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ARTICLE

THE PRESIDENT'S POWER TO COMMUTE: IS IT STILL RELEVANT?

JEFFREY CROUCH*

On November 21, 2011, President Barack Obama commuted the first prison sentence of his presidency, allowing Eugenia Marie Jennings to leave prison on December 21, 2011, after serving less than half of her sentence for a crack cocaine violation.¹ Mandatory minimum sentencing guidelines held that the thirty-four-year-old Jennings would have to serve an approximate twenty-two year prison term because of two minor prior convictions, but the president's clemency decision allowed Jennings, who had three children and was dealing with a recent cancer diagnosis, to leave prison after roughly ten years behind bars.²

Recent American presidents seldom issue pardons, and they commute sentences even less frequently than that,³ so clemency observers took special note of the Jennings sentence commutation. Families Against Mandatory Minimums president Julie Stewart hailed the decision, and the American Civil Liberties Union expressed optimism that perhaps the Jennings commutation might lead to further action by the Obama administration to end the "war on drugs."⁴ P.S. Ruckman, Jr., editor of the

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1. *President Barack Obama Grants Pardons and Commutation*, DEP'T OF JUSTICE (NOV. 21, 2011), <http://www.justice.gov/opa/pr/2011/November/11-opa-1519.html>.

2. Steven Wishnia, *Obama Makes a Few Pardons on Unfair Drug Convictions, but Has Granted Fewer Requests for Clemency Than Any President in the Last Century*, ALTERNET (NOV. 23, 2011), http://www.alternet.org/story/153204/obama_makes_a_few_pardons_on_unfair_drug_convictionspercent2C_but_has_granted_fewer_requests_for_clemency_than_any_president_in_the_last_century/.

3. *See Clemency Statistics*, DEP'T OF JUSTICE, <http://www.justice.gov/pardon/statistics.htm> (last visited Apr. 7, 2012).

4. *FAMM Commends Obama for Exercising Clemency Power*, FAMILIES AGAINST MANDATORY MINIMUMS (NOV. 21, 2011), <http://famm.org/NewsandInformation/PressReleases/FAMMCommendsObamaforExercisingClemencyPower.aspx>; Emma Andersson, *Obama's Commutation: A Prelude to Systemic Reform?*, AM. CIV. LIBERTIES UNION (NOV. 23, 2011), <https://www.aclu.org/blog/criminal-law-reform/obamas-commutation-prelude-systemic-reform>. *See also*

Pardonpower.com blog, characterized the Jennings commutation as “a big-time decision . . . Obama’s first bold act of executive clemency.”⁵ Several months later, though, it appears that whatever optimism existed earlier has been tempered—if not extinguished—by executive inaction. As of this writing in August 2012, Jennings remains the sole federal offender to receive a sentence commutation from President Obama.

In the following article, I will examine whether the president’s power to commute sentences is still relevant in the twenty-first century. In Part I, I begin with a brief review of the clemency literature. Next, I sketch a brief history of the clemency power. Then, I consider the various forms that clemency can assume and describe how to apply for a presidential pardon. Part I ends with a closer look at pardon and commutation statistics for modern presidents. In Part II, I examine several “notable” twentieth century commutations that I categorize as either justifiable or regrettable. More importantly, I contend that these examples illustrate that clemency, and commutations, in particular, have played a pivotal role at various important moments in American history, a fact which may be easily overlooked given how few clemency grants have been awarded by recent presidents. After that, I consider some of the factors that are likely working to constrain presidential pardoning practices. Finally, I review various scholars’ efforts to sustain the important conversation about clemency, and conclude that the clemency power—and the ability to commute sentences—will remain relevant indefinitely.

I. CLEMENCY AND COMMUTATIONS: AN OVERVIEW

A. *Literature Review*

The president’s pardon power has not been one of the more popular research topics for political scientists and legal scholars. In the last couple of decades, though, political scientists David Gray Adler,⁶ Jeffrey Crouch,⁷ Louis Fisher,⁸ Mark Rozell,⁹ and P.S. Ruckman, Jr.,¹⁰ among others, have contributed important work to the body of research on the federal clemency

Douglas A. Berman, *President Obama Commutes Crack Sentence and Issues Five More Pardons*, SENT’G L. & POL’Y (Nov. 21, 2011), http://sentencing.typepad.com/sentencing_law_and_policy/2011/11/president-obama-commutes-crack-sentence-and-issues-five-more-pardons.html.

5. Arthur Delaney & Lucia Graves, *Obama Commutes Crack Prison Sentence in ‘First Bold Act of Executive Clemency’*, HUFFINGTON POST (Nov. 22, 2011, 6:46 PM), http://www.huffingtonpost.com/2011/11/22/crack-prison-sentence-com_n_1108513.html.

6. David Gray Adler, *The President’s Pardon Power*, in INVENTING THE AM. PRESIDENCY 209 (Thomas E. Cronin ed., 1989).

7. Jeffrey Crouch, *Presidential Misuse of the Pardon Power*, 38 PRESIDENTIAL STUD. Q. 722 (2008); JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* (2009) [hereinafter *THE PRESIDENTIAL PARDON POWER*]; Jeffrey Crouch, *The Toussie Pardon, “Unpardon,” and the Abdication of Responsibility in Clemency Cases*, 38 CONG. & THE PRESIDENCY 77 (2011) [hereinafter *The Toussie Pardon*].

8. Louis Fisher, *“The Law:” When Presidential Power Backfires: Clinton’s Use of Clemency*, 32 PRESIDENTIAL STUD. Q. 586 (2002) [hereinafter *When Presidential Power Backfires*].

power. They have been joined by legal scholars Daniel Kobil,¹¹ Margaret Love,¹² and Samuel Morison,¹³ to name just a few of the major contributors in that field. Together, the studies produced by these observers provide valuable context to interested readers.

B. *History of the Clemency Power*

Kathleen Dean Moore points out that the concept of clemency has been around for a very long time: the Babylonians of eighteenth century BC added clemency language to the Code of Hammurabi, the “oldest known legal code”;¹⁴ in ancient Athens, an offender could be spared if he could collect 6,000 signatures; in Rome, Pontius Pilate facilitated one of the more famous pardons in history—the crowd’s decision to free Barabbas instead of Jesus Christ.¹⁵

In England, the pardon power was often a source of contention between such authorities as the King and Parliament.¹⁶ The American Framers, leery of a powerful ruler given their strained relationship with King George III, did not even create a true federal executive under the Articles of Confederation, and they did not initially include clemency language in either the New Jersey Plan or the Virginia Plan.¹⁷ Nevertheless, South Carolina delegate John Rutledge wrote language concerning a pardon power into

9. Mark J. Rozell, *The Presidential Pardon Power: A Bibliographic Essay*, 5 J.L. & POL. 459 (1989); Mark J. Rozell, *President Ford’s Pardon of Richard M. Nixon: Constitutional and Political Considerations*, 24 PRESIDENTIAL STUD. Q. 121 (1994).

10. P.S. Ruckman, Jr., *Presidential Character and Executive Clemency: A Reexamination*, 76 SOC. SCI. Q. 213 (1995); P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development, and Analysis (1900-1993)*, 27 PRESIDENTIAL STUD. Q. 251 (1997); P.S. Ruckman, Jr. & David Kincaid, *Inside Lincoln’s Clemency Decision Making*, 29 PRESIDENTIAL STUD. Q. 84 (1999); P.S. Ruckman, Jr., *Seasonal Clemency Revisited: An Empirical Analysis*, 11 WHITE HOUSE STUD. 21 (2012) (forthcoming). Ruckman is also writing two books: *George W. Bush and the Pardon Power*, and *Pardon Me, Mr. President: Adventures in Crime, Politics and Mercy*.

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

12. Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483 (2000); Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT’G REP. 125 (2001); Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton’s Last Pardons*, 31 CAP. U.L. REV. 185 (2003); Margaret Colgate Love, *Reviving the Benign Prerogative of Pardoning*, 32 LITIG. 25 (2006); Margaret Colgate Love, *Reinventing the President’s Pardon Power*, 20 FED. SENT’G REP. 5 (2007); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010).

13. Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1 (2005); Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253 (2010).

14. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 15 (1989).

15. *See id.* at 16–17.

16. *Id.* at 17.

17. *See* THE PRESIDENTIAL PARDON POWER, *supra* note 7, at 14–15.

the margin of the Virginia Plan.¹⁸ Some Framers unsuccessfully attempted to include limiting clauses that would force the president to share the pardon power with the Senate, prevent the president from using clemency to excuse treason, or disallow the pardon power's use before an offender had been convicted of a crime.¹⁹ The Framers ultimately decided to give the president the virtually unlimited power to “grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”²⁰

Alexander Hamilton wrote in *Federalist #74* that the clemency power would provide a societal safety valve, allowing the president to defuse tensions and put down uprisings through the promise of official forgiveness: “in seasons of insurrection or rebellion . . . a well-timed offer of pardon to the insurgents . . . may restore the tranquility of the commonwealth.”²¹ In addition to this crucial public welfare purpose, Hamilton notes, clemency could also address situations where the law might provide for an unfairly punitive sentence: “without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”²²

C. *Forms of Clemency: Obtaining Relief*

The short constitutional phrase “reprieves and pardons” includes a variety of forms of pardon or, more accurately, federal executive clemency (the “umbrella” term that includes several clemency options). For example, the president has the ability to grant a full pardon, which is the most complete form of forgiveness available.²³ Recent presidents have relied almost exclusively upon the full pardon, save for a handful of sentence commutations. A commutation occurs when the president merely reduces an offender's sentence—it does not go as far as a full pardon to, for example, restore the offender's civil rights.²⁴ Other options for the chief executive include the ability to remit fines and forfeitures, to grant a reprieve or respite (which simply delays the full punishment), and to grant amnesty, which is normally offered to a group rather than an individual.²⁵

A petitioner may seek presidential clemency in two ways: first, and most commonly, by going to the pardon attorney's website and completing an application for the particular form of clemency desired.²⁶ The pardon

18. W. H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 15 (1941).

19. *THE PRESIDENTIAL PARDON POWER*, *supra* note 7, at 15–19.

20. U.S. CONST. art. II, § 2, cl. 1.

21. Alexander Hamilton, *No. 74: The Command of the Military and Naval Forces, and the Pardon Power of the Executive*, in *THE FEDERALIST PAPERS* 415, 417 (Clinton Rossiter ed., 1961).

22. *Id.* at 415.

23. Kobil, *supra* note 11, at 576.

24. *Id.* at 577.

25. *Id.* at 576–78.

26. *Application Forms*, DEP'T OF JUSTICE, <http://www.justice.gov/pardon/forms.htm#s3> (last visited Apr. 7, 2012).

attorney is an official in the Department of Justice charged with handling case files and making recommendations about clemency to the White House. The president ultimately makes the decision whether or not to follow the pardon attorney's advice. Second, a petitioner with the right connections and resources may be able to reach the president himself, or the president's relatives, friends, or closest advisors, in order to make a more direct case. Regardless of which path a petitioner chooses, the destination is almost always the same: a dead end.

D. Modern Sentence Commutations: The Numbers

Among the various forms of clemency available, the commutation has been a modern president's second-favorite form of clemency next to the pardon. Still, the declining use of both forms of clemency over the past several decades is striking. In his twelve years as president, Franklin D. Roosevelt granted 2,819 pardons and commuted 488 sentences.²⁷ Harry S. Truman granted 1,913 pardons and 118 commutations, and his successor, Dwight D. Eisenhower, issued 1,110 pardons and 47 commutations.²⁸ In just under three years as chief executive, John F. Kennedy granted 472 pardons and 100 commutations, while his successor, Lyndon B. Johnson, issued 960 pardons and commuted 226 sentences.²⁹ Richard M. Nixon granted 863 pardons and 60 sentence commutations before resigning from office in favor of Gerald R. Ford, who pardoned Nixon and 381 others, while commuting 22 sentences.³⁰ Jimmy Carter granted 534 pardons and 29 commutations as president, and his successor, Ronald Reagan, granted 393 pardons and commuted 13 sentences.³¹ George H.W. Bush granted 74 pardons and just 3 commutations in his term as president.³² Bill Clinton was more generous than Bush, with 396 pardons and 61 commutations over his eight years in the Oval Office.³³ Clinton's approach appears to be an aberration, though, as successive presidents have pardoned more on par with Bush.

The decline of clemency is even more apparent if one considers the percentage of successful clemency applications in the last three decades by president.³⁴ Jimmy Carter approved 21 percent of petitions for pardon or commutation (563/2,627), Ronald Reagan granted 12 percent (406/3,404), and George H.W. Bush approved only 5 percent (77/1,466).³⁵ Bill Clinton was more generous than his immediate predecessor in terms of positive

27. See *Clemency Statistics*, *supra* note 3.

28. See *id.*

29. See *id.*

30. See *id.*

31. See *id.*

32. See *id.*

33. See *Clemency Statistics*, *supra* note 3.

34. See *id.*

35. See *id.*

clemency decisions (457), but the volume of applications received (7,489) drives his positive clemency decision percentage down to 6 percent, close to George H.W. Bush.³⁶

As staggering as these numbers may be, pardons and commutations have all but dried up in the last decade. George W. Bush granted 189 pardons and 11 commutations out of 11,074 requests during his two terms, for a clemency approval rate below 2 percent.³⁷ The few successful applicants during the Bush years shared common characteristics. According to Margaret Love, a former pardon attorney, “almost every one of [Bush’s] post-sentence pardons went to ordinary individuals convicted many years before of minor offenses,” and “more than 2/3 of Bush’s pardons were granted to people who never went to prison at all.”³⁸ Eight of Bush’s eleven commutation recipients were “drug offenders who had served a substantial period of time in prison.”³⁹ Overall, safety appeared to be the underlying motive of the Bush pardoning philosophy. To date, Barack Obama seems to be following suit—he has pardoned twenty-two offenders and commuted just one sentence.⁴⁰ From the beginning of his presidency through the first nine months of fiscal year 2012, Obama has received 6,662 applications for pardon or commutation, making for an overall clemency approval rate of less than 1 percent.⁴¹ Scattered among clemency grants for marijuana and cocaine offenses, among other things, are trivial grants to a coin mutilator, Ronald Lee Foster, and an unlawful alligator hide dealer, Bobby Gerald Wilson.⁴²

The last ten years in particular are a sad legacy for what remains a potentially potent presidential power. Indeed, there have been several occasions in history when the clemency power, and commutations in particular, were recognized as important tools of statecraft.⁴³

II. CLEMENCY AND COMMUTATIONS FROM THE 20TH CENTURY TO TODAY

As recently as the beginning of the twentieth century, the president has used commutations in circumstances with national implications. Several presidents have commuted the sentence of a popular political figure in order to quell controversy or extend an olive branch.

36. *See id.*

37. *See id.*

38. Margaret Colgate Love, *Final Report Card on Pardoning by George W. Bush* (2009) available at <http://www.pardonlaw.com/materials/FinalReportCard.3.13.09.pdf>.

39. *Id.*

40. *See Clemency Statistics*, *supra* note 3.

41. *See id.*

42. *Pardons Granted by President Barack Obama (2009–2013)*, DEP’T OF JUSTICE, <http://www.justice.gov/pardon/obamapardon-grants.htm> (last visited Apr. 14, 2012).

43. For an overview of the executive clemency power used as a tool of statecraft see THE PRESIDENTIAL PARDON POWER, *supra* note 7.

On the other hand, there are presidents who have abused the power of clemency in regrettable ways to further their own personal interests. The following examples will illustrate how the president's commutation power has been—for better or for worse—a crucial component in a variety of historically significant situations.

A. *Notable Justifiable Commutations*

The commutations of Socialist Eugene Debs, “Back to Africa” leader Marcus Garvey, Puerto Rican Nationalist Oscar Collazo, and labor leader Jimmy Hoffa were controversial, yet justifiable. These decisions were made consistent with Alexander Hamilton's view of clemency as a vital tool to “restore the tranquility of the commonwealth.”⁴⁴

1. *Eugene Debs*

Eugene V. Debs was a well-known Socialist who represented his party in the presidential race five times. He was sentenced to ten years in prison for violating the Espionage Act by criticizing the U.S. government and the Selective Service Act.⁴⁵ Debs received around one million votes in the 1920 presidential election while sitting in federal prison. Impressed by Debs' vote totals in 1920 and his earlier success in the 1912 presidential race, newly elected President Warren G. Harding “let it be known that he considers the fact that Debs was his opponent [in the election] puts his case in a class by itself.”⁴⁶ Previous President Woodrow Wilson had resisted the urging of top labor leaders to pardon Debs, but President Harding allowed Debs to leave prison in Atlanta to travel unescorted to Washington, D.C. to meet with the Attorney General about his case. The *New York Times* suggested that any Debs clemency decision would stem from the president's concern for “political expediency.”⁴⁷

Attorney General Harry Daugherty recommended a sentence commutation for Debs based on the prisoner's advanced age, but he also recognized the volatile political context.⁴⁸ In a report to President Harding, Daugherty noted that, as Debs had not applied for a pardon, normally “no action would be taken in his case.”⁴⁹ However, clemency was a possibility because of

the enormous mass of communications received in his behalf by people who clearly regard Debs as a martyr to the cause of free-

44. Hamilton, *supra* note 21.

45. *Wilson Refuses to Pardon Debs*, N.Y. TIMES, Feb. 1, 1921, at 1.

46. *Id.*; *President is Expected to Pardon Debs When Freeing Other War Offenders Friday*, N.Y. TIMES, Dec. 21, 1921, at 1.

47. *Debs, Minus Guard, Visits Washington to Plead His Cause*, N.Y. TIMES, Mar. 25, 1921, at 1.

48. *Daugherty's Report on Release of Debs*, N.Y. TIMES, Dec. 31, 1921, at 4.

49. *Id.*

dom of speech and the most conspicuous example of the illegal prosecution, and even persecution, of those who differed with the policy of this Government and the course pursued by it in the late war in Europe.⁵⁰

Daugherty described Debs as “a man of much personal charm and impressive personality” who may very well encourage others to commit crimes, noting that “[i]n the work [Debs] has undertaken these qualities make him a very dangerous man, calculated to mislead the unthinking and afford an excuse for those with criminal intent.”⁵¹ What is more, Debs’ “prolonged confinement will have an injurious effect on a large number of people who will undoubtedly regard his imprisonment unjustifiable”⁵² Harding did not comment publicly on his decision, but he ordered Debs’ sentence to cease on Christmas Day, 1921.⁵³

2. *Marcus Garvey*

In 1927, President Harding’s successor, Calvin Coolidge, commuted the prison sentence of Marcus Garvey and had him deported to his native Jamaica as an “undesirable alien.”⁵⁴ Garvey was a popular and charismatic activist, writer, and speaker who, as a leading proponent of the Back-to-Africa movement, successfully appealed to African-American followers in the United States to participate in his plan to establish an African nation for blacks, of which he would be president.⁵⁵ In order to transport his supporters to their new home, Garvey established two businesses, the Black Star Steamship Line and the Black Star Steamship Company, which he intended to be owned and staffed only by African-Americans.⁵⁶ The Black Star Steamship Company eventually went bankrupt; Garvey was charged and convicted of defrauding his investors, with a resulting penalty of five years in prison along with a \$1,000 fine.⁵⁷ Shortly thereafter, a crowd of two thousand African-American supporters protested, raised money, and signed a petition to President Harding requesting bail for Garvey.⁵⁸ Garvey backers also sent “scores of telegrams” protesting his conviction to the Associated Press’s Washington location in the weeks that followed.⁵⁹ As Garvey de-

50. *Id.*

51. *Id.*

52. *Id.*

53. *Harding Frees Debs and 23 Others Held for War Violations*, N.Y. TIMES, Dec. 24, 1921, at 1.

54. *Will be Deported Soon*, N.Y. TIMES, Nov. 24, 1927, at 1.

55. *Garvey Convicted in Black Line Fraud*, N.Y. TIMES, June 19, 1923, at 21 [hereinafter *Garvey Convicted in Black Line Fraud*]; *Garvey Sentenced to 5 Years in Jail*, N.Y. TIMES, June 22, 1923, at 19.

56. *Marcus Garvey, 60, Negro Ex-Leader*, N.Y. TIMES, June 11, 1940, at 25.

57. *Garvey Convicted in Black Line Fraud*, *supra* note 55; *Garvey Sentenced to 5 Years in Jail*, *supra* note 55.

58. *2,000 Negroes Ask Bail for Garvey*, N.Y. TIMES, July 2, 1923, at 8.

59. *Plead for Marcus Garvey*, N.Y. TIMES, July 17, 1923, at 14.

parted the United States for the last time, a crowd of 500 black supporters gathered to bid him farewell.⁶⁰ His popularity has endured—in the 1980s, both Jamaican Prime Minister Edward P.G. Seaga and Rep. Charles Rangel (D-NY) unsuccessfully sought a posthumous pardon for Garvey, who died in 1940.⁶¹

3. *Oscar Collazo*

Puerto Rican Nationalists Oscar Collazo and Griselio Torresola attempted to assassinate President Harry Truman on November 1, 1950, by forcing their way into the Blair House, where the President was temporarily staying.⁶² A brief shootout left Collazo wounded and Torresola dead, while a White House guard was killed and two other White House guards were injured.⁶³ From his hospital bed, Collazo told the Secret Service that his and Torresola's attempt on Truman's life was motivated by their desire to grant Puerto Rico freedom from American control.⁶⁴ President Truman was on record as believing "the Puerto Rican people should have the right to determine for themselves Puerto Rico's political relationship to the Continental United States," a view that he confirmed at a press conference the day after the assassination attempt.⁶⁵ In March of the following year, Collazo was found guilty of four crimes, and faced the death penalty for two of them.⁶⁶

On July 24, 1952, hours before the starting date of a new, more liberating Puerto Rican Constitution, President Truman commuted Collazo's sentence from death in the electric chair to life behind bars.⁶⁷ The decision apparently rested upon Truman's desire to show friendship toward Puerto Rico on the occasion of an important milestone.⁶⁸ Collazo was released from the remainder of his sentence in 1979 by President Jimmy Carter.⁶⁹

4. *Jimmy Hoffa*

International Brotherhood of Teamsters leader James R. "Jimmy" Hoffa was convicted of jury tampering and pension fund fraud and sen-

60. JUDITH STEIN, *THE WORLD OF MARCUS GARVEY: RACE AND CLASS IN MODERN SOCIETY* 207 (1986).

61. Francis X. Clines, *Jamaican Asks U.S. to Pardon a Hero*, N.Y. TIMES, Oct. 18, 1983, at A3; States News Service, *Rangel Seeks Exoneration of Marcus Garvey*, N.Y. TIMES, Apr. 5, 1987, at A39.

62. Anthony Leviero, *President Resting*, N.Y. TIMES, Nov. 2, 1950, at 1.

63. *Id.*

64. Paul P. Kennedy, *Truman Guards Increased; Puerto Rico Jails Hundreds; Grand Jury Here Summons 3*, N.Y. TIMES, Nov. 3, 1950, at 1.

65. *Id.*

66. Paul P. Kennedy, *Blair House Assassin Guilty; Death Sentence is Mandatory*, N.Y. TIMES, Mar. 8, 1951, at 1.

67. Anthony Leviero, *Assassin Spared by Truman in Gesture to Puerto Rico*, N.Y. TIMES, July 25, 1952, at 1.

68. *Id.*

69. *Oscar Collazo, 80, Truman Attacker in '50*, N.Y. TIMES, Feb. 23, 1994, at A16.

tenced to serve thirteen years in federal prison.⁷⁰ Instead, he ended up serving just under five years behind bars when President Richard Nixon commuted his sentence on December 23, 1971, on the condition that Hoffa give up his labor management activities until March 6, 1980, the last day of his original sentence.⁷¹ In a statement, the Justice Department noted that Josephine Hoffa, Hoffa's wife, "[was] suffering from a severe heart condition with attendant difficulties," and that Hoffa had been an "excellent" prisoner.⁷² Still, political considerations lurked in the background. The *New York Times* pointed out that even after years in confinement, Hoffa "is still enormously popular with rank-and-file union members," and that the most important Republican in New Hampshire, a key presidential primary state, had pressured Nixon to free Hoffa.⁷³ Nixon ended up receiving the Teamsters union's endorsement in the 1972 presidential race.⁷⁴ On balance, though, Nixon's decision is still justifiable: the president refused to grant a full pardon, forced Hoffa to very visibly forgo his popular professional role, and successfully defended in court the restriction on Hoffa's union activities.⁷⁵ Gallup polls suggested that the commutation did not substantially help Nixon's job standing with the public. Indeed, Nixon actually *dropped* from 50 percent approval between December 10 and 13, 1971, to 49 percent approval between January 7 and 10, 1972.⁷⁶

B. *Notable Regrettable Commutations*

As with any presidential power, clemency can be used responsibly or irresponsibly. In the last several decades, there have been a number of instances when presidents have granted clemency in extremely volatile circumstances. In time, some are viewed by the public as justifiable, such as the pardon of Richard Nixon by President Gerald Ford. Others—for example, Bill Clinton's offer of conditional clemency to members of the FALN, or George W. Bush's decision to commute the prison sentence of I. Lewis "Scooter" Libby—are less so.⁷⁷ These two particular commutation decisions were made more for the president's personal interest than to pursue justice.

70. Fred P. Graham, *Nixon Commutes Hoffa Sentence, Curbs Union Role*, N.Y. TIMES, Dec. 24, 1971, at 1.

71. *Id.*

72. *Id.*

73. *Id.*

74. See Nick Anderson, *Teamsters Likely to Back Gephardt*, L.A. TIMES, Aug. 1, 2003, at A22. Other Republican presidential candidates who received the Teamster union's endorsement include Ronald Reagan (1980 and 1984) and George H.W. Bush (1988). *Id.*

75. See *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1245 (D.D.C. 1974). Hoffa was last seen alive outside a restaurant near Detroit in July 1975, and his body has never been found. See Joseph B. Treaster, *Hoffa Ruled 'Presumed' Dead*, N.Y. TIMES, Dec. 10, 1982, at D17.

76. GEORGE C. EDWARDS III & ALEC M. GALLUP, *PRESIDENTIAL APPROVAL: A SOURCEBOOK* 61 (1990).

77. See generally THE PRESIDENTIAL PARDON POWER, *supra* note 7.

1. *Members of the FALN*

The FALN, or Armed Forces for Puerto Rican National Liberation, is a terrorist organization that tries to undercut American influence over Puerto Rico.⁷⁸ The organization is not above using violence to accomplish its ends, and has killed at least five and wounded many others through dozens of bombings over the past several decades.⁷⁹ On August 11, 1999, President Bill Clinton extended conditional clemency to sixteen members of the FALN, a decision that was heavily criticized by Republicans and even some prominent Democrats such as Senators Dianne Feinstein (D-CA) and Robert Torricelli (D-NJ).⁸⁰ Clinton claimed support from such prominent politicians as former President Jimmy Carter, Archbishop Desmond Tutu, and Democratic members of Congress from New York such as Jose Serrano, Charles Rangel, Nydia Velazquez, and Eliot Engel.⁸¹ However, the decision was “met with a chorus of protests from members of Congress and the public.”⁸² Indeed, both the House and the Senate passed resolutions criticizing the move by overwhelming margins.⁸³ What made his decision so perplexing was that Clinton made the offer despite the fact that federal law enforcement agencies reviewing a clemency petition for the sixteen FALN members, including the Federal Bureau of Investigation, the Bureau of Prisons, and U.S. Attorneys in Illinois and Connecticut, unanimously opposed mercy.⁸⁴

Clinton was likely influenced by politics; specifically, the possibility of solidifying Hispanic support in New York City at a time when his vice president, Al Gore, was contemplating a presidential run (and would need New York in his win column) and his wife, Hillary Clinton, was deciding whether to run for the New York Senate seat soon to be vacated by long-time incumbent Daniel Patrick Moynihan (D-NY).⁸⁵ Indeed, an e-mail from Jeffrey Farrow, who was a co-chairman of Clinton’s interagency group on Puerto Rico, noted that the FALN situation was “of high constituent importance” to Serrano and Velazquez, and that Gore’s “Puerto Rican position

78. Deborah A. Devaney, *A Voice for Victims: What Prosecutors Can Add to the Clemency Process*, 13 FED. SENT’G REP., 163, 163 (2000).

79. *Id.*

80. *When Presidential Power Backfires*, *supra* note 8 at 589–90.

81. Katharine Q. Seelye, *Clinton to Commute Radicals’ Sentences*, N.Y. TIMES, Aug. 12, 1999, at A15.

82. Michael A. Genovese & Kristine Almquist, *The Pardon Power Under Clinton: Tested but Intact*, in THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY 75, 84 (David Gray Adler & Michael A. Genovese eds. 2002).

83. *See When Presidential Power Backfires*, *supra* note 8, at 590–91 (House of Representatives resolution passed 311 to 41, and Senate resolution passed 95 to 2).

84. David Johnston, *Federal Agencies Opposed Leniency for 16 Militants*, N.Y. TIMES, Aug. 27, 1999, at A1.

85. THE PRESIDENTIAL PARDON POWER, *supra* note 7, at 108–11.

would be helped” if Clinton went through with the clemency decision.⁸⁶ The deputy White House chief of staff rerouted that e-mail to the president’s White House counsel—who has the president’s ear on clemency issues—with a note of approval.⁸⁷ Roughly 75 percent of Puerto Rican voters in New York City self-identify as Democrats.⁸⁸ A USA Today/CNN/Gallup poll showed that 61 percent of respondents found fault with Clinton’s decision to offer clemency to members of the FALN (19 percent supported it), and 60 percent believed that Clinton offered clemency to appeal to Hispanics for support in his wife’s bid for the New York Senate (just 25 percent believed Clinton was motivated by more altruistic concerns).⁸⁹ A majority of the American public believed at the time that Clinton essentially offered clemency to attract voters. There is little reason to believe that public opinion will shift favorably here, as it did regarding the Nixon pardon.

2. I. Lewis “Scooter” Libby

Perhaps President George W. Bush’s most well-known clemency decision was to commute the prison sentence of Vice President Dick Cheney’s former chief of staff, I. Lewis “Scooter” Libby, from two and a half years to no time behind bars. Libby, trusted enough to be invited to “the highest level of White House meetings,” had been caught up in Special Counsel Patrick Fitzgerald’s investigation into who had revealed Valerie Plame to be a CIA agent, and in 2007 Libby was convicted of four felony counts, including perjury and obstruction of justice.⁹⁰ Judge Reggie Walton, whom Bush had nominated to his position, sentenced Libby to serve thirty months in prison, two years of probation, and to pay a \$250,000 fine.⁹¹

Curiously, Libby did not mount much of a defense at trial: he did not testify himself, nor did he plead guilty to a lesser charge; he did not call Vice President Cheney to testify, although he could have done so.⁹² In an interview with CBSNews.com, Jonathan Turley, a George Washington University Law School professor, succinctly stated the likely motivation for Libby’s lackluster showing:

86. Neil A. Lewis, *Report by House Republicans Says Clemency for Puerto Ricans Was Campaign Move*, N.Y. TIMES, Nov. 9, 1999, at A22.

87. *Id.*

88. Amy Waldman, *New York’s Puerto Ricans Show Little Solidarity on Clemency Issue*, N.Y. TIMES, Sept. 9, 1999, at B1.

89. Tom Squitieri & Kathy Kiely, *Clemency Issue Shadows Clintons*, USA TODAY, Sept. 16, 1999, at 02A.

90. Mark Leibovich, *In the Spotlight and on the Spot; Scooter Libby, Backstage no More*, WASH. POST, Oct. 23, 2005, at A01; Carol D. Leonnig & Amy Goldstein, *Libby Guilty on 4 of 5 Counts; Former Cheney Aide Convicted of Lying About His Role in Leak*, WASH. POST, Mar. 7, 2007, at A1.

91. Carol D. Leonnig & Amy Goldstein, *Libby Given 2 1/2-Year Prison Term; Former White House Aide ‘Got off Course,’ Judge Says*, WASH. POST, June 6, 2007, at A1.

92. THE PRESIDENTIAL PARDON POWER, *supra* note 7, at 120–21.

Dick Cheney is very close to Libby and a lot of people view this as a subordinate taking a bullet for Cheney[.] He's not someone who's just loyal in the White House, he's loyal as a criminal defendant . . . Libby is the ultimate inside player. He's not the type to cop a plea or turn on Cheney.⁹³

President Bush commuted Libby's sentence to no time served on July 2, 2007, leaving intact the quarter of a million dollar fine and two years of probation.⁹⁴ In a statement accompanying Libby's commutation, Bush noted his respect for the jury's verdict and the special counsel (Bush had appointed Patrick Fitzgerald to be a U.S. Attorney), but expressed his belief that Libby's sentence was "excessive," arguing that the remaining penalties were sufficient punishment.⁹⁵

Bush's claim to have granted the commutation to remedy an "excessive" prison term is shaky, at best. A study referenced by the *Washington Post* of federal sentences imposed in obstruction cases found that "382 people were convicted for obstruction of justice over the past two years. Three of four were sent to prison. The average prison term was 64 months, more than five years. The largest group of defendants drew prison terms ranging from 13 months to 31 months."⁹⁶

In other words, the study suggested that Libby's sentence was quite typical for others who had committed similar crimes. Even so, Bush decided that Libby merited one of the handful of sentence commutations granted during his presidency. He could have chosen to reduce Libby's prison sentence to whatever range he felt was not "excessive," but instead opted to wipe it out altogether. Why would Bush grant clemency to Libby? Conservative columnist Charles Krauthammer argued that a pardon would be appropriate because Libby was never actually charged with revealing Plame's identity.⁹⁷ Still, Libby's conduct throughout the investigation led to an indictment and conviction for committing four felonies, including obstruction of justice and perjury. Bush did not criticize the judicial process used to reach the verdict, only the end result. Thus, the most likely motive for the commutation is that he was rewarding a loyal soldier who had remained silent and "taken one for the team." Not surprisingly, the public

93. Vaughn Ververs, *A Pardon for Libby?*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/2100-250_162-2542158.html.

94. George W. Bush, *Grant of Executive Clemency*, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH (July 2, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070702-4.html>.

95. George W. Bush, *Statement by the President on Executive Clemency for Lewis Libby*, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH (July 2, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070702-3.html>.

96. Matt Apuzzo, *Attorneys See Irony in Libby Case*, WASH. POST, July 3, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/03/AR2007070301505.html>.

97. Charles Krauthammer, *Fitzgerald's Folly; a Textbook Case for a Speedy Pardon*, WASH. POST, Mar. 9, 2007, at A21.

overwhelmingly disapproved of the decision, 72 percent to 19 percent, according to a CNN poll.⁹⁸

The Framers of the Constitution created an all-but-unlimited clemency power and entrusted it to the president.⁹⁹ Most clemency decisions have been an “act of grace” or “for the public welfare,” as the Framers had hoped. Some recent presidents have shown less restraint than their predecessors in calling upon clemency to serve their own personal interests, whether to pursue votes (Clinton) or to protect close allies (Bush). The Framers would likely not be surprised that clemency might be abused, and provided for impeachment in more extreme circumstances as a check on executive abuse of the pardon power. Today, the mass media and other forces play a crucial role in monitoring, and sometimes constraining, presidential clemency decisions.

C. *Forces Constraining Clemency*

Commutations and pardons have become rarer over the past several decades. The decline of clemency is largely a consequence of a “tough on crime” attitude exhibited by presidents and prosecutors reviewing clemency applications, and the chief executive’s fear of making a mistake that could set off a media “feeding frenzy”¹⁰⁰ and damage the president’s public image.

Former Pardon Attorney Margaret Love argues that pardoning has fallen into disfavor since 1980, partially because “the retributivist theory of ‘just deserts’ and the politics of the ‘war on crime’ together made pardon seem at the same time useless and dangerous.”¹⁰¹ Even more influential than the stingy attitude of the president, Love argues, has been “the hostility of federal prosecutors” and a reconfiguration within the Office of the Pardon Attorney that left prosecutors in charge of advising on clemency decisions.¹⁰² She notes how pardoning practices became incorporated into a larger shift to be tough on criminals, and that officials were content to essentially rubber-stamp the efforts of prosecutors instead of subjecting them to a thorough review.¹⁰³ At the same time, the president devoted little time to clemency, a dynamic which, together with the rise in prosecutorial involvement with clemency, made it “inevitable that the number and frequency of clemency grants would steadily decline through the 1980s.”¹⁰⁴

98. Janet Hook, *Bush Had Little to Lose, Points to Score with Conservatives*, L.A. TIMES, July 3, 2007, at A17.

99. See U.S. CONST., *supra* note 20.

100. LARRY SABATO, *FEEDING FRENZY: ATTACK JOURNALISM AND AMERICAN POLITICS* (2000 ed.) (Sabato is credited, in the preface of his book, for coining the term “feeding frenzy”).

101. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1193 (2010).

102. *Id.* at 1194.

103. *Id.* at 1194–95.

104. *Id.* at 1195.

The power of the press and public opinion are also factors that cannot be ignored by a president contemplating a controversial clemency decision.¹⁰⁵ President Gerald Ford's job approval rating dropped from 71 percent to 49 percent in the few weeks following the Nixon pardon, as the decision helped remind the public of Watergate and compromised Ford's public image.¹⁰⁶ Indeed, according to legal scholar Jerry Carannante, "[s]o much disgust has been expressed at pardons such as those granted to Nixon, to the Iran-Contra defendants, and to [Marc] Rich, that presidents must think twice before exercising the power and having to face the storm."¹⁰⁷ According to Carannante (writing in 2003), "[w]ith the increasing role of the media in American politics and everyday life, the discontent with the clemency power has risen proportionately."¹⁰⁸

Since 2003, the media have arguably become even more pervasive, with Facebook (2004), YouTube (2005), Twitter (2006), and Tumblr (2007) all serving to help perpetuate interesting stories via video or text posting capabilities. The upshot is that anyone with a decent computer and Internet connection can distribute a story more quickly than ever before. In this media environment, any presidential misstep can blow up quickly in a matter of days, or even hours. A case in point: President George W. Bush pardoned mortgage scammer Isaac Robert Toussie and then almost immediately took it back when a media investigation quickly uncovered how Toussie's father had made large, recent donations to Republicans.¹⁰⁹

Clemency applicants face an unfriendly environment. Neither presidents nor Department of Justice staff are inclined to go out of their way to assist federal offenders, especially when one considers the potential cost to be incurred by a mistake. As a result, clemency has been neglected even while the number of clemency applications received by the Office of the Pardon Attorney has skyrocketed since the Clinton years.¹¹⁰

D. *Forces Constraining the Clemency Conversation*

One of the toughest challenges for supporters of a more active role for federal commutations—or any form of clemency—is to sustain public interest long enough to build pressure for action or reform. A sustained drum-

105. See THE PRESIDENTIAL PARDON POWER, *supra* note 7, at 60–61 (“Though the media cannot directly penalize the president for a pardon decision, they can raise the profile of a questionable pardon and persuade other political actors to put pressure on the president about his decision.”).

106. *Support for Ford Declines Sharply*, N.Y. TIMES, Sept. 12, 1974, at 81. For the reaction of the public, the White House staff, the press, and Congress, see THE PRESIDENTIAL PARDON POWER, *supra* note 7, at 73–75.

107. Jerry Carannante, Note, *What to Do About the Executive Clemency Power in the Wake of the Clinton Presidency*, 47 N.Y.L. SCH. L. REV. 325, 349 (2003).

108. *Id.*

109. See *The Toussie Pardon*, *supra* note 7, at 83.

110. THE PRESIDENTIAL PARDON POWER, *supra* note 7, at 64.

beat for change has yet to develop; however, there are recent glimpses of hope.

It has become cliché how most media attention devoted to clemency focuses on freeing the White House turkey before Thanksgiving, or the back stories of the few lucky clemency grantees named on a press release from the Department of Justice that often comes out around Christmas. This perceived pattern to clemency grants was challenged by investigative journalists Dafna Linzer and Jennifer LaFleur, whose employer, *Pro Publica*, teamed with the *Washington Post* in December 2011 to release an important two-part article focusing on the clemency process itself.¹¹¹ Drawing upon “previously unreleased records and related data,” the journalists explored racial disparities in who obtained clemency during the George W. Bush years, finding that 176 Bush pardons went to Caucasians and only 13 went to non-whites.¹¹² They also found that “advocacy makes a difference,” as petitioners enjoying the support of a member of Congress “were three times as likely to win a pardon as those without such backing.”¹¹³ If the painstaking approach of these journalists were to be paired with sufficient resources, it might help paint a broader picture of how well the clemency process has worked under Bush’s predecessors, too.

Much of what is known about the internal working of the clemency process is due to former Pardon Attorney Margaret Love,¹¹⁴ who has written a number of pieces that explain, among other issues, the historical development of the president’s clemency apparatus, the internal forces impacting clemency’s recent decline, and suggestions for reform. For the day-to-day update on clemency decisions, Internet surfers have Pardonpower.com,¹¹⁵ edited by P.S. Ruckman, Jr., and Sentencing Law and Policy,¹¹⁶ a blog maintained by Douglas A. Berman. These websites draw regular viewers and direct mass media attention to clemency issues as breaking news occurs. Other observers are helping to create long-term infrastructure for clemency petitioners. Professor Mark Osler of the University of St. Thomas School of Law has started the nation’s first federal

111. Dafna Linzer & Jennifer LaFleur, *Presidential Pardons Heavily Favor Whites*, PROPUBLICA (Dec. 3, 2011), <http://www.propublica.org/article/shades-of-mercy-presidential-forgiveness-heavily-favors-whites>; Dafna Linzer, *Pardon Applicants Benefit From Friends in High Places*, PROPUBLICA (Dec. 4, 2011), <http://www.propublica.org/article/pardon-applicants-benefit-from-friends-in-high-places>.

112. Linzer & LaFleur, *Presidential Pardons Heavily Favor Whites*, *supra* note 111.

113. Linzer, *Pardon Applicants Benefit From Friends in High Places*, *supra* note 111.

114. Margaret Love’s website is Pardonlaw.com, available at <http://www.pardonlaw.com> (last visited Apr. 13, 2012).

115. P.S. Ruckman, Jr.’s website is Pardonpower.com, available at <http://www.pardonpower.com> (last visited Apr. 13, 2012). Ruckman’s personal website is <http://psruckman.com> (last visited Apr. 13, 2012).

116. Douglas A. Berman’s website is Sentencing Law and Policy, available at <http://sentencing.typepad.com> (last visited Apr. 13, 2012). Berman’s personal website is <http://moritzlaw.osu.edu/faculty/bios.php?ID=5> (last visited Apr. 13, 2012).

commutation clinic,¹¹⁷ and former Maryland Governor Bob Ehrlich is planning “the nation’s first law school clinic and training program devoted to pardons.”¹¹⁸ All of these contributions point toward the same vital end: sustaining interest in clemency-related issues and providing analysis and recommendations for improving the status quo. Our role as scholars and observers is to continue to remind the president—and the American public—of the good the clemency power can do when used responsibly and regularly. As long as injustice and societal unrest remain very real possibilities—and they show no signs of going away—the president must be willing to use the pardon power.

CONCLUSION

Clemency has always been integral to justice systems worldwide and throughout time. Over seventy years ago, Attorney General Homer Cummings oversaw publication of a four-volume series of books entitled *The Attorney General’s Survey of Release Procedures*.¹¹⁹ One volume focused entirely on federal and state pardons and reviewed various pardoning schemes throughout the history of the world, from the time of the Bible, through Greece, Rome, Germany, France, England, and the United States. The editors of the book pointed out that the pardon power has never been perfect, but has certainly had its moments under the right circumstances:

The history of pardons thus teaches one lesson: the prerogative has always been near to absolute power and has been exposed to abuse. At the same time it has been almost uninterruptedly within easy reach of the creative mind of mankind as a weapon to break the rigidity of law and custom and their resistance to progress and reform.¹²⁰

The president of the United States has used the ability to grant official mercy at a variety of crucial junctures in the life of the nation. In recent years, and for various reasons, presidents have chosen to exercise their clemency power very carefully, often deciding not to use it at all, or to abuse it for their own personal interest. At its best, the pardon power can provide people with a fresh start, as exemplified by Eugenia Marie Jennings. Ms. Jennings’ situation is just one example of why clemency is a unique power—and responsibility—which will always be relevant.

117. Kate Metzger, *Federal Commutation Clinic at Law School the First in the Nation*, UNIVERSITY OF ST. THOMAS NEWSROOM (Sept. 12, 2011), <http://www.stthomas.edu/bulletin/2011/09/12/federal-commutation-clinic>. Osler’s personal website is http://www.stthomas.edu/law/faculty_staff/staff/interprofessionalcenter/oslermark/ (last visited Apr. 13, 2012).

118. Dafna Linzer, *Law School Clinic for Pardons Planned*, PROPUBLICA, (Mar. 5, 2012) <http://www.propublica.org/article/law-school-clinic-for-pardons-is-planned>. A profile of Governor Ehrlich is available on the *Washington Post* website at http://www.washingtonpost.com/politics/robert-ehrllich-r/gIQAs6YoAP_topic.html.

119. 3 U.S. DEP’T OF JUSTICE, *THE ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES* 52–53 (Wayne Morse, Henry Weihofen & Hans Von Hentig eds., 1939).

120. *Id.*