than 15 days after the filing of the petition itself. Papers filed by the petitioner more than 15 days after the commutation petition has been filed may be excluded from consideration.

(c) The petitioner's clemency counsel may request to make an oral presentation of reasonable duration to the Office of the Pardon Attorney in support of the clemency petition. The presentation should be requested at the time the clemency petition is filed. The family or families of any victim of an offense for which the petitioner was sentenced to death may, with the assistance of the prosecuting office, request to make an oral presentation of reasonable duration to the Office of the Pardon Attorney.

(d) Clemency proceedings may be suspended if a court orders a stay of execution for any reason other than to allow completion of the clemency proceeding.

(e) Only one request for commutation of a death sentence will be processed to completion, absent a clear showing of exceptional circumstances.

(f) The provisions of this § 1.10 apply to any person under a sentence of death imposed by a United States District Court for whom an execution date is set on or after August 1, 2000.

§ 1.11 Advisory nature of regulations.

The regulations contained in this part are advisory only and for the internal guidance of Department of Justice personnel. They create no enforceable rights in persons applying for executive clemency, nor do they restrict the authority granted to the President under Article II, section 2 of the Constitution.

Guidance for United States Attorneys in Clemency Matters

Contents

1-2.110 Office of the Pardon Attorney

1-2.111 Role of the United States Attorney in clemency matters

1-2.112 Standards for considering pardon petitions

1-2.113 Standards for considering commutation petitions

1-2.110 Office of the Pardon Attorney

The Pardon Attorney assists the President in the exercise of his power under Article II, Section 2, clause 1 of the Constitution (the pardon clause). *See* Executive Order dated June 16, 1893 (transferring clemency petition processing and advisory functions to the Justice Department), the Rules Governing the Processing of Petitions for Executive Clemency (codified in 28 CFR Sections 1.1 et seq.), and 28 CFR Sections 0.35 and 0.36 (relating to the authority of the Pardon Attorney). The Pardon Attorney, under the direction of the Deputy Attorney General, receives and reviews all petitions for Executive Clemency (which includes pardon after completion of sentence, commutation of sentence, remission of fine and reprieve), initiates and directs the necessary investigations, and prepares a report and recommendation for submission to the President in every case. In addition, the Office of the Pardon Attorney acts as a liaison with the public during the pendency of a clemency petition, responding to correspondence and answering inquiries about clemency cases and issues. The following sets forth guidance on clemency matters.

1-2.111 Role of the United States Attorney in Clemency Matters

The Pardon Attorney routinely requests the United States Attorney in the district of conviction to provide comments and recommendations on clemency cases that appear to have some merit, as well as on cases that raise issues of fact about which the United States Attorney may be in a position to provide information. Occasionally, the United States Attorney in the district in which a petitioner currently resides also may be contacted. In addition, in cases in which the petitioner seeks clemency based on cooperation with the government, the Pardon Attorney may solicit the views of the United States Attorney in the district(s) in which the petitioner cooperated, if different from the district of conviction. While the decision to grant clemency generally is driven by considerations that differ from those that dictate the decision to prosecute, the United States

Attorney's prosecutive perspective lends valuable insights to the clemency process.

The views of the United States Attorney are given considerable weight in determining what recommendations the Department should make to the President. For this reason, and in order to ensure consistency, it is important that each request sent to the district receive the personal attention of the United States Attorney. Each petition is presented for action to the President with a report and recommendation from the Department, and the recommendation by the United States Attorney is included in this report.

The United States Attorney can contribute significantly to the clemency process by providing factual information and perspectives about the offense of conviction that may not be reflected in the presentence or background investigation reports or other sources, e.g., the extent of the petitioner's wrongdoing and the attendant circumstances, the amount of money involved or losses sustained, the petitioner's involvement in other criminal activity, the petitioner's reputation in the community and, when appropriate, the victim impact of the petitioner's crime. On occasion, the Pardon Attorney may request information from prosecution records that may not be readily available from other sources.

As a general matter, in clemency cases the correctness of the underlying conviction is assumed, and the question of guilt or innocence is not generally at issue. However, if a petitioner refuses to accept guilt, minimizes culpability, or raises a claim of innocence or miscarriage of justice, the United States Attorney should address these issues.

In cases involving pardon after completion of sentence, the United States Attorney is expected to comment on the petitioner's postconviction rehabilitation, particularly any actions that may evidence a desire to atone for the offense, in light of the standards generally applicable in pardon cases as discussed in the following section. Similarly, in commutation cases, comments may be sought on developments after sentencing that are relevant to the merits of a petitioner's request for mercy.

In pardon cases, the Pardon Attorney will forward to the United States Attorney copies of the pardon petition and relevant investigative reports. These records should be returned to the Pardon Attorney along with the response. In cases involving requests for other forms of executive clemency (i.e., commutation of sentence or remission of fine), copies of the clemency petition and



United States Attorneys' Manual (U.S. Department of Justice, October 1997)

such related records as may be useful (e.g., presentence report, judgment of conviction, prison progress reports, and completed statement of debtor forms) will be provided.

The Pardon Attorney also routinely requests the United States Attorney to solicit the views and recommendation of the sentencing judge. If the sentencing judge is retired, deceased, or otherwise unavailable for comment, the United States Attorney's report should so advise. In the event the United States Attorney does not wish to contact the sentencing judge, the Pardon Attorney should be advised accordingly so that the judge's views may be solicited directly. Absent an express request for confidentiality, the Pardon Attorney may share the comments of the United States Attorney with the sentencing judge or other concerned officials whose views are solicited.

The United States Attorney may support, oppose or take no position on a pardon request. In this regard, it is helpful to have a clear expression of the office's position. The Pardon Attorney generally asks for a response within 30 days. If an unusual delay is anticipated, the Pardon Attorney should be advised when a response may be expected. If desired, the official views of the United States Attorney may be supplemented by separate reports from present or former officials involved in the prosecution of the case. The United States Attorney may of course submit a recommendation for or against clemency even if the Pardon Attorney has not yet solicited comments from the district. The Pardon Attorney informs the United States Attorney of the final disposition of any clemency application on which he or she has commented.

1-2.112 Standards for Considering Pardon Petitions

In general, a pardon is granted on the basis of the petitioner's demonstrated good conduct for a substantial period of time after conviction and service of sentence. The Department's regulations require a petitioner to wait a period of at least five years after conviction or release from confinement (whichever is later) before filing a pardon application (28 CFR Section 1.2). In determining whether a particular petitioner should be recommended for a pardon, the following are the principal factors taken into account.

1. Postconviction conduct, character, and reputation.

An individual's demonstrated ability to lead a responsible and productive life for a significant period after conviction or release from confinement is strong evidence of rehabilitation and worthiness for pardon. The background investigation customarily conducted by the FBI in pardon cases focuses on the petitioner's financial and employment stability, responsibility toward family, reputation in the community, participation in community service, charita-

ble or other meritorious activities and, if applicable, military record. In assessing postconviction accomplishments, each petitioner's life circumstances are considered in their totality: it may not be appropriate or realistic to expect "extraordinary" postconviction achievements from individuals who are less fortunately situated in terms of cultural, educational, or economic background.

2. Seriousness and relative recency of the offense.

When an offense is very serious, (e.g., a violent crime, major drug trafficking, breach of public trust, or white collar fraud involving substantial sums of money), a suitable length of time should have elapsed in order to avoid denigrating the seriousness of the offense or undermining the deterrent effect of the conviction. In the case of a prominent individual or notorious crime, the likely effect of a pardon on law enforcement interests or upon the general public should be taken into account. Victim impact may also be a relevant consideration. When an offense is very old and relatively minor, the equities may weigh more heavily in favor of forgiveness, provided the petitioner is otherwise a suitable candidate for pardon.

3. Acceptance of responsibility, remorse, and atonement.

The extent to which a petitioner has accepted responsibility for his or her criminal conduct and made restitution to its victims are important considerations. A petitioner should be genuinely desirous of forgiveness rather than vindication. While the absence of expressions of remorse should not preclude favorable consideration, a petitioner's attempt to minimize or rationalize culpability does not advance the case for pardon. In this regard, statements made in mitigation (e.g., "everybody was doing it," or "I didn't realize it was illegal") should be judged in context. Persons seeking a pardon on grounds of innocence or miscarriage of justice bear a formidable burden of persuasion.

4. Need for Relief.

The purpose for which pardon is sought may influence disposition of the petition. A felony conviction may result in a wide variety of legal disabilities under state or federal law, some of which can provide persuasive grounds for recommending a pardon. For example, a specific employment-related need for pardon, such as removal of a bar to licensure or bonding, may make an otherwise marginal case sufficiently compelling to warrant a grant in aid of the individual's continuing rehabilitation. On the other hand, the absence of a specific need should not be held against an otherwise deserving applicant, who may understandably be motivated solely by a strong personal desire for a sign of forgiveness.

5. Official recommendations and reports.

The comments and recommendations of concerned and knowledgeable officials, particularly the United States Attorney whose office prosecuted the case and the sentencing judge, are carefully considered. The likely impact of favorable action in the district or nationally, particularly on current law enforcement priorities, will always be relevant to the President's decision. Apart from their significance to the individuals who seek them, pardons can play an important part in defining and furthering the rehabilitative goals of the criminal justice system.

1-2.113 Standards for Considering Commutation Petitions

A commutation of sentence reduces the period of incarceration; it does not imply forgiveness of the underlying offense, but simply remits a portion of the punishment. It has no effect upon the underlying conviction and does not necessarily reflect upon the fairness of the sentence originally imposed. Requests for commutation generally are not accepted unless and until a person has begun serving that sentence. Nor are commutation requests generally accepted from persons who are presently challenging their convictions or sentences through appeal or other court proceeding.

The President may commute a sentence to time served or he may reduce a sentence, either merely for the purpose of advancing an inmate's parole eligibility or to achieve the inmate's release after a specified period of time. Commutation may be granted upon conditions similar to those imposed pursuant to parole or supervised release or, in the case of an alien, upon condition of deportation.

Generally, commutation of sentence is an extraordinary remedy that is rarely granted. Appropriate grounds for considering commutation have traditionally included disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g., cooperation with investigative or prosecutive efforts that has not been

adequately rewarded by other official action. A combination of these and/or other equitable factors may also provide a basis for recommending commutation in the context of a particular case.

The amount of time already served and the availability of other remedies (such as parole) are taken into account in deciding whether to recommend clemency. The possibility that the Department itself could accomplish the same result by petitioning the sentencing court, through a motion to reward substantial assistance under Rule 35 of the Federal Rules of Criminal Procedure, a motion for modification or remission of fine under 18 U.S.C. Section 3573, or a request for compassionate relief under 18 U.S.C. Section 3582(c)(1), will also bear on the decision whether to recommend Presidential intervention in the form of clemency. When a commutation request is based on the serious illness of the petitioner, transmission of the United States Attorney's response by facsimile in advance of mailing the original is always appreciated.

When a petitioner seeks remission of fine or restitution, the ability to pay and any good faith efforts to discharge the obligation are important considerations. Petitioners for remission also should demonstrate satisfactory postconviction conduct.

On January 21, 1977, the President by Proclamation 4483 granted pardon to persons who committed nonviolent violations of the Selective Service Act between August 4, 1964 and March 28, 1973 and who were not Selective Service employees. Although a person who comes within the described class was immediately pardoned by the proclamation, the Pardon Attorney issues certificates of pardon to those within the class who were actually convicted of a draft violation and who make written application to the Department on official forms. When these applications are received by the Pardon Attorney, they are forwarded to the United States Attorney for the district in which the applicant was convicted to verify the facts of the case. The verification should be returned to the Pardon Attorney promptly.

Alexander Hamilton, The Federalist, No. 74



He is also to be authorised “to grant reprieves and pardons for offences against the United States *except in cases of impeachment*.” Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. 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. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The reflection, that the fate of a fellow creature depended on his *sole fiat*, would naturally inspire scrupulousness and caution: The dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of the government than a body of men.

The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason. This, it has been urged, ought to have depended upon the assent of one or both of the branches of the legislative body. I shall not deny that there are strong reasons to be assigned for requiring in this particular the concurrence of that body or of a part of it. As treason is a crime levelled at the immediate being of the society, when the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of an act of mercy towards him to the judgment of the Legislature. And this ought the rather to be the case, as the supposition of the connivance of the Chief Magistrate ought not to be entirely excluded. But there are also strong objections to such a plan. It is not to be doubted that a single man of prudence and good sense, is better fitted, in delicate conjunctures, to balance the motives, which may plead for and against the remission of the punishment, than any numerous body whatever. It deserves particular attention, that treason will often be connected with seditions, which embrace a large proportion of the community; as lately happened in Massa-

chusetts. In every such case, we might expect to see the representation of the people tainted with the same spirit, which had given birth to the offense. And when parties were pretty equally matched, the secret sympathy of the friends and favorers of the condemned person, availing itself of the good nature and weakness of others, might frequently bestow impunity where the terror of an example was necessary. On the other hand, when the sedition had proceeded from causes which had inflamed the resentments of the major party, they might often be found obstinate and inexorable, when policy demanded a conduct of forbearance and clemency. But the principal arguments for reposing the power of pardoning in this case in the Chief Magistrate is this — In seasons of insurrection or rebellion, there are often critical moments, when a well timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the Legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal. If it should be observed that a discretionary power with a view to such contingencies might be occasionally conferred upon the President; it may be answered in the first place, that it is questionable whether, in a limited constitution, that power could be delegated by law; and in the second place, that it would generally be impolitic before-hand to take any step which might hold out the prospect of impunity. A proceeding of this kind, out of the usual course, would be likely to be construed into an argument of timidity or of weakness, and would have a tendency to embolden guilt.

The Attorney General's Survey of Release Procedures

Volume I: Foreword

Three years ago at my direction there was commenced a research project known as the Attorney General's Survey of Release Procedures. The undertaking was financed by a substantial grant of funds from the Works Progress Administration; but the professional direction of the project was made the responsibility of the Attorney General and a staff designated by him.... My fundamental purpose was to secure a broad view of the whole field of release procedures including probation, parole, pardon, and other forms of release both from penal institutions and through the courts. No such study had theretofore been undertaken.... It is my hope that [the five volumes of] this Survey will act as a stimulus to the development of permanent research programs....

Homer Cummings
Attorney General
Washington, D.C. 1939

• • •

Volume III—Pardon

Preface

The subject of pardon must be included in any comprehensive study of release procedures. Operating within its proper sphere, pardon fulfils a needed function in the administration of criminal justice. With the growth of additional procedures of release, and with the variations on the original concept of pardon which have been introduced into our law, there has been misapplication of pardon and confusion as to its nature and function.

In this country there has never been an adequate treatment of the subject of pardon. There cannot even be found a comprehensive history of pardon, notwithstanding the important role which this institution has played in the development of many of our legal ideas. Lack of penetrating study has led to misinterpretation, obscurity, and contradiction in the law itself.

Courts have been misled into ill-considered dicta and insupportable holdings. Examples are numerous. Thus it has been said that a pardon is a sort of deed which cannot be valid without acceptance by the recipient. Nevertheless, can a man get himself hanged in spite of the decision of the executive to the contrary? Can he insist on retaining his cell in spite of a legal order for release? It is safe to say that no court would actually so hold in spite of oft-repeated dicta to the contrary.

Another dictum which has persisted in the decisions of many jurisdictions is that a pardon wipes out

the crime as completely as if it had never been committed, and makes the criminal "a new man." Yet the courts themselves have held that for some purposes, a pardon does not wipe *out* the fact of a conviction and the recipient is regarded not as "a new man" but as a convicted criminal. This is true, for example, when the pardoned criminal takes the stand as a witness in a trial.

In many cases, the effect which should be given to a pardon might well be made to depend upon the ground for which it was granted. A pardon granted because later evidence showed the condemned man to have been innocent might well be held to "wipe out" the crime for all purposes, whereas a pardon granted because the convict helped quell a mutiny of fellow convicts might not. Yet no distinction of this sort exists in our law, nor does it seem logical to lump pardons granted for innocence together with pardons granted for other causes.

The law is silent as to the possible difference between an individual pardon and a general pardon or amnesty. Our courts have held without much debate that power to grant pardons includes power to grant general pardons. Apparently neither our constitution drafters nor our courts have considered that there may be good reason for differentiating between the two, as is done in France for example, where the President of the Republic has power to grant individual pardons, but amnesties can be granted only by act of the National Assembly.

Nor is there to be found any adequate discussion of the power of the legislature to grant pardons. It is generally taken for granted that constitutional provisions giving the President or governor power to pardon are exclusive, and leave no power to be exercised by the legislature. The courts have so stated in numerous cases. But this seems debatable, to say the least. This country has fortunately been largely free from political upheavals which may give rise to occasion for amnesties, but the only occasion in our history when the need for amnesty arose, the Civil War, made it clear how important it is that the legislative branch retain power to act. The amnesties granted during and after the Civil War by Congress and state legislatures are usually ignored by the courts which hold that the pardoning power of the executive is exclusive. Our lack of occasion for amnesties in the past probably accounts for the fact that the subject of amnesty has never received very careful study.

Particularly with regard to the release procedure of parole has there been a failure carefully to delimit the proper field for the exercise of the pardoning power.



Excerpts from a five-volume research project undertaken under the direction of the Attorney General, published in 1939 by the U.S. Department of Justice.

The proper sphere for exercise of the pardoning power is clemency or mercy. Parole, rightly understood, has nothing to do with either. It is safe to say that no state can hope to perfect an adequate and workable parole system so long as parole is treated merely as a type of conditional pardon. Contrary to recommendations which have sometimes been made in the past, that the administration of pardon and parole be combined in one board, this report recommends that the two be carefully kept separate.

All in all, the law of pardon has been a neglected orphan, allowed to grow without benefit of the careful grooming which has been accorded other branches of the law. Small wonder then that it presents a somewhat disorderly spectacle and has picked up certain unfortunate attributes. In the present report the attempt is made to examine the law in regard to the many questions relating to the nature, effect and function of pardon. It is hoped that this report will help clarify existing issues in the law of pardon and will be of assistance in improving the administration of pardon.

Wayne L. Morse, Editor-in-Chief
Henry Weihofen, Editor
Hans von Hentig, Associate Editor

Conclusions and Recommendations

Introductory

Among release procedures, pardon is a patriarch. It is the oldest of them all, and the direct or collateral ancestor of most of them. It reaches back to those early beginnings of human history when the father of the family or of the clan exercised the power to forgive as part of his power to punish. From the head of the family it passed naturally to tribal chiefs, priests, princes, kings, and dictators. It became an institution, not only vested in all absolute rulers as a matter of course, but blossoming out also in a myriad of surprising variations — customs and usages sometimes grim, like the practice of allowing one convict to earn a pardon by acting as executioner of his fellows; and sometimes of a fairy tale quaintness, like the practice told of in old German songs unearthed by Grimm, by which a virgin could earn a pardon for a condemned man by scampering nine times around the marketplace in the nude.

Emerging from the field of mere arbitrary caprice or semimagical folklore, pardon has become an institution which is a part of, and yet above, the legal system. It has never been crystallized into rigid rules. Rather, its function has been to break rules. It has been the safety valve by which harsh, unjust, or unpopular results of formal rules could be corrected. The almost wholly unrestricted scope of the power has been both its greatest weakness and its greatest strength. In the hands of arbitrary rulers exercising the power merely to indulge their personal whims, it has been subject to the most

flagrant abuses. On the other hand, it 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 the 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 well known examples.

Patriarchs do not usually retain the full vigor of their youth, and pardon is shrinking in importance. But it is giving way only to its own offspring. Parole, furloughs, and goodtime laws can all be traced directly to pardon. Indeed even today "parole" in some States (e. g. Florida) is legally merely conditional pardon.

Why Pardon: A Reexamination

The question may even be raised whether the ancient institution has not outlived its usefulness. Is there any valid reason why pardon should be retained? Are not judicial review and modern release procedures like parole sufficient to do all that pardon ever did — and do it better?

To a large extent, the answer must be yes. Much, and in some States most, of what is being done under the Governor's pardoning power could and should be done either by the courts or by a parole board. There remains a valid field for the pardoning power to occupy, but it is a much more restricted field than it occupies today.

This is perhaps the most important conclusion this survey of pardon has to offer. Let us therefore state it emphatically and in detail:

The exercise of the pardoning power should be restricted from two sides:

1. *Criminal procedure should be liberalized so as to permit reversal of a conviction where new evidence is found indicating that the defendant was innocent.* A pardon granted on the ground of innocence is an anomaly at best. Anglo-American law has been peculiarly indifferent to this problem. Continental law has gone much further in permitting judicial reconsideration of such cases. Obviously, this is the only logical and satisfactory way to handle the problem. An innocent man who has been wrongly convicted is entitled to vindication, by reversal of the erroneous conviction. To pardon him for being innocent is irony. What is more, it creates confusion in determining the proper effect to be given to a pardon. As is pointed out in chapter IX, a pardon for innocence should be given much broader effect than other pardons.

The objection to permitting such reversal, of course, is that it would render the law uncertain if there

were not a time after which a case was closed and the judgment final. It may be conceded that some limits must be drawn, but the fact remains that the right of appellate review is much more restricted in this regard in most American States' than it is in England, where in turn it is more restricted than in most continental countries. We recommend a liberalized procedure such as that of France or Germany.

2. All releases on condition of good behavior and under supervision should be under the parole law, and not by conditional pardon. — This is the legitimate field of parole. There is no reason for having similar types of releases granted by two different agencies. Furthermore, the parole organization has better facilities for determining when a prisoner should be so released and for supervising him thereafter. Even where the parole law is inadequate, the proper approach is to strengthen it, rather than to handle the problem by conditional pardon or other forms of executive clemency.

This would mean the almost total elimination of conditional pardons. Special situations may arise from time to time where certain conditions may properly be attached to a pardon, but the use of conditional pardon as a regular procedure, in lieu of parole, should be abandoned. Even the States having no separate parole system, and where parole rests' legally upon the Governor's clemency power, should enact a parole law resting upon the States power to punish criminals and rehabilitate socially dangerous persons, wholly divorced from the Governor's power to grant clemency.

To the same end, the parole laws should be liberalized so as to give the parole board full discretion to parole any prisoner it deems worthy. This means repealing all restrictions in the parole statutes making certain classes of prisoners ineligible for parole. The primary reason why conditional pardon, commutation, reprieve, and other forms of executive clemency have been so extensively used to effect conditional release has been to cover cases not eligible for parole. The big mistake made by those who think we should be "hard boiled" about parole is in forgetting that while they may bar the door against release on parole, the back door of executive clemency always remains open. The result is that restrictions written into the parole laws by those who do not think that certain kinds of criminals should be turned loose on parole — murderers, rapists, second offenders, or those who have not served a certain portion of their sentences — too often defeat their own object. The convicts we refuse to release on parole are released on indefinite furloughs, on conditional pardons, or other types of release under which there is much less actual supervision and control than under parole.

Of course, taking all restrictions out of the parole law and vesting the parole board with unrestricted power to determine when and to whom parole should

be granted means giving the board a degree of power which could be easily abused. The answer, however, must be to safeguard the capability and honesty of the board rather than to cut down its power by arbitrary restrictions. Granting parole is necessarily a matter of individualized consideration of each case. The board should be so constituted as to guarantee that its decisions will be based upon careful, scientific investigation and capable and honest judgment. In short, the answer to defects in the parole system is a better parole system, not less parole.

If such reforms were adopted, what would be left for executive clemency? Enough. It would still be needed for the same general purposes for which it has historically always been used — to take care of cases where the legal rules have produced a harsh, unjust, or popularly unacceptable result, or where for politic reasons the rule of law should be set aside. Such cases will continue to arise under any legal system. A criminal code can only define antisocial conduct in general terms. It can never take into account all the special circumstances which may be involved in a given case. The safety valve will remain necessary. To imagine that the reforms we have suggested would remove all necessity for the intervention of a pardoning power would be as vain as the notion of the French Revolutionists that the introduction of the jury system would make justice perfect and pardon unnecessary.

We may enumerate some of the situations which will continue to arise, in which pardon may be proper:

- a. Political upheavals and emergencies, wherein pardon may be necessary to pacify a revolutiontorn country or unite a country for war.
- b. Calm second judgment after a period of war hysteria, during which persons were given very severe sentences for political offenses later realized to have been very minor or upon evidence later felt to be insufficient.
- c. Similarly, changed public opinion after a period of severe penalties against certain conduct which is later looked upon as much less criminal, or as no crime at all. Prohibition is a recent example. The present severity against kidnappers may give rise to cases which future judgment may recommend for clemency.
- d. Cases "where punishment would do more harm than good," to quote Bentham, as in certain cases of sedition, conspiracy, or acts of public disorder.
- e. Technical violations leading to hard results. We have mentioned at least one example — where the legal "principal" in a crime may be only a comparatively innocent hireling, while the brains of the plot is legally guilty only as an accessory.

- f. Cases where pardon is necessary to uphold the good faith of the State, as where a criminal has been promised immunity for turning State's evidence.
- g. Cases of later proved innocence or of mitigating circumstances. Although we have recommended liberalizing judicial procedure so that most of these cases could be handled by proceedings to reverse the conviction, probably some restrictions will necessarily be retained upon the right to such judicial review, and cases may still arise in which such review is impossible, though innocence is clearly provable.
- h. Applications for reprieve or commutation, especially in death sentence cases. Here, too, liberalization of judicial procedure should permit reprieves to be granted by the courts. But while there is somewhat less logical reason for retaining this power in the executive than can be found for most of the other examples listed above, this last recourse to the Governor in these cases is a benevolent power, which we shall probably want to retain and it will no doubt continue to be a major part of the pardoning power.

Should Pardon and Parole Administration be Combined?

There is a growing tendency to combine the administration of pardon and parole in one board. About half the States now have in greater or less degree combined the two. Especially in recent years has this movement grown. In the year 1937 alone four States—Arkansas, Michigan, Missouri, and Tennessee—enacted laws which not only created such consolidated boards of pardon and parole but also combined probation administration.

Is this tendency sound?

What has been said in the preceding section about the proper function of pardon as distinguished from parole should help in answering this question. The main, not the sole, argument in favor of such consolidation is that to have two agencies performing such similar functions means overlapping and duplication of efforts. But this assumes that the two functions are similar. It is true that as long as executive clemency is used to release persons on conditional pardon and other forms of release similar to parole, there is good reason to say that all these procedures should be handled by one board. But the sounder approach would be not to perpetuate the present misalliance of pardon and parole by throwing them together into one board, but to begin by defining the proper scope for each of them. Under present practice in most States there is no clear differentiation in nature and function between parole and conditional pardon. Yet the line between the two can be clearly and unmistakably drawn, as already stated; pardon should not be in any degree a regular release procedure, but should be restricted to the unusual cases of the types enumerated in the preceding section. All regular conditional releases should be under the parole law.

If executive clemency would abandon the field which rightly belongs to parole, we believe the reasons for consolidation of the two agencies would disappear almost entirely. The field left for pardon would then be quite distinct from that covered by parole. The type of investigation and the training required of the investigators would be entirely different. Parole would depend upon the prisoner's personality, upon his prison record, the degree of his reformation, the environment into which he will return and his chances of getting a job. The investigators to determine these factors should have socialservice training, and the parole board itself should have on its membership competent penologists, psychiatrists, criminologists, and social workers.

On the other hand, pardon in its properly restricted field would depend upon wholly different considerations and would have to be administered upon wholly different policies. The examples we have listed as properly coming within the scope of the pardoning power all depend upon political or judicial considerations. Whether political prisoners should be granted clemency is not a matter to be determined from the social worker's point of view, but from a statesman's. Whether a conviction is of a kind that popular opinion denounces is properly addressed to political officials. Whether a person is innocent though legally convicted is a judicial question which if too late to be reopened in the regular courts must nevertheless be decided by an investigation approaching as nearly as possible the judicial factfinding type of inquiry.

None of these are inquiries which a parole board is particularly fitted to determine.

Combining pardon with parole administration only tends to perpetuate the present muddled situation, in which no clear differentiation exists between the field properly covered by parole and that left to executive clemency. This is not only confusing but unfortunate in its results. In very few States are any officers provided to supervise persons released on conditional pardon, indefinite furlough, or any other type of executive clemency. The very definition of parole, on the other hand, assumes the existence of a staff of parole officers to supervise those paroled. And while in fact such officers nonexistent even under parole statutes, two facts remain true: (1) There are more likely to be parole officers than conditional pardon officers (there are none of these in any State); (2) there is more possibility of reforming the parole law and obtaining an adequate staff of parole officers than of obtaining a staff to supervise persons at liberty on conditional pardon.

The goal to strive for then is not a consolidation of pardon and parole, but the utter exclusion of pardon from the field. Pardon should be restricted to special cases involving political or judicial considerations. The whole field of conditional release as a regular penal practice belongs to parole.

Organization of Pardon Administration

If not in combination with parole, how is pardon to be administered?

The obvious political implications and considerations involved in most of the valid grounds for pardon indicate the propriety of retaining this power in the hands of the chief executive. The objection that this takes too much of the Governor's time from more important matters of state is true today, when executive clemency is used in so many States as a regular and normal release procedure, handling cases which should be left to a competent parole board, but it should not be true if pardon were restricted to the exceptional cases as we have recommended. In the Federal Government, where this distinction is observed, there is no undue press of pardon cases burdening the President.

This does not mean that it would not be helpful to have a pardon official or board to assist the Governor in this function. A board would seem preferable to one official, for the determination of whether or not clemency should be granted would usually involve considerations of policy upon which it would be well for the Governor to have the views of other executive officials of his administration, rather than of a pardon attorney or other official who too often may be merely a kind of secretary.

In most States the board might properly be composed of such other executive officers as the attorney general and the secretary of State. The attorney general should be included because many of the cases will probably involve legal implications.

Prison and parole officials should not be members of this board. Considerations relevant in ordinary release procedures should not be interpolated into the deliberations, and if the viewpoint of penal authorities were introduced into clemency hearings, it would promote exactly the situation we have tried to rectify—the usurpation by the executive clemency power of the field belonging to parole and penology generally. Even such major penal officials as the head of a department of correction or of public welfare should therefore have no place on the pardon board.

It would be helpful for the board to have a secretary or pardon attorney devoting all or a substantial part of his time to his duties as such. Certainly in the larger States this would be necessary. His duties might be patterned after those of the pardon attorney of the United States.

The board may or may not be given some power beyond merely advising the Governor. Three main alternatives suggest themselves:

1. All applications must be brought before the board, but the Governor may, after obtaining the board's views, take any action he wishes.

2. The Governor must obtain the board's consent, and cannot grant a pardon over the unfavorable action of the board.
3. The ultimate pardoning power is in the board itself, of which the Governor is only one member. The Governor may have only one vote, as any other member, or he may have a veto power.

It seems unnecessary to go beyond the first method. This subjects the Governor's action to control which is sufficient to exert powerful pressure against abuse, and yet is respectful and leaves full responsibility resting very directly upon his own shoulders.

Vesting the pardoning power in a board, of which the Governor is only one member with one vote (as in Idaho, Nebraska, and North Dakota) scatters responsibility so that it may be difficult for the public to place the blame for abuse of the pardon power.

Of course it should be mandatory to report regularly to the legislature all cases of clemency, granted. This publicity, together with the requirement that he first submit all cases to the board, would seem to place sufficient checks upon the Governor to make abuse unlikely...

Pardons by the Legislature

In February 1938, a bill was introduced in the California Legislature to grant a pardon to Tom Mooney, the labor leader convicted of murder for the death of nine persons in the San Francisco preparedness parade bombing, July 22, 1916. The bill passed the lower house, but was defeated in the senate. The attorney general of California gave it as his opinion that such a bill would be unconstitutional.

This raises the interesting question of whether the legislature has such power or not. Two objections may be raised: (1) That the grant of the pardoning power to the Governor or pardon board is exclusive, and leaves no concurrent power in this regard to be exercised by the legislature; (2) that at all events constitutional provisions in most States, including California, prohibit the enactment of special legislation, and therefore even if the legislature has power to enact pardon laws, it may not grant a pardon to one individual but may exercise the power in general legislation only.

Of the two, the first is the more fundamental question. If we rely on the great weight of judicial pronouncements, the answer seems almost unanimous—the pardoning power granted to the Executive by the Constitution is meant to be exclusive, and may not be invaded by the legislature. It is true that there is very little direct authority on the question, i. e., very few cases in which the legislature actually and specifically undertook to grant a pardon. Most of the cases discussing the question involved legislation not specifically dealing with pardon at all, but which the

courts said in effect amounted to pardon. The courts have found such inadvertent “invasion” of the executive pardoning power in an amazingly diverse multitude of statutes, including:

Parole laws — on the theory that parole is only a type of conditional pardon and so beyond the control of the legislature;

Probation laws and laws authorizing the courts to suspend sentence — on the theory that these wrongfully purported to delegate a pardoning power to the judiciary;

Laws authorizing courts to reduce a sentence within 30 days after its rendition; this was held bad as attempting to authorize the courts to grant commutation;

Goodtime laws, authorizing deductions from the sentences of convicts for good behavior;

Acts abolishing the rule that convicted felons are incompetent to testify as witnesses;

Immunity statutes, providing that no person should be excused from testifying on the ground that his testimony would tend to incriminate him, but that no person so required to testify should be punished for acts disclosed by such testimony — held bad as attempting to grant a pardon insofar as they applied to witnesses already convicted.

It has even been held unconstitutional for the legislature to repeal a criminal statute and quash pending prosecutions under it. This, in spite of the wellrecognized rule that upon repeal of a statute all pending prosecutions automatically fall and all offenses not yet prosecuted are thereupon wiped out.

American legislatures have not ordinarily undertaken to grant pardon, but on the only occasion in American history when a need for legislation on this subject arose — the reconstruction period following the Civil War — all acts of amnesty which were passed both by Congress and by State legislatures, were upheld by the courts.

In order to reconcile the idea of a generally exclusive power in the executive with the hard necessity involved in such amnesty cases, at least two compromise theories have been evolved: (1) That the power is partially concurrent, i. e., the legislature may enact general laws of amnesty, but cannot grant individual pardons; and (2) that the legislature has only a supplementary power, i. e., it may act where the executive is forbidden to act, as before conviction and in cases of treason, but insofar as the executive is given power, it is exclusive.

It is submitted that there is no reason for denying the legislature a fully concurrent power. In no State does the constitution expressly say that the executive power shall be exclusive; it merely provides that the Governor shall have power to grant pardons, commutations, etc., subject to certain exceptions and restraints.

Historically, the Parliament of England had a concurrent pardoning power with the crown, and a similar power has been exercised by the legislatures in this country from time to time, granting not only general amnesties but individual pardons as well. Either these historical instances are wrong or the exclusive power theory is wrong.

The power to grant amnesties is not only historically well established, but is of the utmost political importance and should not be denied to the legislature as a matter of policy.

As to whether the legislature may also grant individual pardons, there seems no reason for denying this as a part of the pardoning power, in the absence of express restriction. If it is deemed undesirable to allow the legislature to exercise such a power (and this view seems justified), this can be, and in most States already is, taken care of by a constitutional provision restricting the legislature to the enactment of general laws. This is part of the modern tendency to prohibit special legislation. It is not at all limited to pardon. Thus it is felt in most States today that it is undesirable for the legislature to legislate for local governments singly, for example. But there is no question of the legislature's power to do so unless restricted by a constitutional prohibition against such local legislation. The same is true of individual legislative pardons. The true rule is that the legislature has inherent power to enact such pardons, and if this power is to be denied it must be by express constitutional limitation.

Conclusion

It seems to be the twisted fate of the pardoning power in the United States to be unduly extended in one direction and unduly restricted in the other. On the one side the executive exercise of the power has been allowed to intrude itself into the penal system and usurp the functions properly belonging to parole. On the other side, the courts have denied to the legislature its historical power to grant pardons and amnesties, a power which in times of political upheavals is of the utmost importance and which preeminently belongs to the legislative branch. A fuller understanding of the function of pardon should help us to rectify the first mistake and resist the second.

This analysis of pardon and its administration in the United States is presented in the hope that its findings will make clear the true functions of pardon. It shows that there is a great need for clarification and improvement in the administration of pardon processes in many States. Pardon as a legal device for seasoning justice with mercy and for righting miscarriages of justice should be preserved. However, its use as a “political procedure” rather than as a limited release procedure is to be condemned. Under no circumstances should it be used as a substitute for parole. All releases on condition of good behavior and under supervision should be under the parole law and not by way of pardon or conditional pardon.

Annual Reports of the Pardon Attorney (1960, 1963-65)

1960

.... There was a larger number of grants of clemency during 1960 than during the 2 years immediately preceding. The total number of favorable actions was 154 as compared with 119 in 1959 and 104 in 1958. As usual, the power to commute sentences was used sparingly during the year and the preponderance of grants involved full and unconditional pardons after completion of sentences....

Although few actual applications for commutation of sentence were filed, there was a large number of requests for reduction of sentences received from prisoners convicted under the Narcotic Control Act of 1956. First offenders convicted under this Act must serve a minimum of five years' imprisonment without benefit of probation or parole. It is the general policy not to ask the President to intervene in such cases.

1963

.... There were 178 grants of clemency during the past year as compared with 182 during the preceding year. The significant difference in the figures between the two years relates to the number of sentences commuted. During the fiscal year ending June 30, 1962, only 16 sentences were commuted, whereas in the past year there were 43 commutations of sentences.

There has been no systematic method of handling commutations. All applications presented by prisoners for reduction of their sentences were carefully considered and screened. Only those appearing to have merit were recommended. There was no effort to invite the wardens of the various institutions to present other worthwhile cases. Consequently, there were probably many deserving cases that were not considered because no applications were received in such cases. The Attorney General and the Director of the Bureau of Prisons, however, have recently encouraged the wardens to bring to the attention of the Pardon Attorney any cases which they feel deserve consideration, and in the future, we expect an increase in the number of such applications and a larger percentage of applicants may be deserving of favorable consideration.

The commutations of sentences granted during the past year included many longterm narcotic offenders who, by statute, were not eligible for parole but whose sentences were felt to be considerably longer than the average sentences imposed for such offenses. There were a number of commutations granted in the cases of prisoners suffering from terminal illnesses where arrangements had been made by the institution

for appropriate care in the home community in order that the petitioners could spend their last few weeks or months near home and where members of the families could be constantly in contact with them. There were some commutations granted where the petitioners had played perhaps only minor roles in the commission of the offenses or had presented some other meritorious or exceptional circumstance that would justify the granting of commutation....

During the year the pardon rules and procedures were revised. There were only two essentially material effects of such revision. In the first place, the rules that had been in effect since 1946 had been departed from in several respects as far as actual practice was concerned. The new rules officially approved such changes. The other significant change involved the procedure for the denial of clemency. Under prior practices, the Attorney General and the Pardon Attorney were authorized by the President to administratively deny applications that did not appear to them to merit favorable consideration by the President. Under the new procedures that became effective December 11, 1962, all clemency applications are referred to the President. As in the past, when favorable recommendations are made by the Attorney General, a letter of advice in each case is presented to the President by the Attorney General. In all cases where the Attorney General reaches the conclusion that favorable consideration is not warranted, a summary report is submitted to the President recommending denial. In the event the President takes no other action with respect to the case during a period of 30 days, the applicant is notified by the Pardon Attorney that adverse action has been taken with respect to his petition. This new procedure with respect to denial of petitions gives assurance to each applicant that his petition has been given consideration at the White House

1964

.... In the Annual Report for the fiscal year 1963, it was pointed out that in many respects the statistical figures corresponded very closely with those of the preceding year. This is not the case this year. In most respects the figures for this year will indicate a very substantial and striking increase. For instance, the total number of cases considered during the fiscal year ending June 30, 1964, was 1,608 as compared with 1,098 for the preceding year, which was approximately a fifty percent increase.

The total grants of clemency during the past year



Exerpts from Annual Reports of Pardon Attorney Reed Cozart in the Annual Reports of the Attorney General, 1960, 1963-1965, during the administrations of Presidents Eisenhower, Kennedy and Johnson.

increased more than one hundred percent. There were 178 grants for the fiscal year ending June 30, 1963, as compared with 388 during the past year. There was an increase of full and unconditional pardons from 133 to 314 and an increase of commutations of sentence from 43 to 73. There was only one fine remitted during the past year as compared with two for the preceding year.

There was also a very substantial increase in the number of cases disposed of adversely by administrative action. There were 437 such cases during the past year as compared with 232 for the preceding year. This increase in grants of clemency and denials of clemency resulted in one hundred percent increase in total dispositions. There were 825 cases disposed of during the past year as compared with 411 for the preceding year....

During the year, the Director of the Bureau of Prisons was called upon to encourage the wardens of the federal prisons to review cases in their institutions and present to the Attorney General selected cases which they considered to be worthy of clemency and whose sentences could be considered to be disparate. For the first time there is a policy of attempting to systematically review cases which may be deserving of commutation. As a result, a very sizeable increase in commutations has resulted. The number of cases commuted during this year has probably set an all time record and, as may be expected, when the news was spread in the institutions that there had been commutations granted, a sizeable increase in the number of applications occurred. This accounts for the substantial increase in the number of cases acted upon adversely. No prisoner is denied the privilege of applying for

clemency and, as the result, many prisoners who have no real grounds for seeking clemency make application.

As in the years preceding, the commutations of sentence granted included some longterm narcotics offenders who, by statute, were not eligible for parole but whose sentences were considerably longer than the average. There were also a number of commutations granted to prisoners suffering from terminal illnesses and who had not yet become eligible for parole. The grants were recommended when arrangements were made for the petitioners to spend their last weeks or months in their home communities where their families could visit them.

1965

[There were 73 sentences commuted during fiscal year 1964 and 80 during fiscal year 1965].... There were 131 more cases denied in 1965 than in the preceding year. Most of these denials were petitions filed by prisoners who sought reductions in their sentences. There was a very substantial increase in the number of applications for commutation of sentence due to the fact that the prisoners had become aware of the fact that many cases were being commuted and they knew they had nothing to lose by making application. Consequently, many applications were received from very short term applicants and from prisoners who had very long prior criminal records.

As in preceding years, most of the commutations were granted to prisoners serving extremely long sentences, particularly narcotic cases where they were not eligible for parole, and in the cases of prisoners suffering from terminal illness and who had not yet reached their parole eligibility date....

President Gerald Ford's Pardon of Richard Nixon

September 8, 1974

Ladies and gentlemen:

I have come to a decision which I felt I should tell you and all of my fellow American citizens, as soon as I was certain in my own mind and in my own conscience that it is the right thing to do.

I have learned already in this office that the difficult decisions always come to this desk. I must admit that many of them do not look at all the same as the hypothetical questions that I have answered freely and perhaps too fast on previous occasions.

My customary policy is to try and get all the facts and to consider the opinions of my countrymen and to take counsel with my most valued friends. But these seldom agree, and in the end, the decision is mine. To procrastinate, to agonize, and to wait for a more favorable turn of events that may never come or more compelling external pressures that may as well be wrong as right, is itself a decision of sorts and a weak and potentially dangerous course for a President to follow.

I have promised to uphold the Constitution, to do what is right as God gives me to see the right, and to do the very best that I can for America.

I have asked your help and your prayers, not only when I became President but many times since. The Constitution is the supreme law of our land and it governs our actions as citizens. Only the laws of God, which govern our consciences, are superior to it.

As we are a nation under God, so I am sworn to uphold our laws with the help of God. And I have sought such guidance and searched my own conscience with special diligence to determine the right thing for me to do with respect to my predecessor in this place, Richard Nixon, and his loyal wife and family.

Theirs is an American tragedy in which we all have played a part. It could go on and on and on, or someone must write the end to it. I have concluded that only I can do that, and if I can, I must.

There are no historic or legal precedents to which I can turn in this matter, none that precisely fit the circumstances of a private citizen who has resigned the Presidency of the United States. But it is common knowledge that serious allegations and accusations hang like a sword over our former President's head, threatening his health as he tries to reshape his life, a great part of which was spent in the service of this country and by the mandate of its people.

After years of bitter controversy and divisive

national debate, I have been advised, and I am compelled to conclude that many months and perhaps more years will have to pass before Richard Nixon could obtain a fair trial by jury in any jurisdiction of the United States under governing decisions of the Supreme Court.

I deeply believe in equal justice for all Americans, whatever their station or former station. The law, whether human or divine, is no respecter of persons; but the law is a respecter of reality.

The facts, as I see them, are that a former President of the United States, instead of enjoying equal treatment with any other citizen accused of violating the law, would be cruelly and excessively penalized either in preserving the presumption of his innocence or in obtaining a speedy determination of his guilt in order to repay a legal debt to society.

During this long period of delay and potential litigation, ugly passions would again be aroused. And our people would again be polarized in their opinions. And the credibility of our free institutions of government would again be challenged at home and abroad.

In the end, the courts might well hold that Richard Nixon had been denied due process, and the verdict of history would even more be inconclusive with respect to those charges arising out of the period of his Presidency, of which I am presently aware.

But it is not the ultimate fate of Richard Nixon that most concerns me, though surely it deeply troubles every decent and every compassionate person. My concern is the immediate future of this great country.

In this, I dare not depend upon my personal sympathy as a long-time friend of the former President, nor my professional judgment as a lawyer, and I do not.

As President, my primary concern must always be the greatest good of all the people of the United States whose servant I am. As a man, my first consideration is to be true to my own convictions and my own conscience.

My conscience tells me clearly and certainly that I cannot prolong the bad dreams that continue to reopen a chapter that is closed. My conscience tells me that only I, as President, have the constitutional power to firmly shut and seal this book. My conscience tells me it is my duty, not merely to proclaim domestic tranquility but to use every means that I have to insure it.

I do believe that the buck stops here, that I cannot rely upon public opinion polls to tell me what is right.

I do believe that right makes might and that if I am wrong, 10 angels swearing I was right would make no difference.



Remarks of President Gerald R. Ford upon signing a proclamation granting a pardon to Former President Richard Nixon, White House, September 8, 1974; and Proclamation 4311.

I do believe, with all my heart and mind and spirit, that I, not as President but as a humble servant of God, will receive justice without mercy if I fail to show mercy.

Finally, I feel that Richard Nixon and his loved ones have suffered enough and will continue to suffer, no matter what I do, no matter what we, as a great and good nation, can do together to make his goal of peace come true. [At this point, the President began reading from the proclamation granting the pardon.]

“Now, therefore, I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from July [January] 20, 1969 through August 9, 1974.”

[The President signed the proclamation and then resumed reading.]

“In witness whereof, I have hereunto set my hand this eighth day of September, in the year of our Lord nineteen hundred and seventy-four, and of the Independence of the United States of America the one hundred and ninety-ninth.”

NOTE: The President spoke at 11:05 a.m. in the Oval Office at the White House, where he signed Proclamation 4311 granting the pardon.

...

**President Gerald R. Ford's Proclamation 4311,
Granting a Pardon to Richard Nixon**

September 8, 1974

By the President of the United States of America

A Proclamation

Richard Nixon became the thirty-seventh President of the United States on January 20, 1969 and was reelected in 1972 for a second term by the electors of forty-nine of the fifty states. His term in office continued until his resignation on August 9, 1974.

Pursuant to resolutions of the House of Representatives, its Committee on the Judiciary conducted an inquiry and investigation on the impeachment of the President extending over more than eight months. The hearings of the Committee and its deliberations, which received wide national publicity over television, radio, and in printed media, resulted in votes adverse to Richard Nixon on recommended Articles of Impeachment.

As a result of certain acts or omissions occurring before his resignation from the Office of President, Richard Nixon has become liable to possible indictment and trial for offenses against the United States.

Whether or not he shall be so prosecuted depends on findings of the appropriate grand jury and on the discretion of the authorized prosecutor. Should an indictment ensue, the accused shall then be entitled to a fair trial by an impartial jury, as guaranteed to every individual by the Constitution.

It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States. The prospects of such trial will cause prolonged and divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States.

NOW, THEREFORE, I, GERALD R. FORD, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of September, in the year of our Lord nineteen hundred and seventy-four, and of the Independence of the United States of America the one hundred and ninety-ninth.

GERALD R. FORD

President George Bush's Pardon of the Iran–Contra Defendants

December 24, 1992

By George Bush, President of the United States of America

A Proclamation

Today I am exercising my power under the Constitution to pardon former Secretary of Defense Caspar Weinberger and others for their conduct related to the Iran-Contra affair.

For more than 6 years now, the American people have invested enormous resources into what has become the most thoroughly investigated matter of its kind in our history. During that time, the last American hostage has come home to freedom, worldwide terrorism has declined, the people of Nicaragua have elected a democratic government, and the Cold War has ended in victory for the American people and the cause of freedom we championed.

In the mid 1980's, however, the outcome of these struggles was far from clear. Some of the best and most dedicated of our countrymen were called upon to step forward. Secretary Weinberger was among the foremost.

Caspar Weinberger is a true American patriot. He has rendered long and extraordinary service to our country. He served for 4 years in the Army during World War II where his bravery earned him a Bronze Star. He gave up a lucrative career in private life to accept a series of public positions in the late 1960's and 1970's, including Chairman of the Federal Trade Commission, Director of the Office of Management and Budget, and Secretary of Health, Education, and Welfare. Caspar Weinberger served in all these positions with distinction and was admired as a public servant above reproach.

He saved his best for last. As Secretary of Defense throughout most of the Reagan Presidency, Caspar Weinberger was one of the principal architects of the downfall of the Berlin Wall and the Soviet Union. He directed the military renaissance in this country that led to the breakup of the communist bloc and a new birth of freedom and democracy. Upon his resignation in 1987, Caspar Weinberger was awarded the highest civilian medal our Nation can bestow on one of its citizens, the Presidential Medal of Freedom.

Secretary Weinberger's legacy will endure beyond the ending of the Cold War. The military readiness of this Nation that he in large measure created could not have been better displayed than it was 2 years ago in the

Persian Gulf and today in Somalia.

As Secretary Weinberger's pardon request noted, it is a bitter irony that on the day the first charges against Secretary Weinberger were filed, Russian President Boris Yeltsin arrived in the United States to celebrate the end of the Cold War. I am pardoning him not just out of compassion or to spare a 75-year-old patriot the torment of lengthy and costly legal proceedings, but to make it possible for him to receive the honor he deserves for his extraordinary service to our country.

Moreover, on a somewhat more personal note, I cannot ignore the debilitating illnesses faced by Caspar Weinberger and his wife. When he resigned as Secretary of Defense, it was because of his wife's cancer. In the years since he left public service, her condition has not improved. In addition, since that time, he also has become ill. Nevertheless, Caspar Weinberger has been a pillar of strength for his wife; this pardon will enable him to be by her side undistracted by the ordeal of a costly and arduous trial.

I have also decided to pardon five other individuals for their conduct related to the Iran-Contra affair: Elliott Abrams, Duane Clarridge, Alan Fiers, Clair George, and Robert McFarlane. First, the common denominator of their motivation — whether their actions were right or wrong — was patriotism. Second, they did not profit or seek to profit from their conduct. Third, each has a record of long and distinguished service to this country. And finally, all five have already paid a price — in depleted savings, lost careers, anguished families — grossly disproportionate to any misdeeds or errors of judgment they may have committed.

The prosecutions of the individuals I am pardoning represent what I believe is a profoundly troubling development in the political and legal climate of our country: the criminalization of policy differences. These differences should be addressed in the political arena, without the Damocles sword of criminality hanging over the heads of some of the combatants. The proper target is the President, not his subordinates; the proper forum is the voting booth, not the courtroom.

In recent years, the use of criminal processes in policy disputes has become all too common. It is my hope that the action I am taking today will begin to restore these disputes to the battleground where they properly belong.

In addition, the actions of the men I am pardoning took place within the larger Cold War struggle. At home, we had a long, sometimes heated debate about how that struggle should be waged. Now the Cold War



Proclamation 6518 of President George Bush upon granting executive clemency to former Secretary of Defense Caspar Weinberger and others, December 24, 1992, FR Doc. 92-31848, 54 FR 62145 (Dec. 24, 1992).

is over. When earlier wars have ended, Presidents have historically used their power to pardon to put bitterness behind us and look to the future. This healing tradition reaches at least from James Madison's pardon of Lafitte's pirates after the War of 1812, to Andrew Johnson's pardon of soldiers who had fought for the Confederacy, to Harry Truman's and Jimmy Carter's pardons of those who violated the Selective Service laws in World War II and Vietnam.

In many cases, the offenses pardoned by these Presidents were at least as serious as those I am pardoning today. The actions of those pardoned and the decisions to pardon them raised important issues of conscience, the rule of law, and the relationship under our Constitution between the government and the governed. Notwithstanding the seriousness of these issues and the passions they aroused, my predecessors acted because it was time for the country to move on. Today I do the same.

Some may argue that this decision will prevent full disclosure of some new key fact to the American people. That is not true. This matter has been investigated exhaustively. The Tower Board, the Joint Congressional Committee charged with investigating the Iran-Contra affair, and the Independent Counsel have looked into every aspect of this matter. The Tower Board interviewed more than 80 people and reviewed thousands of documents. The Joint Congressional Committee interviewed more than 500 people and reviewed more than 300,000 pages of material. Lengthy committee hearings were held and broadcast on national television to millions of Americans. And as I have noted, the Independent Counsel investigation has gone on for more than 6 years, and it has cost more than \$31 million.

Moreover, the Independent Counsel stated last September that he had completed the active phase of his investigation. He will have the opportunity to place his full assessment of the facts in the public record when he submits his final report. While no impartial person has seriously suggested that my own role in this matter is legally questionable, I have further requested that the Independent Counsel provide me with a copy of my sworn testimony to his office, which I am prepared to release immediately. And I understand Secretary Weinberger has requested the release of all of his notes pertaining to the Iran-Contra matter.

For more than 30 years in public service, I have tried to follow three precepts: honor, decency, and fairness. I know, from all those years of service, that the American people believe in fairness and fair play. In granting these pardons today, I am doing what I believe honor, decency, and fairness require.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, pursuant to my powers under Article II, Section 2, of the Constitution, do hereby grant a full, complete, and unconditional pardon to Elliott Abrams, Duane R. Clarridge, Alan Fiers, Clair George, Robert C. McFarlane, and Caspar W. Weinberger for all offenses charged or prosecuted by Independent Counsel Lawrence E. Walsh or other member of his office, or committed by these individuals and within the jurisdiction of that office.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of December, in the year of our Lord nineteen hundred and ninety-two, and of the Independence of the United States of America the two hundred and seventeenth.

GEORGE BUSH

Effects of a Pardon on Authority to Deport, Firearms Disability, and Remission of Restitution

Office of the Legal Counsel
U.S. Department of Justice
June 19, 1995

A full and unconditional presidential pardon precludes the exercise of the authority to deport a convicted alien under 8 U.S.C. § 1251(a)(2).

A full and unconditional presidential pardon removes a state firearm disability arising as a result of a conviction of a federal crime.

A full and unconditional presidential pardon extends to the remission of restitution ordered by a court pursuant to 18 U.S.C. § 3551(b)–(c) as a “sanction” authorized in addition to imprisonment, probation, or a fine until such time as the restitution award is paid to the victim.

Memorandum for the Pardon Attorney Office of the Pardon Attorney

This memorandum responds to your request for our opinion concerning whether a full and unconditional presidential pardon precludes the exercise of the authority to deport a convicted alien under 8 U.S.C. § 1251(a)(2), removes a state firearm disability arising as a result of conviction of a federal crime, or extends to the remission of court-ordered criminal restitution not yet received by the victim of the pardoned offender. We answer all three questions in the affirmative.

I.A.

Your first question requires us to examine the effect of a presidential pardon on the deportability of an alien on the ground that he or she has been convicted of certain crimes. Section 1251(a) of title 8 describes the classes of aliens who “shall, upon order of the Attorney General, be deported.” The various criminal convictions that make an alien deportable are set forth in subsections (A)–(D) of section 1251(a)(2). Subsection 1251(a)(2)(A)(iv) waives the application of subsection (A) (involving crimes of “moral turpitude” and “aggravated felonies”) for any offender who “has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.” The statute is silent, however, as to the effect of such a pardon on the convictions listed in subsections (B)–(D), which include offenses involving controlled substances, firearms, and miscellaneous crimes.

The Immigration and Naturalization Service takes the position that a pardon only removes the authority to deport an alien whose conviction falls within subsec-

tion (A). Although the statute only addresses the effect of a pardon with respect to crimes involving moral turpitude and aggravated felonies, that conclusion does not end the analysis of this issue, because congressional legislation cannot define or limit the effect of a presidential pardon. As Acting Attorney General John W. Davis opined in a similar context:

The fact that by the act of August 22, 1912, Congress expressly recognized the right of the President to remit such penalties “where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interest” can not affect the power of the President, which exists independently of legislative recognition, to remit such penalties by pardon, whether the offense [was] committed in time of peace or in time of war.

Naval Service—Desertion—Pardon, 31 Op. Att’y Gen. 225, 232 (1918). See also *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (“This power of the President [i.e., the pardon power] is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.”). Thus, the question raised by your request is not a matter of statutory interpretation, but instead entails consideration of the scope of the President’s pardon authority under the Constitution.

Article II, section 2 of the Constitution authorizes the President the authority “to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” In *Ex Parte Garland*, the Supreme Court summarized the reach of a presidential pardon as follows:

A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents ... the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.



WALTER DELLINGER

Assistant Attorney
General, Office of
Legal Counsel, U.S.
Department of Jus-
tice, 1995 WL 861618
(O.L.C.), June 19,
1995.

Garland, 71 U.S. at 380–81. This broad interpretation of the effect of a pardon was affirmed in *Knote v. United States*, 95 U.S. 149 (1877), in which the court stated:

A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights.

Id. at 153.

A presidential pardon relieves the offender of all punishments, penalties, and disabilities that flow directly from the conviction, provided that no rights have vested in a third party as a consequence of the judgment. In *Boyd v. United States*, 142 U.S. 450 (1892), for example, the defense objected to the testimony of a witness who had been convicted of larceny. In response, the prosecution presented a full and unconditional pardon issued by President Harrison. The Court held that the pardon restored the competency of the witness to testify. “The disability to testify being a consequence, according to the principles of the common law, of the judgment of conviction, the pardon obliterated that effect.” *Id.* at 453–54.

This conclusion is supported by the English common law from which the framers drew their understanding of the scope of the power being granted the chief executive. The pardon clause of the Constitution was derived from the pardon power held by the King of England at the adoption of the Constitution. Accordingly, the Supreme Court has repeatedly looked to English cases for guidance in interpreting the effect of a pardon. *See, e.g., Schick v. Reed*, 419 U.S. 256, 263 (1974); *Ex Parte Wells*, 59 U.S. (18 How.) 307, 310–11 (1855). At common law it was well settled that a pardon by the king removed not only the punishment that flowed from the offense, but also “all the legal disabilities consequent on the crime.” 7 M. Bacon, *Abridgment of the Law* 416 (1852). *See, e.g., Cuddington v. Wilkins*, 80 Eng. Rep. 231, 232 (K.B. 1614) (“the King’s pardon doth not only clear the offence it self, but all the dependencies, penalties, and disabilities incident unto it”).

Based on the foregoing analysis, we believe that a deportation order authorized by section 1251(a)(2) is a consequence of a conviction that is precluded by a full and unconditional presidential pardon. Section 1251(a)(2) does not render a person deportable based on the conduct in which he or she engaged. Rather, this provision establishes an additional penalty that attaches solely because of the conviction. Thus, a person who engaged in the conduct prohibited by the relevant criminal statutes but was never convicted of the crime

would not be deportable on the basis of this provision; the authority to deport hinges completely on the fact of conviction. Therefore, a presidential pardon would preclude the imposition of the penalty.

We have considered the possible argument that deportation pursuant to section 1251(a)(2) is not precluded by a pardon because the statute does not impose a penalty or disability based on an offense but rather only implements a decision regarding conduct Congress has deemed inconsistent with the qualifications aliens must have to remain in the country. Although in interpreting the pardon power the Supreme Court has never expressly adopted a distinction between penalties that a pardon can remove and qualifications that a pardon does not affect, the Attorneys General and lower courts have invoked it.

For example, in 1898, Attorney General Griggs was asked to consider the effect of a presidential pardon on the administration of a statute that prohibited the reenlistment of any soldier “whose service during his last preceding term of enlistment ha[d] not been honest and faithful.” *Army—Enlistment—Pardon*, 22 Op. Att’y Gen. 36, 37 (1898). The soldier in question had been discharged after being convicted of desertion from military service. Subsequently, he was pardoned by the President and sought reenlistment. Because Congress may prescribe qualifications and conditions for military service, Attorney General Griggs sought to determine whether the statute in question set such a qualification or attempted to impose additional disabilities on the offender because of the conviction. He concluded that application of the statute to a pardoned soldier was permissible because it did not seek to prevent reenlistment because of the commission of a criminal offense. Rather, he found that the statute’s prohibition related to “previous conduct in service and affect[ed] the personal rather than the criminal character of the applicant.” *Id.* at 39. Where a statute “is properly to be regarded as a rule relating to qualification[s] for office,” a later opinion concluded, and “does not impose a penalty as such on individual offenders ... the incidental disabilities which they may suffer by reason of the statute are not removed by a pardon.” 31 Op. Att’y Gen. at 230. *Accord, Effect of Pardon on Statute Making Persons Convicted of Felonies Ineligible for Enlistment in the Navy*, 39 Op. Att’y Gen. 132 (1938). In contrast, “where a statute although purporting to prescribe qualifications for office has no real relation to that end but is obviously intended to inflict punishment for a past act,” a presidential pardon will abate that punishment. 31 Op. Att’y Gen. at 229.¹

Professor Samuel Williston drew essentially the same distinction in an early and seminal article, reasoning that

[I]f the mere conviction involves certain disqualifications which would not follow from the

commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of [the] crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 653 (1915). In recent decades, several federal courts of appeals have endorsed Williston's view. See *United States v. Noonan*, 906 F.2d 952, 958–59 (3d Cir. 1990); *Bjerkan v. United States*, 529 F.2d 125, 128 n. 2 (7th Cir. 1975).

It is clear that deportation based on section 1251(a)(2) operates solely on the basis of the conviction of crime and therefore falls within the type of consequence that is removed by a pardon under the Williston distinction. The provision creates a “disqualification[] which would not follow from the commission of the crime without conviction.” 28 HARV. L. REV. at 653. A person who engaged in the conduct prohibited by the relevant criminal statutes but was never convicted of the crime would not be deportable on the basis of this provision. Rather, section 1251(a)(2) excludes only those aliens who have been convicted. As such, its application to a pardoned alien is impermissible.²

B.

You have asked us to address specifically whether a pardon removes only the consequences of a conviction or whether it also removes the consequences of an offense even where there has not yet been a conviction. Throughout the nation's history, Presidents have asserted the power to issue pardons prior to conviction, and the consistent view of the Attorneys General has been that such pardons have as full an effect as pardons issued after conviction. See, e.g., *Pardoning Power of the President*, 6 Op. Att'y Gen. 20 (1853); *Pardons*, 1 Op. Att'y Gen. 341 (1820). Indeed, in two of the best-known exercises of the pardon power (President Andrew Johnson's offer of pardons to persons involved in secession but willing to take an oath of loyalty, and President Jimmy Carter's pardon of persons who avoided military service during the Vietnam War), the vast majority of those pardoned had not been convicted of any crime.

The language of the Court's opinion in *Garland* is instructive on this issue:

A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt [for the offense], so that in the eye of the law the offender is as innocent as if he had never committed the offence.

Garland, 71 U.S. at 380 (emphasis added). We under-

stand this passage to mean that a pardon removes or prevents the attachment of all consequences that are based on guilt for the offense. In the great majority of cases, a pardon comes after a conviction; thus, there has already been a finding of guilt in the criminal justice process. It is important to understand, however, that the pardon is for the guilt for an offense, not just the conviction of the offense. Thus, a pardon for an offense that is issued prior to a conviction has the same effect as one that is issued after a conviction. Any consequences that would have attached had there been a conviction are precluded.³

The foregoing analysis does not mean that a pardoned person cannot be held accountable for the conduct underlying the offense by a governmental entity seeking to determine suitability for a position of confidence or trust, adherence to a code of conduct, or eligibility for a benefit. In *Garland* the Court stated that a pardon makes “the offender ... as innocent as if he had never committed the offense.” *Id.* (emphasis added). We do not interpret this to mean that the pardon creates the fiction that the conduct never took place. Rather, a pardon represents the Executive's determination that the offender should not be penalized or punished for the offense. There may be instances where an individual's conduct constitutes not only a federal offense, but also a violation of a separate code of conduct or ethics that the individual is obligated to comply with by virtue of his or her professional license. Discipline associated with the breach of the conditions of a professional license, where the disciplinary action is not triggered merely by the fact of commission or conviction of a federal offense, generally would not be barred by a pardon.

For example, an attorney charged with a criminal offense for which he or she is later pardoned by the President would be relieved of all consequences that attached solely by reason of his commission of the offense. However, the pardon would not necessarily prevent a local or state bar from disciplining the attorney, if it independently determined that the underlying conduct, or some portion of it, violated one of its canons of ethics. In those instances, the bar would not have based its decision to disbar or sanction the attorney on the fact that the attorney had violated the criminal laws of the United States, but rather would have conducted an inquiry into the conduct and determined that an ethical violation had occurred. Several state courts have taken this approach when considering the effect of a gubernatorial pardon on state disbarment proceedings. See e.g., *Nelson v. Commonwealth*, 109 S.W. 337 (Ky. 1908); *In re Lavine*, 41 P.2d 161 (Cal. 1935); *In re Bozarth*, 63 P.2d 726 (Okla. 1936).

II.

Your second question requires us to determine whether a full and unconditional pardon removes firearms disabilities imposed by a state as a result of a conviction of a federal crime. The materials submitted with your opinion request suggest that the typical disability statute makes it an offense for a person convicted of a state or federal offense to own, possess, or have custody or control of a firearm.⁴ See Office of the Pardon Att’y, U.S. Dept. of Justice, Civil Disabilities of Convicted Felons: A State-By-State Survey (1992).

Our conclusion in section I that a presidential pardon removes all punishments, penalties, and disabilities that attach solely by reason of a federal offense necessarily requires the conclusion that a pardon removes state firearms disabilities based solely on a federal offense, so long as we can answer affirmatively the question whether the President’s pardon power extends beyond federal consequences to include consequences imposed by a state. This question was addressed by the Supreme Court in *Carlesi v. New York*, 233 U.S. 51 (1914). In *Carlesi*, the Court was asked to determine whether the fact that the plaintiff had received a presidential pardon for a federal offense prevented a state from treating the plaintiff as a “second offender” for the purposes of punishment for a subsequent state offense. Writing for a unanimous Court, Chief Justice White stated:

It may not be questioned that the States are without right directly or indirectly to restrict the National Government in the execution of its legitimate powers. It is therefore to be conceded that if the act of the State in taking into consideration a prior conviction of an offense committed by the same offender against the laws of the United States despite a pardon was in any just sense a punishment for such prior crime, that the act of the State would be void because destroying or circumscribing the effect of the pardon granted under the Constitution and [the] laws of the United States.

Id. at 57. Ultimately, the Court concluded that the state was not seeking to impose additional punishment for the pardoned offense, but rather had made the conduct underlying that offense an aggravating circumstance for purposes of determining the punishment for the second offense. See *id.* at 59. However, it is clear from the above-quoted passage that if the Court had determined that the state was attempting to punish or penalize the offender for the pardoned offense, the state’s action would have been a violation of the Constitution. At least one federal court of appeals has expressly adopted this position. In *Bjerkan v. United States*, 529 F.2d 125 (7th Cir. 1975), the Seventh Circuit, relying on

the Court’s dicta in *Carlesi*, held that “a presidential pardon restores state as well as federal civil rights.” *Id.* at 129. The court stated that once a federal offense has been pardoned, any “attempted punishment [by a state] would constitute a restriction on the legitimate, constitutional power of the President to pardon an offense against the United States and would be void as circumscribing and nullifying that power.” *Id.* at 128.

The conclusion that a presidential pardon relieves a federal offender of state firearms disabilities that attach solely by reason of a federal conviction is supported by federal supremacy principles based on the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2. The Pardon Clause gives the President exclusive jurisdiction in the issuance of pardons and reprieves for offenses against the United States. See *Schick*, 419 U.S. at 266–67. Accordingly, the Supreme Court has held repeatedly that Congress may not act in any manner that would limit the full legal effect of a presidential pardon. See, e.g., *Garland*, 71 U.S. at 380; *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1871). The same conclusion is required with respect to acts of a state that would limit or destroy the effect of a presidential pardon. When the President issues a pardon pursuant to this constitutional authorization, the pardon preempts any inconsistent state laws, regulations, or actions. In its sphere — offenses against the United States — the President’s pardon power “must be supreme. It cannot be hindered by the operation of the subordinate governments. The pardon power would be ineffective if it could only restore a convict’s federal civil rights.” *Bjerkan*, 526 F.2d at 129. See also *Harbert v. Deukmejian*, 173 Cal. Rptr. 89 (Cal. Ct. App. 1981) (state firearm disability does not apply to a person who has received a full and unconditional presidential pardon).⁵

III.

Your third question concerns whether a full and unconditional presidential pardon extends to the remission of restitution ordered by a court pursuant to 18 U.S.C. § 3551(b)–(c) as a “sanction” authorized in addition to imprisonment, probation, or a fine.⁶ This question, to our knowledge, has not been decided by any court, but we conclude, based upon existing precedent, that a pardon does reach such restitution where the victim has not yet received the restitution award, provided the pardon does not contain an express limitation to the contrary.⁷

Although a pardon is a full forgiveness of punishment, there is a limitation on this power. As the Supreme Court explained in *Osborn v. United States*, 91 U.S. 474, 477 (1875):

If in the proceedings to establish [the offender’s] culpability and enforce the penalty, and before the grant of the pardon, the rights of others than the

government have vested, those rights cannot be impaired by the pardon. The government having parted with its power over such rights, they necessarily remain as they existed previously to the grant of the pardon. The government can only release what it holds.

See also *Garland*, 71 U.S. at 381; *Knote*, 95 U.S. at 153–55. Cf. *Hodges v. Snyder*, 261 U.S. 600, 603 (1923) (the private rights of a party that have been vested by the judgment of a court cannot be taken away by subsequent legislation); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429 (1855) (same). Thus, whether the restitution order is remitted by the pardon depends on whether the order creates a vested right for the victim.

A vested right is one the conferral of which is complete and consummated. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803). With respect to rights affected by a presidential pardon, the Court has stated:

Where ... property condemned, or its proceeds, have not ... vested, but remain under control of the Executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon. The property and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds have thus [vested] when paid over to the individual entitled to them, in the one case, or are covered into the treasury, in the other.

Knote, 95 U.S. at 154. Thus, we do not believe that restitution orders issued pursuant to 18 U.S.C. § 3551(b)–(c) create vested rights in victims until the victims actually receive the award. Prior to that time, the victim does not exercise the complete control over the property required for a right to be vested.

Although 18 U.S.C. § 3663(h) provides victims with civil remedies to collect restitution, it does not make restitution a civil judgment that a court may not revoke. To the contrary, a restitution order results from a criminal proceeding that adjudicates guilt and it is issued as part of the offender's sentence. Its character is undeniably penal rather than compensatory. As the Court reasoned in *Kelly v. Robinson*, 479 U.S. 36 (1986):

Although restitution does resemble a judgment “for the benefit of” the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the

penal goals of the State and the situation of the defendant.

Id. at 52. Thus, the Eleventh Circuit has held that a victim does not have Article III standing to challenge the revocation of a restitution order. *United States v. Johnson*, 983 F.2d 216 (11th Cir. 1993). Other courts have relied on similar reasoning to deny alleged victims standing to challenge the terms of a restitution order under both the Constitution and 18 U.S.C. § 3663–3664. See *United States v. Grundhoefer*, 916 F.2d 788 (2d Cir. 1990); *United States v. Kelley*, 997 F.2d 806 (10th Cir. 1993).

Based on these decisions, it is clear that a victim does not have complete control over a restitution award prior to receiving it. Rather, he or she is allowed to collect only pursuant to the terms set forth by the court. Thus, no rights or interests vest in the victim upon the issuance of a restitution order. Because a pardon eliminates all penalties that do not create vested rights in a third party, we conclude that a full and unconditional presidential pardon has the effect of remitting court-ordered criminal restitution that has not yet been received by the victim.

Of course, as should already be clear from the foregoing discussion, the pardon cannot remit a restitution award that the victim has received. Once the victim takes possession, the Executive no longer has control over the award. As the Court stated in *Knote*, “if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way.” 95 U.S. at 154. Therefore, any restitution awards that have been received by the victim prior to the granting of the pardon are not recoverable by the offender.

IV.

For the foregoing reasons, we conclude that a full and unconditional pardon precludes the exercise of the authority to deport a person pursuant to 8 U.S.C. § 1251(a)(2), removes firearms disabilities imposed by a state solely by reason of a federal conviction, and remits restitution awarded pursuant to 18 U.S.C. § 3551(b)–(c) where the victim has not yet received the award. We note, however, that the President can leave undisturbed any of these consequences by expressly stating that their continued existence is a condition of the pardon.

Walter Dellinger
Assistant Attorney General

Notes

¹ The decision of the Supreme Court in *Garland* illustrates this distinction. In *Garland*, at issue was an act of Congress that attempted to exclude from the prac-

tice of law all persons who had participated in the Rebellion. The Court determined that this exclusion was a punishment for the offense of treason. In other words, the Court concluded that, despite Congress' attempt to present its Act as setting qualifications for a profession, it was actually an attempt to exact additional punishment for an offense. The Court held that the Act could not be applied to Garland because the President's pardon prohibited the plaintiff from being punished for the offense of treason. To hold that he could be punished under this new law would subvert the President's clemency power. As the Court stated, "[i]f such exclusion can be effected by the exaction of an expurgatory oath covering the offense, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency." *Garland*, 71 U.S. at 381. See also *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). Accordingly, any punishment Congress attempted to prescribe for guilt for the offense was not applicable to the plaintiff.

² It might also be argued that because deportation is not punishment, it is not precluded by a presidential pardon. This argument has been suggested in dicta in two court opinions. *Brazier v. Commissioner of Immigration at Port of New York*, 5 F.2d 162 (2d Cir. 1924); *Kwai Chiu Yuen v. INS*, 406 F.2d 499 (9th Cir. 1969). In each instance, the court relied on the Supreme Court's statement in *Mahler v. Eby*, 264 U.S. 32, 39 (1924), that deportation "is not punishment" for purposes of the Ex Post Facto Clause of the Constitution (art. I, § 9), to suggest that a presidential pardon does not preclude deportation. *Brazier*, 5 F.2d at 164; *Kwai Chiu Yuen*, 406 F.2d at 502. We disagree with this argument because we believe that a presidential pardon removes all adverse consequences of conviction that can be viewed as punishments, penalties, or disabilities that attach by reason of the conviction, regardless of whether they are viewed as "punishment" for purposes of invoking other constitutional provisions.

³ Consequences that attach simply by reason of an indictment for an offense generally are not precluded by a pardon. Although the consequence is identified with reference to an offense, it generally is not based on guilt for the offense. For example, in *In re Claire George Fee Application*, No. Div. 86-6, 1994 WL 585681 (D.C. Cir. Oct. 21, 1994), the court considered the application to a pardoned individual of the provision of the Independent Counsel Act, 28 U.S.C. §§ 591-99, that authorizes the payment of attorneys fees to any person who is investigated by an Independent Counsel, see 28 U.S.C. § 593(f)(1). The petitioner claimed that, by virtue of a presidential pardon, he was entitled to be reimbursed for attorneys fees since those fees would have been paid by the government had he not been indicted for the

offense. In concluding that the pardon did not restore his right to attorneys fees, the court relied on the rule enunciated in *Knote*, 95 U.S. at 154: the President's exercise of the pardon power is subject to the constitutional requirement that money may not be withdrawn from the Treasury in the absence of a congressional appropriation. The court could also have reached the same conclusion by the reasoning we suggest here. The petitioner would not have been entitled to reimbursement of his attorneys fees even if he had been found not guilty of the offense at trial. The pardon, therefore, had no effect on his entitlement to payment of attorneys' fees because the refusal to pay attorneys' fees was not a consequence of his guilt for the offense.

⁴ For example, a Colorado statute provides that any person convicted under the laws of a state, or of the United States, of certain crimes within the past ten years or within ten years of release from confinement, may not possess, use or carry on his person a firearm or other weapon prohibited by the firearms laws. Colo. Rev. Stat. Ann. § 18-12-108 (West 1986).

⁵ An 1856 opinion of Attorney General Cushing concludes that a presidential pardon does not extend to legal or political disabilities imposed by one of the states. *Pardons*, 7 Op. Att'y Gen. 760 (1856). However, we decline to follow that opinion because we disagree with the approach it takes on a number of issues. First of all, without any discussion of the scope of the pardon power, the opinion simply accepts the petitioner's assumption that a presidential pardon does not by itself remove a disability imposed by a state on the basis of a federal conviction. More fundamentally, the opinion is inconsistent with the subsequent Supreme Court opinion in *Carlesi*, modern concepts of federalism, and our analysis of the effect of a presidential pardon.

⁶ Subsections (b) and (c) of section 3551 permit a "[s]anction authorized by [18 U.S.C. §] 3556." Section 3556, in turn, permits a sentence requiring "the defendant [to] make restitution to any victim of the offense in accordance with the provisions of ... [18 U.S.C. § §] 3663 and 3664." The latter sections impose an elaborate set of procedural and substantive requirements upon the sentencing court concerning the imposition of restitution. Thus, 18 U.S.C. § 3551(b)-(c) effectively incorporate by reference the requirements of 18 U.S.C. §§ 3663 and 3664.

⁷ Clearly, the President may grant a pardon on the condition that the offender pay any court-ordered restitution imposed before the pardon was issued. However, the President must expressly state any limitation or condition that he wishes to impose because a pardon is presumed to reach all punishment resulting from an offense. Indeed, even when a limitation is expressly stated, any ambiguity must be construed in favor of the beneficiary of the pardon. See *Knote*, 95 U.S. at 151.

The Effect of a Pardon on Bar Discipline

**In re Elliott ABRAMS, Respondent,
A Member of the Bar
of the District of Columbia Court of Appeals.
689 A.2d 6 (D.C. 1997)**

**District of Columbia Court of Appeals.
No. 91-BG-1518
Reargued En Banc May 7, 1996.
Decided Feb. 5, 1997.**

ON REHEARING EN BANC

[*Editors' Note:* An edited version of the majority and dissenting opinions follows. Footnotes that have been retained have been renumbered and recast as endnotes.]

SCHWELB, Associate Judge.

This matter is before us on the recommendation of the Board on Professional Responsibility that Elliott Abrams, Esq., a member of our Bar, and formerly Assistant Secretary of State for Inter-American Affairs, be suspended from the practice of law in the District of Columbia for a period of one year. The Board concluded, on the basis of extensive evidentiary findings by the Hearing Committee, that Abrams had engaged in "dishonesty, deceit or misrepresentation" by giving false (but unsworn) testimony to three Congressional committees regarding the role of the United States government in what has become known as the Iran-Contra Affair.

Following Abrams' conviction, upon a plea of guilty, of criminal charges arising out of his Congressional testimony, President Bush granted him a full and unconditional pardon. Although Abrams conceded before the Board that the pardon did not preclude Bar Counsel from maintaining this disciplinary proceeding, he now contends that the President's action blotted out not only his convictions but also the underlying conduct, and that Bar Counsel's charges must therefore be dismissed. A division of this court agreed with Abrams. *In re Abrams*, 662 A.2d 867 (D.C.1995) (*Abrams I*).

We granted Bar Counsel's petition for rehearing en banc, *In re Abrams*, 674 A.2d 499 (D.C.1996) (en banc) (*Abrams II*), and we now hold, in conformity with the virtually unanimous weight of authority, that although the presidential pardon set aside Abrams' convictions, as well as the consequences which the law attaches to those convictions, it could not and did not require the court to close its eyes to the fact that Abrams did what he did. "Whatever the theory of the law may be as to the effect of a pardon, it cannot work such moral changes as to warrant the assertion that a pardoned convict is

just as reliable as one who has constantly maintained the character of a good citizen." *State v. Hawkins*, 44 Ohio St. 98, 5 N.E. 228, 237 (1886). Specifically, the pardon "did not efface the ... want of professional honesty involved in the crime." *People v. Gilmore*, 214 Ill. 569, 73 N.E. 737, 737 (1905).

"No moral character qualification for Bar membership is more important than truthfulness and candor." *In re Meyerson*, 190 Md. 671, 59 A.2d 489, 496 (1948). An attorney is required to be a person of good moral character not only at the time of admission to the Bar, but also thereafter. *In re Rouss*, 221 N.Y. 81, 116 N.E. 782, 783 (1917) (Cardozo, C.J.). The pardon could not "reinvest [Abrams] with those qualities which are absolutely essential for an attorney at law to possess or rehabilitate him in the trust and confidence of the court." *In re Lavine*, 2 Cal.2d 324, 41 P.2d 161, 163 (1935) (citation omitted). Accordingly, we hold that this court's authority to impose professional discipline was not nullified by the presidential pardon....

[W]e order that Abrams be publicly censured....

II.

THE DISCIPLINARY PROCEEDING

On October 7, 1991, Abrams entered a plea of guilty to a two-count information charging violations of 2 U.S.C. § 192 (1985) (willful failure to answer questions pertinent to a Congressional inquiry).... On November 15, 1991, Abrams was placed on probation for a term of two years and ordered to perform one hundred hours of community service.

Following Abrams' convictions, Bar Counsel charged him with three counts of "conduct involving dishonesty, deceit and misrepresentation," in violation of Disciplinary Rule 1-102(A)(4) of the former Code of Professional Responsibility. A hearing was held on December 21, 1992 before Hearing Committee No. 8, and the Committee took the case under advisement. On December 24, 1992, three days after that hearing, President Bush issued the full and unconditional pardon on which Abrams now relies.

On April 8, 1993, the Hearing Committee issued a comprehensive Report and Recommendation in which it found that Abrams had committed the charged violations. The Committee recommended that Abrams be suspended from practice for one year. The Committee took note of the presidential pardon, but concluded that "[i]n the context of attorney disciplinary proceedings, a presidential pardon will not preclude the imposition of sanctions."...



Before WAGNER, Chief Judge, and FERREN, TERRY, STEADMAN, SCHWELB, FARRELL, KING, RUIZ, and REID, Associate Judges.

Schwelb, J., filed concurring opinion in which Ferren and Farrell, JJ., joined.

King and Ruiz, JJ., filed concurring opinions.

Terry, J., filed dissenting opinion in which Wagner, C.J., Steadman and Reid, JJ., joined.

Charles J. Cooper, with whom William L. McGrath was on the brief, Washington, DC, for respondent.

Michael S. Frisch, Assistant Bar Counsel, with whom Leonard H. Becker, Bar Counsel, and Julia L. Porter, Assistant Bar Counsel, were on the brief, for the Office of Bar Counsel.

The Board sustained the Hearing Committee's findings and recommended, as had the Hearing Committee, that Abrams be suspended from practice for one year.... Abrams filed timely exceptions to the Board's recommendation and, following the issuance of the division's opinion in *Abrams I* and the vacation of that opinion in *Abrams II*, the case was argued to the full court sitting en banc.

III. THE EFFECT OF THE PARDON

...

B. The Merits.

(1) General considerations.

President Bush pardoned Abrams pursuant to Article II, Section 2, Clause 1 of the Constitution, which authorizes the President to "grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment." Although a violation of the District of Columbia Rules of Professional Conduct is not a crime, and certainly not "an offense against the United States," see *In re Bocchiaro*, 49 F. Supp. 37, 38 (W.D.N.Y.1943) (President lacks authority to pardon state offenses), Abrams contends that the presidential pardon directed to his federal convictions precludes this court from imposing any disciplinary sanction based on his testimony before the Congressional committees. He relies heavily on the following language from the majority opinion in *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380-81 (1866):

A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. (Emphasis added.)

According to Abrams, the quoted language requires this court, in effect, to pretend that his pardoned wrongdoing never happened. Although Abrams deceived three Congressional committees, and although he has admitted that he deceived at least two of them, he contends that the pardon precludes us from considering that wrongful conduct in assessing his moral character for the purpose of bar discipline.

The implications of Abrams' position are troubling to say the least. Let us consider an apt analogy. Suppose that an alcoholic surgeon performs an operation while intoxicated. He botches the surgery. The patient dies. The surgeon is convicted of manslaughter and is sen-

tenced to imprisonment. The President grants him a full and unconditional pardon. According to Abrams, the surgeon now has the right, as a result of the pardon, to continue to operate on other patients, without any interference from the medical licensing authorities. [FN7] The proposition that the alcoholic but pardoned surgeon (or, by analogy, a habitually inebriated and unsafe airline pilot) cannot be disciplined is, in our view, altogether unacceptable and even irrational, and it has been emphatically rejected by the courts....

A more reasonable approach to the effect of a pardon, which avoids the incongruous result for which Abrams contends, was suggested by Professor Samuel Williston in his landmark article, *Does a Pardon Blot Out Guilt?*, 28 Harv. L. Rev. 647 (1915). After comparing the passage from *Garland* which we have quoted..., *supra*, with the court's earlier and quite different assessment of the nature of a pardon,[FN8] and after explaining the precedents both before and after *Garland*, Professor Williston concluded:

The true line of distinction seems to be this: The pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

Id. at 653 (emphasis added).

"The fundamental distinction suggested by Professor Williston has been generally accepted and followed by the courts since the date of his article." *Damiano v. Burge*, 481 S.W.2d 562, 565 (Mo. App. 1972). The parties have not cited, and our research has not disclosed, a single decision by any federal, state, or other court (*Abrams I* excepted) which has rejected Professor Williston's reasoning.... We discern no basis in law, justice, or reason to challenge this overwhelming trend.

(2) The nature of the proceeding.

It is important to note at the outset what this case is *not* about. Bar Counsel has not asked the court to disbar Abrams on account of his having been convicted of a crime of moral turpitude.... The presidential pardon would undoubtedly have precluded a sanction based on Abrams' conviction, and Abrams did not, in any event, commit such a crime. Instead, the proceeding was brought to discipline Abrams for engaging in *conduct* which, according to Bar Counsel, violated the Code of Professional Responsibility. Although the case was precipitated in part by Abrams' criminal convictions ... the

existence *vel non* of a criminal conviction is not dispositive of the question whether Abrams violated his ethical obligations as an attorney. The central question in a disciplinary proceeding is whether the attorney has adhered to the high standards of honor and integrity which membership in our profession demands, and not whether he has been criminally punished for any derelictions.

Responsibility for the discipline of attorneys admitted to the bar of the District of Columbia is vested in this court.... "Our purpose in conducting disciplinary proceedings and imposing sanctions is not to punish the attorney; [FN10]³ rather, it is to offer the desired protection by assuring the continued or restored fitness of an attorney to practice law." *In re Steele*, 630 A.2d 196, 200 (D.C.1993) (citation and footnote omitted)....

...

(4) Federal authorities.

So far as we are aware, all of the federal appellate decisions in this century which have considered the effect of a presidential pardon have adopted the approach suggested by Professor Williston and have rejected the position urged on us by Abrams.

The closest case to the present one is *Grossgold v. Supreme Court of Illinois*, 557 F.2d 122 (7th Cir.1977). Grossgold, an attorney, had been convicted of mail fraud and suspended from practice. He was subsequently pardoned by the President. He sought reinstatement to the Illinois Bar, claiming that his suspension had been based on the pardoned offense, and that it had therefore been nullified by the pardon. The Court of Appeals unanimously held that the trial court had lacked federal jurisdiction over the case. The court then added the following:

Assuming federal jurisdiction *arguendo*, the presidential pardon did not wipe out the moral turpitude inherent in the factual predicate supporting plaintiff's mail fraud conviction....

The court quoted with approval the passage from Professor Williston's article reproduced [above], and concluded that because good character is a necessary qualification for the practice of law, and because Grossgold's conduct was incompatible with good moral character, the fact that he had been pardoned did not relieve him from professional discipline. *Id.* at 125-26 (additional citations omitted).[FN13]⁴

...

In *In re North*, 314 U.S. App. D.C. 102, 62 F.3d 1434 (1994) (per curiam), Clair E. George, a C.I.A. official who had been pardoned (along with Abrams) for his role in the Iran-Contra matter, applied for an award of counsel fees. Fees were available, under the applicable statute, to those individuals who had not been indicted. George had been indicted, but he argued that the pardon had "blotted out" the indictment against him. Like Abrams, George relied heavily on *Garland*.

The court ruled, with one judge dissenting, that the pardon did not blot out the existence of the indictment, and that George was not eligible for an award of counsel fees.... [T]he court in *North* characterized *Garland's* "blot[ting] out" language as "dictum." *Id.* at 105, 62 F.3d at 1437. The court noted Chief Justice Marshall's definition of a pardon in *Wilson*, 32 U.S. (7 Pet.) at 160, which we have quoted in note 8, *supra*, and stated that *Garland's* rationale is consistent with *Wilson*; its dictum blotting out guilt is inconsistent with *Wilson*. *Garland's* dictum was implicitly rejected in *Burdick*, 236 U.S. 79, which recognized that the acceptance of a pardon implies a confession of guilt. *Id.* (citations omitted).

...

(5) State court decisions.

So far as our research has disclosed, the state courts which have considered the effect of a presidential or gubernatorial pardon ... have likewise unanimously rejected the contention that such a pardon bars a disciplinary proceeding against an attorney if that proceeding is based on the attorney's underlying conduct.... In the words of then Chief Judge Cardozo, writing for a unanimous court, "[p]ardon blots out the offense and all its penalties, forfeitures and sentences, *but the power to disbar remains*." *Rouss, supra*, 116 N.E. at 783.

...

Perhaps the leading state court case on the relation between a pardon and a disciplinary proceeding against an attorney is *Nelson v. Commonwealth*, 128 Ky. 779, 109 S.W. 337 (1908). Nelson had been convicted of forgery. He received a pardon from the governor. Disbarment proceedings were brought against him, and he interposed the pardon as a defense. The court held that the pardon did not preclude the imposition of discipline:

[W]hile the *general effect* of a pardon as to the restoration of rights and privileges and the creation of a new credit and capacity may be conceded, the fact that a pardon has been granted to a person convicted of an offense cannot warrant the assertion that such a person is as honest, reliable, and fit to hold a public office as if he has constantly maintained the character of a law-abiding citizen.

Id. 109 S.W. at 338. The court stated that although the pardon could blot out the offense for which he was convicted, "*it cannot wipe out the act that he did*, which was adjudged an offense. It was done, and will remain a fact for all time." *Id.* (emphasis added). The court continued:

While the effect of the pardon was to relieve him of the penal consequences of his act, it could not restore his character. It did not reinvest him with those qualities which are absolutely essential for an attorney at law to possess. It could not rehabilitate him in the trust and confidence of the court....

Id. at 340.

We have found no authority to the contrary....

...

(6) The views of the Department of Justice.

On June 19, 1995, in a Memorandum to the Pardon Attorney, the Honorable Walter Dellinger, then Assistant Attorney General for the Office of Legal Counsel (and now Acting Solicitor General), addressed the very issue presented in this case. He wrote, in pertinent part, as follows:

In *Garland* the Court stated that a pardon makes the offender ... as innocent as if he had never committed the offense." *Id.* (emphasis added). We do not interpret this to mean that the pardon creates the fiction that the conduct never took place.

Rather, a pardon represents the Executive's determination that the offender should not be penalized or punished for the offense. There may be instances where an individual's conduct constitutes not only a federal offense, but also a violation of a separate code of conduct or ethics that the individual is obligated to comply with by virtue of his or her professional license. Discipline associated with the breach of the conditions of a professional license, where the disciplinary action is not triggered merely by the fact of commission or conviction of a federal offense, generally would not be barred by a pardon....

[Editors' Note: The entire Dellinger Memorandum is reproduced in this Issue in the Appendix.]

(7) The *Garland* decision.

Because Abrams relies so heavily on *Ex parte Garland*, *supra*, we address that case in some detail. Shortly after the Civil War, Congress provided by statute that any person seeking the right to practice before a court of the United States must take an oath affirming that he had neither aided the Confederacy during the war nor held office in the Confederate government. Garland, who had been a member of the Supreme Court bar before the war, served as a member of the Confederate Congress during the Rebellion, and he was therefore unable to take the oath. Upon receiving a full and unconditional pardon from President Andrew Johnson, Garland petitioned the Supreme Court for the right to continue to practice before that Court without taking the prescribed oath.

The Court, by a vote of 5-4, held that the Act of Congress which imposed the requirement of this oath was "subject to the constitutional inhibition against the passage of bills of attainder." 71 U.S. (4 Wall.) at 377. Further, in the majority's view, the statute was "brought within the further inhibition of the Constitution against the passage of an *ex post facto* law." *Id.* After holding the

Act unconstitutional on these grounds, Justice Field wrote that the Court's conclusion to that effect was "strengthened by a consideration of the effect of the pardon." *Id.* at 380. Justice Field then added the passage, quoted ... above, in which the pardon was described as "blot[ting] out" the offense. *Id.*

In light of the Court's holding on the "bill of attainder" and "*ex post facto* law" issues, the discussion of the presidential pardon was unnecessary for its disposition of the case. By the time Justice Field reached the issue of the pardon, the case had already been decided. Irrespective of the pardon, the statute was deemed invalid on other constitutional grounds. The courts, both federal and state, have thus accurately described the "blot[ting] out" discussion in *Garland* as "dictum." ...

More fundamentally, the problem before the court in *Garland* was quite different from the one presented here. *Garland* did not involve a disciplinary proceeding against an individual attorney for violating his ethical responsibilities. Rather, that case dealt with a statutory enactment which, in one fell swoop, retroactively destroyed the right of numerous attorneys to practice law before the federal courts. That blanket disqualification, after the fact, of all who had served the Confederacy was the statute's principal vice. The Court had no occasion in *Garland* to decide the question whether an individual attorney who had violated applicable ethical requirements could escape disciplinary sanctions on the basis of a presidential pardon....

Perhaps the most perceptive assessment of the portion of the *Garland* opinion on which Abrams relies was that of Judge Lehman, writing for a unanimous New York Court of Appeals:

Literally, of course, an executive pardon cannot "blot out of existence the guilt" of one who committed a crime. At most it can wipe out the legal consequences which flow from an adjudication of guilt. In *Ex parte Garland*, ... the court gave to the presidential pardon no greater effect.... To illuminate a decision in which a bare majority of the court concurred and which was rendered while the passions roused by the rebellion still clouded the judgment of most citizens, the court used, appropriately enough, a metaphor; but metaphors cannot appropriately be used to justify a conclusion which would follow logically only if the metaphor were not a figure of speech but an accurate description.

[*People v. Brophy*, 38 N.E.2d 468, 470 (NY 1941).]

[T]he federal and state courts have uniformly ruled that Professor Williston had it right and that the Supreme Court's use of metaphor in the *Garland* opinion does not compel a contrary conclusion. We now adopt the prevailing view....

IV. THE SANCTION

[I]n conformity with D.C. Code § 11-2502 (1995), Elliott Abrams, Esq. is hereby publicly censured for professional misconduct.

So ordered.

TERRY, Associate Judge, with whom Chief Judge WAGNER and Associate Judges STEADMAN and REID join, dissenting:

My view of this case is fundamentally different from that of my colleagues in the majority.... I am firmly convinced that the full and unconditional pardon which President Bush bestowed on Mr. Abrams on Christmas Eve in 1992, less than four weeks before leaving office, instantly and permanently deprived this court of all power to impose any sanction whatsoever. Thus it does not matter whether Mr. Abrams is a saint or a scoundrel; “the fact that Abrams did what he did” is utterly irrelevant....

I.

...

B. The Post-Civil War Supreme Court Decisions

During and after the Civil War, Presidents Abraham Lincoln and Andrew Johnson exercised their pardoning authority extensively by granting individual amnesties to supporters of the rebellion.... These executive measures were necessary to prevent the bringing of treason charges against former Confederate soldiers and sympathizers.... As a result, several cases raising issues of first impression about the scope of the President's pardoning power found their way to the Supreme Court.

The first such case, and the one that most closely resembles the case before us, was *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). Garland was an attorney from Arkansas who had been admitted to the Supreme Court bar in 1860. During the Civil War, he served in the Congress of the Confederacy. In January 1865 Congress passed legislation, later implemented by a Supreme Court rule, requiring that in order to practice law in any federal court, all attorneys must take a loyalty oath stating that they had never given aid or comfort to any enemy of the United States. Shortly after this law was enacted, Garland received a full pardon for his actions during the Civil War. Since he could not take the required oath because of his service in the Confederate Congress, he petitioned the Supreme Court for permission to continue practicing as an attorney, arguing *inter alia* that the pardon relieved him of any obligation to take the oath.

Basing its decision in part on a broad reading of the President's pardoning authority, a majority of the Court granted Garland's petition.... To th[e] expansive statement [quoted by the majority] the Court added but

a single limitation, consistent with similar restrictions on the pardoning authority of the English King. The Court cautioned that a presidential pardon, by itself, “does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.” *Id.* at 381 (footnote omitted).[FN8]⁵

...

C. Later Supreme Court Decisions

The Supreme Court has consistently followed the precedents it established in the post-Civil War cases concerning the scope and effect of a full presidential pardon....

...

... Supreme Court case law reveals two significant features of a full and unconditional presidential pardon. First, the Court has made clear that such a pardon attaches not just to a criminal conviction, but also to the conduct which is or may be the basis of a conviction. Not only does the Pardon Clause itself speak in terms of “offences” rather than convictions, [FN13]⁶ but the Court's decisions have often characterized a pardon as obliterating, in the eyes of the law, the offense committed by the pardon's recipient....

Second, because the pardon attaches to the underlying conduct, the Court has established that a pardoned offender enjoys immunity not only from criminal prosecution, but also from any other form of punishment or civil disability imposed as a consequence of his actions. Many of the early Supreme Court cases involved attempts by the government to impose non-penal sanctions or disabilities on the pardoned offender, all of which the Court struck down....

II.

Whether the presidential pardon of Mr. Abrams prohibits this court from imposing any disciplinary sanction against him depends on our resolution of a somewhat narrower issue: whether the proposed sanction would constitute either a form of punishment or a civil disability stemming from his involvement in the pardoned offenses. The Supreme Court has made clear that Mr. Abrams' pardon would prevent this court from disciplining him if the sanction is either a punishment or a civil disability. I think it is both.

A. Disciplinary Sanction As Punishment

Addressing first the punishment issue, I start with the proposition that a disciplinary proceeding against a member of the bar, although intended to protect the public and to preserve the integrity of the legal profession, nevertheless has the additional effect of punishing the sanctioned attorney.... Indeed, the Court in *Ex parte Garland* declared that “exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as pun-

ishment for such conduct.” 71 U.S. (4 Wall.) at 377.

...

B. Disciplinary Sanction As a Collateral Consequence of the Pardoned Offense

There is a separate and independent ground for rejecting the Board’s recommendation. As the case law demonstrates, a full presidential pardon insulates its recipient not only from punitive sanctions based on the pardoned offense, but also from any civil disabilities or collateral consequences flowing from the offense. Since any suspension or censure of Mr. Abrams would have to be seen as a collateral consequence of the pardoned offense, I believe that this court is without authority to impose such a sanction....

Further support for this conclusion is found in *Ex parte Garland*, in which the Supreme Court flatly rejected the notion that Congress had authority to place any restrictions on the effect of a presidential pardon.... The congressional restriction in *Garland* was a law requiring all attorneys wishing to practice in the federal courts to take a loyalty oath — regardless of whether a particular attorney had been pardoned for aiding the Confederacy. The Court held that such a restriction interfered with the virtually “unlimited” power of the President to grant pardons. 71 U.S. (4 Wall.) at 380. In so holding, the majority necessarily rejected Justice Miller’s dissenting argument that *Garland*’s pardon relieved him “from all the punishment which the law inflicted for his offence,” but from “nothing more.” *Id.* at 396.... Instead, the majority held precisely the opposite: that a pardoned offender is immune from any type of punitive or disciplinary measure based on the offense for which the pardon was granted. Moreover, and of special significance here, *Garland* illustrates that restrictions on an attorney’s ability to practice law are among the collateral consequences which a full presidential pardon prohibits.

...

III.

Finally, I address the majority’s and Bar Counsel’s suggestion that the Supreme Court’s post-Civil War pardon cases are of dubious precedential value because they have been widely criticized and rejected by other federal and state courts.

Most of the modern criticism of the *Garland* line of cases has its origin in a 1915 article by Samuel Williston in the Harvard Law Review. According to Professor Williston, the common perception is that pardoned offenders are in fact guilty, and that “when it is said that in the eye of the law they are as innocent as if they had never committed an offense, the natural rejoinder is, then the eyesight of the law is very bad.” Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 648 (1915). Williston maintained that the scope of

a pardon should be viewed more narrowly than the Supreme Court had viewed it....

Yet, despite his disapproval of the Supreme Court’s earlier decisions, Williston acknowledged that in cases involving the disbarment of pardoned attorneys, “courts have found some difficulty in escaping the language of *Ex parte Garland*.” *Id.* at 655. Williston noted that courts in Kentucky, ... Maine, and New York had all managed to disbar pardoned attorneys since the *Garland* decision, but he found none of those decisions to be particularly illuminating. *Id.* at 656.... Although *Garland* and its progeny were decided during a unique period in our country’s history, a time in which reconciliation was a primary political objective, that fact does not — and cannot — diminish the controlling precedential value that collectively inheres in these cases....

IV.

Nothing in this opinion should be construed as condoning Mr. Abrams’ admitted violations of federal law.... However, the “act of grace” which President Bush has seen fit to bestow upon him has tied this court’s hands and left it powerless to act. The court therefore has no choice but to reject the Board’s recommendation and impose no sanction whatsoever. Because a majority of my colleagues holds otherwise, I respectfully dissent.

Notes

¹ Abrams’ attorney effectively conceded at oral argument that the foregoing hypothetical is indistinguishable from the present case in terms of the effect of the pardon.

² “A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.” *Wilson*, [32 U.S. (7 Pet.) 150, 160 (1833)] (emphasis added). The Supreme Court reiterated in *Burdick v. United States*, 236 U.S. 79, 91 (1915) that the acceptance of a pardon implies a confession of guilt.

³ Disciplinary proceedings not being penal in nature, Abrams’ reliance on decisions holding that a pardon blots out the penal consequences of an offense ... is misplaced.

⁴ The discussion in *Grossgold* of the effect of a pardon must be regarded as dictum in light of the court’s holding as to federal jurisdiction.

⁵ The Court struck down the statute requiring the oath as a bill of attainder and an ex post facto law before addressing the pardon issue.... As a result, Bar Counsel argues that the Court’s pardon discussion is dictum In my view, this is a misreading of *Garland*; the Court’s pardon analysis was a substantial part of its opinion. Moreover, I see no significance at all ... in the order in which the Court considered *Garland*’s various arguments....

⁶ “[T]he term ‘offences’ is used in the Constitution in a more comprehensive sense than are the terms ‘crimes’ and ‘criminal prosecutions.’” *Ex parte Grossman*, [267 U.S. 87, 117 (1925)] (citation omitted).

Without Pardon:

Collateral Consequences of a Felony Conviction

And the Lord put a mark on Cain, so that no one who came upon him would kill him — Genesis 4:15.

I am an ex-con.

I spent 18 months in federal prison after pleading guilty in 1994 to tax and mail fraud charges resulting from the Whitewater investigation.

Before that, I practiced law in Arkansas, was elected mayor of Little Rock and served as chief justice of the Arkansas Supreme Court. In 1993, I was appointed associate attorney general of the United States, the third-highest law enforcement official in the land.

I figured that, with those skills and experience — not to mention the support of my friends and family — I would be able to start over and renew my life as a contributing member of society once I had paid my debt to it and got out of prison.

I soon learned, as have millions of other Americans, that I carry a mark that keeps me behind bars, even on the outside.

In the prison reform movement, it's called the "mark of Cain," but contrary to the biblical injunction, God's mercy isn't attached. Rather, it shackles former offenders like me with restrictions barring us — often permanently — from the means to live a normal life. Legally, these restrictions are called "civil disabilities." More realistically, they are called "civil death," a condition that, for many of us, offers little option but to return whence we came: to prison.

Ex-felons are not typically high on most readers' sympathy list. After all, we got what we deserved, right? But there are so many of us — approximately 2 million currently behind bars, 4.5 million under some sort of supervision and 600,000 of us due to be turned out onto the streets this year alone. The majority of us will be re-arrested and reincarcerated within three years of our release.

It's a vicious revolving door that increasing numbers of experts and policy makers realize must be changed.

"Once someone is punished, we have to figure out a way for the punishment to end and for them to get on with their lives," Raul Russi, New York City Mayor Rudolph Giuliani's probation commissioner, told USA Today. Right now, said Russi, who also headed the New York state parole board, ex-cons have just two options: "Either they work or they go back to jail."

Among the opportunities closed to me as I walked out of Cumberland Federal Prison in Maryland: Almost

any job requiring a federal license. Had I possessed any, they would have been automatically revoked.

It is highly unlikely that I could ever obtain a custom broker's license, an export license, a merchant marine license, or even a locomotive engineer's license. (Somehow, it's hard for me to understand how my driving a train, once every little boy's dream, could be a menace to society.)

I cannot become a director, officer, employee or controlling stockholder of any federally insured institution such as a bank or a savings and loan. I cannot be an adviser, officer or director of a labor organization for 13 years after my conviction.

The Commodities Futures Trading Commission may refuse to register me as a broker, adviser or commodities pool operator. The Securities and Exchange Commission prohibits me from becoming an investment adviser for 10 years. The secretary of Health and Human Services can bar me from working in any aspect of health care if federal, state or local dollars are involved. I couldn't even sweep the floors of a nursing home.

State laws are a crazy quilt of disqualifications, although they have one thing in common: They are far more draconian than federal restrictions. Any job that requires a state license is probably out, unless one has the money to hire an expert who, just maybe, could guide you through a panoply of bureaucratic hoops.

In California, with a marijuana possession conviction, you can probably kiss goodbye a career in teaching or real estate. With a conviction for income tax evasion, you'll never be a doctor.

I lost my license to practice law in my home state of Arkansas forever. The chances of getting a license to practice in another state are remote. Other occupations most likely closed to me include: certified public accountant, physician, dentist, insurance agent, nurse, real estate broker, pharmacist, landscape architect, law enforcement officer, teacher, day-care worker, veterinarian, bartender, dietitian, engineer, barber, cosmetologist, mortician, speech pathologist, social worker.

Getting on with one's life also involves family and social obligations. In Virginia, I could not raise money for my church or for the nonprofit organization where I work because it violates an obscure state law regarding certain types of felons. One young woman from Pennsylvania who corresponded with me after she served time for a minor role in a drug operation had a hard time explaining to her daughter why she couldn't attend a parent-teacher conference. It's because some



**WEBB
HUBBELL**

The Mark of Cain,
SAN FRANCISCO CHRONICLE, Sunday, June 10,
2001, Page D-1.

Reprinted by permission of the author.

©2001 San Francisco Chronicle

Webb Hubbell, former associate attorney general of the United States, is a senior research fellow at the National Center on Institutions and Alternatives in Alexandria, Va.

states, including California, have passed laws banning ex-felons from school grounds.

Ah, yes, drugs. The mark of Cain extends here, too, even to the most minor offenses. Under pressure from the Bush administration to enforce a law passed during the Clinton presidency, college campuses are denying loans to students with misdemeanor drug convictions. This could have devastating consequences. Last year, 9,200 student applicants were denied aid because of an admitted drug conviction. Under Bush administration rules, any student who refuses to answer the question about a drug conviction will also be denied aid. Last year, 279,000 students left that question blank.

An editorial in the *Pittsburgh Post-Gazette* noted, "During his campaign for the presidency, George W. Bush refused to answer questions about whether he used drugs in his youth, but a similar demurral by student-aid applicants will not be tolerated."

Such hard-line policies can only make an already disastrous situation worse.

Of the 145,000 inmates in federal prison, according to *Fortune* magazine, 58 percent are in for drug offenses, compared to 25 percent in 1980. How much higher would the administration like that percentage to go?

President Bush, who has admitted to "youthful indiscretions," is lucky. He lives in the White House, while others caught in similar indiscretions are barred from public housing. The president commands our armed forces; others who were caught are barred from serving in the military. The president will retire to a life of federal benefits and service on corporate boards and charitable foundations. Those less lucky may never be allowed inside a corporate boardroom. Perhaps his own daughters' recent brushes with the law will prompt some rethinking by the president.

Ironically, the founding fathers did not prohibit felons from holding elected office. Aside from a few statutory disqualifications, a felony conviction does not disqualify a person from federal employment. I could conceivably run for president or even work again in the Justice Department (though I'm not waiting for Attorney General John Ashcroft to call). California and 35 other states (with the notable exception, as we know, of Florida) return the right to vote to felons once their debt is paid.

For most of the nonwhite, poorly educated inmates who make up the majority of America's prison population, running for president is not a high priority. For those who want to go straight — and in my experience as an inmate and a counselor, the majority do — the question is whether they will be given that chance or

whether the growing number of barriers will shackle them permanently to the lowest rung of the American ladder.

Yet, for the most part, rehabilitation remains a dirty word.

Perhaps it's time to remove the mark of Cain.

The Justice Department has made a tentative start, backing pilot "reentry partnership" programs in eight states, including Nevada, which bring together corrections institutions, local police, businesses, faith-based and community organizations to help ex-offenders re-enter society.

There are additional pilot programs — also backed by the Justice Department — involving "re-entry courts" (modeled after drug courts) which work with ex-offenders. These courts have the power to lift various restrictions so long as the ex-offender stays with the program. Unfortunately, the courts cannot override state or federal laws that restrict employment opportunities.

We need to make these restrictions part of a judge's discretion, which he or she could impose — or not. Further, restrictions should be tailored to the actual crime. For example, an individual found guilty of bank fraud might incur a five-year ban from working in a financial institution but not lose his right, once out of prison, to work in other fields.

What would be appropriate for me under this scenario? I think it would be right for the judge to bar me from practicing law for at least five years, while insisting that I take some ethics courses. Were I to return to the profession, it would be under some form of supervision for a period of time.

My hypothetical judge would prohibit me from acting in a fiduciary capacity for a period of years as well. I think he would have agreed with the further orders in my actual case: to make restitution to the law firm from which I stole, to amend all my tax returns — thus incurring substantial indebtedness to the IRS in past-due taxes, interest and penalties. In addition to requiring that I speak to inmates in Arkansas prisons for a year, at my expense, my hypothetical judge would mandate an additional period of community service. All these obligations would be appropriate in return for the removal of the mark of Cain.

It is important that American society protect itself with appropriate punishments for both violent and white-collar criminals. It is also important that we don't extinguish the hopes for a second chance held by hundreds of thousands of fellow Americans who leave our prisons every year. Without that hope, and the means to realize it, what do we expect these people to do?

President Clinton's Executive Clemency Policy

THE WHITE HOUSE
Washington

JANUARY 26, 1996

MEMORANDUM

FOR: Jamie S. Gorelick, Deputy Attorney General
FROM: Jack Quinn, Counsel to the President
SUBJECT: Executive Clemency Policy

I write this memorandum to convey to you as well as the Pardon Attorney the essence of several recent directives I received from the President concerning his executive clemency policy.

Preliminarily, the President reiterated his belief that the power to grant executive clemency is an important presidential prerogative which he takes very seriously. As such, he asked me to express to you and to the Pardon Attorney his sincere appreciation for the care and attention with which your office reviews clemency requests. The President intends to continue to rely greatly on your joint recommendations regarding clemency applications. The President has reviewed the criteria employed by the Department of Justice at present in determining whether to recommend that a particular clemency request be granted or denied. These criteria, of course, include: (1) post-conviction conduct, character and reputation; (2) seriousness and relative recentness of the offense; (3) acceptance of responsibility, remorse and atonement; (4) official recommendations and reports; and, (5) any specific need for relief.

The President has also identified additional factors that he believes we should integrate into the evaluation of clemency applications. These factors fall broadly into two categories: those which militate in favor of granting clemency and those which raise a presumption that clemency should be denied. Use of these additional factors should provide for even greater consistency among the ultimate recommendations forwarded to the President for the many different types of requests submitted.

The following circumstances would weigh in favor of granting clemency:

- Indications that the crime for which clemency is sought was truly aberrational, i.e., a lone instance of criminal behavior in an otherwise exemplary life.

- Cases committed long ago when the individual was very young and which do not involve major crimes.
- Cases not involving major crimes in which the individual has clearly turned his or her life around by making sustained and significant contributions to the community since being released from prison.

By contrast, in certain cases, even extraordinarily exemplary actions post-conviction may not merit the remedy of executive clemency. These cases might include:

- The commission of major crimes: There are categories of crimes which are so serious that the President will not consider granting a pardon for them under almost any circumstances. Such crimes would include large-scale drug trafficking, sex offenses involving minors, offenses involving central involvement in political corruption, or violent crimes such as murder or rape.
- An extensive criminal history: Three or more separate convictions should raise a substantial presumption against granting a pardon with respect to any one of them. This presumption would only be overcome by a truly exceptional rehabilitative history involving exemplary service to the individual's community or country.

Again, these factors are not meant to supplant the criteria currently employed, but, rather, should enhance the analysis of clemency requests.

As you and I have discussed, we would like to explore whether there are additional applications for clemency, pardons in particular, that should be considered. We do not intend to imply by this that the percentage of applications approved by the President should necessarily be substantially increased. We would, however, entertain additional requests in order to determine if such an increase may be appropriate.

Please do not hesitate to call me if you have any questions concerning the implementation of the guidance outlined in this memorandum.

Jack Quinn

cc: Margaret Colgate Love, Pardon Attorney



House Committee on Government Reform, "The Controversial Pardon of International Fugitive Marc Rich", February 8, 2001, Exhibit 78.

President Clinton's Explanation of the FALN Clemency Grants



Letter from President Bill Clinton to Congressman Henry Waxman, House Committee on Government Reform, September 21, 1999.

September 21, 1999

The Honorable Henry Waxman
Ranking Minority Member
Committee on Government Reform
House of Representatives
Washington, D.C. 20515

Dear Henry:

As you know, on August 11, 1999, I offered clemency to 16 Puerto Rican nationalists conditioned on these individuals formally seeking it, renouncing violence and abiding by all parole requirements. This letter is in response to requests for information about my decision.

For the last six years, various Members of Congress, religious and civic leaders, as well as others, have urged me to grant clemency to a group of Puerto Rican prisoners, most of whom have been in prison between 16 and 19 years as a result of convictions for offenses arising out of their participation in organizations supporting Puerto Rican independence.

The question of clemency for these prisoners was a very difficult one. I did what I believe equity and fairness dictated. I certainly understand, however, that other people could review the same facts I did and arrive at a different decision.

In making my decision, I did not minimize the serious criminal conduct in which these men and women engaged. I recognize and appreciate that there are victims of FALN-related violence who feel strongly that these individuals, although not directly convicted of crimes involving bodily harm to anyone, should serve the full sentences imposed. Before making my decision, I sought and considered the views of the Department of Justice. Press reports note that certain Federal Bureau of Investigation and Justice Department officials, including the U.S. Attorneys in Chicago and Connecticut, were opposed to clemency. I did not dismiss those concerns as some have implied. Rather, I carefully weighed them in making this difficult decision.

On the other hand, the prisoners were serving extremely lengthy sentences — in some cases 90 years — which were out of proportion to their crimes. (In contrast, Jose Solis Jordan, who was prosecuted and convicted in July in Chicago of conspiring to place explosive devices at a Marine recruiting center, received a sentence of 51 months.)

The petitioners received worldwide support on humanitarian grounds from numerous quarters. Presi-

dent Jimmy Carter wrote in 1997 that granting clemency to these men and women “would be a significant humanitarian gesture and would be viewed as such by much of the international community, a concern that was relevant in 1979 and I believe is today” He noted that each individual had “spent many years in prison, and no legitimate deterrent or correctional purpose is served by continuing their incarceration.” Finally, in explaining the close similarity between the current clemency petition and the clemency he granted in 1979 to people who had committed serious crimes in the name of Puerto Rico’s independence, he said that then, as now, “to the extent that clemency might, under other circumstances, be viewed as evidence of leniency towards terrorists, no such conclusion could be drawn here in light of the length of the sentences served.”

President Carter’s support was particularly noteworthy because he commuted to time-served the sentences of the Puerto Rican nationalists who were convicted for their 1954 attack on the House of Representatives, which resulted in the wounding of five congressmen. President Carter also commuted to time-served the life sentence of Oscar Collazo, who attempted to assassinate President Truman, an attack that resulted in the death of a White House policeman.

Bishop Tuto and Coretta Scott King also wrote to seek clemency for the petitioners, since they had received “virtual life sentences” and “have spent over a decade in prison, while their children have grown up without them.”

In addition, various Members of Congress, a number of religious organizations, labor organizations, human rights groups, and Hispanic civic and community groups supported clemency. The petitioners also received widespread support across the political spectrum within Puerto Rico. We have recently provided Congress more than 14,000 pages of materials that the White House received in connection with this clemency matter, including thousands of letters seeking clemency for the prisoners.

Many of those who supported unconditional clemency for the prisoners argued that they were political prisoners who acted out of sincere political beliefs. I rejected this argument.

No form of violence is ever justified as a means of political expression in a democratic society based on the rule of law. Our society believes, however, that a punishment should fit the crime. Whatever the conduct of other FALN members may have been, these petition-

ers — while convicted of serious crimes — were not convicted of crimes involving the killing or maiming of any individuals. For me, the question, therefore, was whether the prisoners' sentences were unduly severe and whether their continuing incarceration served any meaningful purpose. I considered clemency for each of them on an individual basis.

Nine of the petitioners were convicted in the Northern District of Illinois of seditious conspiracy, armed robbery, and various firearms offenses. They did not appear at trial, refused defense counsel and presented no defense to the charges against them. They also did not assist the probation office in preparing the pre-sentence reports. They received 20-year sentences for the seditious conspiracy and Hobbs Act counts, 10-year sentences for the weapons charges and 5-year sentences for the vehicle charges. The sentences on most or all of these counts were imposed consecutively, rather than concurrently — which would rarely occur today under the Sentencing Guidelines — and resulted in sentences ranging from 55 to 90 years. These nine prisoners have served 19 years in prison. I commuted the sentences of eight of these prisoners to between 23 and 26 years thereby making them eligible for parole pursuant to the mandatory release standards applicable to all prisoners. I refused to commute the sentence of Carlos Alberto Torres, who had been indicted by a federal grand jury in 1977 on explosive charges, was identified as the leader of the group, and had made statements that he was involved in a revolution against the United States and that his actions had been legitimate.

One of the petitioners, Oscar Lopez-Rivera, was charged with the other nine petitioners but was not arrested until May 1981. He was convicted of the same offenses and received sentences totaling 55 years. He too did not present a defense at trial or assist the probation officer in preparing the pre-sentencing report. In 1984, he tried to escape and was sentenced to an additional 15 years for that attempt to run consecutive to his earlier sentence. I proposed commuting his original conviction to 29 years but did not commute his sentence for the attempted escape. He declined the commutation offer.

Three of the petitioners were separately convicted in the Northern District of Illinois of seditious conspiracy, interstate transportation of stolen vehicles and weapons offenses. At trial they were represented by standby counsel and participated in parts of the trial, although they did not participate in the sentencing process. Each was sentenced to 35 years in prison and had served 16 years. I commuted their sentences to 26 years, thereby making them eligible for parole.

The final four petitioners were members of Los Macheteros and were convicted in the District of Connecticut in connection with the 1984 robbery of a Wells Fargo office. Juan Enrique Segarra-Palmer received a

sentence of 55 years, Antonio Camacho-Negron received a sentence of 15 years, and Roberto Maldonado-Rivera and Norman Ramirez-Talavera received sentences of 5 years each. The last two have completed their sentences, but I remitted their outstanding fines. Antonio Camacho-Negron was released in 1998 on parole, but was later re-arrested for parole violation. I was informed that he would be eligible for release at any time if he agreed to abide by the parole requirements. In light of his refusal to comply with the conditions of his first release, I refused to commute his sentence, although I did offer to remit his outstanding fines. He rejected this offer. Finally, I commuted the sentence of Juan Enrique Segarra-Palmer so that he would be eligible for parole after serving 19 years in prison, consistent with the time served by the Chicago petitioners.

The timing of my decision was dictated by the fact that my former counsel, Charles Ruff, committed to many of those interested in this issue that he would consult with the Department of Justice and make a recommendation to me before he left the counsel position. Pursuant to this commitment, I received his recommendation in early August. As he recently indicated to the *New York Times*, his recommendation and my decision were based on our view of the merits of the requests — political considerations played no role in the process.

As you know, last week I asserted executive privilege in the face of Chairman Burton's subpoena seeking memoranda and testimony concerning the decision process. I did so, after receiving the opinion of the Attorney General that such assertion was proper, as the demand clearly intruded on areas reserved to the President under the Constitution.

Grants of clemency generate passionate views. In vesting the pardon power in the President alone, the framers of our Constitution ensured that clemency could be given even in cases that might be unpopular and controversial. The history of our country is full of examples of clemency with which many disagreed, sometimes fervently. When Theodore Roosevelt granted amnesty to Filipino nationals who attempted to overthrow U.S. control of the Philippines, when Harry Truman commuted the death sentence of Oscar Collazo, and when Jimmy Carter commuted the sentence of Collazo and other Puerto Rican nationalists who had fired upon the House of Representatives, they exercised the power vested them by the Constitution to do what they believed was right, even in the face of great controversy. I have done the same.

I hope this information is helpful in understanding my decision and that you will share it with members of your Committee and others who might find it useful.

Sincerely,

Bill Clinton

President Clinton's Statement of his Pardoning Philosophy



President Clinton's remarks at ceremony appointing Roger Gregory to an interim seat on the U.S. Court of Appeals for the Fourth Circuit.

December 27, 2000

QUESTION: Mr. President, are you still considering providing pardons for some of the Whitewater figures?

THE PRESIDENT: I expect to do another round of pardons, but I haven't had any meetings or made any decisions about any others yet. I just expect to do some. I have done — I haven't seen the final numbers, but before the last batch at least, I had done fewer than any President in almost 30 years. And part of that, frankly, is the way the system works, something I'm not entirely satisfied with. But I think that it is appropriate for the President to do them where circumstances are appropriate.

I have always thought that Presidents and governors, when I was a governor, 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.

And in that sense, I think that the word is most misused, because it's not like you — you can't erase the fact that someone has been convicted and served his sentence, in the case of those who have; but there are many people, including more people than I get their applications to my desk — many people don't have lawyers, they don't even know to ask for a pardon — but they'd like to vote at election time, they'd like to be full citizens, and they're out there working hard and paying taxes — and they have paid the price.

So I would like to be in a position to do that. A lot of the folks — virtually all of them on the first list I released, 58 I think, were people that are unknown to most Americans. They're not people with money or power or influence. And I wish I could do some more of them — 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.

Judge Doty's Letter to the President Recommending Commutation of Kim Allen Willis's Sentence

August 22, 2000

President William J. Clinton
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Re: Kim Allen Willis, Federal Reg. No. 041013-041
Petition for Commutation of Sentence

Dear President Clinton:

On July 7, 2000, you granted Ms. Serena Nunn's Petition for Commutation of Sentence. In 1990, following Ms. Nunn's conviction by a jury of drug related offenses in the U.S. District Court for the District of Minnesota, I sentenced her to a term of 188 months in prison. Ms. Nunn's case marked the first-time since my appointment in 1987 by President Reagan that I had ever written a letter in support of a Petition for Commutation of Sentence.

I was recently informed by Kim Willis' pro bono counsel that Mr. Willis will be submitting a Petition for Commutation of Sentence. Mr. Willis was one of the twenty-four defendants involved in the *same* case as Ms. Nunn. In 1990, following Mr. Willis' conviction by a jury of drug related offenses, similar to Ms. Nunn, I sentenced him to a term of 188 months in prison. (Case No. Criminal 4-89-94 (8)). To date, Mr. Willis has been incarcerated for approximately 128 months and is scheduled to be released in September 2003. I am writing to respectfully request that you grant Mr. Willis' Petition for Commutation of Sentence based on the following three grounds: (1) the unfairness of the mandatory-minimum sentencing guidelines as they were applied to Mr. Willis; (2) Mr. Willis' significant rehabilitative accomplishments while incarcerated; and (3) the poor health of Mr. Willis' mother.

I. Factual Background

In 1989, the United States Grand Jury for the District of Minnesota issued an Indictment naming 24 defendants. The Indictment was primarily related to a conspiracy to distribute cocaine. As discussed above, Mr. Willis was one of the named defendants and was accused of committing the following crimes: (1) aiding and abetting in the attempt to possess approximately 20 kilograms of cocaine with the intent to distribute and (2) conspiracy to possess with the intent to distribute 5 kilograms or more of cocaine.

At the time of the Indictment, Mr. Willis was 19 years old. He had no prior criminal convictions. Mr. Willis was a lifelong resident of Minnesota. He was raised in the inner-city of St. Paul. As a kid, Mr. Willis aspired to win a Gold Medal in martial arts at the Olympics. As a teenager, he trained religiously every day to make his dream come true. In 1987, however, Mr. Willis dropped out of high school in the eleventh grade. This is when his troubles began.

Mr. Willis was friends with Ralph Lamont Nunn aka Monte. Monte's father, Ralph Duke aka Plukey, was the leader of the biggest cocaine ring in the State of Minnesota. Monte was also dealing drugs himself. In May 1989, Monte was arrested after attempting to purchase approximately 20 kilograms of cocaine from a government informant. The government had set up a reverse-sting operation with the specific intention of catching Monte and his father, Plukey. Subsequently, all 24 defendants including Mr. Willis were indicted.

At trial, the government asserted that Plukey set up a "four-tier pyramid scheme" to distribute the drugs. According to the government, Mr. Willis was at the bottom of Plukey's pyramid scheme. Prior to trial, the government offered several of the defendants plea bargains in return for their cooperation and testimony against the remaining defendants. Many of the defendants accepted the plea bargains and received sentences that ranged from one to seven years. One of the defendants who received a plea bargain was Marvin McCaleb. Mr. McCaleb was Plukey's *equal* in the drug distribution pyramid scheme and was the government's star witness at trial. In return for Mr. McCaleb's testimony, the government did not charge him in Minnesota, but instead brought unrelated drug charges against him in federal court in Los Angeles, California. Despite his role as a leader in Plukey's conspiracy and his prior criminal convictions that included rape and manslaughter, Mr. McCaleb received a seven year sentence under the "old" sentencing guidelines by a federal judge in Los Angeles. After Plukey's conviction, I sentenced him to life in prison without the possibility of parole.

Initially, Mr. Willis was offered a plea bargain in which he would have received a sentence of up to 10 years if he pled guilty. However, by the time Mr. Willis' trial counsel informed the government that Mr. Willis would accept the plea bargain, the government told his trial counsel that it was too late and that the offer had been previously withdrawn. The government's charging tactics in this case and, specifically as to Mr. Willis, were expressly criticized by Senior Circuit Judge



Letter from The
Honorable David S.
Doty (D. Minn.) to
President Bill Clinton,
August 22, 2000.

Heaney in *United States v. Hammer*, 940 F.2d 1141 (8th Cir. 1991). Judge Heaney wrote the following:

I write separately to highlight several concerns that I have with the sentencing guidelines and their application in the Plukey Duke cases. These cases involved twenty-four defendants, the vast majority of whom were convicted of drug trafficking crimes. From my view of the record, it is clear that there is a great disparity in sentence length among defendants with similar degrees of involvement in the drug ring. . . . The sentences imposed on drug traffickers in the Plukey Duke cases illustrate that sentencing disparity continues to exist under the guidelines, that defendants who go to trial pay a heavy premium for their choice, and that the prosecutor largely determines the sentence of the defendant by deciding who to charge, what to charge, and when to charge.

Id. at 1142.

The case of Loren Duke . . . illustrates how the prosecutor's charging decisions affect the sentence imposed. Loren Duke is a 23-year-old nephew of Plukey Duke with one prior burglary conviction. Loren was heavily involved in the drug distribution ring. He frequently acted as a drug courier and was involved in the purchase and delivery of more than thirty-five kilograms of cocaine. . . . The United States Attorney, however, offered Loren Duke a favorable plea bargain . . . and the district court sentenced Loren Duke to twelve months imprisonment.

While it is impossible to make precise comparisons among defendants, Loren Duke's twelve-month sentence should be viewed in relation to the 188-month sentence given to Kim Willis, a 20-year-old man with no prior criminal record. It is clear from the record that Willis' involvement was no more extensive than that of Loren Duke, yet Willis received a sentence nearly sixteen times as long as Loren Duke's. While Loren Duke cooperated with the government, Willis offered to cooperate, but his offer was rejected as not being timely. *Id.* at 1144-45.

The trial against the Plukey Duke defendants took approximately one month to complete. The jury convicted Mr. Willis of the two counts charged against him. Most of the evidence presented by the government during the trial did not pertain to Mr. Willis. However, sufficient evidence showing his guilt was presented. The evidence against Mr. Willis was primarily the following: (1) on three separate occasions, Mr. Willis sold one-fourth ounce quantities of cocaine to a co-defendant; (2) on two separate occasions, Mr. Willis accompanied Monte to Los Angeles, California, to assist him with purchasing cocaine; (3) although Mr. Willis was not

physically present when Monte was arrested, the athletic bag Monte was carrying containing the money needed to purchase the cocaine bore the name of Kim Willis; and (4) despite his denial while testifying on his own behalf that he had nothing to do with Monte's attempt to purchase approximately 20 kilograms of cocaine, other witnesses testified that Mr. Willis played a small role in Monte's transaction.

In April 1990, I sentenced Mr. Willis to 15.6 years in prison (188 months). Mr. Willis' conviction was subsequently affirmed in *United States v. Willis*, 940 F.2d 1136 (8th Cir. 1991), *cert. denied*, *Willis v. United States*, 113 S. Ct. 1411 (1993).

II. Grounds for Mr. Willis' Petition for Commutation of Sentence

A. The Unfairness of the Mandatory-Minimum Sentencing Guidelines

I told Mr. Willis at his sentencing hearing in April 1990, that I did *not* believe he was a major player in the Plukey Duke conspiracy to distribute cocaine. I further told Mr. Willis that I thought he was a bright young man with a good attitude. However, I told Mr. Willis that I was frustrated with the mandatory-minimum sentencing guidelines because the guidelines provided me with little discretion to grant either a downward departure or a departure below the proscribed mandatory-minimum sentence. Finally, before I pronounced Mr. Willis' sentence, I told him that he did *not* deserve the sentence that I was going to impose on him, but I had no other choice except to do what the law required. I then sentenced Mr. Willis to over 15 years in prison (188 months), the *same* sentence I imposed on Serena Nunn.

Presently, I am still not in favor of mandatory-minimum sentences. As you are aware, mandatory-minimum sentences have also been harshly criticized by the American Bar Association, the U.S. Sentencing Commission, Supreme Court Chief Justice William H. Rehnquist and Barry R. McCaffrey who was appointed by you to head the Office of National Drug Control Policy.

In my letter to you on behalf of Ms. Nunn, I stated the following: "If mandatory-minimum sentencing did not exist, no judge in America, including myself, would have ever sentenced Ms. Nunn to 15 years in prison based on her role in the conspiracy, her age, and the fact that she had no prior criminal convictions before the instant offense." I strongly believe that this statement also holds true as to Mr. Willis.

Accordingly, based on the unfairness of the mandatory-minimum sentencing guidelines as they were applied to Mr. Willis, I respectfully request that you grant Mr. Willis' Petition for Commutation of Sentence.

B. Mr. Willis' Significant Rehabilitative Accomplishments While Incarcerated

Prior to his sentencing in April 1990, Mr. Willis told the U.S. Probation Department that he would make constructive use of his incarceration period by going to school and/or learning a trade. At his sentencing hearing, I told Mr. Willis about the importance of turning these negative events in his life into a positive thing during his incarceration period to ensure that he would leave prison with a positive attitude. It is my understanding that over the past 10.5 years, Mr. Willis has exhibited a positive attitude, has come to accept full responsibility for his criminal actions, and has made significant rehabilitative accomplishments.

Today, Mr. Willis is 30 years old and is incarcerated at the Federal Prison Camp in Duluth, Minnesota. Mr. Willis was initially placed in a medium security institution, but through good behavior he earned a transfer to a minimum security camp. It is my understanding that during his incarceration period of 10.5 years, he has received only a few minor disciplinary reports.

In 1991, Mr. Willis completed his GED. Subsequently, Mr. Willis earned certifications in both welding and blue print reading. Additionally, from 1991 to 1998, Mr. Willis participated in several different educational and personal improvement courses offered by the different prisons he was incarcerated in. Then, in 1998, after Mr. Willis was transferred to the Federal Prison Camp in Duluth, MN, he began taking college courses from Lake Superior College in Duluth. Mr. Willis has now completed one year of college in which he made the Dean's List in both the Fall and Spring semesters and has a 3.7 cumulative grade point average. It is Mr. Willis' goal to receive a degree in business.

The most important rehabilitative accomplishment Mr. Willis has made is his participation in the Youth Awareness Program. The Youth Awareness Program permits inmates to leave the prison camp and speak to kids in the community who are the most susceptible to being involved with drugs. In the last year alone, Mr. Willis has made 20 different presentations. I understand that in Mr. Willis' presentation to the kids, he tells them the following:

when he was a kid involved with drugs he only thought about the material things that he was able to obtain, but never thought about how his actions were responsible for destroying his own community; how as a kid he naively rationalized his drug involvement as being acceptable because he was not forcing anyone to buy the drugs; once you become involved with drugs there are only two ways that you will likely stop, either by imprisonment or by death; criminals like himself must take complete responsibility for the choices they make in life and cannot continue to blame their impris-

onment on poverty, lack of education, broken families and/or racial discrimination.

I understand that Mr. Willis, upon his release from incarceration, plans to continue speaking with kids about the dangers of being involved with drugs.

Accordingly, based on the unfairness of the mandatory-minimum sentencing guidelines as they were applied to Mr. Willis, in conjunction with his significant rehabilitative accomplishments while incarcerated, I respectfully request that you grant Mr. Willis' Petition for Commutation of Sentence.

C. The Poor Health of Mr. Willis' Mother

This past June I received a letter from the Willis family requesting that I contact the Federal Bureau of Prisons' on Mr. Willis' behalf to ask them if Mr. Willis could visit his mother in the hospital. Mr. Willis' mother, Wanda, suffers from chronic asthma. The Willis family also provided me with a letter from Mrs. Willis' doctor indicating that she had suffered an asthma attack and was in intensive care. Within the last 18 months, Mrs. Willis has suffered two asthma attacks which required her to be hospitalized in intensive care and placed on a ventilator. Sadly, within the next four years, there is a significant possibility that Mrs. Willis could have a fatal asthma attack. Presently, Mrs. Willis must use a nebulizer every four hours. Mrs. Willis' use of a nebulizer restricts her ability to travel lengthy distances and thus has made it very difficult for her to visit Mr. Willis at the prison camp in Duluth.

Mr. Willis is the youngest of two children. He comes from a tight-knit family and thus his criminal behavior caused great shame to his family. I understand that during the 10.5 years Mr. Willis has been incarcerated, he has worked very hard to make amends with his family for the grief his criminal behavior caused them. Nothing has made the Willis family more happy than to experience their son's transformation from a criminal into a mature and responsible adult. Besides Mr. Willis' educational and technical trade accomplishments, I understand that while incarcerated Mr. Willis has also become an expert in both crocheting and pottery. This expertise has enabled Mr. Willis to give his family members very special gifts for all of the support and encouragement they have provided him during the last 10.5 years.

As a result of his conviction in this case, Mr. Willis has now spent over one-third of his life in prison including all of his twenties. Therefore, upon his release he will face a tough transition back into society. I understand that each member of Mr. Willis' family is dedicated to helping him become successful upon his release from prison. Hopefully, Mrs. Willis' health will allow her to experience her son's release from prison.

Accordingly, based on the unfairness of the

mandatory-minimum sentencing guidelines as they were applied to Mr. Willis, in conjunction with both his significant rehabilitative accomplishments while incarcerated and the poor health of his mother, I respectfully request that you grant Mr. Willis' Petition for Commutation of Sentence.

III. Conclusion

I strongly believe that Mr. Willis' sentence in this case is an example of how the mandatory-minimum sentencing guidelines have not only had an unjust effect on young women like Serena Nunn, but also on young men like Mr. Willis. Based on all of the grounds set forth herein, I strongly support Mr. Willis' Petition for Commutation of Sentence and thus respectfully request that you grant his Petition.

Sincerely,

David S. Doty

CC: Office of the Pardon Attorney
 U.S. Department of Justice
 500 First Street, NW 4th Floor
 Washington, DC 20530

Rising Numbers Sought Pardons in Last 2 Years

When Tom Bhakta, an Arkansas businessman, decided in the fall to seek a presidential pardon for his 1991 tax evasion conviction, the odds seemed long. Thousands of other felons had been jockeying for executive clemency for as much as a year, with more applications arriving at the Justice Department each day.

Their requests followed a routine: inquiries by the Federal Bureau of Investigation, review by the relevant prosecutors, and recommendation to the White House by a Justice Department office that works full time on pardons.

Mr. Bhakta's plea for clemency traveled a different route. In the last hours of the Clinton administration, his was one of nearly two dozen rushed to the head of the line without the customary scrutiny. The process was so hurried that his name was misspelled on the official announcement and on the executive order President Bill Clinton signed.

Mr. Bhakta is hardly a political insider. But he did have some connections, although it is not clear what role, if any, they played in the outcome. Records show that on a single day in October, just as he became interested in getting a pardon, he, his wife and his three college-age children contributed \$1,000 each to the New York Senate campaign of Hillary Rodham Clinton. Mr. Bhakta's business partner and lawyer, Kenneth Mourton, had also represented the broker who in the late 1970's handled the commodities trades that brought Mrs. Clinton nearly \$100,000 in profits. An associate of Mr. Bhakta's knew a senator who could be approached to help him obtain a pardon, Mr. Bhakta said on Friday in a brief interview. He did not identify the senator or associate.

In the nine days since Mr. Clinton issued 176 pardons and clemency orders, attention has focused on some of the most controversial recipients, particularly Marc Rich, a fugitive billionaire who fled the country after his indictment on charges of tax evasion, fraud and racketeering. The president's power to pardon is absolute, without legal constraints, but current and former government officials said that Mr. Rich's case is just one example of how Mr. Clinton ranged further from a system whose established procedures were more closely adhered to by his predecessors.

In many of these cases, government officials say, Justice Department lawyers and the F.B.I. had no idea that pardons were being considered until late on the night before George W. Bush's inauguration, on Jan. 20. Federal agents, who had scrutinized the other names on the list, could conduct only the most cursory

of investigations of the late arrivals from the White House.

Government officials said the Justice Department had no knowledge that the White House was compiling its own list. But many felons with Washington connections did. Beginning last fall, the notion began to circulate among potential applicants that the White House might be receptive to direct proposals for pardons, said current and former government officials, pardon applicants and lawyers. The result, these people said, was a mad search around the country for lawyers with contacts in the Clinton administration. Some of these lawyers were offering their services at a steep price. The spouse of one applicant said that a former congressman was willing to help her, if she agreed to pay as much as \$500,000.

Even those going through the traditional process joined those going straight to the White House in reaching out to people with influence. The heavyweight lawyers who represented recipients of Mr. Clinton's clemency orders included Jack Quinn, a former White House counsel; William Kennedy III, a former White House aide who has returned to Mrs. Clinton's former law firm; and Nicholas deB. Katzenbach, who was attorney general under President Lyndon B. Johnson.

Mr. Clinton has defended the pardon of Mr. Rich, saying it was granted on the merits of his case, but he has declined to discuss his other pardons. Senator Clinton has said that the pardon decisions were strictly the president's. Her spokesman, Howard Wolfson, said there was no connection between contributions to her Senate campaign and the decision to issue Mr. Bhakta's pardon.

At least one of these pardon cases is still stirring within the government. Yesterday, Vice President Dick Cheney said the Justice Department may be exploring the possibility of blocking Mr. Rich's pardon.

Hoping to Be Heard

Over all, Mr. Clinton's granting of pardons and commutations is comparable to that of his predecessors: over two terms he awarded two more pardons than President Ronald Reagan did in his two terms. And other presidents, notably George Bush, handed out controversial pardons in the waning hours of their administrations. But several legal experts said the midnight rush by Mr. Clinton was deeply troubling.

"There is always a certain amount of slippage in this process," said Margaret Love, a former head of the Justice Department's pardon office who remains in



**KURT EICHEN-
WALD &
MICHAEL MOSS**

NEW YORK TIMES,
January 29, 2001
Page A-1.

Copyright: The New
York Times Company.

Reprinted by permis-
sion.

contact with lawyers there. "But here the slippage was massive."

The results have been particularly disturbing for the applicants and family members whose hopes were dashed by their omissions from the list. After months of work — following the rules, working through the complex process and gaining respect for the professionalism of the government's pardon lawyers — they now believe that they were unknowingly playing on an unlevel field.

"It's not fair," said Ginger Whitacre, whose husband, Mark, hoped to have his prison sentence for fraud and price-fixing commuted because of his cooperation with federal investigations. "It's supposed to be equal. And it comes down to whether you have money or not."

There is, of course, no such presumption of equality in presidential pardons, and the ground rules that have been established over the years serve merely to organize the process.

Throughout much of his presidency, pardons did not seem high among Mr. Clinton's priorities. By the end of 1998, he had granted only 77 pardons and clemency requests out of nearly 4,000 submitted.

But about that time, government officials said, the number of applications for clemency began to climb. The officials speculated that the increase was an unlikely side effect of the Monica Lewinsky scandal. As Mr. Clinton asked repeatedly for public forgiveness, the officials said, some might have believed he would be more likely to grant a little forgiveness of his own.

The signs that Mr. Clinton might be changing his use of the power emerged about a year later, in August 1999, when Mr. Clinton granted clemency to 16 imprisoned members of a Puerto Rican nationalist group known as the FALN, for Armed Forces of National Liberation. It was a decision that Republicans said was motivated to help Mrs. Clinton's Senate bid. At the time, the White House denied that Mrs. Clinton played any role in those pardons, and ultimately Mrs. Clinton publicly opposed them.

Government officials say they believe that felons read the FALN decision as another signal that the president was unsheathing his clemency power. Applications to the pardon office climbed rapidly in the months that followed, with the total number that fiscal year growing 30 percent, to 1,300.

Then, this past July, the president commuted the sentences of four women jailed on drug charges in separate cases. Around the country, others sentenced for drug violations thought their prospects for release had brightened. The July commutations "made us realize Clinton was likely to do more," said Julie Stewart, president of Families Against Mandatory Minimums.

The Ears of Influence

In the months that followed, clemency applications from people convicted of drug crimes and other felons poured in to the Justice Department at a rapidly increasing rate. The lawyers in the Justice Department's pardon office began loading up on cases to review, ready for some staggering months of work.

At the same time, applicants and their family members were beginning to jockey for position. Garry Mauro, a longtime friend of the Clintons and the Texas chairman of the Gore presidential campaign, said he received more than 300 calls starting in November from Democrats asking for help on behalf of a relative or friend who wanted to obtain presidential clemency. He helped out in only a few cases by sending a letter of support, Mr. Mauro said.

Martie Jobe decided to do everything she could to help her husband, Stanley, get a pardon for his 1994 bank fraud conviction. Ms. Jobe, a lawyer from El Paso, obtained the nine-page application form from the pardon office and answered all of its detailed questions. She sought letters from politicians, business people and other professionals to attest to her husband's character. She compiled hundreds of pages of supporting material in a notebook. Still, she wanted to push harder.

She asked for help from a former Democratic congressman from Dallas with contacts in the administration. The former congressman was willing to join in the effort, Ms. Jobe said, for a payment of \$200,000 up front, with a \$300,000 bonus if he met with success.

Despite her eagerness to clear her husband's name, Ms. Jobe balked. "That was close to buying a pardon," she said.

In an interview, the former congressman, John Bryant, now a lawyer and lobbyist, said that his fee, which he said might have been less than Ms. Jobe remembered, was to cover the extensive work that would be required.

"It's not like you get a check and walk over to the White House and say, 'How about it?'" Mr. Bryant said. "The fee I quoted was for three different people working on the matter. It was not that I had a friend in high places to go to. You had to convince people at Justice and then get over to the White House to make sure it happened."

Many applicants have no legal representation. Lawyers who do represent pardon applicants said their standard fee ranged from \$2,500 to \$5,000 for 8 to 20 hours of work.

Ms. Jobe said she sought another person with administration connections, who in turn made contact with a White House official. "It was all kind of mysterious," she said.

Her husband won his pardon this month.

At the White House, the lobbying on behalf of felons stepped up. Mr. Rich, through his lawyer, Mr. Quinn, the former White House counsel, began pushing for a pardon, something that former pardon lawyers said was exceptional, since he remained a fugitive.

The Last-Minute List

On Dec. 22, Mr. and Mrs. Clinton met in the Map Room at the White House with a group seeking clemency for four New York men who were serving sentences for stealing \$40 million from various government grant and loan programs. The president eventually granted their request.

At the same time, an assortment of other candidates for pardon were pressing their case at the White House, either directly or through a representative. They included Michael R. Milken, the former financier who was convicted of securities fraud, and Webster L. Hubbell, a long-time friend of the Clintons and a former Justice Department official who had engaged in financial fraud involving his former law firm and clients. Mr. Clinton ultimately declined to grant either man a pardon.

A few blocks away, officials in the pardon office thought they were wrapping up their work, government officials said. Their recommendations had been completed, and sent on to the deputy attorney general for review and approval before they were passed to the White House counsel's office.

On Jan. 19, the last day of the Clinton presidency, an announcement of pardons was scheduled for 5 p.m., government officials said. But 5 came and went. The

announcement was rescheduled for 9, but that passed as well.

In the pardon office, lawyers stayed waiting for word from the president's staff. Late that night, it arrived: the White House had more names it wanted on the list. As the hours passed, more and more new names came in, until they finally totaled close to two dozen. And the pardon lawyers had never investigated any of them.

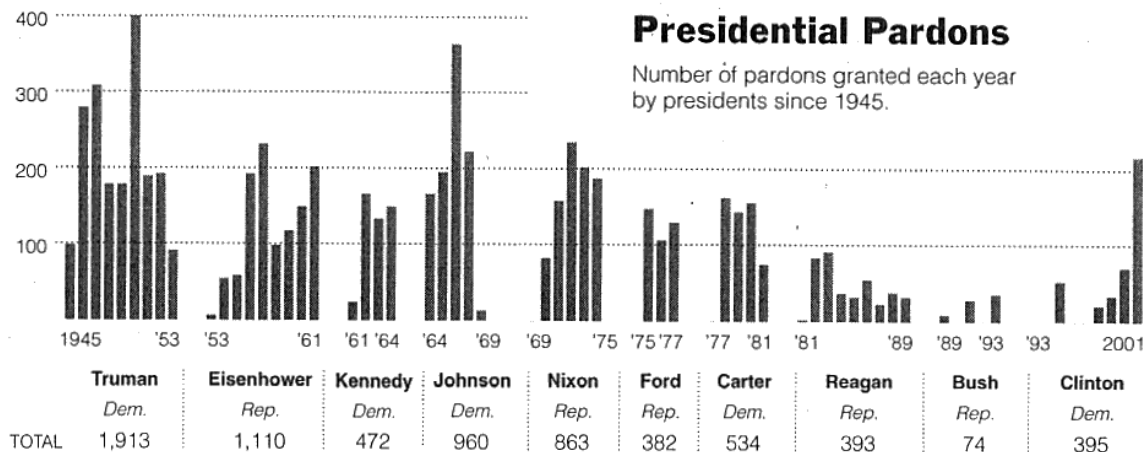
With no time to conduct the usual in-depth inquiries into pardon applicants, F.B.I. agents instead just ran the names through bureau computers in search of other possible felony convictions. By 3 a.m., lawyers from the deputy attorney general's office decided to head home, knowing that the pardon lawyers would be working through the night.

By 5 a.m., an anxious lawyer awaiting word on his client's fate phoned the pardon office. Roger Adams, the head of the office, answered the phone, sounding dazed, the caller said. "Still waiting," he told the lawyer.

As the hours closed in on the Bush inauguration, the pardon office staff was rapidly typing out information sheets for each clemency recipient, governmental officials said. Most of the sheets listed an array of details for each case: the statute violated, the sentence, the lawyers and the names of character witnesses.

But more than 20 of those information sheets mentioned nothing more than the pardoned felon's name.

It was, a government official said, the only information that the pardon office had.



Source: Office of the Pardon Attorney

Access Proved Vital in Last-Minute Race for Clinton Pardons



**DON VAN
NATTA JR. &
MARC LACEY**

NEW YORK TIMES,
February 25, 2001.

Copyright: The New
York Times Company.

Reprinted by permis-
sion.

In a speech before the Arkansas Legislature on Jan. 17 on his final trip as president, Bill Clinton described his amazement at the last-minute avalanche of applications for pardons and prison-sentence commutations.

"We're still getting applications in the mail," Mr. Clinton told the legislators. "It's crazy."

Minutes after his speech, Mr. Clinton, the former Arkansas governor, visited his old office in the Statehouse, where several Arkansas legislators cornered him and made an impromptu appeal for a pardon for a former colleague. The legislators urged Mr. Clinton to pardon Lloyd George, a former state representative from Danville, Ark., a Clinton aide said. Mr. George was convicted in 1997 of mail fraud for selling an overpriced irrigation system to a state prison. He served nine months of home detention.

Three days after that legislators' plea, in Mr. Clinton's final hours in the White House, Mr. George received one of the president's 176 pardons and commutations, demonstrating that in some instances, applicants succeeded in getting quick results, as long as they had the right connection to Mr. Clinton.

While only a few applicants got face-to-face meetings with Mr. Clinton in the final weeks of his administration, a wide array of private individuals, public relations firms, advocacy groups, officeholders, business executives, foreign leaders, campaign donors and even family members leaned on Mr. Clinton — and people close to him — for pardons on behalf of people convicted of a variety of felonies, including trafficking in large amounts of cocaine and rolling back the odometers of used cars.

In interviews with more than a dozen lawyers this week, a common ingredient became evident in the final group of pardons: access, either to the president or to the White House counsel's office. Without such entree, it was nearly impossible to argue the merits of clemency applications, many lawyers said.

Assistance was given by a wide array of people who topped the "Friends of Bill" list: Harry Thomason, the television producer; Terry McAuliffe, the longtime Clinton fund-raiser and recently elected Democratic National Committee chairman; the Rev. Jesse Jackson; and Harold M. Ickes, the former White House deputy chief of staff and senior adviser to Mrs. Clinton.

And applicants were willing to pay dearly for the right entree, given the six-figure fees charged by middlemen such as Hugh Rodham, Mrs. Clinton's brother, who worked on two clemency petitions, and Jack Quinn, the former White House counsel who repre-

sented Marc Rich, the fugitive commodities trader.

The Rich pardon is now under investigation by United States Attorney Mary Jo White in Manhattan and two Congressional panels, while Mr. Rodham's activities and \$400,000 in fees (he said he returned the money) are also drawing scrutiny from Congressional investigators. "You have to have help," said one Washington lawyer who was successful in securing a pardon but agreed to speak only on condition of anonymity. "Clearly, there has to be a voice there pushing for your person, or you have absolutely no chance."

The disclosure of the Rodham fee — coupled with the disclosure this week that Roger Clinton, Mr. Clinton's half-brother, also lobbied unsuccessfully on behalf of six pardon applicants — made it clear that some people thought the best access came through relatives of the president.

But Julia Payne, a spokeswoman for Mr. Clinton, rejected the argument that applicants with connections had a much better chance of success, saying Mr. Clinton rejected pardons despite heavy lobbying from major campaign contributors.

"If pardons were for sale, as some have alleged, then the list of those who received pardons and commutations would have been a lot different," Ms. Payne said.

In the last three months of Mr. Clinton's presidency, the Justice Department said it received more than 1,000 applications for pardons and commutations, the most ever received in a three-month period.

But that number does not include dozens of additional applications, such as Mr. George's, that were submitted directly to the White House, some just a few days before Mr. Clinton left office on Jan. 20. Usually, the pardon application process takes months or even years, but the flurry of last-minute applications left the Justice Department little or no time to conduct background checks or seek the comments of prosecutors.

Of the dozens of applications that bypassed the Justice Department, the president granted pardons to 31 people, and some of those cases were championed by close Clinton associates.

Several lawyers and fund-raisers attributed the pardon frenzy that engulfed the White House to the widespread publicity in December that Mr. Clinton was thinking about granting a pardon to the financier Michael Milken. In December, it was reported in The New York Times that Mr. Milken's application was supported by Ron Burkle, a California billionaire who has contributed millions of dollars to the Democratic Party. On one occasion, Mr. Burkle spoke with the president

about a pardon for Mr. Milken. (Mr. Milken was not pardoned.)

"After that story, there was so much buzz about pardons," said a long-time Democratic fund-raiser, who said a person contacted him for help with a pardon. "People were looking for people who could open the door at the White House. People figured if you could get a contributor, or a friend of Bill, you could get a pardon."

A lawyer who was involved in a successful pardon application, who spoke on the condition of anonymity, said that "the word was on the street" that the only way to distinguish an application from the glut of requests was to "get help."

After President George Bush pardoned Caspar W. Weinberger, the former defense secretary, and several other defendants in the Iran-Contra affair on Dec. 24, 1992, after his defeat by Bill Clinton, lawyers understood that they could take their cases directly to the White House, bypassing the Justice Department.

Nevertheless, few pardon seekers who approached Mr. Clinton directly had much success in most of his presidency, when he was considered in legal circles to be stingy in granting the requests, possibly because he did not want to appear lenient toward criminals.

Several lawyers this week said they believed that his attitude changed only at the end of his second term, after Mr. Clinton survived what associates said was the searing experience of impeachment and a criminal investigation by the Whitewater independent counsel.

"He finally got religion," one lawyer said.

The president's willingness to consider pardons was not communicated through the legal grapevine, but through the loose Clinton network of longtime friends, campaign contributors and insiders with access to the White House. One lawyer said the word spread through this network that the president would favorably consider anyone who could show that he or she had been mistreated by overzealous or unfair prosecutors, just as Mr. Clinton felt he had been victimized by the independent counsel Kenneth W. Starr. "This guy got a feel for it that nobody else ever had," the lawyer said.

Indeed, in order to pardon the maximum number of people who were embroiled in another independent counsel investigation, involving former Agriculture Secretary Mike Espy, lawyers from the White House counsel's office invited pardon applications from defense lawyers who represented clients convicted in the case. Mr. Clinton gave pardons and commutations to seven men convicted as part of the independent counsel inquiry of Mr. Espy in connection with gifts he was reported to have received.

"It was clear it was a last-minute decision," said a lawyer who represented one of the people pardoned in the case. "And there were no applications for these guys. It was clear that it was coming from inside the White House."

Some pardons were arranged by a chain of close Clinton friends and advisers. In early January, Mr. Thomason, the Hollywood friend who assisted Mr. Clinton in the early days of the scandal involving a White House intern, asked Mr. Ickes, the former White House deputy chief of staff, to help obtain pardons for James L. Manning and Robert Fain, who was convicted in 1982 of tax evasion.

Mr. Ickes referred Mr. Thomason to William Cunningham III, a New York law partner of Mr. Ickes and a former assistant United States Attorney who was the campaign treasurer for Hillary Rodham Clinton in her Senate race.

Mr. Cunningham said at a news conference on Friday that he was paid \$4,062.50 to put together the pardon applications for Mr. Manning and Mr. Fain, who were pardoned by Mr. Clinton on Jan. 20. Mr. Thomason and Mr. Ickes said they did not receive any payment.

Mr. McAuliffe, the Democratic Party chief, helped a Republican, Lake, in his successful application for a pardon. Mr. Lake pleaded guilty in 1995 to illegal corporate campaign contribution and was put on probation for two years and fined \$150,000. Mr. Lake's application was also supported by the Republican Senators Orrin G. Hatch of Utah and Fred Thompson of Tennessee.

Pardon applicants were assisted by other people with deep ties to Mr. Clinton. Brian Greenspun, the president and editor of *The Las Vegas Sun* and a long-time Democratic contributor and fund-raiser, asked the president over Thanksgiving weekend to pardon Adolph Schwimmer, who violated the United States Neutrality Act in the late 1940's when he ferried aircraft to Israel in its war for independence. Mr. Schwimmer was pardoned. Mr. Greenspun did not return calls this week seeking comment.

Mr. Jackson, the minister, made a successful appeal for a sentence commutation for Mel Reynolds, the former Chicago Democratic congressman serving a seven-year prison sentence for corruption and for having sex with an underage campaign worker.

Mr. Jackson also pushed for clemency for Dorothy Rivers, a former official of the minister's Operation PUSH, serving six years for embezzling more than \$1 million in federal aid for homeless children, and John H. Bustamante, 70, a lawyer and former Jackson adviser who pleaded guilty to fraud in 1993. Ms. Rivers's sentence was commuted and Mr. Bustamante, who was placed on probation, was pardoned.

One of the last-minute pardons that bypassed the Justice Department was given to Edward Downe Jr., a Connecticut publishing and financial executive who pleaded guilty to insider trading in 1993. The application of Mr. Downe, a Democratic contributor since 1991, was supported in a letter to Mr. Clinton by Senator Christopher J. Dodd of Connecticut, his office said this week. The pardon has been criticized by lawyers at

the Securities and Exchange Commission.

One of the lawyers who represented Salim B. Lewis, a takeover specialist who pleaded guilty to stock-price manipulation in the late 1980's, was Douglas Eakeley of New Jersey, a former roommate and classmate of Mr. Clinton at Oxford University and Yale Law School.

Mr. Eakeley said he never spoke with the president and he was not paid for his work representing Mr. Lewis, who received a pardon. Indeed, Mr. Eakeley said there was no political aspect to Mr. Lewis's pardon application. "I did not speak to the president," he said. "This was an application that went through because of the merits of the case."

But Mr. Eakeley acknowledged that his name on the application could not have hurt Mr. Lewis's chances.

"When someone vouches for someone else," Mr. Eakeley said, "that vouching for is only as good as the voucher's reputation and his word."

You Have To Have Help

Many of those granted last-minute pardons and commutations by President Bill Clinton were helped by someone with connections to the president.

PERSON WHO RECEIVED CLEMENCY/OFFENSE

Marc Rich — fugitive commodities trader — Charged with tax evasion and violating a trade embargo

PERSON WHO HELPED OBTAIN CLEMENCY

Jack Quinn — former White house counsel Denise Rich — songwriter and Democratic contributor

PERSON WHO RECEIVED CLEMENCY/OFFENSE

Carlos A. Vignali — Cocaine trafficking

PERSON WHO HELPED OBTAIN CLEMENCY

Hugh Rodham — President Clinton's brother-in-law

PERSON WHO RECEIVED CLEMENCY/OFFENSE

Almon Glenn Braswell — Miami businessman — Mail fraud, perjury.

PERSON WHO HELPED OBTAIN CLEMENCY

Mr. Rodham; Kendall Coffey — lawyer for Vice President Al Gore during the post-election contest in Florida

PERSON WHO RECEIVED CLEMENCY/OFFENSE

Robert Fain and James L. Manning — Arkansas restaurant operators — False corporate tax returns

PERSON WHO HELPED OBTAIN CLEMENCY

William Cunningham III — Hillary Rodham Clinton's

Senate campaign treasurer and law partner of Harold M. Ickes, a former Clinton adviser

PERSON WHO RECEIVED CLEMENCY/OFFENSE

Salim B. Lewis — stock trader — Securities fraud, record-keeping violations

PERSON WHO HELPED OBTAIN CLEMENCY

Douglas Eakeley — New Jersey lawyer and classmate of Mr. Clinton at Oxford and Yale University Law School

PERSON WHO RECEIVED CLEMENCY/OFFENSE

James H. Lake — Washington lobbyist — Illegal campaign contributions

PERSON WHO HELPED OBTAIN CLEMENCY

Terry McAuliffe — Democratic fund-raiser, friend of Mr. Clinton and new chairman of the Democratic National Committee

PERSON WHO RECEIVED CLEMENCY/OFFENSE

Charles W. Morgan III — of Little Rock, Ark. — Conspiracy to distribute cocaine

PERSON WHO HELPED OBTAIN CLEMENCY

William H. Kennedy III — former associate White House counsel; partner at Rose Law Firm, where Senator Clinton worked

PERSON WHO RECEIVED CLEMENCY/OFFENSE

David C. Owen — former aide to Senator Bob Dole — Filing a false tax return

PERSON WHO HELPED OBTAIN CLEMENCY

James Hamilton — Clinton adviser; lawyer for family of Vincent W. Foster Jr., former White House lawyer who committed suicide

PERSON WHO RECEIVED CLEMENCY/OFFENSE

Edward R. Downe Jr. — Connecticut investor — Securities fraud; wire fraud and tax evasion

PERSON WHO HELPED OBTAIN CLEMENCY

Senator Christopher J. Dodd — Democrat of Connecticut

PERSON WHO RECEIVED CLEMENCY/OFFENSE

Adolph Schwimmer — Israeli arms dealer — Conspiracy to export arms to foreign country

PERSON WHO HELPED OBTAIN CLEMENCY

Brian Greenspun — editor, *The Las Vegas Sun*; friend and overnight guest of Clintons and Democratic contributor

Source: Justice Department

Rush of Pardons Unusual in Scope, Lack of Scrutiny: Back-Door Lobbying Had Large Role In Clinton's Decisions, Observers Say

Previous presidents have granted pardons to political supporters and big donors, but the spate of pardons granted by President Clinton during his final days in office was unique in the amount of back-channel lobbying, the limited scrutiny applied to those seeking clemency, and the number of people who succeeded in obtaining pardons.

Interviews with former White House officials, Justice Department lawyers responsible for reviewing pardon requests and records from the U.S. Archives indicate that the system for granting clemency under Clinton represented a dramatic escalation of the influence of personal connections and a dramatic departure from normal procedures, with a number of the most controversial pardons not submitted for the usual Justice Department review.

And while the overall number of pardons granted by Clinton was in line with those of recent presidents, no previous president has issued such a large number of unfiltered pardons at the last possible moment. Clinton's predecessors generally granted pardons steadily throughout their terms; Clinton, by contrast, granted no pardons at all during four of his first five years as president, the fewest since George Washington, then markedly accelerated the pace. More than half the 457 pardons he granted came during his last month in office.

Before Clinton's final pardons, which she called "unprecedented," former Justice Department pardon attorney Margaret Colgate Love said the number of situations in recent decades in which a pardon was granted without a prior Justice Department investigation and recommendation from the attorney general "could be counted on the fingers of one hand."

The exceptions were President Gerald R. Ford's 1974 pardon of former president Richard M. Nixon; President Ronald Reagan's 1981 pardon of two top FBI officials who had ordered illegal surveillance of American radicals, and President George H. W. Bush's 1992 pardons of former defense secretary Caspar W. Weinberger and five other Iran-Contra figures.

By contrast, more than 30 of the 177 pardons and commutations granted by Clinton on his last day did not go through the Justice procedures, which typically take 18 to 24 months and are designed to provide a full set of facts and law enforcement's view of the matter. Most of the actions that escaped such scrutiny were advocated by people close to Clinton, including his brother-in-law, Hugh Rodham; his close friend, producer Harry Thomason; and political donors Beth Dozoretz and Denise Rich.

Rep. Henry A. Waxman (D-Calif.) has called Clinton's handling of the pardons a "chaotic mess" that should "embarrass every Democrat and every American." At the same time, he said, the Republican-led Government Reform Committee was guilty of "selective indignation," citing President George Bush's 1989 pardon of industrialist Armand Hammer for making \$54,000 in illegal campaign contributions to Nixon.

Hammer, who tried unsuccessfully to obtain a pardon during the Reagan administration, had recently donated money to the Bush-Quayle inaugural fund and another \$110,000 to state Republican parties. "The appearance of a quid pro quo is just as strong in the Hammer case as in the [Marc] Rich case, if not stronger, since Mr. Hammer himself gave the contribution," Waxman said.

Lawyers who have worked the system say that Clinton exceeded the norm in handling so many cases from the White House. Previously, these attorneys say, the pleas and the pleaders were almost always sent first to the Justice Department to make their case, reducing the likelihood of a regrettable decision.

"In the Reagan administration, there were no stealth pardons," said Reagan's White House counsel, Fred F. Fielding. At the Bush White House, "we never suggested to anyone that we were open for business," said former White House counsel C. Boyden Gray. "So unless you were really very sophisticated, you never would have thought of starting out at the White House. As a result, we never got bombarded."

Controversy over presidential pardons stretches far back in U.S. history. As Duquesne University law professor Ken Gormley told the Senate Judiciary Committee last month, Thomas Jefferson was suspected of favoring his Anti-Federalist supporters, while Abraham Lincoln was accused of granting a disproportionately large number of pardons to friends from Kentucky, with "pardon brokers" extracting lucrative fees for their supposed services in obtaining pardons.

When President Harry S. Truman commuted the mail fraud sentence of former Boston mayor James Michael Curley, he was condemned for helping a fellow Democratic politician. At the end of his term, Truman issued seven pardons without going through the Justice process, all but one of whom were current or former government officials who had served their sentences.

The outcry over that, Love said, prompted President Dwight D. Eisenhower's attorney general, Herbert Brownell, to announce a "goldfish bowl" policy of making pardon grants public as well as the names of the



**PETER SLEVIN
& GEORGE
LARDNER JR.**

THE WASHINGTON
POST

March 10, 2001,
Saturday, Final Edition

Reprinted with
Permission

persons recommending them, a policy that had been in effect before the New Deal. Love said, however, that the policy was later abridged to prevent disclosure of who made the recommendations.

In 1971, Nixon granted clemency to Teamsters head James R. Hoffa, cutting short his prison term for jury tampering. The next year, the union endorsed Nixon for reelection. In 1978, President Jimmy Carter commuted the prison term of Patty Hearst Shaw after hearing from nearly 50 members of Congress who supported the idea.

John R. Stanish, pardon attorney in the Carter administration, said applications submitted directly to the White House were given a courteous hearing and promptly kicked over to his office for review and recommendation. He recalled a group of Hasidic Jews who found their way to the White House counsel's office with high-powered backing from the New York Democratic Party.

Seeking clemency for a convicted diamond smuggler, the delegation was sent to Justice, where Stanish met with them and looked into the matter. Clemency was denied.

In another case, Stanish said, Carter sent him a highly personal note from the president of Sudan, asking for a pardon of a Sudanese national. Affixed to it was a Carter message to Attorney General Griffin Bell: "Griffin, handle this as you see fit. Prepare a response for me." No pardon was granted.

On his next to last day in office, Reagan pardoned New York Yankees owner George Steinbrenner for illegally funneling money to Nixon's 1972 presidential campaign. Like Bush's later pardon of Hammer, the Steinbrenner pardon — obtained with the help of former attorney general William B. Saxbe — prompted accusations of favoritism for the rich and well-connected.

The best-known Bush pardon was the Christmas Eve 1992 clemency granted to Weinberger and five others connected to the Iran-Contra affair. Bush said Weinberger was an American hero, but the pardon also may have spared him from being called to testify at Weinberger's trial.

Apart from Weinberger and the other Iran-Contra defendants, Gray said, all pardon petitions forwarded to Bush were reviewed by Justice.

At the same time, there were occasional bursts of intense lobbying. In addition to his Iran-Contra pardons, Bush in his final days in office kicked up a storm when he commuted the sentence of Joseph Occhipinti, a former immigration agent imprisoned for conducting illegal searches of Hispanic-owned businesses in New York. Clemency had been sought by then Staten Island Borough President Guy V. Molinari, the New York state chairman of Bush's 1988 campaign, who demanded the Justice Department look at what he said was new evidence.

Then-Deputy Attorney General George J. Terwilliger said much of the material had been fabricated, but he recommended clemency anyway. New York prosecutors were outraged when Bush ordered Occhipinti freed after

serving eight months of a 37-month prison term.

Until the number pardons and commutations were granted by American presidents each year. George Washington proclaimed amnesty for hundreds of participants in the Whiskey Rebellion, a violent uprising of Pennsylvania farmers who refused to pay taxes on the whiskey they made. During the Civil War and after, presidents Abraham Lincoln and Andrew Jackson extended amnesty to about 200,000 people.

In 1945, President Franklin Delano Roosevelt pardoned several thousand convicts who had served at least a year in the military. Truman pardoned 9,000 people who had been convicted of desertion in peacetime.

Pardons began declining under Reagan with the arrival of a tough-on-crime era, and they continued to drop during the Bush and Clinton administrations. Carter pardoned 563 people in one term, while Reagan granted 406 pardons in two. President George H. W. Bush made 77 clemency grants during his four years, while Clinton made 457 in eight.

"Clinton and the old George Bush were about as stingy as you can get in granting clemency," Stanish said. "A lot of good cases died on the vine."

Clinton pressed Justice early last year to increase its referrals of favorable recommendations. But the small pardon attorney's staff at Justice was overwhelmed. Last fall, former White House counsel Beth Nolan testified, the agency informed the White House that it was unable to process more applications, but that did not stop petitions from being handled directly by the White House.

In fact, the pardons that occurred without Justice review appeared to conflict with Clinton's own assessment of how clemency petitions should be handled. In 1996, while running for reelection, Clinton was asked about the prospect of pardoning Whitewater figures Susan McDougal — who eventually received a pardon on Jan. 20 — and former Arkansas governor Jim Guy Tucker, who did not.

"My position would be that their cases should be handled like others. There's a regular process for that, and I have regular meetings on that, and I review those cases as they come up, after there's an evaluation done by the Justice Department. And that's how I think it should be handled," Clinton told PBS. Clinton's willingness to have White House staff play a role "entirely independent of the Justice Department" was evident in his 1999 clemency grant to members of the FALN, a Puerto Rican nationalist group involved in terrorist acts, Love said. Justice had recommended against clemency in 1996 and in the end, Clinton relied entirely on the White House counsel, whose advice was based on a White House investigation of the cases.

"We should have seen a big red flashing light because of the FALN cases," she said. "The FALN grants foreshadowed the endgame."