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Reorganizing the Federal Clemency Process

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Abstract

The President relies on the Department of Justice to filter out ineligible applicants and recommend from the remainder which ones should receive clemency, but the department suffers from an actual or apparent conflict of interest. One proposed remedy would be for Congress to create an independent advisory board like the U.S. Sentencing Commission to review every clemency application and offer the President its recommendations. A better alternative would be for the President to move the Office of the Pardon Attorney into the Executive Office of the President and use the Vice President as his principal clemency adviser. The Vice President can offer the President several benefits in the clemency decision-making process that no one else in the government possesses.

Western civilization has always encouraged anyone in a position of authority to "temper...Justice with Mercie."[1] "The extraordinary power to grant clemency," which is an integral part of this tradition, "allows a chief executive to play God on this side of the River Styx by forgiving an offender's sins or remitting his punishment."[2] Clemency was a settled feature of English common law[3] and a feature of criminal justice during the early days of our nation.[4] The Framers saw a host of benefits in being able to extend offenders "forgiveness, release, [and] remission"[5] from a conviction or punishment,[6] and they vested that prerogative in the President by Article II of the Constitution.[7]

Criticisms of the Federal Clemency Process

Of late, however, the federal clemency process has come under considerable criticism.[8] Three charges in particular stand out. The

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Key Points

- The President relies on the Justice Department to filter out ineligible applicants and recommend from the remainder which ones should receive clemency, but the department suffers from an actual or apparent conflict of interest.
- The President needs unbiased recommendations that those decisions are based on their merits. Granting the Justice Department a privileged position in the clemency process cannot provide the necessary confidence that those goals will be achieved.
- One proposed remedy would be for Congress to create an independent advisory board like the U.S. Sentencing Commission to review every clemency application and offer the President its recommendations.
- A better alternative would be to move the Office of the Pardon Attorney into the Executive Office of the President and use the Vice President as the President's principal clemency adviser. The Vice President lacks an institutional conflict of interest and offers the President several benefits that no one else can offer.

first one is that Presidents have granted clemency too infrequently for it to serve its most beneficial and needed goal: expressing forgiveness and wiping the slate clean for an offender, particularly one who is simply an average person rather than a celebrity, who has admitted his wrongdoing and who has turned his life around.[9] Consider President Barack Obama. He commuted the terms of imprisonment imposed on more than 1,700 offenders whom he believed received unduly stiff sentences under the federal drug laws, but neither he nor his predecessors over the past three-plus decades have pardoned offenders at the rate that we saw for most of our prior history.[10] President Donald Trump should renew a hallowed tradition.

The second fault is that Presidents have used their clemency power in dishonorable ways, such as repaying old political debts or making new political allies.[11] Bill Clinton is Exhibit A (and B). He offered conditional commutations to the members of a Puerto Rican terrorist group, very possibly to enlist the support of the Puerto Rican community for Hillary Clinton's New York Senate race and Vice President Al Gore's presidential campaign. He also granted pardons and commutations during his last 24 hours in office to cronies, people with White House connections, or individuals who had contributed to his party or presidential library.[12] Such a tawdry practice dishonors a noble, revered criminal justice instrument.

The first and second criticisms focus on the actions of our Presidents, and it may not be possible to answer them without improving the character of the people we elect to that office.[13] The third criticism, however, targets a structural flaw in the federal clemency process: the doorkeeping role played by the Department of Justice.[14]

The President relies on the Justice Department to filter out ineligible applicants[15] and to recommend from the remainder which ones should receive clemency in some form or other, whether a pardon, commutation of sentence, rescission of a fine or forfeiture, general amnesty, or merely a stay in the execution of sentence.[16] The problem with that arrangement, however, is that the Justice Department suffers from an actual or apparent conflict of interest.

The Department of Justice is effectively an adversary to each applicant because it prosecuted every one of them.[17] That fact creates a serious risk that the department would be unlikely to look neutrally and dispassionately on an offender's claim that he should never have been charged with a crime; that he is innocent; that there was a prejudicial error in his proceedings; that his sentence was unduly severe; or that for some other reason, such as his post-conviction conduct, he should be excused or his conduct forgiven.[18] In any other decision-making process, critics maintain, a neutral party would play the role now performed by the department to avoid the appearance of a conflict of interest. The department should remain free to offer a recommendation as to whether the President should award clemency to a particular applicant, but it should not be in a position where it can decline to forward to the White House applications that a reasonable person would support.[19]

The President represents the nation when making clemency judgments. He is entitled to receive unbiased recommendations, and the nation is entitled to believe that those decisions are based on their merits. Granting the Justice Department a privileged position in the clemency process cannot provide the necessary confidence that those goals will be achieved.

Potential Remedies

A Clemency Board. One proposed remedy for this problem would be for Congress to create an independent, multimember advisory board like the U.S. Sentencing Commission that would review every clemency application and offer the President its recommendations.[20] By being independent of the Justice Department, the board would avoid the conflict of interest afflicting the latter. By being a collegial entity, the board could include a broad range of people—former law enforcement officials, defense attorneys, members of the clergy, criminologists, and so forth—with the types of diverse backgrounds and perspectives that best represent the varied opinions of the American public on clemency. The President, the applicant, and the public, the argument concludes, would be well served by such a commission.

A formal clemency board created by statute, however, would pose several problems for the President that he would rather avoid.[21] Principal among them would be the risk that the board or some of its members would use its existence and mission as a political platform to criticize a President's general clemency philosophy or individual decisions. That is a risk even if the President himself can freely select

and remove board members, but the risk becomes a certainty once Congress becomes involved. In any implementing legislation, Congress might demand, expressly or impliedly, the right for each chamber and party to select a certain number of board members or at least to have a role in approving commission members.[22] Politics would inevitably come to play a role in the board's decisions as members campaigned for clemency to be awarded for certain types of offenses (e.g., street crimes vs. white-collar crimes vs. drug crimes); to certain types of offenders (e.g., offenders identified by race, ethnicity, income level, and so forth); or to certain types of constituents (e.g., rural vs. suburban vs. urban offenders).

There is no legal or moral justification for using a spoils system to decide whether someone deserves forgiveness.[23] Besides, the President could always establish his own advisory board if he believed that it would be helpful. Just as the President does not dictate to Congress whether it should use committees and subcommittees to decide how to legislate, Congress should not dictate to the President whether he should use an advisory board to execute one of his prerogatives.

The Vice President. A better alternative would be for the President to move the Office of the Pardon Attorney into the Executive Office of the President and use the Vice President as his principal clemency adviser.[24] Unlike the Attorney General, the Vice President would be seen as impartial. He has no law enforcement responsibility and so lacks an institutional conflict of interest.

The Vice President also enjoys several institutional and practical benefits shared by no one else in the executive branch. He is a constitutional officer who serves the same four-year term as the President, which is generally longer than most Attorneys General serve. He has the stature necessary to referee disputes between White House Clemency Office staff and Justice Department officials, even if one of the latter is the Attorney General. He has ideal access to the President because he has an office in the West Wing. His judgment would be valuable to the President, particularly if he had served previously as a governor, because he would have made clemency decisions in that role.

There are, of course, occasions in which the President might value the opinions of someone else more than those of the Vice President. The classic example occurred when the Attorney General—Robert Kennedy—was the brother of the President—John Kennedy. But those scenarios may be few and far between. That one, after all, has not reappeared in the 50-plus years since it first occurred. Until then, it makes sense for the President to rely on the Vice President as the head of a White House Clemency Office and the President's principal clemency adviser.

Conclusion

The Vice President can offer the President several benefits in the clemency decision-making process that no one else in the government possesses. President Donald Trump should seriously consider using Vice President Mike Pence as his principal clemency adviser. Trump, future Presidents, clemency applicants, and the public would all benefit from that new arrangement.

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Endnotes

1. John Milton, *Paradise Lost*, Book X, in 2 The Works of John Milton 307 (F. Patterson ed. 1931); *see also*, *e.g.*, William Shakespeare, The Merchant of Venice act 4, sc. 1 ("The quality of mercy is not strained. / It droppeth as the gentle rain from heaven / Upon the place beneath. It is twice blest: / It blesseth him that gives and him that takes.... / It is an attribute to God himself, / And earthly power doth then show likest God's / When mercy seasons justice.").
2. Paul J. Larkin, Jr., *Essay: A Proposal to Restructure the Clemency Process—The Vice President as Head of a White House Clemency Office*, 40 Harv. J. L. & Pub. Pol'y 237, 239 (2017) (hereafter Larkin, *The Vice President and Clemency*).
3. *See*, *e.g.*, United States v. Wilson, 32 (7 Pet.) 150, 160 (1833) ("[T]his power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance."); 4 Blackstone, Commentaries *401; Edward Coke, The Third Part of the Institutes of the Law of England 233 (Lawbook Exchange, Ltd. 2002) (1817); Naomi D. Hurnand, The King's Pardon for Homicide Before A.D. 1307 (1969).
4. *See*, *e.g.*, Herrera v. Collins, 506 U.S. 390, 411–12 (1993); *Ex parte* Wells, 59 U.S. (18 How.) 307, 319–15 (1855); Stuart Banner, The Death Penalty: An American History 54 (2002); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 Harv. J.L. & Pub. Pol'y 833, 845 & nn. 32–41 (2016) (collecting authorities discussing the historical, legal, policy, and philosophical discussions for the use of clemency in America) (hereafter Larkin, *Revitalizing Clemency*). In fact, the practice likely began long before recorded history. *See*, *e.g.*, *Genesis* 4:8–16 ("Cain said to the Lord, 'My punishment is greater than I can bear! Today you have driven me away from the soil, and I shall be hidden from your face; I shall be a fugitive and a wanderer on the earth, and anyone who meets me may kill me.' Then the Lord said to him, 'Not so! Whoever kills Cain will suffer a sevenfold vengeance.' And the Lord put a mark on Cain, so that no one who came upon him would kill him. Then Cain went away from the presence of the Lord, and settled in the land of Nod, east of Eden.").
5. *Ex parte* Wells, 59 U.S. (18 How.) at 310.
6. Clemency was not a controversial issue for the Framers. The Articles of Confederation did not create a chief executive and did not empower the legislature to exercise clemency. The issue was the subject of little action or debate at the Constitutional Convention of 1787. Aside from vesting a clemency power in the newly created President, the Framers excluded cases of impeachment from the pardon power and rejected two other proposed restrictions. One would have required the Senate to approve clemency; the other would have exempted treason. *See*, *e.g.*, Jeffrey P. Crouch, The Presidential Pardon Power 14 (2009); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332, 1345 n.55 (2008); Todd David Peterson, *Congressional Power over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 Wake Forest L. Rev. 1225, 1228–35 (2003). The Framers believed that clemency could serve "as a correction for an errant conviction or unduly severe punishment, as a decision that a lesser punishment better serves the nation's interests, as a means of demonstrating that he oversees the operation of the criminal law, or simply as an act of grace." Larkin, *Revitalizing Clemency*, *supra* note 4, at 849–50.
7. *See* the Pardon Clause, U.S. Const. art. II, § 2, cl. 1 ("The President...shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."). The President's authority is plenary. *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867) ("This power of the President is not subject to legislative control."); 2 Joseph Story, Commentaries on the Constitution of the United States § 1504, at 324 n.4 (2011) (4th ed. Thomas M. Cooley ed., 1873) ("Congress cannot limit or impose restrictions on the President's power to pardon.").
8. *See*, *e.g.*, Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. Chi. L. Rev. 1 (2015); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 Tex. L. Rev. 569 (1991); Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. Crim. L. & Criminology 1169 (2010); Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 Harv. L. & Pol'y Rev. 447 (2009); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. Crim. L. & Criminology 593 (2012).
9. *See*, *e.g.*, Mary Bosworth, The U.S. Federal Prison System 97 (2002) ("[T]his power is hardly ever used."); Love, *supra* note 8, at 1169 ("For most of our nation's history, the president's constitutional pardon power has been used with generosity and regularity to correct systemic injustices and to advance the executive's policy goals. Since 1980, however, presidential pardoning has fallen on hard times, its benign purposes frustrated by politicians' fear of making a mistake, and subverted by unfairness in the way pardons are granted."); Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting 4 (Aug. 9, 2003) ("The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of mercy."), http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp08-09-03 [https://perma.cc/6EJN-ZWBE].
10. *See*, *e.g.*, Larkin, *Revitalizing Clemency*, *supra* note 4, at 854–55 ("From President Reagan through President Obama, the pardon power has fallen into desuetude. In fact, through his first term, President Obama granted fewer clemency applications than any full-term President since George Washington."); Love, *supra* note 8, at 1193–95, 1200–08. Obama increased the number of commutations, but not pardons, during his second term. Larkin, *The Vice President and Clemency*, *supra* note 2, at 237–38 & n.3.
11. *See*, *e.g.*, Stephanos Bibas, The Machinery of Criminal Justice 24 (2012) ("Presidential clemency is criticized as a perk for the rich and powerful, ranging from vice-presidential aide I. Lewis Libby to fugitive commodities trader Marc Rich."); Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. Crim. L. & Criminology 1131 (2010); Love, *supra* note 8, at 1195–1200.
12. Larkin, *Revitalizing Clemency*, *supra* note 4, at 881.
13. *Id.* at 913–16.

14. *See, e.g.*, Alschuler, *supra* note 11, at 1164; Barkow & Osler, *supra* note 8, at 13–15, 18–19; Larkin, *Revitalizing Clemency*, *supra* note 4, at 903–06; Kobil, *supra* note 8, at 622; Margaret C. Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. Tol. L. Rev. 89 (2015); Rosenzweig, *supra* note 8, at 609–10; P.S. Ruckman, Jr., *Preparing the Pardon Power for the 21st Century,* 12 U. St. Thomas L.J. 446, 446–47 (2016); Editorial, *It's Time to Overhaul Clemency,* N.Y. Times (Aug. 18, 2014) ("Even if the [Obama Clemency Project 2-14] succeeds, it is a one-time fix that fails to address the core reasons behind the decades-long abandonment of the presidential power of mercy. A better solution would be a complete overhaul of the clemency process. First and foremost, this means taking it out of the hands of the Justice Department, where federal prosecutors with an inevitable conflict of interest recommend the denial of virtually all applications. Instead, give it to an independent commission that makes informed recommendations directly to the president."), http://www.nytimes.com/2014/08/19/opinion/its-time-to-overhaul-clemency.html?_r=0 [https://perma.cc/7ZTM-A7NW].
15. For example, the President can grant clemency only to parties who have been convicted of "Offences against the United States," U.S. Const. art. II, § 2, cl. 1, so offenders convicted of state-law crimes are ineligible for federal relief.
16. *See, e.g.*, Larkin, *Revitalizing Clemency*, *supra* note 4, at 846–47 (discussing the different forms of federal clemency). Clemency applications are first reviewed by the Office of the Pardon Attorney at the Department of Justice, which forwards recommendations to the White House. *See* 28 C.F.R. §§ 0.35, 1.1 to 1.11 (2011); *Office of the Pardon Attorney*, U.S. Dep't of Justice, http://www.justice.gov/pardon/. For an excellent historical discussion of how the federal clemency process has worked, see Love, *supra* note 8, at 1175–1204.
17. Clemency petitions were initially considered by the Department of State, but the responsibility was transferred to the Justice Department after it was created in the 19th century. The Office of the Pardon Attorney came into being to assist the Attorney General in managing the clemency process for the President. That process worked well until Attorney General Griffin Bell transferred management to the Deputy Attorney General, who is responsible for overseeing all criminal prosecutions brought by the department and the U.S. Attorney's Offices. Combining the two responsibilities in one department official creates an actual or apparent conflict of interest, since few officials in that position, critics argue, would be willing to recommend that the President exonerate or grant leniency to someone whom a colleague has sent to prison. Concern with this conflict of interest has existed for some time. *See* William W. Smithers, *Nature and Limits of the Pardoning Power*, 1 J. Am. Inst. Crim. L. & Criminology 549, 557 (1911) (criticizing the notion that "it is frequently considered advisable to consult the prosecuting attorney" due to the "common belief" that he is "disinterested"; "this is generally an error. The degree of partisanship entering into the selection and the duties of a modern prosecuting officer, the probability of his having set views and his purely legal conception of a case render his opinion of little value in the higher field of clemency. He is not apt to possess or have been impressed with the broader field of facts, and while he may be requested to give some undisputed data, his opinion [on clemency] should not be asked. All the facts, judicial and extra-judicial, plus the doctrines of clemency, ought to guide the executive to an opinion entirely his own. He has no right to shirk the responsibility.").
18. *See, e.g.*, Rosenzweig, *supra* note 8, at 609–10 ("[C]areer prosecutors (like any human beings) are products of their culture and less likely to see flaws in the actions of their colleagues.").
19. *See* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 Va. L. Rev. 271, 290 (2013) ("Under Bill Clinton and George W. Bush together, the Justice Department received more than 14,000 petitions for commutations, but recommended only 13 to the White House.") (footnote omitted).
20. *See, e.g.*, Barkow & Osler, *supra* note 8, at 1.
21. *See* Larkin, *The Vice President and Clemency*, *supra* note 2, at 249–53.
22. *See, e.g.*, U.S. Const. art. II, § 2, cl. 2 (the President can appoint "Officers" of the United States "by and with the Advice and Consent of the Senate"); 47 U.S.C. § 154(b)(5) (2012) ("The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission."); 52 U.S.C. § 30106(a)(1) (2012) ("There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party."); Buckley v. Valeo, 424 U.S. 1, 113 (1976) (noting that, under the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (held unconstitutional in part by *Buckley*), the President pro tempore of the Senate appointed two members of the Federal Election Commission "upon the recommendations of the majority leader of the Senate and the minority leader of the Senate."). In that regard, if a clemency commission did not exercise governmental power, the Appointments Clause might not legally bar the Senate and House of Representatives from demanding authority to appoint some of its members. Nothing, however, prevents Congress from making such a demand as a matter of politics.
23. The U.S. Sentencing Commission occupies a different position. It is a collegial body, but its sentencing guidelines must comply with the punishments defined by the federal criminal code. Larkin, *Revitalizing Clemency*, *supra* note 4, at 252. A clemency commission would not have to operate within those guardrails because there are and can be no statutory restrictions on who may receive clemency. *See supra* note 7.
24. *See* Larkin, *The Vice President and Clemency*, *supra* note 2, at 241–48; Larkin, *Revitalizing Clemency*, *supra* note 4, at 900–03.