

PRESIDENT'S DUTY TO BE MERCIFUL

OF PARDONS, POLITICS AND COLLAR BUTTONS:

REFLECTIONS ON THE PRESIDENT'S DUTY TO BE MERCIFUL

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[Pardon] 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.¹

INTRODUCTION

Few provisions in the Constitution are as misunderstood and underestimated as the President's power to pardon.² Most people today associate pardons with politics and controversy, and do not know that for much of our nation's history the pardon power was exercised regularly and without fanfare to give relief to ordinary people convicted of garden-variety federal crimes. Once an integral part of the justice system, pardon is considered anachronistic in an age devoted to rules and wary of discretion, a vestige of a simpler time whose occasional exercise is either capricious or pointless, or both. Indeed, until quite recently the prevailing view among criminal justice practitioners and philosophers was that the time had come for pardon "silently to fade away — like

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

²"The President shall . . . have Power to grant Reprieves and Pardons for Offences against the United States, except in cases of Impeachment." U.S. CONST. art. II, § 2, cl. 1. Sixty years ago, the introduction to what is still the only systematic study of the federal pardon power noted that "the vast majority of people have a very hazy idea of the meaning and of the implications of the President's pardoning power. The persistence of erroneous ideas, the lack of exact information, and the absence of publicity concerning the acts of the pardoning authority envelop the power in a veil of mystery." W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 6 (1941). In the intervening years, and notwithstanding episodic scholarly interest in particular sensational grants, the public understanding of the pardon power has changed very little, and constitutional texts devote little space to it. *See, e.g.*, P. SHANE & H. BRUFF, THE LAW OF PRESIDENTIAL POWER (1988) (discussing pardon power on four of 811 pages of text).

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collar buttons, [its] usefulness at an end."³

At the same time, the intense competition for partisan advantage in matters touching on crime control has made pardoning politically problematic. This was brought home to the Clinton Administration in the summer of 1999 by the public furor that greeted the President's offer of clemency⁴ to sixteen members of a Puerto Rican nationalist group ("FALN") who were serving lengthy prison sentences for terrorist offenses. The President defended his decision in terms of "equity and fairness,"⁵ but it was widely criticized as a thinly-veiled attempt to curry favor with Hispanic voters in New York on behalf of his wife's expected Senate candidacy.⁶

Given the great risk and uncertain return of pardoning, it seems less surprising that the President does it rarely than that he does it at all. But the concern for political risk threatens to become a self-fulfilling prophecy: as the power is exercised less and less frequently and produces fewer and fewer grants, it is more and more likely to be regarded with suspicion and cynicism.

³KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 84 (1989); see also Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power From the King*, 69 TEX. L. REV. 569, 604, 611 (1991) [hereinafter Kobil, *Quality of Mercy*] (the clemency power has been "trivialized," having "failed to evolve with the rest of the judicial system"). Both Moore and Kobil argue for a revitalized role for pardon as an "extrajudicial corrective" for unjust outcomes of the legal system. See *infra* note 70.

⁴The term "clemency" is a comprehensive term that has come to be used for all types of relief available pursuant to the pardon power, to avoid confusion with the narrower technical use of the term "pardon" in the Justice Department's clemency regulations which denotes the limited grant of relief after completion of sentence. See Executive Clemency, 28 C.F.R. § 1.2 (2000). Clemency includes commutation of sentence, reprieve, and remission of fine, as well as full or unconditional pardon. The term "amnesty" is usually used where a grant of clemency is extended by proclamation to a class of individuals. Throughout this paper I have also used the constitutional term "pardon" in this same comprehensive sense, though I have attempted, where appropriate, to distinguish it from the post-sentence relief described in the Justice Department's clemency regulations.

⁵Letter from the President to the Honorable Henry Waxman, Ranking Minority Member, Committee on Government Reform (Sept. 21, 1999) [hereinafter FALN Letter] (copy on file with author).

⁶See, e.g., Katherine Q. Seelye, *Ex-Clinton Lawyer Says Politics Had No Role in Clemency*, N.Y. TIMES, Sept. 18, 1999, at A10; Katherine Q. Seelye, *Clinton Says Clemency Plan Was Unrelated to First Lady*, N.Y. TIMES, Sept. 10, 1999, at B4; David Johnston, *Federal Agencies Opposed Leniency for 16 Militants*, N.Y. TIMES, Aug. 27, 1999, at A1.

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It is unfortunate that the federal pardon power seems to have fallen into disuse and disrepute just when it appears that it might once again prove useful. The harsh inflexibility that has come to characterize the federal criminal justice system in the past two decades is becoming a matter of public concern, in part because of "hard cases" in which the legally mandated punishment seems morally wrong, and in part because of a growing crime control infrastructure that reflects poorly on our national humanity. Also, for the first time in many years, questions about the role of clemency in capital cases are being raised at the federal level. There are many who believe that it is time to declare victory in our thirty-year war on crime, assess its costs, and begin the work of reconciliation. In this connection, it seems appropriate to take a fresh look at the presidential pardon power in the constitutional scheme.⁷

The FALN grants, along with several other recent clemency actions by President Clinton, are a hopeful sign that reports of pardon's death are greatly exaggerated. In this Article, I hope to contribute to its recovery by proposing that the President has a duty to pardon, not so much to do justice in particular cases, but to be merciful as a more general obligation of office. As background, I will briefly describe how in recent years the President's pardoning power has come to be neglected. In a final section I will suggest some ways in which the President can revive the power by making a more considered and generous use of it.

A. The Evolving Role of Federal Pardons

What Alexander Hamilton called the "benign prerogative of pardoning"⁸ has two quite different but equally public aspects. The first is to permit the President to dispense "the mercy of the government" where the outcome dictated by law seems harsh or unjust.⁹ The second is to

⁷See Editorial, *Wrong Way on Pardons*, WASH. POST, Feb. 10, 2000, at A22 [hereinafter *Wrong Way on Pardons*] ("The Founders envisioned [the pardon power] as a robust political check on a criminal justice system that would inevitably produce excesses. With tremendous growth in the reach of federal criminal law, the need is greater than ever. Yet as this growth has taken place, the practice has withered."); Editorial, *The President's Pardons*, WASH. POST, Dec. 27, 1999, at A24 ("Given the harsh mandatory minimum sentences that govern drug offenses, including nonviolent offenses, there must be many cases where presidential clemency would be a powerful tool for justice. The president should not routinely second-guess the court system. But given the desultory use of this constitutional power over the past 20 years, there seems to be no danger of that. The danger, rather, is that a valuable check on the justice system has wilted into symbolism.").

⁸THE FEDERALIST NO. 74, at 422 (Alexander Hamilton) (Penguin Books ed., 1987).

⁹*Id.* ("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

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enable him to deal expeditiously with situations involving political upheavals or emergencies.¹⁰ The pardon power is not subject to limitation by Congress¹¹ or the courts,¹² and the President is held accountable for its exercise only through the political process.¹³ It has always been assumed

sanguinary and cruel."); James Iredell, *Address in the North Carolina Ratifying Convention*, reprinted in 4 THE FOUNDERS' CONSTITUTION 17 (P. Kurland and R. Lerner, eds., 1987) [hereinafter *Iredell Address*] ("[T]here may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.").

¹⁰Hamilton considered the utility of pardon in case of domestic disorder: "[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." THE FEDERALIST NO. 74, *supra* note 8, at 423. Iredell also mentioned pardon's usefulness in time of "civil war," and added the need to obtain the testimony of accomplices and to protect spies who have proved useful to the government. *See Iredell Address*, *supra* note 9, at 18.

¹¹*See In re Garland*, 71 U.S. 333, 380 (1866) ("This [pardon] power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.").

¹²*See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280 (1998) ("Pardon and commutation have not traditionally been the business of courts; as such, they are rarely, if ever, decisions appropriate subjects for judicial review" (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981))); *In re Grossman*, 267 U.S. 87, 121 (1925) ("[W]hoever is to make [pardon] useful must have full discretion to use it"); *see also Yelvington v. Presidential Pardon and Parole Attorneys*, 211 F.2d 642 (D.C. Cir. 1954) (the court will not compel compliance with internal Justice Department clemency regulations so as to interfere with administration of pardon power).

¹³Proposals during the Constitutional Convention that the power be shared with Congress were rejected on grounds of efficiency, and on the theory that the President's personal accountability to the electorate was a sufficient check on abuses. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION 419 (Aug. 25, 1787) (statement of Sherman) (M. Farrand ed., 1937) (rejecting proposals to allow reprieves until the ensuing session of the Senate, and to condition pardon on the consent of the Senate); *id.* at 626-27 (rejecting proposal to vest the power to pardon treason jointly in the President and the Senate); *see also* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 501-06 (1977) [hereinafter Duker, *President's Power*]. Hamilton argued that the pardon power was vested in "one man" rather than "a body of men" for

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(though evidently never authoritatively decided) that the power to pardon is one of the very few whose exercise the President may not delegate to a subordinate official, and in fact no President has ever tried.¹⁴

The public is most familiar with the occasions throughout our history when the pardon power was used for purposes of calming and unifying the country after a period of strife, notably the amnesties that have followed almost every one of our wars.¹⁵ President Ford's pardon of Richard Nixon, which cost Ford his own political future, is properly regarded as a legitimate

two reasons: first, "the sense of responsibility is always strongest in proportion as it is undivided," and second, "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." THE FEDERALIST NO. 74, *supra* note 8, at 422-23.

¹⁴*Cf.* TERRY SANFORD, MESSAGES, ADDRESSES AND PUBLIC PAPERS OF GOVERNOR TERRY SANFORD, 1961-65, 552 (1966), *quoted in* Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 75 CHI. KENT L. REV. (forthcoming 2000) (manuscript at 5-6, on file with author) ("To decide when and where such mercy should be extended is a decision which must be made by the executive. It cannot be delegated even in part to anyone else, and thus the decision is a lonely one. It falls to the Governor to blend mercy with justice as best he can, involving human as well as legal considerations, in the light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state.").

¹⁵Perhaps best known are the great Civil War pardon proclamations of Presidents Lincoln and Johnson. *See* DUKER, *supra* note 13, at 509-21. Also well known are the amnesties issued by Presidents Ford and Carter to persons guilty of military and selective service violations following the Vietnam War. *See* U.S. PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT (1975) [hereinafter CLEMENCY BOARD REPORT]; Proclamation No. 4483, 3 C.F.R. 4 (1978); *see also* Kent Greenawalt, *Vietnam Amnesty — Problems of Justice and Line-Drawing*, 11 GA. L. REV. 1 (1976). In addition, Washington used the pardon power to pacify the Whiskey Rebels in 1794-95; *see* 1 Annals of Congress 1411-1413; Adams also used the pardon power to bring an end to the Tariff Insurrection in 1800, *see* 1 Annals of Congress 1552-53; and, Madison used it on three separate occasions during the War of 1812 to persuade deserters from the army to return to service. *See* JAMES D. RICHARDSON, 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 413, 497, 528 (1897) [hereinafter RICHARDSON, MESSAGES]; *see also* BIBLIOGRAPHY OF AMNESTY IN AMERICA 22-24 (Morris Sherman ed., 1974). The pardon power was also used, as it had been in England, to man the military. *See* 1 Op. Att'y Gen. 341, 342 (1820). Presidents Wilson and Truman both issued a number of pardons to mark the end of the two world wars. *See* CLEMENCY BOARD REPORT, *supra*, at 374-79.

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measure to restore what Hamilton called "the tranquility of the commonwealth."¹⁶ Other examples of pardons granted in whole or in part for political purposes are President Jackson's pardon of the Baratavia pirates as a reward for their assistance in defending New Orleans in the War of 1812,¹⁷ President Cleveland's pardon of Mormon settlers in Utah to shield them from prosecution for polygamy,¹⁸ President Nixon's conditional commutation of Jimmy Hoffa's prison sentence barring him from union management after his release from prison,¹⁹ and President Reagan's commutation of a foreign spy's life sentence in contemplation of a "swap" for several of our nationals imprisoned abroad.²⁰ Considerations of politics also underlay President Bush's Iran-Contra pardons,²¹ as they did Jefferson's pardon of those convicted and sentenced during the preceding Federalist period under the Alien and Sedition Act.²²

¹⁶Murphy v. Ford, 390 F. Supp. 1372, 1374 (W.D. Mich. 1975) (rejecting challenge to pardon based on both timing and merits). *See also* Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883, 887 (1992) ("Although our national anger seemed to demand punishment for Nixon's crimes, Ford believed that in the long run, the national interest would be better served by enabling the ex-President to avoid prosecution, leaving him untouched by legal proceedings that would otherwise have kept alive our national obsession with Watergate, which, in retrospect, it was plainly time to put aside.").

¹⁷RICHARDSON, MESSAGES, *supra* note 15, at 543-45.

¹⁸*See* JAMES D. RICHARDSON, 13 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 5942 (1897).

¹⁹Hoffa was unaware of the condition in the commutation warrant, inserted by White House Counsel John Dean, until after he had been released from prison, and sued to declare it unenforceable. *See Hoffa v. Saxbe*, 378 F. Supp. 1221, 1223-24 (D.C. 1974). His appeal of the district court's decision against him was dismissed after he disappeared and was presumed dead. *See Leonard B. Boudin, The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 U. COLO. L. REV. 1, 21-22 (1976).

²⁰*See* U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, WARRANTS OF PARDON, 1935-1999, *Exec. Grant of Clemency to Marian W. Zacharski*, June 7, 1985 [hereinafter WARRANTS OF PARDON].

²¹*See* Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992) (recipients of pardon among "the best and most dedicated of our countrymen," who were motivated by patriotism and not by hope of private gain, and whose prosecution resulted from the "criminalization of policy differences").

²²*See Duker, President's Power*, *supra* note 13, at 530; Kobil, *Quality of Mercy*, *supra* note 3, at 593.

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What is less well-known is that the pardon power has also been exercised by the President over the years on a more mundane and less visible level, to make exceptions to the law in a wide variety of circumstances. The archival records of clemency actions from George Washington's administration onwards reveal the frequent use of the pardon power to cut short a prison sentence, to delay an execution, to return forfeited property, and to restore civil rights.²³ For much of our history, several hundred pardons or commutations were routinely granted each year, most generating little public interest.²⁴ While there have been colorful clemency recipients in every period of our history — such as Eugene Debs, Tokyo Rose, George Steinbrenner, Patty Hearst, and Marvin Mandel — the vast majority of pardons have gone unnoticed and unremarked.

Reflecting the pardon power's historically close ties with the operation of the criminal justice system, its administration has been entrusted to the Attorney General since the middle of the nineteenth century.²⁵ He is assisted by the Pardon Attorney, who is responsible for accepting and

²³Portions of these records from 1794 to 1935 are on microfilm in the Office of the Pardon Attorney. That office also retains the original pardon warrants from the first administration of Franklin Roosevelt until the present, as well as the originals of many pardon recommendations signed by the Attorney General addressed to the President. *See* WARRANTS OF PARDON, *supra* note 20. While pardon warrants are public records, pardon recommendations are generally not disclosed by the Department of Justice, even where a subject is deceased. Clemency case files are acceded to the National Archives on a regular basis in accordance with established records policies, except for a few involving notorious individuals or issues of special interest, and most are destroyed after a certain period of time.

²⁴*See* OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY FISCAL YEAR, JULY 1, 1900 TO JUNE 20, 1945 (Mar. 24, 1999); PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION, 1945 TO PRESENT (Feb. 1, 2000) [hereinafter, collectively, OPA CLEMENCY ACTIONS].

²⁵Until 1853, the Department of State administered the pardon power, perhaps reflecting the power's frequent early use to restore forfeited property and remit fines. A copy of each warrant was kept in longhand, as well as a separate ledger book containing a brief description of the offense being pardoned, and the reasons for the grant. Pardons that had the effect of cutting short a prison sentence were generally made pursuant to the recommendation of the prosecutor or sentencing judge. After 1854 the administration of the pardon power was shifted to the Attorney General, though warrants were still drawn up in the State Department. In 1893 President Cleveland by executive order formally transferred all administrative duties in pardon matters to the Attorney General. *See* Exec. Order of June 16, 1893 (on file at the Office of the Pardon Attorney). *See also* Reed Cozart, *Clemency Under the Federal System*, 13 FEDERAL PROBATION 3 & n.1 (1959). The first Justice Department clemency regulations, signed by both the Attorney General and the

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reviewing clemency applications and preparing recommendations for their disposition.²⁶ At least since the beginning of the twentieth century, with only a handful of exceptions, the President has made each clemency grant pursuant to a report and recommendation drafted by the Pardon Attorney and signed by the Attorney General or his designee.²⁷ In fact, pardon warrants often incorporate a reference to the Justice Department's recommendation. The degree to which the President has historically depended upon the Attorney General's advice in clemency matters is suggested by the

President, were issued in 1898. A complete set of clemency regulations, from the 1898 McKinley regulations to the current regulations approved by President Clinton in 1993, is on file at the Office of the Pardon Attorney.

²⁶See 28 C.F.R. §§ 0.35-0.36 (1983). In 1865 Congress appropriated funds to pay a "pardon clerk" to assist the Attorney General, and in 1891 the first Pardon Attorney was appointed. See 13 Stat. 516 (1865); 26 Stat. 946 (1891). The Pardon Attorney reported directly to the Attorney General until the late 1970s, when Attorney General Griffin Bell delegated responsibility for clemency matters, and supervisory authority over the Office of the Pardon Attorney, to the Deputy Attorney General. See Interview with Terrence B. Adamson, Special Assistant to the Attorney General, 1977-1979, in Washington, D.C. (Apr. 2, 2000). Since 1983 the Attorney General's responsibility for providing advice to the President in clemency matters has been delegated to the Pardon Attorney, but recommendations to the President are generally signed by the Deputy Attorney General. See 28 C.F.R. § 0.35 (Attorney General responsibility delegated to Pardon Attorney, whose clemency recommendations are made "through" the Deputy Attorney General). During most of the 1980s, the Associate Attorney General was responsible for supervising the criminal components of the Department, and for approving and signing clemency recommendations; in 1989, this responsibility was returned to the Deputy Attorney General, where it has remained.

²⁷By the late 1930s, the Attorney General was too busy with other matters to prepare a separate recommendation to the President in any but the most important or controversial clemency cases, and usually simply "endorsed" the recommendation of the Pardon Attorney. See HUMBERT, *supra* note 2, at 90 n.15. At some later point, probably during the Kennedy administration, the practice of having these "letters of advice" personally signed by the Attorney General resumed. In addition, during the Kennedy administration, reports in summary form recommending denial of clemency (also signed by the Attorney General) were sent to the President. Previously, most cases in which the Department did not recommend favorable action had been closed administratively by the Pardon Attorney. See 1963 ATT'Y GEN. ANN. REP. 63 [hereinafter 1963 AG ANNUAL REPORT]. The Attorney General personally signed all clemency recommendations until about midway through the Carter Administration, when the Deputy Attorney General assumed this responsibility. See Interview with Terrence B. Adamson, *supra* note 26.

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fact that, until the Kennedy Administration, most applications that the Attorney General did not support were not even forwarded to the White House, but closed administratively without presidential action in the Pardon Attorney's office.²⁸

Until the early 1920s, the pardon power was used most frequently to commute a prison term, often because of some miscarriage of justice or equitable defect in the underlying conviction, but more commonly because the prisoner was simply deemed to have served sufficient time in prison.²⁹ With the advent of indeterminate sentencing and an administrative parole system, as well as greater opportunity to appeal convictions through the courts, pardon no longer played such a

²⁸See 1963 AG ANNUAL REPORT, *supra* note 27, at 63.

²⁹While in modern times the President has not usually disclosed his reasons for granting a pardon, the early pardon ledger books and the annual reports of the Attorney General between 1885 and 1931 record each clemency grant with the reasons for recommending relief. Many of these involve doubt as to guilt, lack of capacity, or excuse — a reminder of how relatively primitive our early justice system was. Sometimes the reasons for a favorable recommendation involve the prisoner's age or health (fear of contagion was as likely as imminent death to qualify a prisoner for early release) or immigration status (pardon to "avert deportation"); sometimes they reflect operational considerations like reward or immunity; sometimes they depend upon an official recommendation, including that of prison officials; and sometimes they are simply quaint (e.g., "to enable petitioner to catch steamer without delay," "to enable farmer prisoner to save his crops," and "not of criminal type"). See HUMBERT, *supra* note 2, at 124-33. The range of reasons reveals the idiosyncratic sense of compassion in the recommending official. For example, Attorney General Charles J. Bonaparte observed in 1908 that:

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

1908 ATT'Y GEN. ANN. REP. 8. Unfortunately, after 1931 these fascinating records were no longer compiled and published for reasons of efficiency, and they exist now only in the uncatalogued letters of advice signed by the Attorney General on file in the Pardon Attorney's office, a treasure trove for interested scholars. It has been Department policy for many years not to divulge the basis for its clemency recommendations in particular cases, though general standards are set forth in sections 1-2.112 (pardon) and 1-2.113 (commutation) of the U.S. Attorney's Manual.

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central operational role as a post-conviction remedy.³⁰

While there were fewer commutations after 1930, however, post-sentence pardons "to restore civil rights" remained a popular way for the President to recognize and further the rehabilitation of criminals who had served their sentence and returned to a productive life in their communities.³¹ Between 1932 and 1980, there were well over a hundred post-sentence pardons granted almost every year; in some years, the President signed more than 300 separate pardon warrants.³² These grants were generally made on a regular basis through the year, evidence that the

³⁰SURVEY OF RELEASE PROCEDURES, *supra* note 1, at 296 ("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.").

³¹Under the Justice Department's first clemency rules promulgated in 1898 and continuing to the present, eligibility to apply for a post-sentence pardon depends upon satisfaction of a waiting period after release from prison (originally "a considerable period," and now five years). Unless granted for innocence, a pardon has no implications for the validity of the underlying conviction, and the conviction remains on an individual's record to be reported whenever requested. However, a presidential pardon removes disabilities imposed as a result of conviction under federal or state law. *See* Memorandum for Margaret Colgate Love, Pardon Attorney, Office of Pardon Attorney, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, Re: Effect of a Presidential Pardon 1 (June 19, 1995) (presidential pardon relieves a federal offender of state firearms disabilities that attach solely by reason of a federal conviction); *cf. In re Elliott Abrams*, 689 A.2d 6, 9-18 (D.C. 1997) (holding that presidential pardon did not nullify court's authority to impose professional discipline based on conduct underlying the conviction). For some illustrations of the post-sentence benefits sought and gained through the pardon process, see Cozart, *supra* note 25, at 5-6; *see also* Henry Allen, *Uh, Pardon Me, Mr. President, Caspar & Co. Weren't the Only Ones Let Off the Hook Last Week*, WASH. POST, Jan. 1, 1993, at D1; Ted Gup, *For Seekers of Forgiveness at Lofty Levels, A Presidential Pardon*, WASH. POST, Apr. 17, 1987, at A21.

³²*See* OPA CLEMENCY ACTIONS, *supra* note 24. Franklin Roosevelt issued a total of 2721 pardons, commuted 491 prison sentences and remitted fines in 475 cases; Truman commuted 133 sentences and issued 1911 pardons. Eisenhower commuted 47 sentences and pardoned 1110 individuals; Kennedy commuted 103 sentences and pardoned 472 individuals; Johnson commuted 228 sentences and granted 959 pardons; Nixon commuted 63 sentences and granted 863 pardons; Ford commuted 27 sentences and granted 381 pardons; and Carter commuted 32 sentences and granted 534 pardons. *See id.* (numbers of commutations include both commutations and fine remissions). Until the Eisenhower Administration, each pardon grant was evidenced by its own separate warrant signed by the President. President Eisenhower began the practice of granting pardons by the batch, through the device of a "master warrant" listing all of the names of those

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business of pardoning was regarded as part of the ordinary housekeeping work of the Presidency.³³ More significantly, the percentage of pardon petitions acted on favorably remained high, approaching or exceeding thirty percent in every administration from Franklin Roosevelt's to Jimmy Carter's.³⁴ Even the number of commutations remained surprisingly high throughout this period, given the availability of alternative early release mechanisms like parole.³⁵

pardoned, which also delegated to the Attorney General (or, later, the Deputy Attorney General or Pardon Attorney) authority to sign individual warrants evidencing the President's action. All but a few pardons today are granted pursuant to such a master warrant, though commutations are generally evidenced by separate warrants so that the prison warden can satisfy himself of the grant's authenticity.

³³See WARRANTS OF PARDON, *supra* note 20. Until the Bush administration, pardons were granted at periodic intervals throughout the year, with the exception of the Nixon grants which came only at Christmas. President Bush issued very few grants during his four years in office, but none at Christmas until the end of his term. Most of President Clinton's pardons have been granted a day or two before Christmas.

³⁴See OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION, 1900-1996 (through Jan. 31, 1996) (Jan. 31, 1996); PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION AND RELIEF SOUGHT, 1969-1996 (through Jan. 31, 1996) (Jan. 31, 1996) [hereinafter, collectively, 1996 OPA CLEMENCY ACTIONS]. Because statistics on the total number of clemency applications acted upon were not compiled separately for pardons and commutations until 1967, it is impossible to tell exactly what percentage of pardon petitions alone were granted until the Nixon Administration. That said, Franklin Roosevelt granted 27.8% of *all* clemency petitions acted upon during his tenure, Truman granted 41.5%, Eisenhower granted 26.7%, and Kennedy granted 40.9%. (In light of the fact that Eisenhower commuted only 47 sentences in eight years, it is likely that his 1110 pardons represent more than 30% of the total number of pardon petitions acted on during his two terms.) Nixon granted 51% of the pardon petitions acted on during his tenure, and 26.3% of pardon and commutation petitions combined; Ford granted 39% of pardon petitions and 31.2% overall; and Carter granted 34% of pardon petitions and 21.6% overall. *See id.*

³⁵*See id.* Often the commutation took the form of sentence modification to make the petitioner eligible for parole, leaving the actual release decision up to the Parole Commission. *See, e.g.*, WARRANTS OF PARDON, *supra* note 20 (granting clemency to Eileen Rock Lowe on October 27, 1983, for kidnapping, commuting the life sentence to 21 years' imprisonment, "which will make her immediately eligible for parole consideration"). Sometimes the sentence was reduced so as to make the recipient eligible for mandatory release on parole, thereby ensuring his supervision for at least

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During the Reagan Administration the number of clemency grants each year began to dwindle, both in absolute terms and relative to the total number of applications acted on. President Reagan pardoned a total of 393 individuals in eight years, compared to the 534 pardoned by his predecessor in four, and commuted only thirteen sentences. The percentage of Reagan's favorable actions in pardon cases dipped to a low point for the century of twenty percent, and his overall grant rate to thirteen percent. President Bush granted even fewer pardons: his sixty-eight grants³⁶ represented only seven percent of the pardon petitions acted on during his four years in office. Factoring in his three commutations, his overall grant rate is four percent. President Clinton's record at this point in his presidency is about the same as that of President Bush: during the seven years of his presidency, through the end of 1999, he has pardoned 145 individuals, or about thirteen percent of those whose pardon petitions were acted on during that period.³⁷ His fifteen commutations³⁸ and two fine remissions bring his overall grant rate through the end of calendar 1999 to about 4.5%.

One might predict that the reduced likelihood of favorable action on a clemency petition since the mid-1980s would be reflected in a corresponding reduction in the number of annual

some period of time after release.

³⁶This figure does not count the six Iran-Contra grantees, who did not file applications with the Pardon Attorney and were pardoned by proclamation. See 1996 OPA CLEMENCY ACTIONS, *supra* note 34.

³⁷It is difficult to compare President Clinton's pardon grant rate with that of his predecessors at this point in his term because of the large number of petitions filed during his administration that have not yet been acted on. While in the recent past the number of pardon cases carried over from year to year has tended to remain relatively stable, since 1995 the number of pending pardon cases has grown each year by about one hundred cases, so that 737 pardon cases awaited action in February, 2000. See OPA CLEMENCY ACTIONS, *supra* note 24.

³⁸Prior to the FALN commutations in 1999, President Clinton had granted only three commutations: one in 1994 to Ernest Krikava, a Nebraska hog farmer sentenced in 1993 to five months' imprisonment for perjury in a bankruptcy proceeding, whose clemency petition had attracted intense media interest and support of family farm groups; and two in 1995 to individuals convicted of drug trafficking offenses who had cooperated with the government. One of these was made to Johnny Palacios, sentenced in 1991 to 71 months' imprisonment for distribution of marijuana, whose cooperation the court refused to recognize for jurisdictional reasons; and the other was made to Jackie Trautman, sentenced in 1992 to 33 months' imprisonment (as reduced) for distribution of cocaine, whose cooperation had already earned her two sentence reductions from the court on motion of the U.S. Attorney. See WARRANTS OF PARDON, *supra* note 20.

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clemency filings. However, it appears that seekers after clemency remain ever hopeful. Since the beginning of the Clinton administration the rate of pardon filings has remained relatively steady at about 225 petitions each year, more than were filed annually during the Bush administration and almost regaining the level of filings during President Reagan's second term.³⁹ The number of commutation petitions filed annually has increased dramatically during the Clinton administration, up from about 150 each year during the Reagan and Bush administrations, to an average of 500 annually after 1992.⁴⁰

B. Causes of Pardon's Decline

What lies behind the recent trend towards fewer pardons described in the preceding section? As noted above, statistics on annual clemency filings rule out a decline in demand, for there appears to be no slackening of interest in obtaining either sentence reduction or post-sentence relief. Indeed, there are few alternative early release mechanisms available to most federal inmates,⁴¹ or other means of relieving many of the civil disabilities resulting from a conviction.⁴² Finally, the declining rate of pardoning is too pronounced and too persistent to be the result of accident or coincidence. So it is reasonable to conclude that the declining number of clemency actions in

³⁹See OPA CLEMENCY ACTIONS, *supra* note 24.

⁴⁰Given the negligible number of commutations since 1980, it is fair to assume that the increase in inmate petitions is attributable as much to the growth of the federal prison population and longer determinate sentences as to any realistic hope of favorable action.

⁴¹The Sentencing Reform Act of 1984 abolished parole for persons sentenced after November 1, 1987, and provides only one avenue other than clemency by which an inmate may gain release prior to expiration of sentence. See 18 U.S.C. § 3582(c)(1)(A)(i) (1987) (providing that inmates may seek early release from the sentencing court, on motion of the Bureau of Prisons, "for extraordinary and compelling reasons"). An analogous provision is available for inmates serving paroleable sentences. See 18 U.S.C. § 4205(g) (2000). The Bureau of Prisons uses these provisions only in particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing, generally interpreted to mean when the inmate is terminally ill and close to death. See 28 C.F.R. § 571.60 (2000).

⁴²See, e.g., Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, in HUMAN RIGHTS WATCH & THE SENTENCING PROJECT (1998); OFFICE OF THE PARDON ATTORNEY, U.S. DEPARTMENT OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1996); see also *Beecham v. United States*, 511 U.S. 368 (1994) (holding that federal felons may regain firearms privileges only through a federal restoration procedure, which currently is limited to a presidential pardon).

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recent years is the result of considered executive policy.

It has been suggested that pardon's modern "atrophy" is attributable to changes in penal philosophy: initially, in the early part of the twentieth century, "the rehabilitative ideal reduced the importance of pardons by giving their job to paroles and indeterminate sentencing."⁴³ Later, in the 1970s, the "new retributivism" rejected pardon as an unprincipled tampering with lawfully determined penalties ("an unwelcome intrusion on an enlightened process"⁴⁴). However, while it is certainly correct that pardon has not played an important role as a sentence reduction mechanism since the 1930s, the pardon power thrived long afterwards in the federal system as a means of relieving civil disabilities stemming from a conviction, of recognizing and encouraging rehabilitation, and of signaling official "forgiveness."⁴⁵ While retributivism may resist unprincipled adjustments to punishment, it cannot account for an unwillingness to make merciful gestures that are largely symbolic. But now even this "stripped down and hollowed out"⁴⁶ form of clemency is threatened with obsolescence, bespeaking an official unwillingness to be merciful quite independent of a retributivist commitment to just deserts and truth in sentencing.

It appears more likely that pardon's declining incidence since 1980 is attributable to the politics of crime control, a politics that has produced some of the most potent and divisive electoral issues of the last thirty years. Since the early 1980s, Republicans and Democrats have competed for advantage in a "race to incarcerate,"⁴⁷ producing a "prison industrial complex" with a powerful

⁴³See MOORE, *supra* note 3, at 83.

⁴⁴*Id.* at 84; see also Rapaport, *supra* note 14, at 9 ("The neo-retributivist critique of clemency reflects, reinforces and expands upon the impulse to improve if not perfect criminal justice by circumscribing discretion.").

⁴⁵See *supra* note 32.

⁴⁶MOORE, *supra* note 3, at 83.

⁴⁷Marc Mauer describes the interplay of crime and politics in the 1980s and 1990s. See MARC MAUER & THE SENTENCING PROJECT, RACE TO INCARCERATE 56-80 (1999); see also David Dolinko, *The Future of Punishment*, 46 UCLA L. REV. 1719 (1999) (discussing the recent growth in U.S. prison populations). In 1997, former President Jimmy Carter recalled that,

as a young Governor of Georgia, he and contemporaries like Reuben Askew in Florida and Dale Bumpers in Arkansas had 'an intense competition' over who had the smallest prison population. 'Now it's totally opposite, Mr. Carter said. 'Now the governors brag on how many prisons they've built and how many people they can keep in jail and for how long.

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institutional constituency.⁴⁸ Politicians and bureaucrats alike have been far more interested in feeding the front end of the justice system through enacting more laws, hiring more prosecutors, and building more prisons, than in helping people avoid becoming enmeshed in the system in the first place, creating opportunities for them to earn their way to freedom, or finding ways to encourage their reintegration into the community. It is hard to find a place for pardon in a system with such priorities.

The process by which pardon came to be devalued in the federal justice system was hastened by the Attorney General's decision in the Reagan Administration to delegate authority to approve clemency recommendations to the same subordinate official within the Department of Justice who exercised day-to-day supervisory responsibility over federal prosecutions.⁴⁹ This had important consequences for the independence and integrity of the Department's clemency program. Clemency recommendations prepared by the Pardon Attorney no longer carried the symbolic and political weight of the Attorney General's personal imprimatur, or reflected the perspective of the Attorney General's dual role as chief law enforcement officer and political adviser to the President. Rather, they increasingly reflected the perspective of prosecutors, in policy positions in Washington and in the field, who did not always have a clear understanding of or appreciation for clemency.⁵⁰

N.Y. TIMES, Apr. 28, 1997, *quoted in MAUER, supra*, at 56.

⁴⁸Eric Schlosser describes this phenomenon as "a set of bureaucratic, political and economic interests that encourage increased spending on imprisonment, regardless of the actual need." Eric Schlosser, *The Prison Industrial Complex*, ATLANTIC MONTHLY 51, 54 (Dec. 1998).

⁴⁹*See supra* note 26. Since the late 1970s, the functions of reviewing the Department's clemency recommendations and supervising federal prosecutions have been performed by the same official, the Associate Attorney General for most of the 1980s and the Deputy Attorney General since 1989. For most of this time that official has either been a former prosecutor himself, or has had career prosecutors on his staff review the clemency recommendations drafted by the Pardon Attorney. This has tended to reinforce the traditional policy of giving substantial weight to the views of the United States Attorney whose office prosecuted a clemency applicant in deciding whether to recommend a case favorably. *See, e.g., HUBBERT, supra* note 2, at 123-28 n. 42 (citing *Hearings on S.J. Res. 282, 67th Cong., Before the Joint Comm. on the Reorganization of the Admin. Branch of Gov't*, 68th Cong. 1 (1924) (statements of Harry M. Daugherty and Rush L. Holland)); *see also* U.S. ATTORNEY'S MANUAL § 1-2.111 ("The views of the United States Attorney are given considerable weight in determining what recommendations the Department should make to the President.").

⁵⁰*See, e.g.,* Larry Margasak, *Any Pardons Would Come After Election Day, Observers Say*,

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In this environment, it did not take long for the Department's clemency program to become an extension of its "tough on crime" law enforcement agenda.

Particularly during the latter part of the Bush administration, an unofficial policy of parsimony in pardoning was firmly in place at the Justice Department, as the war on crime went into high gear. The Willie Horton episode was a lively reminder of the possibility of embarrassment or worse if a recipient of clemency turned out to be less than deserving.⁵¹ During the first years of the Clinton Administration, the determination of the White House not to cede anything to the political opposition on crime issues virtually assured prosecutors' continued influence over the pardon program in the Department.⁵² Over time, standards for recommending a

ASSOC. PRESS, Jan. 18, 1988 ("the administration's use of career prosecutors to screen pardon requests has `resulted in a natural inclination for tighter scrutiny'" (quoting Deputy Associate Attorney General William Landers)). It may be presumed that the Department's pardon program suffered in the early years of the Reagan administration because of the President's decision, only a few weeks after taking office, to abort through a preemptive pardon the Justice Department's prosecution of two FBI officials convicted of authorizing illegal "black bag jobs," reportedly without notifying the prosecutors or involving the Attorney General. *See* Pardon for W. Mark Felt & Edward S. Miller, Statement of the President, 17 WEEKLY COMP. PRES. DOC. 437 (Apr. 15, 1981) (generosity due "two men who acted on high principle to bring an end to terrorism that was threatening our nation"); *see also* REPORT OF THE CRIMINAL LAW COMMITTEE, REC. ASS'N B. N.Y.C., *The Felt-Miller Presidential Pardon*, Oct. 1981, at 411, 414. In 1983, the Office of the Pardon Attorney was relocated from downtown Washington to Chevy Chase, Maryland.

⁵¹*See generally* DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE (1995). Another danger was that a particular grant might be distorted and give a mistaken impression of the Administration's commitment to crime control. For example, after President Bush pardoned a particularly deserving and well-known individual who had been convicted of a minor marijuana possession offense thirty years before, the grant was characterized as "especially ironic, given the administration's current push to enact tougher penalties on drug offenders" Tom Watson, *In Rare Move, Bush Pardons Drug Offender; Civic Service, Campaign Win Forgiveness for Harlem Globetrotter*, LEGAL TIMES, Mar. 18, 1991, at 1; *see also* Pardon Me, LEGAL TIMES, Oct. 7, 1996 (quoting Rep. Curt Weldon, R-Pa.: "I don't know how you can champion yourself in the debate on drug use when you pardon drug dealers.").

⁵²*See* Stuart Taylor, Jr., *All the President's Pardons: The Real Scandal*, NAT'L J., Oct. 30, 1999, at 3116. ("Clinton's neglect of his pardon power apparently derives from the same determination to out-tough the Republicans on crime that explains his support for draconian mandatory minimum prison sentences.").

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case for pardon were set higher and the review process became more rigorous,⁵³ resulting in a corresponding drop in the number of pardon cases sent forward to the White House for favorable action. As for commutation petitions, it was generally anticipated that most would be summarily recommended for denial. In these circumstances, absent an independent interest at the White House in the routine work of pardoning, it was inevitable that the number and frequency of ordinary clemency grants would steadily decline.

Based on the number of pardons granted by President Clinton in the first six years of his tenure, one might predict that his overall pardoning record would be about the same as President Bush's. However, there have recently been some hopeful signs that he is interested in exploring both the justice-dispensing and symbolic aspects of clemency. Perhaps most significantly, President Clinton justified his 1999 FALN grants in retributivist terms by reference to the disproportionate prison terms involved.⁵⁴ In addition, he issued three pardons in 1999 and early

⁵³See, e.g., Pete Earley, *Presidents Set Own Rules on Granting Clemency*, WASH. POST, Mar. 19, 1984, at A17 (Pardon Attorney David Stephenson reports that his office has become more "exacting" in its scrutiny of pardon applications, "to better reflect the administration's philosophy toward crime."). Deputy Associate Attorney General William Landers also states that

It's not enough that someone convicted does not commit another offense and is gainfully employed There has to be extraordinary conduct after conviction that shows they contributed to the community in a unique or significant fashion, such as charitable contributions or community volunteer work — something that shows they have gone the extra mile over what an ordinary citizen may do.

Margasak, *supra* note 50.

⁵⁴See FALN Letter, *supra* note 5, at 2 ("[T]he prisoners were serving extremely lengthy sentences — in some cases 90 years — which were out of proportion to their crimes."); *see also id.* at 3 ("For me, the question . . . was whether the prisoners' sentences were unduly severe and whether their continuing incarceration served any meaningful purpose."). This letter also made reference to the "worldwide support" for clemency in the cases on "humanitarian grounds." *Id.* at 2 (quoting letters from President Jimmy Carter, Archbishop Desmond Tutu and Coretta Scott King). President Carter reportedly had written that each individual recipient of clemency had "spent many years in prison, and no legitimate deterrent or correctional purpose is served by continuing their incarceration." *Id.* Bishop Tutu and Mrs. King were said to have sought clemency because the prisoners "have spent over a decade in prison, while their children have grown up without them." *Id.* Cognizant of the political furor stirred up by the grants, President Clinton emphasized that "political considerations played no role" in his decision or in the decision-making process. *Id.* at 4. Documents subsequently released to the Senate Judiciary Committee indicated that law

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2000 whose evident purpose was to correct a miscarriage of justice. One of these was an unprecedented posthumous grant to Henry Flipper, the first African-American graduate of West Point, whose 1881 court martial had long been officially acknowledged as unwarranted and unfair.⁵⁵ Another was a grant to Freddie Meeks, one of two surviving members of a crew of African-American sailors convicted of mutiny in connection with a racially charged incident at the Port Chicago Naval Magazine during World War II.⁵⁶ The third significant pardon, also in a case

enforcement agencies had opposed clemency, and that the Department of Justice had at least initially recommended against it. *See* Hearings Before the Senate Judiciary Committee Concerning Clemency for FALN Members, 106th Cong., 2d Sess., 1999 WL 27595875 (Oct. 20, 1999) (statement of Eric Holder, Deputy Att'y Gen.). As noted previously, the clemency decision proved extremely controversial, and its merits were debated in the press for a number of weeks. *See, e.g.*, Editorial, *Puerto Rican Clemency*, WASH. POST, Sept. 10, 1999, at A36 ("It was perhaps inevitable that Mr. Clinton's action should be assessed through the prism of New York politics, but it is also unfortunate. Whatever the President's motives, the case for clemency is strong.").

⁵⁵*See* Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251 (1999). The Flipper grant was unprecedented because it had long been the Pardon Attorney's policy not to accept or process posthumous pardon applications, in reliance on Supreme Court precedent analogizing a pardon to a "deed" that must be accepted. However, Deputy Attorney General Eric Holder is reported to have explained that "[t]he Justice Department's recommendation was up to him . . . and he favored it." Elizabeth Amon, *The Pro Bono Pardon: How Arnold and Porter Cleared a Man's Name a Century Later*, NAT'L L. J., June 28, 1999, at A1, col. 2. In their brief in support of the pardon application, lawyers for the Flipper family noted that the stigma of Lt. Flipper's conviction had discouraged inclusion of his statute in a "Walk of History" under consideration by the City of El Paso. Jackson et al., *supra*, at 1264. They urged that pardon be granted to remove "the unjust blot upon his outstanding reputation and character," for "Lieutenant Flipper and his descendants, for the good of the military justice system, and for the good of our country . . ." *Id.* at 1291. At the White House ceremony at which the pardon was granted, President Clinton stated that "This good man has now completely recovered his good name." *Id.* at 1254. Deputy Attorney General Holder stated in a subsequent interview that "'This has resonance beyond this case, beyond Lt. Flipper What happened to him was really troubling — it was racism.'" Amon, *supra*, at A14.

⁵⁶While the pardon warrant in the Meeks case does not explicitly refer to the reason for clemency, it is significant that his case was singled out from other pardons granted on the same day for special treatment in a separate and unusually detailed warrant. *See* Executive Grant of Clemency to Freddie Meeks (Dec. 23, 1999). Press accounts of the pardon reported that "a legal review of the case by the Navy in 1994 found that the black sailors were the victims of racial prejudice," and that "[l]awmakers, veterans' groups and the NAACP had urged Clinton to grant the

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with racial overtones, was granted to Preston King, an African-American who had lived in self-imposed exile for almost four decades after his 1961 conviction in Georgia for draft evasion.⁵⁷

The FALN grants recognize the hardships imposed by prison sentences whose length is disproportionate to the crime, while the three pardons recognize the hardships imposed by the lingering legal disabilities and stigma of a criminal conviction. Perhaps the spirit of humanity and reconciliation that motivated these well-received pardon grants, coupled with optimism over the "lowest crime rate in thirty years,"⁵⁸ will inspire the President to look carefully at some of the less visible cases that have historically constituted the vast majority of clemency applicants.

C. The President's Duty to Pardon

1. Pardon as Public Mercy

The fact that there have been so comparatively few pardons since 1980 invites speculation about whether the President might decide to stop pardoning entirely, simply letting the power lapse.

pardon." Associated Press, *President Pardons Veteran Convicted in 1944 Mutiny*, WASH. POST, Dec. 24, 1999, at A4. See also Editorial, *The President's Pardons*, WASH. POST, Dec. 27, 1999 ("the pardon is recognition that the conviction was a terrible injustice"). One of the effects of the pardon was to restore Meeks' military benefits. See Associated Press, *President Pardons Veteran*, *supra*.

⁵⁷According to press accounts, King refused to report for induction after his all-white draft board in Georgia refused to renew his student deferment, on grounds that the board had treated him in a racially discriminatory fashion. He was sentenced in 1961 to 18 months in prison on a conviction for draft evasion, but fled the country while on bail and returned to England where he had been pursuing graduate studies at the London School of Economics. At the time of his pardon he was a professor of political theory at the University of Lancaster and father of a British Member of Parliament. In support of pardon, the sentencing judge acknowledged that King had been subjected to a "long-lasting, deeply rooted method of racial discrimination," and that he had "followed his conscience just as Rosa Parks had followed hers." Philip Shenon, *Pardon Lets Black Exile Come Home*, N.Y. TIMES, Feb. 22, 2000, at A12; Reuters, *Black Professor Pardoned in 1961 Draft Board Case*, WASH. POST, Feb. 22, 2000, at A2. King's application for pardon was supported by the NAACP and several human rights groups. The White House noted that the clemency process had been expedited to permit Dr. King to return to the United States for his brother's funeral, out of "humanitarian concerns." *Id.*

⁵⁸Marc Lacey, *Clinton Isn't Running for Office, But He Has a Lot to Say About the Race*, N.Y. TIMES, Feb. 17, 2000, at A18 (quoting the President at his news conference on February 16, 2000).

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This in turn raises the questions whether the President has any duty to pardon, and what the source of such a duty might be. Judicial precedent is not very helpful in providing answers to these questions: on the one hand, the courts describe pardon as a "part of the Constitutional scheme" to be exercised for the "public welfare;"⁵⁹ on the other, they call it "a matter of grace" that need not be justified or defended within the legal system.⁶⁰ While pardon's "public welfare" aspect might support an argument that the President has some obligation to "afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law,"⁶¹ its "grace" aspect points the other way, indicating that an individual is not entitled to a pardon in the same sense that he is entitled to receive a just punishment. Therefore, while the President may not be entirely free of constitutional constraints in his exercise of the power,⁶² it seems clear that he cannot be *legally*

⁵⁹*Biddle v. Perovich*, 274 U.S. 480, 486 (1927) ("A pardon in our day is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." (citing *In re Grossman*, 267 U.S. 87, 120, 121 (1925))). In *Perovich*, the Court upheld the President's authority to commute the death sentence of a convicted murderer, over the objections of the purported beneficiary of the grant: "Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, and not his consent determines what shall be done." *Perovich*, 274 U.S. at 485.

⁶⁰*See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 282, 285 (1998). Where the federal pardon power is concerned, the courts have consistently declined to limit its exercise; *see, e.g.*, *Schick v. Reed*, 419 U.S. 256, 264-66 (1974) (upholding President's right to commute a death sentence conditional upon service of life without parole); *cf. Burdick v. United States*, 236 U.S. 79, 89-90 (1915) (holding that the Fifth Amendment privilege against self-incrimination may not be overcome by device of preemptive pardon).

⁶¹*Grossman*, 267 U.S. at 120-21.

⁶²The Supreme Court has recently indicated that the Due Process Clause applies to the clemency process, although the level of protection it provides may be minimal. *See Woodard*, 523 U.S. at 282-85. In *Woodard*, the justices split 5-4 on the issue whether a clemency applicant is constitutionally entitled to due process, with the minority taking the position that clemency is "a matter of grace" entirely outside of the judicial process. *Woodard*, 523 U.S. at 282, 285. Of the five who thought some process was due, four thought it minimal: the governor could not "flip[] a coin," or "arbitrarily den[y] a prisoner any access to its clemency process." *Id.* at 289 (O'Connor, J., concurring in part). Justice Stevens, concurring in part and dissenting in part, took the position that Ohio's creation of mandatory clemency application and review procedures made it part of the adjudicative process and thus fully amenable to judicial oversight. *See id.* at 292-93 (Stevens, J.,

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compelled to grant a pardon even in case of "evident mistake."⁶³

Nor would one expect to find much support for a duty to pardon in prevailing theories of punishment, which presume that the law reflects society's judgment about each person's "just deserts." Indeed, the conventional retributivist view of pardon is as something akin to a gift, and thus inconsistent with justice.⁶⁴ Recently, however, concern over statutory limitations on flexibility and discretion in sentencing has given rise to new interest in pardon as a necessary (though extraordinary) means of adjusting an imperfect legal system. In her influential 1989 monograph, Kathleen Dean Moore looks to pardon to compensate for the absence of a mechanism in the law whereby punishments can be individualized.⁶⁵ She posits a distinction between legal liability and moral desert, urging that punishments be at least partially uncoupled from a legal framework and tested against a set of retributivist categories such as innocence and excuse. In this fashion, she argues, pardon can be applied systematically to make exceptions to the rules "when the general presumptions are defeated by exceptional circumstances."⁶⁶

Consistent with her retributivist model, however, Moore conceptualizes pardon as "an act of justice rather than an act of mercy."⁶⁷ If a just system is obligated to punish each person the same

concurring in part and dissenting in part). The Court did not decide the question whether clemency proceedings might be subject to the Equal Protection Clause. *See id.* at 276. Justice Stevens noted, however, that "no one would contend that a governor could . . . use race, religion, or political affiliation as a standard for granting or denying clemency." *Id.* at 292 (Stevens, J., concurring in part and dissenting in part).

⁶³This is not to say that the President may not have a legally enforceable duty to *consider* granting clemency. It is simply to say that his decision on the merits is not subject to judicial review, except perhaps on Equal Protection grounds. *See id.*

⁶⁴Jeffrie Murphy notes Immanuel Kant's view that "[t]he right to pardon a criminal, either by mitigating or by entirely remitting the punishment, is certainly the most slippery of all the rights of the sovereign. By exercising it he can demonstrate the splendor of his majesty and yet thereby wreak injustice to a high degree." IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* 107-08 (J. Ladd trans., 1965), *quoted in* Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 174 n.9 (1988).

⁶⁵*See* MOORE, *supra* note 3, at 128-29.

⁶⁶*Id.*

⁶⁷*Id.* at 129. *See also id.* at 213 ("a justified pardon is one that corrects injustice rather than tempers justice with mercy").

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as others similarly situated, and pardon is a way of assuring that each person receives the punishment he deserves, then each morally deserving person who has not received a just punishment deserves a pardon. And, if a person deserves a pardon in this sense, then there is a corresponding duty to give him one. Thus, she argues, "pardons are not discretionary."⁶⁸ It follows that, as a matter of fairness, a pardon would have to be given to all similarly situated and presumably equally deserving individuals. In effect, Moore would have pardon function as an adjunct of the legal system, if not to replicate it at least continually to correct its outcomes.

Moore's effort to justify clemency on retributivist grounds necessarily devalues its historical association with compassion and redemption, making it substantively indistinguishable from justice. This in turn has procedural implications that would convert clemency proceedings into "judicial courts of last resort."⁶⁹ If pardon is a nondiscretionary duty of justice, its administration necessarily requires the establishment of a full-blown executive apparatus for making judgments about "just deserts" in individual cases that parallels the judicial system, and that is grounded in clearly articulated standards and supported by procedural protections, such as the giving of reasons and the right to appeal.⁷⁰ At the very least, such a duplicative system would be highly inefficient,

⁶⁸*Id.* at 214.

⁶⁹Rapaport, *supra* note 14, at 21. Professor Rapaport disagrees with Moore's reduction of clemency "to a type of remedial justice," and urges a greater use of "discretionary lenity" in accordance with justice-based norms as well as "the storehouse of traditional nonretributivist justifications for clemency," like post-conviction rehabilitation and heroism. *Id.* at 19, 27-30. See also Michael A. G. Korengold et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 *HAMLIN L. REV.* 349, 366 (1996) ("clemency is necessarily and properly separate from the judicial system" and "may be granted on different factors than those considered in appellate review").

⁷⁰Daniel Kobil develops the administrative implications of Professor Moore's theory of clemency-as-justice by proposing to place clemency's "justice-enhancing" functions in "a professional board that is independent of the political pressures which inevitably distort the decisions of elected officials." Kobil, *supra* note 3, at 622. In making decisions about the mitigation of punishment, his "clemency commission" would be guided by "explicit, internally consistent standards," and operate pursuant to a full panoply of due process protections, including the giving of reasons and an opportunity to be heard, similar to those applicable in "the analogous release procedure of the parole process." *Id.* at 624, 634. In this fashion "[t]he extrajudicial corrective of clemency provides a safety valve for our criminal justice system, another opportunity for an offender to tell her story more thoroughly, or at least differently, than she could at trial." *Id.* at 613.

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unless pardon were somehow co-opted into functioning as part of the legal system, as it does in the military and in some states.⁷¹ Of greater concern, this "bureaucratization of the clemency power"⁷² would sacrifice exactly those qualities that commended pardon to the framers: quick action, broad discretion, and personal accountability to the electorate.⁷³

A sounder philosophical justification for pardon, one that provides support for Moore's notion of executive duty without major revisions in pardon's historical character, has been suggested by Jeffrie Murphy. Murphy grounds pardon squarely and exclusively in the concept of mercy, which in his view is an "autonomous moral virtue" entirely separate from justice.⁷⁴ A private individual shows mercy when she voluntarily, out of compassion, waives a right to impose a penalty, a right that could in justice be claimed. Extrapolating from this private law paradigm, Murphy finds a justification for pardon as a collective exercise of mercy by the community as a whole, through its chief executive:

If each citizen can justly exercise mercy individually when his individual interests are at issue, why may not all citizens justly join together and exercise mercy collectively when their collective interests are at issue? And if they may do this by statute, may they not call on the governor to pardon? And if they may call on the governor to pardon in a particular case, may they not simply *delegate* to the

⁷¹See 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); THE NAT'L GOVERNORS' ASS'N CTR. FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988) [hereinafter GUIDE TO EXECUTIVE CLEMENCY]. In Georgia, for example, an inmate who is not eligible for parole may seek administrative early release by pardon from the State Board of Pardons and Paroles. See *id.*, at 59-61.

⁷²Rapaport, *supra* note 14, at 37.

⁷³See *supra* notes 11-13.

⁷⁴See HAMPTON & MURPHY, *supra* note 64, at 175; see also Jean Hampton, *The Retributive Idea*, in HAMPTON & MURPHY, *supra* note 64, at 158-59 ("mercy is the suspension or mitigation of a punishment that would otherwise be deserved as retribution, and which is granted out of pity for the wrongdoer"); cf. Carla A.H. Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 LAW & PHIL. 109, 116-17 (1991) ("to eliminate the concept of legal mercy . . . because it is in most cases a means of doing justice is to ignore the message of history It is precisely because the law defines justice narrowly, limiting power before the law to the institutional power of entitlements and rights, that it can require genuine mercy to achieve genuine justice.").

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governor . . . the power to exercise mercy on their behalf whenever he believes that they would, out of love and compassion, so desire — even if they have not petitioned and even if they are not unanimous on the issue?⁷⁵

Murphy does not suggest that an individual is entitled to mercy, or that an official with power to show mercy may be under any obligation to do so. To the contrary, he is careful to distinguish between the discretionary decision to pardon that is reposed in a head of state, usually by some organic document, from the nondiscretionary legal duty of justice owed by a prosecutor, judge, or parole board.⁷⁶

By conceptualizing mercy as separate from, rather than a subset of justice, Murphy avoids most issues of individual entitlement. Yet his mercy is not a "free gift or act of grace."⁷⁷ He argues that mercy "must not be arbitrary or capricious but must rather rest upon some good reason — some morally relevant feature of the situation that made the mercy seem appropriate."⁷⁸ Where public mercy or pardon is concerned, "good reason" may be determined not simply by reference to what an individual morally deserves, but also by what serves the public welfare:

The "job description" [of a chief executive] may . . . involve a concern for the common good or common welfare of the community in the executive's care. This might mean that, in deciding whether to pardon an individual, the chief executive (unlike a trial judge) might legitimately draw upon values other than the requirements of justice and thus might legitimately ignore the just deserts of an

⁷⁵HAMPTON & MURPHY, *supra* note 64, at 177-78 (emphasis in original).

⁷⁶*See id.* at 173-74 ("Judges in criminal cases are obligated to do justice. So too, I would argue, are prosecutors and parole boards in their exercise of discretion. Thus there is simply no room for mercy as an autonomous virtue with which their justice should be tempered."); *see also id.* at n.8 ("The focus of a judge, either in enforcing a rule or in seeking a way to modify or get around it, is to be on the question of what is required by justice — not on what he may be prompted out of compassion to do."). Murphy's rejection of mercy in what he describes as the "criminal law paradigm" has sometimes been misunderstood as a rejection of mercy itself. *See* Joan H. Krause, *Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 748-49 (1994); Rapaport, *supra* note 14, at 20.

⁷⁷*See* HAMPTON & MURPHY, *supra* note 64, at 180.

⁷⁸*Id.* at 181.

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individual and pardon that individual if the good of the community required it.⁷⁹

In short, in making pardon decisions the chief executive may look to "the requirements of justice," but he may also ignore those requirements and grant a pardon for "the good of the community."

Moreover, Murphy argues that mercy is not constrained by principles of fairness in the same way that justice is, because it is entirely voluntary and, in the case of public mercy, because it has a political dimension. For example, mercy "is more likely to be needed by the poor and weak than by the rich and powerful."⁸⁰ There is also a pragmatic reason why mercy is not constrained by a conventional obligation to be even-handed: "[I]f rational persons thought that once having shown mercy they would be stuck with making a regular practice of it, they might be inclined never to show it at all."⁸¹

Murphy does not elaborate on what standards ought to guide the exercise of the pardon power within the general parameters of morality and the common good. It is reasonable to suppose that, with one caveat, he would consider them best left to the discretion of the executive who has been popularly chosen to be the "dispenser of the mercy of the government."⁸² The caveat is that it would be inappropriate and perhaps an abuse of power to withhold mercy in a case where moral desert had been established (proof of innocence comes to mind as an obvious example), whatever public sentiment might be. On the other hand, a gesture of mercy could be appropriate simply because it would be popular, thus satisfying a felt need in the community to alleviate a legally determined punishment in a particular case, or across the board.

To summarize, Murphy sees pardon as a manifestation of public mercy that has a legitimate role in a retributivist legal system, to override the law where its outcome is unjust or where the common welfare otherwise requires it. Thus Murphy might elaborate on Hamilton to advise the President that he is empowered to make "exceptions in favor of unfortunate guilt," but ordinarily is not obliged to — except in cases where a compelling moral claim has been established. He might

⁷⁹*Id.* at 174 n.9.

⁸⁰*Id.* at 182.

⁸¹*Id.* at 183.

⁸²THE FEDERALIST NO. 74, *supra* note 8, at 423. One might predict a certain amount of discomfort with this idea in an age where we tend to distrust both discretionary decision-making and our elected leaders. *See, e.g.,* Kobil, *supra* note 3, at 614 ("Unfortunately, both justice-enhancing and justice-neutral aspects of clemency suffer when the executive has recourse only to her own moral and political sensibilities in making clemency decisions.").

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also suggest that pardon decisions will ordinarily be guided by considerations of moral relevance, but need not be if the welfare of the community provides an alternative justification. Finally, he might tell the President that he ordinarily has no duty to treat like cases alike.⁸³

2. The Political Duty to Pardon

In Murphy's theory of public mercy, there is generally no inconsistency between pardon as an uncompelled "matter of grace,"⁸⁴ and pardon as an authoritative act that is "part of the constitutional scheme." This theory thus reconciles seemingly contradictory Supreme Court precedent and provides a coherent framework for analyzing particular exercises of the pardon power. It also provides the basis for an argument that the President has a duty to pardon, not just where moral desert has been established in a particular case, but also as a more general obligation of office. This latter aspect of the duty to pardon is neither grounded in nor limited by considerations of law or morality, but is essentially one of politics.

The political duty to be merciful "if the good of the community require[s] it" may be inferred from the several ways in which pardon helps the President carry out his other constitutional duties. First, pardon serves the purpose of checking the legislature when the criminal law is static and inflexible, by signaling the need for changes in the law itself.⁸⁵ Thus, for example, the

⁸³While there is no duty to pardon all similarly situated offenders, absent similarly compelling moral claims, the pardon power may not be exercised arbitrarily or capriciously. *See, e.g., Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 292 (1998) (Stevens, J., concurring in part and dissenting in part).

⁸⁴Murphy seems to equate an "act of grace" and a "free gift," *see* Murphy, *supra* note 64, at 180, but I would argue that they should be conceptually distinguished, at least insofar as pardon is concerned. Pardon may be an "act of grace" in the eyes of the law, but it is not a "free gift" as a political matter because it is subject to standards of moral relevance and the public welfare.

⁸⁵*See* SURVEY OF RELEASE PROCEDURES, *supra* note 14, at 295-96:

[Pardon] has been the tool by which many of the most important reforms in the substantive criminal law have been introduced. Ancient law was much more static and rigid than our own. As human judgment came to feel that a given legal rule, subjecting a person to punishment under certain circumstances, was unjust, almost the only available way to avoid this rule was by pardon. . . . Quickly pardons on such grounds became a matter of course; and from there to the recognition of such circumstances as a defense was only a short step. This is what happened with self-defense, insanity, and infancy, to mention only three examples.

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President's decision to commute a sentence mandated by the terms of a statute, based on his conclusion that the punishment was disproportionately harsh in light of all the circumstances (including some that the law could not take into account), might encourage legislative inquiry into the possible need for changes in the law to allow individual circumstance to be considered.⁸⁶ A grant of clemency might also reveal shortcomings in the appeals process that limit a court's ability to consider new evidence or changed circumstance. But, because pardon is a political duty and not a duty of justice, the President would be under no obligation to grant clemency to all offenders with arguably similar equitable claims.

Pardon also serves as an executive check on courts' discretionary decisions.⁸⁷ While much of the current interest in federal clemency arises precisely from the limits on judicial discretion imposed by the federal sentencing guidelines and statutory mandatory minimum sentences, it is possible that an act of executive mercy might lead a court to rethink its own discretionary powers and interpret them more broadly.

Within the executive branch, pardon can play an important role in carrying out the President's obligation to take care that the laws are faithfully executed in two ways. First, it enables the President to intercede directly to change the outcome of a case that he believes was wrongly handled by his subordinates, where no judicial remedy is available.⁸⁸ Second, it permits him to

Id. This law reform function is consistent with the retributivist theory that the need for pardon provides a rough assessment of the moral legitimacy of the law. See MOORE, *supra* note 3, at 129 ("If pardons grew to an unmanageable number, one would have to be suspicious that the legal codes were seriously out of kilter with the moral code."); Rapaport, *supra* note 14, at 39-40 (while clemency is "ill-suited as a means to overcome wholesale legislative failures," it "may play a role in reopening channels of politics to systemic reform").

⁸⁶See, e.g., Krause, *supra* note 76, at 719-42 (discussing relationship between gubernatorial clemency actions and legislatively authorized reviews and releases for battered women unable to offer battering defenses at the time of their trials).

⁸⁷See *In re Grossman*, 267 U.S. 87, 120-21 (1925) (justifying pardon on grounds, among others, that "[t]he administration of justice by the courts is not always wise or certainly considerate of circumstances which may properly mitigate guilt."). The pardon power also came into play as a check on the power of the court-appointed Independent Counsel in the Iran-Contra cases. See *supra* note 20.

⁸⁸See Thomas E. Sharp, *The President's Policy Pardon: A Misunderstood Tool of Presidential Decision-Making* 26-33 (1996) (unpublished manuscript, on file with author). Sharp argues that the pardon power gives the President an ability to control discretionary decisions of prosecutors that

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send a very direct and powerful message to his subordinates about how he wishes the law to be enforced in the future, including in particular the manner in which they should exercise their discretion.

Finally, the President's personal intervention in a case through the pardon power reassures the public that the legal system is capable of just and moral application. It enables him to correct legal errors that for one reason or another could not be corrected by the courts, and to make equitable accommodation where a sentence has been imposed according to the strict requirements of the law but nonetheless seems unfair.⁸⁹ It is especially important that the public be confident in clemency as the "fail safe" of the justice system in capital cases, which are now moving forward through the federal system for the first time in many years.⁹⁰ At the other end of the clemency spectrum, the President can use the opportunity provided by post-sentence pardons to emphasize the rehabilitative goals of the justice system by recognizing criminal justice success stories.

The President's duty to pardon does not arise from any single one of these "public welfare" grounds for pardon, but from a combination of them all. And it is a duty that resists quantification,

become legally irreversible before he is aware of them. *See id.* at 30 (citing Attorney General William Randolph, Am. State Papers, Misc. I, 46, No. 26 (1791)) ("[I]t may frequently arise that the United States may be deeply affected by various proceedings in the inferior courts, which no appeal can rectify."); *see also* Harold J. Krent, *Executive Control over Criminal Law Enforcement*, 38 AM. U. L. REV. 275, 286-87 (1989). The inherent difficulty of supervising the exercise of prosecutorial discretion has become a matter of greater concern because of the number of federal prosecutions that result in guilty pleas, and the dislocations in discretionary decision-making that have been produced by the federal sentencing guidelines. *See* K. STITH & J. CABRANES, FEAR OF JUDGING 130-42 (1998).

⁸⁹SURVEY OF RELEASE PROCEDURES, *supra* note 1, at 299 (enumerating situations in which clemency in the form of commutation may be appropriate, including those involving "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;" "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," citing prohibition as an example; and "[t]echnical violations leading to hard results").

⁹⁰*See* Naftali Bendavid, *Clinton Won't Follow Illinois on Executions*, CHI. TRIB., Feb. 17, 2000, at 1; *see also Excerpts from Clinton's Comments at Wide-Ranging News Conference*, N.Y. TIMES, Feb. 17, 2000, at A19 ("We are . . . in the process of developing guidelines for clemency applications [in capital cases] where any individual claims of innocence or question [about] the sentence, even though guilt is not a question, can be pressed.").

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or enforcement in any court other than that of public opinion. The point is simply that if the President neglects the pardon power, public confidence in it may be so undermined as to make it constructively unavailable to serve the benign purposes the framers envisioned for it. In this way, failure to exercise the power may have the same consequence as abusive exercise. Conversely, a generous and regular exercise of the power in circumstances evidently warranting it, provides the President with an unparalleled opportunity not simply to do justice in particular cases, but also to set an example for his appointees in the executive branch, for the other branches of government, and for the public.

D. Reviving the Power

In this final section I propose a number of simple ways in which the President can make his exercise of the pardon power more reliable and respectable, and therefore less politically risky. I do not recommend that he attempt to insulate himself from public criticism by establishing advisory boards and elaborate administrative structures, since these tend to defeat the very virtues of the power that the framers most valued: efficiency, discretion, and accountability.⁹¹ Nor do I think he should necessarily feel constrained to explain himself or be consistent, which would be required of a decision-maker within a legal system, for the same reasons.⁹² But there are other ways he can

⁹¹See SANFORD, *supra* note 14 (discussing the "lonely" situation of the pardoner); see also EDMUND G. (PAT) BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW 163 (1989) ("It was an awesome, ultimate power over the lives of others that no person or government should have, or crave."). Professor Rapaport observes that:

most state executives and the national executive are cautious compared to their predecessors earlier in the century From the beginning of the century through the 1960s, a rhetoric of claiming responsibility for the final decision to execute or commute, to confine or release, came naturally to governors. The governor of today is more likely to portray himself as bound to respect the decision of a jury, the due process of trial and appellate courts, and to heed obdurate victims.

Rapaport, *supra* note 14, at 5-6.

⁹²Professor Rapaport makes a compelling argument for a requirement that the chief executive explain the reasons for each grant and denial of clemency: "Discretion can give a better or worse account of itself; the body of cases and reasons ought to exercise significant control over future practice. Such a record provides a basis for criticism and even political repudiation of an executive." Rapaport, *supra* note 14, at 41. I do not disagree that full disclosure is often indispensable to full accountability. Nor do I disagree that the executive should consider whether giving reasons for an act of clemency will enhance the beneficial effects of the grant. But I am

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reassure the public that the power is being used wisely and for the general welfare.

1. Shore up the Attorney General's Advisory Role

Historically, the President has relied on the Attorney General for advice in pardon cases, and this has afforded him the combined perspective of law enforcement official and political adviser. The President's acquiescence twenty years ago in the delegation of the Attorney General's clemency-related responsibilities within the Department of Justice meant that the advice he received was less likely to reflect the views of a member of his Cabinet and more likely to reflect those of prosecutors and other law enforcement officials. It also left him without a high-level political appointee to take some responsibility if a particular grant turned out to be ill-advised or politically unpopular.

The Clinton administration also created substantive problems for itself by undercutting the Justice Department's historically central role in the clemency process.⁹³ If the Attorney General is only one of several possible sources of advice in clemency matters, and the process is no longer a regular one, questions inevitably arise about the relative importance of justice and politics in clemency decision-making, and thus about the accessibility of official mercy to ordinary people.

2. Be Generous and Expect No Credit

Generosity in extending mercy beyond the strict framework of the law has been called "an

concerned that there are also disadvantages of requiring the executive to give reasons in every case that may outweigh the advantages, in constraining what Professor Rapaport calls "unruly discretion" and ultimately discouraging its exercise. *See also Wrong Way on Pardons, supra* note 7 ("A bill that would diminish executive branch confidentiality within the pardon process will only make presidents more wary of stepping into the minefield that executive clemency has become.").

⁹³*See* FALN Letter, *supra* note 5, at 4 (President's decision based on an independent investigation and recommendation of his White House Counsel). In routine responses to inquiries about the clemency process, the White House has stated that it relies on advice from many quarters, including the Department of Justice, in deciding whether to grant clemency. As a result of congressional concern over the FALN grants, legislation was introduced to require the Justice Department to consult with victims of crime and law enforcement agencies in connection with making a clemency recommendation to the President. *See* § 2042, The Pardon Attorney Reform and Integrity Act, 106th Cong., 2d Sess., 146 Cong. Rec. S538-05, 2000 WL 142206 (Feb. 9, 2000). The editors of the Washington Post opined that this bill might encourage the President "to circumvent the Justice Department entirely." *See Wrong Way on Pardons, supra* note 7.

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important attitude of a healthy society."⁹⁴ Purely as a practical matter, a policy of generosity is likely to be more effective than a policy of caution in avoiding unwarranted criticism of particular grants. Until quite recently presidents have been shielded from public criticism in connection with pardoning by the frequency and regularity with which they acted on pardon applications, as well as the sheer volume of their grants. When the President signed a pardon warrant every couple of months, granting relief to dozens of unknown "little people" simply because they had been recommended by the Attorney General, he could credibly distance himself from the merits of any particular case. But so few people have been pardoned in the past twenty years that each new clemency action is regarded with suspicion and subjected to intense scrutiny, no matter how apparently innocuous.

In any event, public criticism goes with the territory, as President Clinton recognized in defending his FALN grants.⁹⁵ It is never possible to be absolutely certain about the wisdom of a particular grant or the virtue of particular grantees, particularly given the defining characteristic they share, but it is part of the President's job to take risks in this regard. This means that he should decide cases at a time when he can be held properly accountable for his actions, and not at the very end of his term.⁹⁶

⁹⁴SANFORD, *supra* note 14.

⁹⁵See FALN Letter, *supra* note 5, at 4.

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.

Id.

⁹⁶It is perhaps inevitable that a chief executive will be tempted to make pardon grants just prior to leaving office, but it is equally inevitable that giving in to this temptation tends to bring the power into disrepute. See, e.g., Krause, *supra* note 76, at 721-25 (describing the furor resulting from the last-minute clemency actions of Ohio Governor Celeste, which led to a 1995 amendment of the state constitution to make the governor's clemency power subject to regulation). It is also true that there have apparently been few instances of actual corruption in connection with the power. See Rapaport, *supra* note 14, at 10 (noting that there were only two documented pardon-selling scandals in the 20th century — one resulting in the 1920 impeachment of Oklahoma Governor Walton, and the other resulting in the 1980 indictments of several members of the administration of Tennessee Governor Blanton).

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3. Act First, Explain Later

Presidents have in the past acted on clemency cases without first vetting them publicly, a practice which recent experience has shown tends to bring the progress of a clemency case to a standstill.⁹⁷ Where the White House calls attention to a clemency action before it actually occurs or before it becomes final, a host of questions arise that require prompt and thorough response lest the power itself be compromised in the public eye. These questions are much easier to answer after the fact. While the framers fully anticipated that clemency decisions would take into account popular opinion, they would not likely have favored plebiscites even in this context.

4. Make Considered Use of the Power in Light of Its Public Purposes

The pardon power provides the President with an unparalleled bully pulpit from which to speak about criminal law issues, large and small, in the context of a specific fact situation. Issues that come to mind include the harsh inflexibility of the drug sentencing laws, the mandatory deportation of aliens convicted of minor and sometimes dated offenses, the mitigating impact of domestic violence, and legislative curtailment of post-conviction judicial remedies. But there are other less ambitious things that the pardon power can accomplish, like recognizing and rewarding rehabilitation, enabling individuals who have served enough time in prison to return to their communities to make a new start (or, in case of grave illness, to die at home with their families), or simply satisfying an individual's desire for an official gesture of forgiveness. It is, in short, an effective way to shape criminal justice policy and tell good news about the justice system at the same time.

⁹⁷An example is the extensive media coverage during President Clinton's first consideration of Jonathan Pollard's clemency petition. The Administration's apparent attempt to take the public's pulse on the case back-fired when law enforcement and intelligence agencies opposed to clemency took their own case to the media. See, e.g., Michael Isikoff & Ruth Marcus, *Justice's No. 2 Official May Propose Leniency for Pollard*, WASH. POST, Dec. 23, 1993, at A10; Barton Gellman, *Aspin's Allegation About Pollard Affects Clemency Campaign*, WASH. POST, Dec. 29, 1993, at A6. In the end the public opposition of senior administration officials, as well as the almost uniformly adverse reaction from the media, virtually foreclosed the President's ability to act favorably, had he wished to do so. While clemency applicants and their supporters often take their case to the media, problems of a different order are created when the executive itself "goes public" prior to a grant. See also Krause, *supra* note 76, at 725 (publicity surrounding Maryland Governor Schaefer's consideration of clemency for battered women "almost stopped the 'mass' clemency in its tracks.").

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CONCLUSION

It is unlikely that pardon will ever fade away entirely, even if the criminal justice system could be made to work perfectly. Unlike collar buttons, pardon will always be useful from a political standpoint. But its current underutilization is disturbing, in light of the mounting evidence that the justice system is *not* working perfectly, or even close to it. The underutilization of pardon is disturbing not so much because of its impact on disappointed individuals, but because of what it reflects about the justice system and the message it sends to those who administer it, as well as to the public. A President's pardons say a lot about his priorities and overall goals for the administration of justice. If rehabilitation and reconciliation are aspirations of government, pardon serves an important symbolic purpose in marking a successful law enforcement effort. If, however, punishment is the primary objective, then it is unnecessary to be concerned about mercy or redemption, much less to make a point of crediting them.⁹⁸

The Constitution gives the President the power to pardon not as a personal privilege but as an obligation of office. If he is willing and able to use the power in the fashion envisioned by the framers, courageously and creatively, he gains important opportunities to signal the need for changes in the law, to set an example for discretionary decision-making by his subordinates, and to shore up public confidence in the overall morality of the criminal justice system.

⁹⁸Susan Bandes points out that "a legal process devoid of such 'soft' emotions as compassion or mercy is not emotionless; it is simply driven by other passions." *THE PASSIONS OF LAW* 11 (Susan A. Bandes ed., 1999). The essays in this collection describe some of those passions as vengeance, rage, contempt, disgust, and indignation — many of which seem to have gained a certain new legitimacy in the criminal justice system. Perhaps it is not coincidental that mercy and compassion seem at the same time to have lost their place as counterweights. Indeed, it may even be that certain of the "hard" emotions have turned in judgment upon the "soft," so that mercy is held in contempt and compassion looked on with indignation and disgust.