

CHAPTER 13

PARDON POWER AND EXECUTIVE CLEMENCY: REINVIGORATE THE PARDON POWER AND MAKE OPERATIONAL AND STRATEGIC USE OF EXECUTIVE CLEMENCY

THE ISSUE

With the rapid growth of the federal prison population and the expansion of legal barriers to reentry, the presidential pardon power by rights should play a central operational role in the federal criminal justice system. However, over the past 20 years, using the pardon power has been perceived as posing too great a political risk—at least until the end of a President's term. Governors have been similarly reluctant to pardon or commute prison sentences. As a consequence, during the past several administrations, the pardon power has been allowed to atrophy as a remedy available to ordinary people, and the Department of Justice (DOJ) has neglected its historical role as steward of the pardon power. The President should recognize the values pardon serves, define a clear operational role for pardon in the criminal justice system, and establish a system for administering the pardon power that will maximize its potential for correcting injustice and advancing the administration's policy objectives.

HISTORY OF THE PROBLEM

The pardon power is exercised by the President alone, without statutory limit. The pardon power in Article II of the Constitution gives the President unlimited authority to issue full or conditional pardons, commutations of sentence, remissions of fines, amnesties, and reprieves.¹ Clemency plays a vital role in the federal criminal justice system, because many prisoners are serving extremely lengthy sentences, including mandatory minimums, with no possibility of parole; post-conviction remedies have been significantly limited in recent years; and the collateral legal and social consequences of conviction are numerous, onerous, and frequently permanent. Even when Congress has recognized the need for remedial legislation to mitigate unduly harsh sentences, as it did in the recently enacted Fair Sentencing Act of 2010², prisoners serving mandatory sentences under the previous regime do not benefit from the new law. Ultimately, federal law includes no general relief mechanism that would substitute for clemency, either to reduce a prison sentence or relieve collateral consequences after a court-imposed sentence has been served.

Despite the evident need for clemency, the current system for administration of the pardon power is inefficient, unreliable, and results in very few grants. The pardon power has been administered since the mid-19th century by the Attorney General, assisted by the Pardon Attorney. Since the late 1970s, the Pardon Attorney has reported to the Deputy Attorney General (DAG), who signs all clemency recommendations to the President.³ The Pardon Attorney, in recent years a career DOJ lawyer, is assisted by five attorneys and additional support staff. The Office of the Pardon Attorney (OPA) reviews applications for clemency, directs the investigation of each case as

¹ U.S. CONST. art. II, § 2, cl. 1.

² Pub. L. No. 111-220, 124 Stat. 2372.

³ See Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: The President's Duty to Be Merciful*, Fordham Urb. L.J., 27 FORDHAM URB. L.J. 1483, 1489-90 (2000) (hereinafter *Collar Buttons*).

appropriate, and solicits the opinions of the judges and prosecutors involved in the case.⁴ OPA drafts a recommendation to grant or deny each request, which is approved by the DAG before being sent to the Office of White House Counsel. A recommendation is sent to the White House in every clemency case filed with DOJ, unless the case is withdrawn or otherwise is not completely processed, and each case is acted upon by the President.

In the past, a report containing sufficient information about each clemency case has been provided to the White House, but in recent years these reports have become less and less informative in a majority of cases. Currently, most clemency cases are treated by OPA in a summary fashion, with only a small percentage of cases being referred to the FBI for a background investigation or to the prosecutor for a recommendation. Many case reports are only a few sentences long, and in some cases there is no report at all. According to persons familiar with the operation of DOJ's clemency program, a prosecutor's recommendation in a case is almost invariably negative, if it is sought at all; DOJ's recommendation rarely deviates from that of the prosecutor; and the President generally accepts the DOJ recommendation. At the end of the last two administrations, the slow and inhospitable pardon process in DOJ resulted in end-runs to the White House by those who either had political connections or were in a position to hire people who did. As a result, pardoning was brought into disrepute and frequently failed to provide deserved relief through the established clemency procedures.⁵

Further complicating matters, the number of clemency applications has increased dramatically in recent years, and there is now a backlog of over 4,000 requests.⁶ President George W. Bush issued fewer commutations and pardons in absolute terms than any other President in recent history, with the exception of his father, and denied many times more.⁷ This is in sharp contrast from practice prior to 1980, when grants were made regularly and frequently.⁸ To date, President Obama has issued nine pardons.⁹ These pardons were made to individuals convicted of minor offenses many years ago.¹⁰ Further, he has denied more than 1500 petitions for clemency.¹¹

⁴ United States Attorney's Manual Standards for Consideration of Clemency Petitions, Section 1-2.110, Office of the Pardon Attorney, available at <http://www.justice.gov/pardon/petitions.htm>.

⁵ See, e.g., GEORGE W. BUSH, DECISION POINTS 104 (Crown 2010); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY (forthcoming 2010), available at <http://www.pardonlaw.com/materials/The%20Twilight%20of%20the%20Pardon%20Power3.27%282%29.pdf> (hereinafter *Twilight*).

⁶ George Lardner, Jr., *No Country for Second Chances*, N.Y. TIMES (Nov. 23, 2010).

⁷ Margaret C. Love, Final Report Card on Pardoning by George W. Bush (January 27, 2009 (rev. March 13, 2009)), available at <http://www.pardonlaw.com/materials/FinalReportCard.3.13.09.pdf>.

⁸ *Twilight*, supra note 4.

⁹ Charlie Savage, *In a First for Obama, Nine Pardons Are Granted*, N.Y. TIMES (Dec. 3, 2010).

¹⁰ *Id.*

¹¹ Presidential Clemency Actions by Administration (1945 to Present), Office of Pardon Attorney, Department of Justice, http://www.justice.gov/pardon/actions_administration.htm#obama (last visited Jan. 20, 2011). This includes petitions closed without presidential action pursuant to 28 CFR § 1.8.

RECOMMENDATIONS

1. Executive Clemency's Role in the Justice System

A. *Executive Clemency Currently Plays No Meaningful Part in the Justice System Despite a Growing Need for the President to Exercise his Pardon Power.*

There has been no considered discussion in this Administration of what role executive clemency should play in the federal justice system in light of the abolition of parole and the increase in collateral consequences, and initial efforts to reform the clemency review process have come to naught. Nor has there been evident congressional interest in the administration's clemency policies or practices. Reinvigorating the clemency program will allow the President to do justice in individual cases, signal his law enforcement priorities within the executive branch, and highlight the need for reform of the legal system.

Congress cannot regulate or limit the Presidential pardon power, as it is a power based in Article II of the Constitution. Congress can inquire into the use of the pardon power but such inquiries are infrequent. Congress may react when a controversial grant of clemency is made¹², or express support for particular clemency applicants and make public statements calling on the President to grant clemency to certain individuals.¹³ Ultimately however, the President must take the lead in revitalizing the executive power.

B. *Revitalize Executive Clemency.*

Executive

President Obama should make granting clemency a strategic priority for the White House. The Administration should develop a strategic plan for the use of the pardon power to advance the president's criminal justice policy agenda both within and outside of the executive branch. It should identify the functions of clemency in the federal justice system, both to reduce prison sentences and to recognize and reward rehabilitation, and consider what changes in the law may be in order to reduce the need for clemency. It should make public standards to guide those who wish to apply for clemency, as well as those who are responsible for reviewing and making recommendations on clemency applications. It should publicize particular clemency grants to help make Congress and the general public more comfortable with the use of clemency by showing the "human face" of

¹² For example, Congressional hearings were held to investigate President Bill Clinton's commutation of Puerto Rican terrorists in 1999 and his pardon of Marc Rich and others in 2001. Congressional hearings were also scheduled but later cancelled in 2007 to inquire into the racial breakdown of clemency grants, and into President George W. Bush's grant of clemency to I. Lewis "Scooter" Libby.

¹³ For example, Congressional members have called for the pardons of former Border Patrol agents Ignacio Ramos and Jorge Compean, long-dead boxer Jack Johnson, and convicted spy Jonathan Pollard.

those serving harsh prison sentences or burdened by the lingering collateral disabilities of a criminal conviction.

Examples might include granting clemency to:

- Provide relief from some severe collateral penalty or disability (e.g., deportation, disqualification from employment or licensure, ineligibility for a particular benefit or opportunity);
- Recognize exemplary post-sentence rehabilitation in cases where a person has turned her life around and become an exemplary contributor to her community;
- Recognize particularly harsh sentences (e.g., nonviolent drug offenders serving life sentences or mandatory minimums that the sentencing judge believed were disproportionate to the offense);
- Remedy unwarranted sentencing disparity (e.g., in the cases of girlfriends/wives, "drug mules," and first-time drug offenders serving longer sentences than those of their more culpable boyfriends/husbands, suppliers, or co-conspirators);
- Give retroactive application to changes in the law (e.g., to crack cocaine drug offenders who did not benefit from the provisions of the Fair Sentencing Act, which increased the amount of the drug needed to trigger mandatory minimums);
- Signal disapproval of a particular investigative or prosecutorial policy or practice (e.g., sentencing entrapment, trial penalty, or appeal waivers); or
- Release seriously ill or elderly prisoners who can receive adequate care in a noncustodial setting.

The Administration should also consider using clemency grants strategically to advance criminal justice reforms by matching individual grants of clemency with proposals to change the law that made clemency necessary in that instance. For example, grants to long-time legal residents threatened with deportation for dated minor convictions, to prisoners serving mandatory minimums for drug or gun offenses, and to people who have grown old or sick while in prison might be paired with calls to Congress to change sentencing laws or laws imposing collateral consequences. Whether through press releases, the State of the Union address, or personal meetings with members of Congress, the administration could use targeted individual clemency grants to advocate for legislative reform—e.g., to expand the safety valve or allow individuals who have served at least 15 years in prison to petition a court for a “second look” at their sentence. Other potential types of legislative reform may be in the area of laws imposing collateral consequences, such as mandatory deportation, firearms disqualification, or licensing debarment.

The President should also make the process for administering the pardon power more independent, efficient, and accountable. The President should consider whether it would be beneficial to remove the pardon process from DOJ to an independent board of appointees—perhaps consisting of a panel of retired federal judges that could operate with a degree of independence from federal prosecutors and give the president additional protection from political pressure. DOJ would continue to have an important role in clemency matters through providing the President with facts about a clemency case, and recommendations reflecting law enforcement’s perspective.

If the pardon advisory function remains in DOJ, the Office of the Pardon Attorney (OPA) must be given a clear mandate to carry out the president’s direction and sufficient resources to do so. The President should direct the Attorney General (AG) to personally review and sign all clemency recommendations, as he did between 1896 and 1978. As a member of the President’s cabinet, the AG can bring to bear both law enforcement and political perspectives. The current practice of having the Deputy Attorney General (DAG) or a subordinate official within his office sign clemency recommendations has allowed the pardon program to come under the control of prosecutors, and has constrained the pardon’s operational and policy functions. Having the AG take personal responsibility for the pardon program elevates the pardon program within DOJ and allows OPA to improve its ability to provide meaningful review to pardon applications.

In recognition of the strategic importance of clemency grants, the President should assign a senior official in the White House Counsel’s office to review and advise the President on pardon matters, and to review clemency recommendations on a regular basis. This would allow for regular opportunities for the President to review and act on clemency requests with his counsel.

Regardless of whether the responsibility for clemency recommendations stays with DOJ or is moved to a more independent board, the entity responsible for preparing clemency recommendations should develop a strategic plan for the use of the pardon power to accomplish the President’s criminal justice policy agenda. This entity should also issue specific standards to guide those who wish to apply for clemency and those who are responsible for reviewing and making recommendations on clemency applications. Furthermore, the President’s pardon policy and the standards for favorable consideration of pardon applications should be made public. Steps should be taken to introduce a degree of transparency and accountability into the pardon process, consistent with the privacy of clemency applicants and the prerogatives of the President. Pardon authorities should be afforded sufficient resources to ensure that applications are promptly and thoroughly reviewed, with a goal of ensuring that most cases are decided within two years of their receipt.

Finally, the AG should make maximum use of statutory alternatives to clemency in the form of commutation, such as the sentence reduction¹⁴ and the deportation authority.¹⁵ The

¹⁴ 18 U.S.C. § 3582(c)(1)(A)(i).

administration should develop alternatives to pardon to avoid or mitigate the collateral consequences of conviction, including advocating for expansion the Federal First Offender Act¹⁶, and creation of a program for awarding certificates of good conduct. Collateral consequences in federal law and regulations should be catalogued, and the administration should devise ways of enabling persons with convictions to avoid or mitigate these collateral consequences, either through federal agency waiver programs or by giving effect to state relief mechanisms.

Judicial

Judges should assist in the clemency process by including in the court record their opinion as to the appropriateness of the sentence imposed. The judicial branch generally becomes involved in the pardon process only when a sentencing judge is asked to make a recommendation in a particular pardon case, or to write a letter of support for a commutation applicant. However, in several cases, a judge has taken the initiative to recommend clemency either at sentencing or when a substantial portion of the sentence has been served, which may assist the President in making decisions.¹⁷

¹⁵ 8 U.S.C. § 1231(a)(4).

¹⁶ 18 U.S.C. § 3607.

¹⁷ See Joanna M. Huang,, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE. L. J. 131 (2010).

APPENDICES

Experts

Margaret Colgate Love, former U.S. Pardon Attorney, currently represents numerous clemency applicants (<http://www.pardonlaw.com/>)

Sam Morison, Counsel to the Office of Military Commissions; Former staff attorney in the Office of the Pardon Attorney

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Professor P.S. Ruckman, Editor of PardonPower.com blog, Professor of Political Science, Rock Valley College (<http://psruckman.com/>)

George Lardner, Journalist; Author of forthcoming study of presidential pardon
(<http://niemanwatchdog.org/index.cfm?fuseaction=about.viewcontributors&bioid=237>)

Sam Sheldon, Assistant U.S. Attorney, Southern District of Texas; successfully represented several clemency recipients in 2001

Further Information

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