

**THE PARDON PARADOX:
LESSONS OF CLINTON'S LAST PARDONS**

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It is hard to make sense out of the pardons Bill Clinton granted on his last day in office. At the time, they were almost universally condemned as an abuse of executive power, embarrassing the President's friends and confounding his enemies. They were also trivialized, spoken of in the same breath as the Clintons' solicitation of parting gifts and supposed efforts to make off with White House furniture.¹ They have been dismissed by subsequent commentators as "a final self-indulgence, a total loss of control," by a man accustomed to living on the edge.² They seem to embody all the contradictions and shortcomings of Bill Clinton's political character.

More generally, the final Clinton pardons confirm the popular view of the pardon power as a remnant of tribal kingship, rather than an integral part of our constitutional scheme.³ The fact that so few legal scholars

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¹ See, e.g., Michael Kelly, *The Pardoner's False Brief*, WASH. POST, Feb. 21, 2001, at A23; Hamilton Jordan, *The First Grifters*, WALL ST. J., Feb. 20, 2001 at A27.

² JOE KLEIN, *THE NATURAL: THE MISUNDERSTOOD PRESIDENCY OF BILL CLINTON* 204 (2002); BARBARA OLSON, *THE FINAL DAYS* (2001), includes a colorful, if partisan, account of the circumstances surrounding the 177 pardons and commutations issued by President Clinton on January 20, 2001, and a representative sampling of the extensive contemporary press coverage. In the summer of 2002, the House Committee on Government Reform published a three-volume report on its investigation into the final Clinton pardons, which focuses on a dozen or so cases of special interest to it. See JUSTICE UNDONE: CLEMENCY DECISIONS IN THE CLINTON WHITE HOUSE: BEFORE THE HOUSE COMMITTEE ON GOVERNMENT REFORM, H. REP. NO. 107-454, 107th Cong. 2d Sess [hereinafter JUSTICE UNDONE].

³ Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13, 19 (2002) (commenting on the pardoner's "self-indulgent pleasure of wielding uncontrolled political power according to personal whim"). For better or worse, it is simply not the case that "the public understandably perceives a
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have chosen to write about them speaks volumes about how seriously the pardon power is taken as an instrument of government, even in the academy.

But seen in historical perspective, and taken seriously, the final Clinton pardons offer important insights into why an executive power that once played an integral operational role in the justice system has in recent years become “a living fossil.”⁴ As an object lesson in how even well-intentioned pardoning can go horribly wrong, they offer a way back to a more functional role for pardon in the federal system.⁵

In seeking useful lessons from the final Clinton pardons, this essay focuses not so much on the merits of particular grants as on the process that produced them. Comparing two of the final grants that ostensibly came to Clinton’s attention by very different routes, it shows that there are certain pardoning ground rules that any president ignores at his peril. Thus, the universally negative reaction to the final Clinton pardons can be explained in terms of a paradox: the constitutional power to pardon is not subject to regulation or claim of entitlement, but as a practical matter it cannot be exercised except pursuant to a process that is perceived as accessible and fair.

Note that I said the process must be perceived as accessible and fair, not that it must always necessarily be so. The point is not so much that a flawed decision-making process tends to produce bad decisions, though

clemency request to be an adjunct to the law enforcement process.” L. Anthony Sutin, *If Only You Had Asked: Trust the Pardon Review Process*, available at <http://jurist.law.pitt.edu/pardonop6.htm> (last visited Sept. 14, 2002). Even sixty years ago, the introduction to what is still the only systematic study of the federal pardon power noted 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).

⁴ Daniel T. Kobil, *The Evolving Role of Clemency in Capital Cases*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* (Acker, Bohm, & Lanier eds. 2nd ed. 2002). Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to be Merciful*, 27 *FORDHAM URB. L.J.* 1483, 1487-94 [hereinafter *Collar Buttons*] (describing the “atrophy” of pardoning in the Federal Criminal Justice System).

⁵ I have attempted elsewhere to make the case for a more expansive use of the pardon power. See, e.g., *Collar Buttons*, *supra* note 4, at 1500-09; Margaret Colgate Love, *Rescuing the Pardon Power*, *WASH. POST*, Jan. 27, 2001. See also JOHN R. STEER & PAULA BIDERMAN, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 *FED. SENT. RPTR.* 154 (2001) (pointing out the continuing need for clemency in the guidelines system); David M. Zlotnick, *Federal Prosecutors and the Clemency Power*, 13 *FED. SENT. RPTR.* 168 (2001) (explaining how pardons can be a useful tool for prosecutors). Here I hope to suggest how a chief executive may safely make greater use of the power, should she or he choose to do so.

that is surely the case. Rather, it is that, in pardoning, an apparently sound decision-making process tends to produce politically acceptable decisions.⁶ If people trust the process by which pardons are granted, they will have confidence in the grants themselves. Conversely, if people think that the pardon process is somehow rigged, they will be suspicious of any grants made pursuant to it. If the breakdown of a trustworthy pardon process during the Clinton Administration made poor decisions more likely, it virtually guaranteed that the public would be prepared to believe the worst about them.

The two commutation cases discussed in Part III of this article illustrate the importance of appearances in pardoning. While their relative merits might seem evident to many observers, the most important difference between them is the process that produced them. Kim Willis' commutation appeared to be the product of an established and accessible administrative routine; Carlos Vignali's commutation, the other hand, appeared to be the product of influence-peddling. The way each case came to the President's attention made all the difference in how his decisions were received at the time, and how they have later come to be judged.

I. REGULATION OF THE UNRULY POWER

The President's constitutional power to pardon allows him to free people convicted of federal crimes from any and all legal penalties imposed as a result of their convictions, guided only by his social conscience and political instincts. The "benign prerogative of pardoning" is an awesome responsibility, and the Framers saw it as having very

⁶ Appearances are critical in the business of pardoning because there are no objective standards by which to judge decisions made outside the law, decisions that are profoundly personal in every sense. Jeffrie Murphy points out 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 individual and pardon that individual if the good of the community required it." Jeffrie Murphy & Jean Hampton, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY 174 n.9 (1988). Even when the criteria for granting a pardon are spelled out in some administrative manual, one can never really be sure of the reasons for a grant or a denial. See, e.g., Daniel T. Kobil, *Should Clemency Decisions Be Subject to a Reasons Requirement?*, 13 FED. SENT. RPTR. 150 (2001). And, even the most disciplined review process cannot control for personal preferences of staff, or the intervention of influential outsiders.

specific public purposes.⁷ They entrusted the pardon power to the President's sole discretion: Congress cannot limit it, the courts generally cannot review it, and individuals are not entitled to it.⁸ Pardon is not constrained by principles of fairness in the same way that justice is, because it is entirely voluntary and because, as an expression of the will of the community, it has a political dimension.⁹ The President can be held accountable for his use of the power only in the court of public opinion.¹⁰

But popularity can be a powerful disincentive to pardoning, especially when the public cares a lot about crime and the President cares a lot about his approval rating. So most presidents have appreciated that their ability to use the pardon power depends upon gaining the public's confidence, not just in particular pardons, but in the practice of pardoning itself. People are most likely to be persuaded that a particular pardon is in the public interest if they trust the process by which it was produced. The converse is also true: if a pardon is not perceived to be fairly awarded, pursuant to comprehensible criteria and an accessible process, it is likely to be

⁷ *Collar Buttons*, *supra* note 4, at 1485, nn. 8-10. *See also* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 501-06 (1977).

⁸ *See generally Collar Buttons*, *supra* note 4, at 1486, nn. 11-13. *See also* Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) and its progeny, discussed in Kobil, *supra* note 4.

⁹ Murphy & Hampton, *supra* note 6, at 181-83. Professor Murphy points out that there is a practical reason for this as well: "if 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." Murphy & Hampton, *supra* note 6, at 183. While there is no duty to pardon all similarly situated offenders, the pardon power may not be exercised arbitrarily or capriciously. Murphy & Hampton, *supra* note 6, at 181 ("[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"). *See also* Woodard, 523 U.S. at 292 (Stevens, J., concurring in part and dissenting in part). Where public mercy or pardon is concerned, what is "a good reason" may be determined not simply by reference to what an individual morally deserves, but also by what serves the public welfare. *Id.*

¹⁰ The prospect of punishment at the polls or impeachment may have no persuasive value for a President at the end of his term, but the Framers believed that the President would always be restrained by the risk of what James Iredell called "the damnation of his fame to all future ages." Address in the North Carolina Ratifying Convention (July 28, 1788), in THE FOUNDERS' CONSTITUTION 17 (P. Kurland & R. Lerner, eds. 1987). The political checks on the pardon power have collectively been called "limited and clumsy," LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-10, at 721 (3d ed. 2000), and in the post-Clinton era commentators have unfortunately become even more cynical about the importance placed by politicians upon "venerable reputation." Sisk, *supra* note 3, at 19.

regarded with suspicion and cynicism.¹¹ Like any other product in the marketplace, pardons have to be regulated before people will buy them. In fact, this is not simply a marketing issue: undisciplined and random production methods are not likely to produce a dependable product.

Until Bill Clinton, presidents understood that the best way to gain acceptance for their use of the pardon power was to submit their unruly discretion to a disciplined decision-making process, a process “tied to the consistent application of principles rather than whim, lobbying, or bias.”¹² They appreciated the need to keep some distance between themselves and those responsible for administering that process, both to underscore its integrity and to avoid temptation. They also discovered the benefits of giving a key advisory role to a political appointee with an independent institutional stake in the outcome of the process. Finally, they found that a policy of frequent and generous pardoning was more likely to secure their power than a policy of caution: a few problematic grants can more safely be salted among many unexceptionable ones.

In the early years of the Republic, Presidents sought the advice of various Cabinet members in granting pardons, relying as well upon the views of the prosecutor and sentencing judge in particular cases.¹³ Shortly after the Civil War, the President committed himself to a more regular process by which pardon cases came to him only after being investigated by the Attorney General, and grants were made only upon the Attorney General’s advice.¹⁴ In regulations first promulgated by the Attorney

¹¹ Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT. RPTR. 125, 127 (2001) (“The apparent contradiction between classical pardon theory and the aspirations of democratic institutions has historically been reconciled by the discipline of the federal pardon process ...”).

¹² Sutin, *supra* note 3.

¹³ Interview with George Lardner, Investigative Reporter, THE WASH. POST (Sept. 22, 2002) (concerning his research in the State Department and presidential archives for the history of pardon power). Throughout most of the 19th century, appeal to the President’s pardon power was virtually the only way in which individuals could challenge their conviction or shorten their sentence. Pardon not only recognized defenses unknown in the law, it functioned as the only available paroling authority. The displacement of pardon by a statutory parole system in the 1920’s is documented in United States Department of Justice, THE ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES, Volume III Pardon 295-313 (1939), *portions reprinted in* 13 FED. SENT RPTR. 199-204 (2001).

¹⁴ *Collar Buttons*, *supra* note 4, at 1489-90. Throughout most of the 19th century, the Attorney General shared responsibility for administering the pardon power with the Department of State. In 1893, President Cleveland formally transferred all pardon administrative duties to the Attorney General, and directed him to make recommendations in particular cases. See Exec. Order of June 16, 1893 (on file at the Office of the Pardon Attorney). That order has never been rescinded, and has been confirmed over the years in a
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General and signed by the President in 1898, all applicants for pardon or commutation of sentence were required to file a petition for clemency with the Pardon Attorney at the Justice Department.¹⁵ The Pardon Attorney investigated each application, sought the views of interested officials, and prepared a report and recommendation for the signature of the Attorney General (or his designee), which in turn was sent to the President for his disposition.¹⁶ Substantive criteria for granting pardon or commutation were not spelled out in any official document, and the President rarely discussed either his clemency policy or his reasons for a particular grant.¹⁷

series of regulations jointly signed by the President and the Attorney General. *See infra* note 15.

¹⁵ *See* 28 C.F.R. pt. 1. The requirement that all clemency applications be submitted through the Justice Department was announced in the first clemency regulations signed by President McKinley in 1898, and has remained consistently in effect since that time. *Collar Buttons*, *supra* note 4, at 1491. A complete set of clemency regulations, from the 1898 McKinley regulations to the current regulations signed by President Clinton in 1993, is on file at the Office of the Pardon Attorney.

¹⁶ Since the Kennedy administration, all properly filed applications for pardon and commutation eventually find their way to the White House, including those in which the Attorney General recommends against clemency. *Collar Buttons*, *supra* note 4, at 1489, n. 27.

¹⁷ It has been Department's policy since the Franklin Roosevelt Administration not to divulge the basis for its clemency recommendations in particular cases, though general standards are now spelled out in sections 1-2.112 (pardon) and 1-2.113 (commutation) of the U.S. Attorney's Manual. *See* <http://www.usdoj.gov/pardon/petitions.htm> (lasted visited Sept. 16, 2002.) Between 1885 and 1932, the Attorney General's Annual Report recorded each clemency grant with the reasons for recommending relief:

[m]any of [the reasons] 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 Collar Buttons, *supra* note 4 at 1490, n. 29. *See also* HUMBERT, *supra* note 3, at 124-33. It was rare for either the President or the Attorney General to spell out a coherent theory of pardoning, especially during office. Attorney General Charles Bonaparte was an exception:

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At the outset of the Clinton Administration, this system for processing clemency applications had been continuously in use for over 100 years. Under the Attorney General's guiding hand, frequent and regular pardoning had introduced a measure of flexibility into an otherwise rigid legal system, and the power had been generally accessible to those without political connections.¹⁸ Almost every year between 1900 and 1980 there were over a hundred grants of pardon and commutation, most of them to ordinary individuals convicted of unremarkable crimes. Pardon warrants were signed at regular intervals by the President four or five times a year, and there was no particular bunching of grants at the end of an administration. Sheer volume protected the President's ability to make an occasional grant for personal or political reasons that the public might otherwise not understand.¹⁹ In this fashion, pardon continued for many years to play an integral part in the regular functioning of the federal criminal justice system.

Prior to the Clinton administration, the White House consistently relied upon the Justice Department's administrative process, even after the instance of ordinary pardoning began to decline during the administration of President Reagan.²⁰ And, while there was an occasional controversial

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. RPT. 8.

¹⁸ As a political counselor to the President as well as the chief law enforcement officer, the Attorney General was in a good position to reconcile the tension between the President's duty to enforce the law and his occasional duty to dispense with it, for mercy's sake. *See Love, supra* note 11, at 126.

¹⁹ *See e.g.*, Exec. Grant of Clemency to Adil Shahryar, (June 11, 1985) (son of aide to Indian Prime Minister Rajiv Gandhi, serving 35-year federal sentence for explosives and fraud offenses, freed as "goodwill gesture" on occasion of Gandhi's visit to U.S.); Exec. Grant of Clemency to Marian W. Zacharski, (June 7, 1985) (foreign spy's life sentence commuted in contemplation of a "swap" for several U.S. nationals imprisoned abroad), U.S. DEPT OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, WARRANTS OF PARDON, 1935-1999 [hereinafter WARRANTS OF PARDON].

²⁰ Between 1953 and 1999, there were only three occasions on which the President did not follow the established Justice Department procedure for handling pardons: 1) President Ford's 1975 pardon of Richard Nixon; 2) President Reagan's 1981 pardon of two FBI officials who had authorized illegal surveillance of radicals; President Bush's 1992

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grant, the only federal pardon-related scandals during the 20th century involved the rare cases that were staffed outside of the normal Justice Department review process.²¹ “It was the regularity of the Justice Department’s investigations and the reliability of the Attorney General’s recommendations that kept the pardon process from being cynically viewed as a lottery, and that protected the President’s ability to exercise his discretion as he thought best for almost two hundred years.”²²

Yet the seeds of the breakdown of the pardon advisory process in the Clinton Administration had been planted in the Carter Administration, when the Attorney General began delegating his advisory responsibilities to subordinate officials within the Department whose duties were exclusively concerned with law enforcement.²³ These seeds took root in

pardon of six Iran-Contra defendants. *See Collar Buttons*, *supra* note 4, at 1496, nn. 3, 50. Even the most politically controversial cases, like the sentence commutations granted Teamster boss Jimmy Hoffa, heiress Patty Hearst, Maryland Governor Marvin Mandel, and Soviet spy Marian Zacharski, were processed through Justice Department channels, and granted pursuant to the Attorney General’s recommendation. *See Collar Buttons*, *supra* note 4.

²¹ For example, in 1953, President Truman was criticized for seven end-of-term pardons that were issued without the advice of the Justice Department, all but one of which went to current or former government officials. The resulting outcry prompted President Eisenhower’s Attorney General Herbert Brownell to announce a “goldfish bowl” policy of making pardon grants public, as well as the names of persons recommending them, returning to the policy of disclosure in effect prior to the New Deal. *See* Walter Trohan, *Bridges Seeks to End Secrecy in U.S. Pardons*, N.Y. HER. TRIB., Aug. 30, 1953, at 10. *See also* pardon mentioned in *supra* note 19.

²² Love, *supra* note 11, at 127.

²³ Attorney General Griffin Bell’s informal delegation of the pardon advisory function to subordinate officials within the Department was formalized in the Reagan Administration by Attorney General William French Smith. *See* 28 C.F.R. § 0.35 (1983) (Attorney General responsibility delegated to Pardon Attorney, whose clemency recommendations are to be made “through” the Deputy Attorney General). As a result,

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. 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.

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the “tough on crime” decade of the 1980’s, and by the early 1990’s the pardon program in Justice was well on its way to being subsumed, in operation and in philosophy, by the law enforcement components. While the views of prosecutors had always been given “substantial weight” in the clemency process,²⁴ by the end of the 1980’s they had become controlling, particularly where sentence commutations were concerned.²⁵ By the time President Clinton entered office in 1993, the pardon program at Justice had lost whatever independence and integrity it once enjoyed within the Department, and was functioning primarily to ratify the results achieved by prosecutors, not to provide any real possibility of revising them.²⁶ To be sure, the pardon process was disciplined and regular. But it had no sense of mission, and produced very little.

Collar Buttons, *supra* note 4, at 1496-97. Seven of the thirteen officials responsible for overseeing the Department’s pardon program between 1983 and 2001 were former United States Attorneys, one had been an elected state district attorney, and two others had been line federal prosecutors. The three who had not themselves been prosecutor’s assigned responsibility for overseeing the pardon program to career prosecutors on their staff. *See* Love, *supra* note 11, at 126, n. 23.

²⁴ *See, e.g.*, HUMBERT, *supra* note 3, 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)).

²⁵ *See* Evan Schultz, *Does the Fox Control Pardons in the Henhouse*, 13 FED. SENT. R. 177 (2001), originally published as *Pardoning Around (Outside of) the Rules*, LEGAL TIMES, Mar. 12, 2001 (“the pardoning process seems to have been captured by the very prosecutors who run our inevitably flawed criminal justice system”). *See also* Margaret Colgate Love, *Testimony Concerning The President’s Power to Pardon before the Subcommittee on the Constitution of the House Committee on the Judiciary*, (Feb. 28, 2001), available at <http://jurist.law.pitt.edu/love2.htm> (last visited Sept. 14, 2002) (Love Testimony) (“Over the past twenty years [the pardon process] has gradually come to reflect the unforgiving culture of federal prosecutors, and now is perceived primarily as a conduit for their views.”). *Id.*

²⁶ *See* Love, *supra* note 11, at 128 (“The possibility that pardon might actually help prosecutors do their job went largely unexplored. Nor, apparently, did it occur to any President after Jimmy Carter that the pardon power might be used to emphasize the rehabilitative goals of the justice system.”) On occasion, a United States Attorney would appeal to the pardon power to correct a situation beyond the power of the court. *See, e.g.*, Exec. Grant of Clemency to Johnny Palacios, Aug. 21, 1995, in WARRANTS OF PARDON, *supra* note 19 (court refused to entertain government’s motion for reduction of sentence under Rule 35 for jurisdictional reasons); *See also* Exec. Grant of Clemency to Alain Orozco, July 5, 2001, Zlotnick, *supra* note 5, at 169 (discussing the Orozco case).

II. THE PARDON PARADOX TRAPS BILL CLINTON

To all appearances, the pardon process in Justice served Bill Clinton reasonably well through most of his tenure. He publicly professed his respect for it,²⁷ and was very sparing in his pardon grants, consistent with the rest of his law enforcement agenda. As long as he was vulnerable to the electorate, President Clinton acted on the assumption that there is no constituency for convicted criminals. As a result, six months into his final year in office, he had pardoned less generously than any president since John Adams.²⁸

As the time on his watch grew short, another side of President Clinton emerged. He began talking publicly about his interest in pardoning, lamenting how few pardons he had granted and signaling an intention to do more before leaving office.²⁹ For the first time in eight years, he expressed sympathy with nonviolent drug offenders serving long prison terms,³⁰ and articulated a generous policy of restoring civil rights to anyone who had completed his sentence.³¹ He said he was particularly

²⁷ In 1996, during a PBS interview about possible Whitewater pardons, Clinton publicly committed himself to follow the Justice Department review process. Jerry Seper, *Clinton Broke Vow in Pardon of Rich; Violated His Pledge of Justice Review*, WASH. TIMES, Feb. 2, 2001, at A1. Evidently this commitment to follow the process did not extend to acting promptly on the pardon recommendations sent to him by Justice. See *infra* note 38.

²⁸ Interview with George Lardner, *supra* note 13; P.S. Ruckman, Jr., *Federal Executive Clemency in the United States, 1789-1995: A Preliminary Report*, JURIST, THE LEGAL EDUCATION NETWORK, available at <http://ednet.rvc.cc.il.us/~PeterR/Papers/paper3.htm> (last visited Sept. 14, 2002).

²⁹ See e.g., Remarks at the ceremony appointing Roger Gregory to an interim seat on the Fourth Circuit Court of Appeals, Dec. 27, 2000, reprinted in 13 FED. SENT. R. 228 [hereinafter Gregory Remarks]. Newsweek reported an incident in early January in which the President wandered into the press section of Air Force One on a trip to Arkansas and asked "You got anybody you want to pardon?" Weston Kosova, *Backstage at the Finale*, NEWSWEEK, Feb. 26, 2001.

³⁰ Jan Wenner, *Bill Clinton: The Rolling Stone Interview*, ROLLING STONE MAGAZINE, Dec. 28, 2000-Jan. 4, 2001, at 98: "We really need a reexamination of our entire policy on imprisonment. . . . [A] lot of people are in prison today because they have drug problems or alcohol problems. . . . I think the sentences in many cases are too long for nonviolent offenders. . . . I think [mandatory minimum sentences] should be reexamined." *Id.*

³¹ See Gregory Remarks, *supra* note 29 (stating that:

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interested in granting forgiveness to people “with[out] money or power or influence.”³² He seems to have realized how meager his overall pardoning record was compared to that of his predecessors, and he was determined to make up for lost time.³³ That was evidently proving harder than he had expected, and he publicly complained about the unresponsive Justice Department review process that “existed before I got here.”³⁴ It was later revealed that he had for some time felt unable to depend upon the Justice

I have always thought that Presidents and governors (should be) broad-minded about pardons because, in so many states in America, pardons are necessary to restore people's rights of citizenship. Particularly if they committed relatively minor offenses, or if some years have elapsed and they've been good citizens and there's no reason to believe they won't be good citizens in the future, I think we ought to give them a chance, having paid the price, to be restored to full citizenship.

³² Gregory Remarks, *supra* note 29.

³³ It was rumored that Clinton was particularly concerned that his pardoning record at least equal that of Ronald Reagan. See Stephen Braun & Richard Serrano, *Clinton Pardons: Ego Fed a Numbers Game*, L.A. TIMES, Feb. 25, 2001, at A1. The competitive spirit animating the final Clinton pardons is evidenced in the apologia Clinton wrote for the op ed page of the New York Times several weeks after the grants, where he pointed out that he had issued “a total of approximately 450 pardons and commutations, compared to 406 issued by President Reagan during his two terms.” William Jefferson Clinton, *My Reasons for the Pardons*, N.Y. TIMES, Feb. 18, 2001 §4, at 13. See also Adam Nagourney, *Hail to the Former Chief, Picking Up a Sandwich at the Deli*, N.Y. TIMES, Jan. 22, 2001 at B-1 (quoting President Clinton, “If you look at it, we did some more than President Reagan in the aggregate, but less than President Carter and President Ford did . . .”). Clinton’s desire to increase the absolute number of his grants may explain the curious appearance on the pardon warrant of 20 individuals whose cases had been denied by the President two years before and had never reapplied. See Letter from Sheryl L. Walker, *infra* note 50.

³⁴ *President Clinton’s Statement of his Pardoning Philosophy*, 13 FED. SENT. R. 228 (2000).

I haven’t seen the final numbers, but before the last batch at least, I had done fewer than any President in almost 30 years. And part of that, frankly, is the way the system works, something I’m not entirely satisfied with . . . I wish I could do some more [pardons to ordinary people] – and I’m going to try. I’m trying to get it out of the system that exists, that existed before I got here, and I’m doing the best I can.

Department for pardon recommendations, and had decided to work around this problem by using his own White House staff.³⁵

Of course Clinton himself was at least partially responsible for the unresponsiveness of the pardon bureaucracy in the Justice Department. From the beginning of his administration, he had taken little interest in the pardon review process that had served his predecessors well for over a century. He evidently did not trust bureaucracy, particularly one that he did not control. After the first year or two of his administration, there was little communication between the White House and the Office of the Pardon Attorney, and many routine clemency inquiries were handled directly by the President's own staff.³⁶ More troublesome, if only from a management standpoint, were the long delays at the White House in disposing of the Justice-generated clemency caseload, which past Administrations had handled promptly as routine housekeeping business. The result was that no pardon grants at all were issued in four of President Clinton's first five years in office, despite a growing number of applicants, and the handful of grants in later years came primarily at Christmastime.³⁷ Case backlogs, all but eliminated during the first Bush Administration, grew steadily larger each year. Recommendations for and against pardon piled up at the White House without action.³⁸ Senior political officials at

³⁵ See *Hearings before the House Committee on Government Reform on the Pardon of Marc Rich*, 107th Cong. 1st Sess. (2001), available at <http://www.washingtonpost.com/wpsrv/onpolitics/transcripts/pardonshearingtext030101.htm> [hereinafter *House Hearings*]. A chart distributed by the Department of Justice to members of the press on February 13, 2001, which includes the date each recipient applied, reveals that upwards of thirty of the recipients of pardon or commutation on January 20 did not file applications with the Department at all, and another six filed ceremonial applications with the Department a few days before January 20. In addition, another dozen grantees had filed their applications after the Pardon Attorney had announced he was accepting no more applications, and too late in any event for them to be considered in the ordinary course. See chart on file with author.

³⁶ Routine responses to inquiries about pardon stated that the President would consider advice on pardon cases from all quarters, including, but presumably not limited to, the Justice Department. At the very beginning of the Clinton Administration, communication between the White House and the Office of the Pardon Attorney had been the personal responsibility of Associate White House Counsel Cheryl Mills. Soon, however, this responsibility was delegated to more junior staff, and for the last three years of my tenure as Pardon Attorney (1995 to 1997) there was virtually no direct contact between responsible officials in the White House and the Office of the Pardon Attorney.

³⁷ Clinton may not have realized that the only other President to have pardoned almost exclusively at Christmastime was Richard Nixon.

³⁸ Many favorable recommendations from the Justice Department languished at the White House without Presidential action for years. For example, almost half of the 59
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the Justice Department took their cue from this apparent presidential indifference, which simply confirmed their predisposition to marginalize the Department's pardon program.³⁹

In 1999 and 2000, a number of high-profile pardons were staffed directly out of the White House, reflecting the further distancing of the President from his Justice Department in clemency matters.⁴⁰ All

pardon grants issued on December 22, 2000, went to individuals whose cases had been sent forward to the White House four or five years before, during my own tenure as pardon attorney. During the final three and a half years of the Clinton Administration, new applications came in at more than twice the rate that they were disposed of. See OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION, 1945 TO PRESENT (2002). When President Clinton departed Washington on January 20, he left behind him nearly 3000 pending clemency applications. Based on Beth Nolan's testimony before the House Committee on Government Reform, it may be presumed that many of these cases had been fully investigated by the Justice Department, but that they had not been favorably recommended. See *infra* note 41, discussing fruitless White House efforts in the final months of 2000 to get more favorable recommendations from the Justice Department and *infra* note 75, discussing the White House directive to the Deputy Attorney General in the fall of 2000 not to forward any more denial recommendations to the White House.

³⁹ For example, from 1893 until 1994, all recommendations sent to the President in pardon and commutation cases had been signed personally by the Attorney General or, later, the Deputy Attorney General. See *Collar Buttons*, *supra* note 4, at 1495, n. 47. In 1994, Deputy Attorney General Philip Heymann delegated this authority to one of his staff, and under his successor, Jamie Gorelick, responsibility for signing pardon recommendations was distributed among her staff. The question of who should sign pardon recommendations became an issue between the pardon attorney and the Deputy Attorney General's office, an issue that had not been resolved by the fall of 1997 when I left office.

⁴⁰ In the summer of 1999, the President commuted the sentences of 16 Puerto Rican terrorists, members of the so-called FALN, based on the recommendation of his then-White House Counsel Charles Ruff. The White House had received a recommendation in 1996 from the Justice Department that clemency in these cases be denied, but this recommendation was evidently later withdrawn and a more neutral view substituted. THE PARDON ATTORNEY REFORM AND INTEGRITY ACT OF 1996, S. REP. NO. 106-231, at 8 (1996). In 1999 and early 2000, the President issued three high-profile pardons to African-Americans who had been victims of a racist justice system. See Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L. J. 1251 (1999). One was the posthumous pardon to Henry Flipper, the first African-American graduate of West Point, whose 1881 court martial had long been officially acknowledged as unwarranted and unfair. The Pardon Attorney had refused to accept an application in Flipper's behalf based on longstanding Justice Department policy against issuing posthumous pardons. *Id.* Another was the pardon granted to Freddie Meeks, one of two living survivors of a racially charged mutiny case at Port Chicago in Seattle

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indications were that this President, unlike his predecessors, intended to handle clemency matters personally.

Under the circumstances, it was perhaps understandable that the Justice Department would draw back from any independent effort to shape the President's pardon agenda. What is less understandable is that the Justice Department apparently made no effort to warn the President about the perils of unregulated pardoning. To the contrary, by the late 1990's Justice seems to have essentially shut down its production of pardon recommendations, notwithstanding the steadily growing number of applications. By the final year of Clinton's presidency, when he finally turned his attention to his pardoning legacy, the stream of recommendations from the Justice Department had all but dried up. White House Counsel Beth Nolan later testified to her unsuccessful efforts to galvanize the Justice Department into action during Clinton's final year, and to the President's belief that the established system for reviewing pardon applications was unable (or perhaps unwilling) to produce enough cases to satisfy his demands.⁴¹ In October of 2001, the Pardon Attorney

during World War II. See *President Pardons Veteran Convicted in 1944 Mutiny*, WASH. POST., Dec. 24, 1999, at A4. The third unusual pardon went to Preston King, a prominent African-American scholar who had fled the country in 1961 and lived in self-imposed exile for almost forty years after being convicted in Georgia for evading the draft. See *Collar Buttons*, *supra* note 4, at 1499, n.57. The Justice Department had for years declined to accept a pardon application from King because he was a fugitive. All three of these cases were widely publicized by the White House and applauded by the civil rights community as evidence of the President's sensitivity to racial discrimination in the justice system.

⁴¹ See *House Hearings*, *supra* note 35, at 341. Ms. Nolan testified that the President "wanted to exercise the pardon power more than he had in the past, that he felt that he hadn't exercised it fully, and he wanted to be sure that we had a process in place to be sure that pardons were moved quickly through the process." Ms. Nolan reported that she had met several times with Justice officials during the last year of Clinton's term to encourage them to produce more favorable pardon recommendations, conveying the President's view that "he generally believed that restoration of civil rights was important, that if people had served their time and led a good life since then, he would be in favor of [their] receiving pardons."

When asked if she had found resistance at Justice, she said "I found no movement. I don't quite know how to describe what was happening. It was very hard for me to see inside the Justice Department. But sometime in August, I said to Eric Holder, we have to have another meeting because we're coming up to the end and we need to know that, you know, we can move along more pardons. That produced very little. Sometime, I think in November or December, I learned that we could expect, at most, 15 favorable recommendations.

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publicly announced that his office would no longer accept any new pardon applications, and advised those interested in a last-minute clemency grant to take their cases directly to the White House. This unprecedented disavowal of responsibility by the pardon bureaucracy prefigured the endgame.

With the clemency review process in the Justice Department effectively sidelined by its own choice, the President set up an ad hoc procedure in the White House Counsel's office to identify suitable candidates for pardon and commutation.⁴² He did not have to go far to find candidates after his intentions became public.

Throughout the fall of 2000, pardon-seekers besieged the President and his staff for a final favor, so that pardon matters occupied the attention of even the most senior White House staff.⁴³ Rumors flew about deals and promises involving pardons, influential insiders were retained to argue otherwise hopeless cases, and the press speculated about who was and who was not likely to be a beneficiary of Clinton's end-of-term largesse.⁴⁴ By

House Hearings, supra note 35, at 342.

She also confirmed that at some point in the fall Justice informed her that "they couldn't take any more pardon applications and that they weren't going to be able to review them or get the information to the White House."

⁴² Clemency matters in the White House were the primary responsibility of Deputy White House Counsel Bruce Lindsay, assisted by Associate Counsel Meredith Cabe and a more junior staffer, Eric Angel. Angel was evidently responsible for keeping a running tally of applicants whose cases were of particular interest. White House Counsel Beth Nolan and Chief of Staff John Podesta were also drawn into discussions on pardons, as was former Associate Counsel Cheryl Mills, who had by this time left government service. *See House Hearings, supra* note 35.

⁴³ White House Counsel Beth Nolan testified before the House Committee on Government Reform that the White House was "inundated" with pardon requests, and calls from influential people, including members of Congress, about particular cases:

They were coming from everywhere . . . We had requests from members of Congress on both sides of the aisle and both Houses. We had requests from movie stars, newscasters, former Presidents, former first ladies. There wasn't anybody--I refused to go to holiday parties because I couldn't stand being--nobody wanted to know how I was, thank you very much. They wanted to know about a pardon. So I just didn't go.

House Hearings, supra note 35, at 341.

⁴⁴ *See e.g.*, Peter Slevin & George Lardner, Jr., *Rush of Pardons Unusual in Scope, Lack of Scrutiny; Back-Door Lobbying Had Large Role in Clinton's Decisions, Observers Say*, WASH. POST, Mar. 10, 2001, at A3; Don Van Natta Jr. & Marc Lacey, *Access Proved* (continued)

their own account, during the final weeks White House staff at all levels worked around the clock compiling and revising lists of pardon applicants, fielding calls from influential supporters, and attending meetings at which the merits of pardon cases were debated.⁴⁵

The President talked about the coming pardons at almost every personal appearance during the final weeks. Regularity and process went by the boards in an all-out drive to create an entire pardoning legacy overnight. It appeared that pardoning had a place on the President's agenda alongside the Middle East peace negotiations and the Independent Counsel's inquiry into the President's own conduct.⁴⁶ Excitement mounted as the final days approached, for it was evident that something very unusual was going on.

While everyone expected the departing president to ring down the curtain on his presidency with some controversial pardon grants, no one was quite prepared for what actually happened on the morning of January 20, 2001, including, evidently, President Clinton himself. The 177 pardons and sentence commutations he issued just hours before his successor took the oath of office would become the second-most damaging scandal of his presidency, and irredeemably tarnish his legacy.

Some of the grants were immediately identifiable as personal gestures, to reward friends and family, and to nail shut the coffin of the Independent

Vital in the Race to Secure a Pardon from Clinton, N.Y. TIMES, Feb. 25, 2001, at A1; Kurt Eichenwald & Michael Moss, *Rising Number Sought Pardons in Last 2 Years*, N.Y. TIMES, Jan. 29, 2001, at A1. The atmosphere at the White House in the final weeks was likened by former Attorney General Dick Thornburgh to a "Middle Eastern bazaar."

⁴⁵ See *House Hearings*, *supra* note 35. See also, e.g., JUSTICE UNDONE, *supra* note 2, at 1309-14 (describing White House staff handling of the Carlos Vignali petition).

⁴⁶ See *House Hearings*, *supra* note 35:

[Congressman Henry] Waxman: So let me make sure I understand this. The White House was involved in closing up its operations, but still trying to issue new regulations and negotiating a Middle East peace agreement. The President was insisting that you consider as many pardon applications as possible, despite the fact that the Justice Department wouldn't take any more applications after October of 2000, and you were being besieged by members of Congress and others to consider an ever-growing number of pardons. And on top of that, I suspect you weren't even aware of some of the pardon activities. Is that a fair statement of what was going on at the White House? [White House Counsel Beth] Nolan: I think that is a very fair statement ... Waxman: And, Mr. Podesta, is that an accurate statement from your point of view? [White House Chief of Staff John] Podesta: I think that's accurate, yes.

Counsel Act.⁴⁷ The pardons granted to fugitive billionaire Marc Rich and his partner Pincus Greene produced instant outrage from all quarters, focused on the key role of former White House Counsel Jack Quinn and his manipulation of the Justice Department advisory process.⁴⁸ But as the press parsed through the many less familiar names over the next six weeks, it became apparent that numerous other grants had been secured outside official channels through the intervention of individuals with direct access to the President, and that at least some of these individuals had been paid handsomely for their efforts. Over thirty of the grantees had never filed an application through the Justice Department, and a dozen more had filed so late in the game that it was obviously a mere formality.⁴⁹ Twenty other grantees had been denied pardon in 1998, and had never reapplied.⁵⁰ A number of the grants were highly unusual on the merits;⁵¹ and some

⁴⁷ The morning after the pardons were issued, the Washington Post noted that “Clinton appeared to be tying up loose ends from many of the independent counsel investigations that had daunted him and several senior members of his administration virtually from the beginning of his tenure.” Amy Goldstein & Susan Schmidt, *Clinton’s Last-Day Clemency Benefits 176; List Includes Pardons for Cisneros, McDougal, Deutch and Roger Clinton*, WASH. POST, Jan. 21, 2001, at A1. The President pardoned four individuals convicted as a result of the Whitewater Independent Counsel investigation (Susan McDougal, Christopher V. Wade, Stephen A. Smith, Robert W. Palmer), his former Housing Secretary Henry Cisneros and Linda Medlar Jones; and he “wiped the slate clean” on the Independent Counsel’s investigation of former agriculture secretary Mike Espy, commuting the sentence of Espy’s former chief of staff Ron Blackley, and pardoning Richard Douglas, Alvarez T. Ferouillet, John J. Hemmingson, and James Lake. *Id.* (Archibald R. Schaffer III had been pardoned on December 22, 2000, shortly before his sentencing). The President reportedly struggled over whether to pardon his former close political associates Webb Hubbell and Jim Guy Tucker, both convicted as a result of the Whitewater investigation, and their names were finally taken off the list of grantees only at the very last minute. He pardoned his brother Roger Clinton’s 1985 cocaine trafficking conviction, but did not pardon any of the individuals Roger Clinton had reportedly recommended. *See* JUSTICE UNDONE, *supra* note 2, at 709-831.

⁴⁸ *See, e.g.*, JUSTICE UNDONE, *supra* note 2, at 99-266.

⁴⁹ *See House Hearings*, *supra* note 35.

⁵⁰ *See* Letter from Sheryl L. Walker, Office of Legislative Affairs, Department of Justice, to The Honorable Dan Burton, Chairman, House Committee on Government Reform (Feb. 6, 2001) (on file with author). *See also* Stephen Braun & Richard Serrano, *Clinton Pardons: Ego Fed a Numbers Game*, L.A. TIMES, Feb. 25, 2001; Steve Bosquet, *Pardon Her, But She’s Still No Fan of Ex-President Clinton*, MIAMI HERALD, Feb. 23, 2001.

⁵¹ Commutation grants were made to a number of persons recently convicted of notorious crimes, notably Harvey Weinig, a New York lawyer convicted of money-laundering for a major drug organization, who had been privy to a murder-for-hire scheme, and whose commutation was vigorously opposed by
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involved almost unprecedented uses of the pardon power.⁵² For example, the President preemptively commuted the sentence of Paul Prospero, a Florida Lawyer and a college classmate of the President who had appealed his conviction for counterfeiting securities and tax evasion, but on January 20 was awaiting resentencing. The warrant manifesting the grant stated: "I further hereby commute any total period of confinement that has already been imposed or could be imposed . . . that is in excess of 36 months, and I

the United States Attorney and the Justice Department, *see* Benjamin Weiser, *A Felon's Well-Connected Path to Clemency*, N.Y. TIMES, Apr. 14, 2001, at A1; four Hasidic Jews convicted of embezzling federal grant money intended to benefit their own small community, *see* Randal C. Archbold, *Behind Four Pardons, A Sect Eager for Political Friends*, N.Y. TIMES, Feb. 5, 2001; Dorothy Rivers and Mel Reynolds, both serving prison terms for fraud and both reportedly recommended for release by the Reverend Jesse Jackson. *See* Olson, *supra* note 2, at 156-58. *See also* Deborah A. Devaney, *A Voice for Victims: What Prosecutors Can Add to the Clemency Process*, 13 FED. SENT. R. 163, 165-166 (2001). Pardon grants went to a number of well-connected people who never filed an application with the Justice Department, including several Arkansas businessmen and lawyers. *See* Olson, *supra* note 2, at 156-67. One case that proved embarrassing to the President was that of A. Glen Braswell, whose 1983 conviction for mail fraud and perjury was pardoned even though he was then the subject of an FBI investigation for tax evasion and money-laundering. *See* Christopher Marquis with Michael Moss, *A Clinton In-Law Received \$400,000 in 2 Pardon Cases*, N.Y. TIMES, Feb. 22, 2001, at A1. It was reported in the press that he had paid Hugh Rodham \$200,000 to press his case at the White House. *See id.* In January 2003, Braswell was arrested and charged with tax evasion. *See Calif. Businessman Pardoned by Clinton Arrested for Tax Evasion*, Associated Press, Jan. 14, 2003.

⁵² In addition to Marc Rich and Pincus Greene, neither of whom had been convicted and were fugitives from justice under indictment at the time of their pardon, Clinton pardoned J. Fife Symington, III, former Governor of Arizona, who was at the time awaiting retrial on charges of mail fraud. *See* Exec. Grant of Clemency, Jan. 20, 2001. John Deutsch, former Director of Central Intelligence, was pardoned for the misdemeanor to which he had pled guilty only the day before, on January 19, 2001. *See* Bill Miller and Walter Pincus, *Deutsch had Signed Plea Agreement, Sources Say*, WASH. POST, JAN. 24, 2001. Howard Mechanic, who had sought a commutation of his prison sentence, was pardoned instead. *See* Dennis Wagner & Brent Whiting, *Mechanic Receives Pardon*, ARIZ. REPUB., Jan. 21, 2001. Many of the pardon grantees, including those whose convictions been obtained by an independent counsel, were not eligible to apply for a pardon under Justice Department regulations, and some (notably the Independent Counsel grantees) had apparently not even asked for a pardon.

further commute any such period of confinement to be served in home confinement.”⁵³

There were so many avenues to explore that the press hardly knew where to begin.

The public outcry over Clinton’s final pardons dominated headlines and talk shows for weeks, eclipsing the new President’s efforts to introduce the American people to his own agenda, and inflicting lasting damage to Clinton’s popularity.⁵⁴ The Pardon Attorney publicly distanced himself from the process that produced the grants,⁵⁵ and the new administration reportedly considered the possibility of retracting them. They became the subject of congressional hearings in both the House and Senate, and ultimately were referred for investigation by a grand jury in the Southern District of New York.⁵⁶

⁵³ Exec. Grant of Clemency to Paul Prosperi, Jan 20, 2002 (on file with U.S. Pardon Attorney, U.S. Dept. of Justice). See Leon Fooksman, *Embezzler gets House Arrest: Ex-Lawyer Stole \$1.8 million from Irish Client*, Fort Lauderdale Sun-Sentinel, March 3, 2001 at B1.

⁵⁴ See, e.g., *Bill Clinton’s Reputation Sinks Fast*, NEWSWEEK, Mar.7, 2001:

Former President Clinton’s standing among Americans has fallen precipitously since he left office, reflecting a deep skepticism over the slew of last-minute pardons he granted, a new NBC-Wall Street Journal poll shows. Clinton’s ratings, in fact, are lower now than during the depths of the Monica Lewinsky scandal . . . When asked specifically about the pardons, more than two-thirds of those surveyed — 68 percent — said they thought most of Clinton’s pardons and commutations were granted ‘because of political influence and financial contributions.

⁵⁵ In an interview with a Washington Post reporter a few hours after the pardons were announced, Pardon Attorney Roger Adams reportedly told her that “I’ve never seen anything like it. . . . We were up literally all night as the White House continued to add names of people they wanted to pardon. Many people on the list didn’t even apply for pardons.” Mr. Adams reported that some requests from the White House arrived so late in the evening on Friday that his office did not have time to conduct record checks with the FBI. Among the names his office received for the first time on Friday night were the President’s brother Roger, and Richard Riley Jr., the son of Clinton’s Secretary of Education. See Goldstein, *supra* note 47. Three weeks later, Mr. Adams again described the final hours in testimony before the Senate Judiciary Committee three weeks later. See Testimony of Roger C. Adams before the Senate Committee on the Judiciary Concerning Recent Presidential Pardons, Feb. 14, 2001.

⁵⁶ At the time of this writing the grand jury inquiry is apparently still pending. Sisk, *supra* note 2, at 15, n. 13. One aspect of that probe was publicly concluded with no indictments in June of 2002, but presumably other pardon-related matters remain under
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For his part, President Clinton appeared genuinely perplexed by the nearly universal judgment that he had recklessly abused the power of his office.⁵⁷ His reaction (like the pardons themselves) is hard to understand, for President Clinton is a brilliant man and a savvy politician, who was surrounded by hard-working hand-picked advisers who were paid well to protect his interests. The most likely explanation is that President Clinton simply did not understand or appreciate the public nature of the pardon power, or his obligation to stand accountable for its principled exercise even at the end of his term.⁵⁸ He seems to have honestly believed that the power entitled him upon his departure to a final unencumbered opportunity to reward friends, bless strangers, and settle old scores. In short, he did not take the power seriously.

Because he regarded the pardon power as a personal one, he felt unconstrained by the rules and procedures that had guided and protected his predecessors. Apparently no one on his own staff made any effort to dissuade him of this intensely narcissistic view of the pardon power throughout his two terms as President. Nor did they apparently appreciate how important the protection offered by the Justice Department's pardon process would be in this circumstance.

If anyone at Justice warned the President of the perils of unregulated pardoning, there is no evidence of it. Senior Justice officials were comfortable in assigning a low profile to the pardon program, for they had

review. See Randal C. Archbold, *Prosecutors Clear Clintons in Clemency of 4 Hasidic Men*, N.Y. TIMES, June 21, 2002, at A18.

⁵⁷ See Jonathan Alter, *Life is Fleeting Man*, NEWSWEEK, Apr., 2002:

People are free to say that they disagreed with this or that part of the decisions I made, but there wasn't a shred of evidence that it had been done for any improper motive. . . . It was terrible politics. It wasn't worth the damage to my reputation. But that doesn't mean the attacks were true. . . . I had no idea that Hugh [Rodham] was involved in those two cases. Had I known it, I would have turned them down. I was just surprised and disappointed.

⁵⁸ This theory is confirmed by President Clinton's public statements in the final weeks of his presidency about the injustices of mandatory sentencing, and the importance of recognizing rehabilitation of criminals. These statements were apparently a reflection of deeply held personal beliefs that the President had never felt free to incorporate into his criminal justice program, or act upon as long as he could be held politically accountable. This is a concept of pardoning that is intensely personal. While no one doubts that the President can and should incorporate his personal moral beliefs into his pardon decisions, the constitutional bargain is that he must be prepared to take responsibility with the electorate for his actions.

little institutional incentive to try to interest the President in an activity that seemed to them inconsistent with their law enforcement responsibilities.⁵⁹ The pardon power was not taken very seriously at the Justice Department either.

Over time, Clinton's inherent disdain for the rules of the pardon process was compounded by his chilly relations with his own appointees at the Justice Department, and a well-founded concern that their pardon recommendations reflected nothing more or less than "the unforgiving culture of federal prosecutors."⁶⁰ When Clinton at last recognized his need for help in producing his final pardons, the Justice Department was unwilling or unable to be helpful to him. And so the power was abandoned to the chaos that reigned at the White House during Clinton's final weeks in office. Without the legitimizing regularity and thoroughness of the Justice Department review process, even the most innocuous of President Clinton's grants was suspect.⁶¹

III. THE PARADOX IN OPERATION: A TALE OF TWO COMMUTATIONS

The rudderless handling of pardons at the White House in the final weeks of Clinton's presidency produced two commutation grants that perfectly illustrate the pardon paradox. Kim Willis and Carlos Vignali were both young minority men serving long prison terms as a result of their involvement in large-scale cocaine distribution schemes. Both had gone to trial and been found guilty by a jury in federal court in Minnesota in the early 1990's, and both had been sentenced by District Judge David S. Doty. Both men asked President Clinton to commute their sentences, and both were released from prison on the last day of his term, returning home to supportive families years earlier than expected.

But the two grants were received very differently. Kim Willis' commutation went virtually unnoticed by the press, and was publicly praised by the sentencing judge as a "textbook example of how and why" clemency should be granted.⁶² Carlos Vignali's commutation, on the other hand, produced a firestorm of adverse publicity and became the subject of

⁵⁹ See *infra* pp. 20-21 and notes 25-26.

⁶⁰ Love, *supra* note 11, at 126.

⁶¹ See, e.g., John Harwood, *Clinton Pardon Firestorm Raises Questions About Nearly Everyone Involved in the Process*, WALL S. J., Mar. 7, 2001 (lawyer for one successful applicant states "I feel bad for my client. . . . I would prefer to have [had] the pardon last year").

⁶² See David S. Doty, *Clemency: A View from the Bench of Two Commutations – Vignali and Willis*, 13 FED. SENT. R. 161 (2001) [hereinafter *View from the Bench*]. See also Judge Doty's Letter to the President Recommending Commutation of Kim Allen Willis' Sentence, (Aug. 22, 2000), *reprinted in* 13 FED SENT. R. 229 (2001) [hereinafter *Judge Doty's Letter*].

a congressional investigation, embarrassing the President with evidence that the grant had been improperly (and possibly corruptly) obtained through the intervention of the First Lady's brother. The difference lies as much in the manner in which each case came to the President's attention, as in their respective merits.

A. *The Case of Kim Willis*

Kim Willis was 19 years old when he was convicted in 1990 of participating in a drug-trafficking conspiracy, and sentenced to fifteen years in prison.⁶³ Willis had no prior convictions, and had lived all of his life in the inner city of St. Paul. Abandoning an early passion for martial arts, he dropped out of school in the eleventh grade and began working as a courier for a cocaine ring headed by the infamous Plukey Duke, the father of one of his friends. The government's evidence against him confirmed that he had played a very marginal role in the conspiracy, but the prison term he ultimately received was substantially longer than almost all of his codefendants, primarily because they had cooperated with the government and he had not.⁶⁴ In sentencing Willis to 188 months in prison, the minimum sentence permitted by the federal sentencing guidelines, Judge Doty expressed frustration with the mandatory nature of the guideline scheme, and stated that he did not believe Willis deserved such a long sentence.⁶⁵

⁶³ The facts of Willis' case are taken from Judge Doty's Letter, *supra* note 63.

⁶⁴ In his letter to President Clinton, Judge Doty pointed out that the government had originally offered Willis a plea agreement that would have capped his sentence at ten years, but later withdrew it on grounds that his offer to cooperate was untimely. Willis went to trial and received a much longer sentence than many of his more culpable codefendants – including his friend Loren Duke, who was heavily involved with his father's drug ring but received a 12-month sentence as a reward for his cooperation. *See* Judge Doty's Letter, *supra* note 63. On appeal, Senior Circuit Judge Heaney expressed his frustration with the government's charging tactics in this case, which resulted in "a great disparity in sentence length among defendants with similar degrees of involvement in the drug ring." *United States v. Hammer*, 940 F.2d 1141, 1144-45 (8th Cir 1991) (Heaney, J., concurring).

⁶⁵ Judge Doty recounted that:

I told Mr. Willis at his sentencing hearing in April 1990 that I did not believe he was a major player in the Plukey Duke conspiracy to distribute cocaine. I further told Mr. Willis that I thought he was a bright young man with a good attitude. However, I told Mr. Willis that I was frustrated with the mandatory minimum sentencing guidelines because the guidelines provided me with little discretion to grant either a downward departure or a departure below the prescribed mandatory minimum sentence. Finally . . . I told him that he did not deserve the

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In the summer of 2000 having served almost eleven years of his fifteen-year sentence Kim Willis filed a petition for executive clemency with the Department of Justice, in accordance with the applicable regulations. Attached to the petition was an eight-page letter from Judge Doty recommending that the President give favorable consideration to Willis' request.⁶⁶ Judge Doty told the President that he thought the sentence he had been required to impose on Willis was "unfair" in the circumstances, noting his more general opposition to mandatory minimum sentences in drug cases. He told the President that Willis' offer to cooperate had been rejected, and alluded to the concerns expressed years before by Senior Circuit Judge Gerald Heaney about unwarranted sentencing disparity among the codefendants in the case resulting from the prosecutors' charging decisions. Finally, he noted that Willis had been contrite and remorseful from the beginning, fully accepting responsibility for his part in the crime.

Judge Doty's letter reported that Willis had used his time in prison well. He had completed his GED, earned certifications in welding and blueprint reading, and had participated in several different educational and personal improvement courses. In 1998, through good behavior, he had earned a transfer to a minimum security camp, and began taking courses from Lake Superior College in Duluth, finishing his first year on the Dean's List with a 3.7 cumulative grade point average. But what Judge Doty described as Willis' "most important rehabilitative accomplishment" was his extensive participation in the Youth Awareness Program, a program that permits inmates to leave the prison to speak to youth in the community who are the most susceptible to being involved in drugs.⁶⁷ In

sentence that I was gong to impose on him, but I had no other choice except to do what the law required.

Judge Doty's Letter, *supra* note 63, at 3.

⁶⁶ See Judge Doty's Letter, *supra* note 63. Judge Doty noted that the President had only the month before commuted the sentence of one of Willis' codefendants, Serena Nunn, whose case was similar to Willis', and who had also been represented in her clemency petition by the same lawyer, Sam Sheldon. Judge Doty reminded the President that he had also supported commutation of Nunn's sentence, noting that it was the first time since his appointment to the bench by President Reagan that he had ever supported a clemency bid. Judge Doty later described the key role Sheldon had played in securing the necessary official support for Willis' commutation, and commended him for his energetic efforts on behalf of both Willis and Serena Nunn: "It is a testimonial to Sheldon's work and determination that Willis too had his sentence commuted." *View from the Bench*, *supra* note 63, at 162.

⁶⁷ Judge Doty later wrote that Willis "took full responsibility for the choices he had made. He did not blame poverty, his family, or racial discrimination for his incarceration.

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sum, the judge thought Willis had “exhibited a positive attitude, has come to accept responsibility for his criminal actions, and has made significant rehabilitative accomplishments.” Judge Doty also noted the stable family situation that awaited Willis at home in St. Paul to ease his transition from prison to the free community, and the poor health of Willis’ mother.

All of these factors, the unfairness of Willis’ original sentence, his significant rehabilitative accomplishments while in prison, and the poor health of his mother, combined in Judge Doty’s opinion to justify the President’s making an extraordinary gesture of clemency to cut short Willis’ prison sentence and allow him to return home.

Circuit Judge Heaney, who years before had criticized the government’s charging tactics in the case with specific reference to Willis’ situation, also wrote to the President in support of Willis’ petition.

Perhaps most significantly, the United States Attorney in Minnesota indicated that he did not oppose commutation.⁶⁸ While the nature of the Justice Department’s recommendation to the President in the case has never been revealed, the detailed account of the facts of the case in Judge Doty’s letter and the strong official support for clemency were evidently brought to the attention of White House staff.⁶⁹

Accordingly, when Kim Willis’ name appeared on the warrant signed by the President, which cut short his prison sentence and those of 35 other individuals, no one suggested that Willis’ case had not come up through the system in an entirely regular fashion. To those who inquired, the President’s decision to free Kim Willis seemed entirely defensible because of the process that evidently produced it.⁷⁰ The only cases that caused

All in all, Willis illustrated in a dramatic way that he was deserving of a commutation.” *View from the Bench*, *supra* note 63, at 162.

⁶⁸ *View from the Bench*, *supra* note 63, at 162. For better or worse, the prosecutor’s support (or at least neutrality) has become almost essential to obtaining a favorable recommendation from the Justice Department’s administrative process. *See supra* notes 25-26.

⁶⁹ The record of the Hearings before the House Comm. on Government Reform indicates that White House staff was aware of Judge Doty’s favorable recommendation in the Willis case. *See JUSTICE UNDONE*, *supra* note 2, at 1313-14 (hand-written notation by a White House staffer in connection with the Carlos Vignali case indicates that Judge Doty had recommended “other cases”).

⁷⁰ There was some speculation in the press at the time of the final Clinton grant that many of the 20 low-level drug offenders whose sentences were commuted had come to the President’s attention outside regular Justice Department channels. It was reported, for example, that in several of these cases there had been intense lobbying by community leaders and Members of Congress, and that 17 of the 20 had been supported the by Families Against Mandatory Minimums (FAMM). *See* Richard A. Serrano & Stephen Braun, *In Many Drug Cases, Normal Clemency Process Bypassed*, L.A.TIMES, Mar. 5, 2001, at A1.

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trouble for the President were ones for which there was no such defense. Carlos Vignali's was one.

B. *The Case of Carlos Vignali*

Carlos Vignali was convicted in 1993 of participating in a scheme whereby large quantities of cocaine were sent to Minnesota by mail from California, converted to crack, and distributed on the street. Vignali was found by the jury to have played a major role in the conspiracy and was unrepentant and uncooperative throughout his trial. Judge Doty later wrote that he "showed no signs of remorse and took no responsibility for his role in the crime prior to or during sentencing."⁷¹ His sentence of 175 months included an increase for obstruction of justice based on his perjurious testimony at trial.⁷²

Efforts to reduce Carlos Vignali's sentence, orchestrated by his father, began almost immediately after his conviction. Horacio Vignali, a successful Los Angeles businessman and political activist in the Latino community, was able to enlist a number of California politicians and law enforcement officials in the campaign to free his son, including Lee Baca, the sheriff of Los Angeles, and Alexander Mayorkas, the United States Attorney in Los Angeles. In 1998, shortly after Vignali's judicial appeals were exhausted, a petition for clemency was filed with the Department of Justice claiming that he had been wrongly convicted.⁷³ In addition to Baca, Mayorkas and a number of other Los Angeles politicians, Congressmen Esteban Torres and Xavier Becerra wrote the President urging that he grant clemency to Vignali. Even Roger Mahony, Cardinal Archbishop of Los Angeles, wrote to the President saying that a grant of

Kim Willis was among the prisoners whose release had been urged by FAMM. In several of the 20 cases, the U.S. Attorney's office told the press that it had not been contacted. *Id.* But at least in Willis' case there was no reason for the public to believe that it had not been processed regularly and recommended favorably by the Justice Department. *See generally supra* note 6.

⁷¹ *View from the Bench, supra* note 63. Even so, Vignali's sentence of 175 months was slightly lower than Willis' because of the different drug weights involved. At the time his sentence was commuted, Vignali had served 73 months of his term. The merits of Vignali's criminal case are extensively discussed in JUSTICE UNDONE, *supra* note 2.

⁷² JUSTICE UNDONE, *supra* note 2, at 1283.

⁷³ The contents of the Vignali clemency petition are discussed in detail in JUSTICE UNDONE. *supra* note 2, at 1280-83. They are characterized in the Pardon Attorney's report to the President as "recycled arguments already rejected by the jury and the courts." JUSTICE UNDONE, *supra* note 2, at 1414. Much of the information in this article about the way the Vignali petition was handled in the White House comes from JUSTICE UNDONE, *supra* note 2.

clemency to Vignali was “worthy of your consideration.”⁷⁴ None of the individuals who wrote in support of clemency for Carlos Vignali appear to have had any first-hand knowledge of his federal conviction, and all had been misinformed in some degree about the facts of his case, misinformation that they unquestioningly passed along to the White House. Also, none appear to have been aware that Horacio Vignali was then under investigation for drug trafficking in Southern California.⁷⁵

The Pardon Attorney conducted the customary investigation of the Vignali petition, found no merit in it, and prepared a report to the President recommending that it be denied.⁷⁶ The report was routinely sent forward to the Deputy Attorney General for signature sometime in the fall of 2000. Ordinarily, the report would then have been sent to the White House with a recommendation against clemency, the President would have accepted the Justice Department’s recommendation, and that would have been the end of the matter. But the final months of the Clinton presidency was no ordinary time. According to staff in the Deputy Attorney General’s office, the Pardon Attorney’s report was never signed or sent to the White House because the Deputy had been instructed by the White House in the fall of 2000 not to send forward any more denial recommendations.⁷⁷

In early December of 2000, the Vignali clemency petition was brought to the attention of senior White House officials by Hugh Rodham, the First Lady’s brother. Rodham had been retained by the Vignali family to press their son’s case at the highest levels in the White House, and had been promised a fee of \$200,000 if his efforts produced a favorable result.⁷⁸ Rodham’s intervention came at an opportune time, for the President had made it clear to his staff that he was interested in commuting the sentences of “low level” drug offenders.⁷⁹ At some point in mid-December, staffers in the White House Counsel’s office decided that Vignali’s was “the kind

⁷⁴ JUSTICE UNDONE, *supra* note 2, at 1284-1301.

⁷⁵ JUSTICE UNDONE, *supra* note 2, at 1301-1306.

⁷⁶ JUSTICE UNDONE, *supra* note 2, at 1412. The memorandum containing the Pardon Attorney’s adverse recommendation, along with a number of other sensitive pardon-related documents from the Clinton White House, was produced to the House Committee on Government Reform by the National Archives, to the understandable consternation of the White House.

⁷⁷ According to interviews with staff of the Deputy Attorney General’s office, the report was held up because the Department had been instructed by the White House in November 2000 to stop sending denial recommendations to the President. JUSTICE UNDONE, *supra* note 2, at 1311.

⁷⁸ JUSTICE UNDONE, *supra* note 2, at 1308.

⁷⁹ See *supra* note 72.

of case” the President wanted to grant, and added his name to a list of drug offenders considered to have been “over-sentenced.”⁸⁰

It is not clear exactly what information the White House had about Vignali’s case other than the commutation petition itself (which proclaimed Vignali’s innocence), Hugh Rodham’s misleading representations about the case, and the calls and letters from Vignali’s Los Angeles supporters who were either ignorant of or misinformed about the facts underlying Vignali’s conviction. It seems that the White House staff that handled pardons did not seek any independent documentation of Vignali’s offense or any official advice about the case from the Justice Department or the sentencing judge. They seem to have uncritically accepted inaccurate representations about the position of the U.S. Attorney in Minnesota who had prosecuted the case.⁸¹

Through December and into early January, Rodham reportedly pestered key White House staff to ensure that Vignali’s case made the final cut. There is evidence that on at least one occasion he alluded to the First Lady’s alleged interest in the case.⁸² At the same time, Vignali’s Los Angeles supporters were showering the White House with calls and letters. But still the White House did not request a report from the Justice Department on the case.

Finally, at some point in early January, the Pardon Attorney somehow became aware that Vignali’s case was under serious consideration at the White House. Concerned that Vignali’s sentence might be commuted without any input from the Justice Department, the Pardon Attorney sought and received permission from the Deputy Attorney General to send to the White House the report he had prepared over his own signature.⁸³

The Pardon Attorney’s unsolicited report on the Vignali case was received at the White House on January 12, and for the first time the White

⁸⁰ Vignali’s name was not on the White House tracking list dated December 10, 2000, *see* JUSTICE UNDONE, *supra* note 2, at 1686, but it appeared for the first time on the list dated January 9, 2001. JUSTICE UNDONE, *supra* note 2, at 1568. Many of the other cases on this list had been recommended for clemency by FAMM.

⁸¹ The tracking chart dated January 9, 2001 contains the notation that according to “representatives, U. S. Atty in Minneapolis (who prosecuted him) supports.” JUSTICE UNDONE, *supra* note 2, at 1469.

⁸² An undated and unsigned handwritten note on White House stationery, produced by the Clinton Library in response to a congressional subpoena, states “Hugh says this is very important to him and the First Lady as well as others.” JUSTICE UNDONE, *supra* note 2, at 1318-19.

⁸³ JUSTICE UNDONE, *supra* note 2, at 1312 (interview with Associate Deputy Attorney General Deborah Smolover). When later asked by Congressional investigators, a member of the Deputy Attorney General’s staff declined to speculate why Deputy Attorney General Eric Holder had refused to sign the Vignali report.

House staff learned that many of the details of the case provided them by Hugh Rodham and others were incorrect.⁸⁴ They also learned for the first time that the United States Attorney in Minnesota strongly opposed a grant of clemency in the case. But strangely enough, this new information did not result in Vignali's name being removed from the list of "oversentenced" low level drug offenders, or even provoke any additional investigation by White House staff.⁸⁵

The congressional investigation of the Vignali case concluded that "[t]he process by which the President actually reached the decision to grant the Vignali commutation is still a mystery."⁸⁶ Somehow the doubts of some White House staffers were resolved, and a decision in favor of clemency was made at the very last moment, on January 19.⁸⁷ The only thing that seems clear is that the Pardon Attorney's recommendation counted for very little. Because Vignali's case raised so many questions, and because the process by which it was considered was evidently not designed to ascertain the truth, it is hard to avoid the conclusion that the final decision to commute his sentence was the product of "whim, lobbying, or bias."⁸⁸

In the days immediately after January 20, Vignali's case was initially lumped in with the group of low-level drug offenders that included Kim Willis. However, it quickly became apparent, based on the outraged

⁸⁴ The Pardon Attorney's report pointed out that all of Vignali arguments in support of clemency were "recycled" arguments that had already been rejected by the jury and the courts, that he continued to deny his guilt, and that his petition contained a number of "misleading statements and misstatements of fact." JUSTICE UNDONE, *supra* note 2, at 1414. The report concluded that Vignali's sentence was, if anything, lenient in light of his established role in the offense and contumacious conduct during his trial. The report noted the strong opposition of the United States Attorney. The sentencing judge was never contacted, probably because the Pardon Attorney thought it unlikely that his views would be any different. JUSTICE UNDONE, *supra* note 2.

⁸⁵ Inexplicably, the chart tracking clemency cases prepared by White House staff was not changed to reflect this new information, and to the end reported that that the United States Attorney in Minnesota supported clemency. *See supra* note 86. The tracking chart contains a notation that the sentencing judge had recommended another case (Kim Willis), but no one ever contacted Judge Doty. Nor did anyone from the White House seek confirmation of the views of the United States Attorney in Minnesota. JUSTICE UNDONE, *supra* note 2, at 1481.

⁸⁶ JUSTICE UNDONE, *supra* note 2, at 1320.

⁸⁷ JUSTICE UNDONE, *supra* note 2, at 1321.

⁸⁸ Sutin, *supra* note 3. It could be argued, based on the findings of the House investigation, that incompetent staffing was at least partially responsible for the Vignali grant. It is true that incompetence at some point produces whimsical results, which is perhaps the most charitable explanation of the Vignali grant.

reaction from the field, that his case was different. About three weeks after the January 20 grants, two enterprising reporters from the Los Angeles Times discovered the Hugh Rodham connection.⁸⁹ Given the extraordinary level of distrust about the pardons, everyone assumed the worst. Senator Hillary Clinton held a press conference to say that she was “heartbroken and shocked” to learn that her brother had been paid to lobby her husband on Vignali’s behalf and that she and the President had directed him to return the fee.⁹⁰ The President later said that he was “surprised and disappointed” to learn that Hugh had been “involved” in the case.⁹¹ No one tried to explain the Vignali grant on the merits.

IV. ADVANTAGES OF A NEUTRAL PROCESS

In defending his grants on the editorial pages of the New York Times, President Clinton stressed that all those to whom he granted clemency were “deserving.”⁹² And it is surely true that a case can be made to support almost any particular pardon. Certainly the President could reasonably have reached the conclusion that both Willis and Vignali had been “over-sentenced,” by his own standards, and therefore that both “deserved” to have their sentences reduced in some retributivist sense. While there may have been many other similarly situated prisoners who equally deserving, the President is not constrained by a conventional obligation to be fair or even-handed in pardoning.⁹³

What the President did not seem to recognize in defending his grants is that people were not as interested in his views about the merits of cases, as they were about how he made his decisions. That is, they wanted to be assured that the lucky few singled out for a special favor had not been chosen arbitrarily or corruptly.⁹⁴ The manner in which the Willis case

⁸⁹ Richard A. Serrano & Stephen Braun, *Drug Kingpin’s Release Adds to Clemency Uproar*, L.A. TIMES, Feb. 11, 2001, at A1; Braun & Serrano, *More Clemency Lobbying by Rodham Alleged*, L.A. TIMES, Feb. 26, 2001, at A1. Hugh Rodham’s paid lobbying of other clemency applicants, including A. Glen Braswell (pardoned while under investigation by federal authorities for tax evasion and money-laundering), is detailed in JUSTICE UNDONE, *supra* note 2, at 1328-39.

⁹⁰ See *Excerpts from Senator Clinton’s News Conference on the Presidential Pardons*, N.Y. TIMES, Feb. 23, 2001, at A1.

⁹¹ Alter, *supra* note 58.

⁹² Clinton, *supra* note 33.

⁹³ See *supra* notes 7-10 and accompanying text. Thus the President could appropriately commute some overly severe sentences without coming under any moral or political obligation to commute all overly severe sentences.

⁹⁴ *C.f.* *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (Justice O’Connor, concurring) (the President could not “flip[] a coin,” or “arbitrarily den[y] a prisoner any access to its clemency process”).

came to the President's attention gave him four important advantages in delivering such assurance, which legitimized his grant of clemency and insulated him from attack. He had none of these advantages in the Vignali case.

1. Accurate Information – The Willis case came to the President with a detailed and reliable account of the facts of the underlying criminal case, as well as verifiable information about Willis' personal history and prison record, all presumably certified by the Pardon Attorney in the Justice Department. In the Vignali case, the White House staff apparently relied heavily on unverified information supplied by his supporters, information that turned out to be one-sided and inaccurate. For one reason or another, the White House staff did not seek confirmation from the Justice Department or the field, and chose not to credit the factual information in the unsolicited report of the Pardon Attorney. Moreover, they translated expressions of general interest in the case, and expressions of sympathy for the family from such distinguished individuals as the Cardinal Archbishop of Los Angeles, into affirmative expressions of support for the case on the merits.⁹⁵ Finally they incorrectly reported that the prosecuting United States Attorney in Minnesota supported clemency, evidently confused by the intervention of the United States Attorney in Los Angeles, who had no official role in the case.

It is not clear whether the White House staff did not know how to compile an accurate and thorough factual report on a pardon case, did not have time to do it, or did not think it was necessary, given who was supporting the grant. What is clear, however, is that in failing to give heed to the warnings provided by the established investigative process, President Clinton "fully assumed the risk of a bad decision."⁹⁶

2. Consistent Policy Advice - In the Willis case the President had available to him the informed perspective of the sentencing judge and the prosecutor, as well as a judge who had been involved in the case at the appellate level, about the policy issues raised by the case, and the implications of a grant of clemency for law enforcement in the district. Presumably, he also had the advice and recommendation of justice officials on policy issues raised at the national level. The district judge's advice gave him a sense of the equities of the case in relation to other similar cases, and reminded him that he had commuted the sentence of one of Willis' similarly situated codefendants just six months before. It also gave him some sense of how a grant of clemency would be perceived in the district where the criminal case was prosecuted. While Willis had been

⁹⁵ See JUSTICE UNDONE, *supra* note 2, at 1469.

⁹⁶ Sutin, *supra* note 3.

involved in one of the largest cocaine rings in Minnesota's history, his acceptance of responsibility and subsequent good conduct in prison might make him a criminal justice success story that could be used to benefit law enforcement interests. Even if the Justice Department recommendation was against clemency for Kim Willis, the official perspectives on the policy issues raised by the case gave the President solid policy grounds for his own decision.

In contrast, the official perspectives on the law enforcement policy issues raised by the Vignali case were made available to the President only at the last minute, and only because the Justice Department volunteered them. But by then the White House staff had evidently made up their mind that Vignali's case was sufficiently similar to the other "over-sentenced" low-level drug offenders they were considering, and they were evidently not persuaded to the contrary by the facts laid out in the Pardon Attorney's report.⁹⁷

3. Accountable Advisors— Historically, the President has relied upon the recommendations of his Attorney General, and of the judge and prosecutors most familiar with a case, to justify his decision in law enforcement terms. These officials have an independent institutional stake in seeing that a clemency decision does not undermine decisions made by the justice system. The very fact that the President is known to rely upon such accountable officials has a legitimizing effect, even if he decides not to accept their advice.⁹⁸ In the Willis case, it became known early on that the officials most familiar with the case (and perhaps also officials in Main Justice) had given assurances that a grant of clemency was appropriate. But even if the recommendations of the judge and prosecutor had not become public, there was no reason to doubt that the established Justice Department review process had been fully complied with, and that it had likely resulted in a recommendation favoring clemency. Such official support for a clemency request seems to confirm its intrinsically deserving nature, in light of the law enforcement and sentencing policies involved, and thus serves as a shield against public criticism.

The President had no such protection in the Vignali case, not because he received no official Justice Department recommendation in the case, but

⁹⁷ It appears that senior White House staff may have been operating under a misconception respecting the position of the United States Attorney in Minnesota whose office had prosecuted the case. And the testimony of Chief of Staff John Podesta suggests that he may have been confused by the intervention of the U.S. Attorney in Vignali's home town of Los Angeles, who had no role in the prosecution of the case and whose views about the merits of the case were of questionable relevance. *House Hearings, supra* note 35.

⁹⁸ The White House is under no obligation to divulge the nature of the Attorney General's advice in clemency cases, and has not made a practice of doing so since the administration of Franklin Roosevelt. *See Collar Buttons, supra* note 4, at 1490, n.29.

because it was evident that he had not relied on it. Once the negative views of officials in the field became known, the President could not point to official endorsements when questions were raised about the merits of the case.⁹⁹ When it later became known that his own brother-in-law had been paid to lobby him about the case, the President had no credible defense against the ensuing charges of cronyism and abuse of power.

4. The Lull of Routine- In addition to its practical advantages, a regular administrative process has certain less tangible value for the discretionary decision-maker. The simple observance of an established routine, the application of familiar standards by career staff insulated from the political process, the central role of a politically accountable official who has an independent institutional stake in the matter, all combine to give ordinary people an expectation that clemency decisions will be made fairly and without regard to an applicant's social position or political connections. In a word, where the decision-making process is perceived as having independent integrity, whatever decision results is likely to be accepted without too close a look at its merits.

In summary, the regular process followed in the Willis case gave the President the benefit of reliable factual information, a consistent approach to the policy issues, official endorsement of his decision, and the stamp of bureaucratic routine -- all of which combined to guarantee his action a measure of public acceptance. This "textbook" process produced a "textbook" grant of mercy, one that was generally commended by those few who took notice of it. In contrast, the absence of any observable procedural regularity or relevant official support in the Vignali case left the President with no credible independent justification for his decision when evidence of Hugh Rodham's role came to light.

The political advantage of a credible review process is perfectly illustrated elsewhere in this volume by Richard Celeste, as he describes the two clemency initiatives he undertook during his final year as Governor of Ohio.¹⁰⁰ One of these involved battered women imprisoned for murdering

⁹⁹ Judge Doty publicly expressed dismay when the grant was announced, and told the press that, had he been asked, he would have recommended against clemency. See *Los Angeles Cardinal Regrets Role in Pardon*, N.Y. TIMES, Feb. 13, 2001, at A26 ("I have no idea why it happened, but we are all aghast.") See also Bob von Sternberg & Pam Louwagie, *Judge Who Sentenced Dealer in Minnesota Questions Clemency*, STAR TRIB. (Minneapolis, MN), Feb. 15, 2001, at A1; *Drug Kingpin's Release Adds to Clemency Uproar*, L.A. TIMES, Feb. 11, 2001. Judge Doty later wrote about the Vignali commutation that "the prosecutor was outraged and the judge was astonished and thought that justice had not been done." *View from the Bench*, *supra* note 63, at 162.

¹⁰⁰ Richard F. Celeste, *Executive Clemency: One Executive's Real Life Decisions*, 31 CAP. U. L. REV. ___ (2002).

the men that had abused them, and the other involved a group of death row inmates. By his own account, the thorough and thoughtful investigation of the battered women's cases gained general public acceptance of acts of mercy that might otherwise have been controversial. In contrast, his hasty last-minute death penalty commutations, however well-intentioned, stirred up a public outcry that finally led to an amendment of the state constitution limiting the Governor's pardon power.¹⁰¹

Like the Willis and Vignali cases, Governor Celeste's two clemency initiatives demonstrate that an unlimited power to make exceptions to the law depends for its legitimacy upon a process that at least appears to limit it. They also demonstrate how a process that appears fair and regular can make pardoning an effective tool in the administration of justice, and ensure the success of a systematic pardoning initiative. Conversely, when the process fails, an executive's reputation may be tarnished and the power of his office diminished. Like President Clinton, Governor Celeste learned about the pardon paradox the hard way, and too late to avoid the fate the Framers foresaw for the careless pardoner.

V. LESSONS FOR THE FUTURE

It is tempting to dismiss Bill Clinton's final pardons as a manifestation of undisciplined grandiosity, and to blame him personally for misunderstanding the power and neglecting his pardoning responsibilities. In some measure this is a fair critique, and President Clinton's reputation has suffered justifiably.

But to ignore the larger context of the final Clinton pardons is to miss their most important lesson. The fact is that these pardons could not have happened had the Justice Department taken seriously its own responsibility for administering the power and advising the President in its use. The Justice Department did not try to help the President develop an agenda for

¹⁰¹ Celeste, a lifelong opponent of capital punishment, had been asked by the Ohio Public Defender to spare all 105 of the prisoners on Ohio's death row. *See* Kobil, *supra* note 4. Instead, "concerned that such a blanket commutation would short-circuit public debate and galvanize support for the death penalty," Celeste commuted to life the sentences of four men whose execution was imminent, and all four women. *See* Kobil, *supra* note 4. The ensuing firestorm of criticism "culminated in the irony of a sitting Governor filing a lawsuit designed to limit his own constitutional authority, suggest[ing] that clemency is perhaps the only executive power that public officials are actually anxious to relinquish." Kobil, *supra* note 4. The Celeste commutations are discussed approvingly in a number of law review articles about legal challenges to the convictions of battered women. *See e.g.*, Joan H. Krause, *Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 721-29 (1994).

pardoning at the beginning of his administration, did not encourage him to use the power regularly as his term went along, and did not try very hard to restrain him from abusing the power at the end. Nor did it take proper care of the process within its own house that had proved essential over the years to the legitimate exercise of the power. Instead, it insisted to the end on its own crabbed view of pardoning, and the parochial prosecutorial agenda it reflected.

When faced with the demands of a different vision of pardoning at the end of the Clinton Administration, the Justice clemency program simply stalled. Indeed, Justice seems to have actually been working at cross purposes with the White House, first in its passive refusal to provide the President with the favorable recommendations he sought, later in closing its doors to new applications, and finally in publicly criticizing the President's final grants.

For a president who hopes to have some latitude in exercising his pardon power, and to reclaim the power as a policy tool as well as an instrument of justice, it is essential to restore credibility and reliability in the pardon administrative process. The public must have confidence in the way pardons are brought to the President's attention and the way he decides them, or it will not accept the pardons themselves. The Clinton pardons teach again the lesson most presidents before him understood: it is essential to rely upon a credible independent administrative apparatus to reconcile the constitutional pardon power with the imperatives of the democratic process.

They also teach that the pardon administrative apparatus must have a degree of independence from the front end of the criminal justice system, and that its exercise must be informed by different values than those that drive a criminal prosecution.¹⁰² The Justice Department's failure in the first instance to educate President Clinton about his pardoning responsibilities, and its later failure to be responsive when he belatedly awoke to them on his own, were largely the result of its inability (or unwillingness) to appreciate that pardon necessarily and inevitably involves the possibility of revision or qualification of the punishment imposed. This failure of vision was largely responsible for the breakdown of an administrative system that had served the presidency well for over a century. But it also points the way toward much-needed reforms in that system.¹⁰³ A fuller appreciation of the reasons Bill Clinton avoided the

¹⁰² It has been suggested that pardoning reflects the right brain of the justice system, emphasizing such soft emotions as compassion and mercy that have almost disappeared from the legal system. See Susan A. Bandes, *Introduction*, in *THE PASSIONS OF LAW* 11 (Susan A. Bandes ed., N.Y.U. Press 1999).

¹⁰³ Compare Brian Hoffstadt, *Guarding the Integrity of the Clemency Power*, 13 *FED. SENT. RPTR.* 180 (2001) with Schultz, *supra* note 25. Schultz argues that the administration
(continued)

Justice Department's clemency review process should help future presidents integrate their use of the constitutional pardon power with other aspects of their law enforcement agenda.

of the pardon power should be removed from the Department of Justice because “the pardoning process seems to have been captured by the very prosecutors who run our inevitably flawed criminal justice system.” Schultz, *supra* note 25, at 178. He recommends that the White House should itself establish a process for reviewing pardons, to better carry out the President’s pardoning philosophy. Hoffstadt argues for an independent review process housed in the Justice Department, and suggests a number of ways the administration of the power can be insulated against “the danger and perception” of undue influence by prosecutors. He points out that there are several components within the Department – the Office of Legal Counsel, the Office of Policy Development, and the Office of Professional Responsibility whose role it is to “provide a different perspective.” Schultz, *supra* note 25, at 182. Both of these commentators call for “a hard look at, and thoughtful reform of, the federal clemency power.” Schultz, *supra* note 25, at 182; *See also* Love, *supra* note 25.