Clemency for the 21st Century:
A Systemic Reform of the Federal Clemency Process

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I. Introduction

Federal clemency is in crisis. In response to that crisis, a remarkable bipartisan consensus has formed in support of systemic reform. This statement acknowledges that consensus, and lays out a framework for change. The reforms described here are achievable without significant congressional action, consistent with best practices in the states, and cost-effective. To summarize our conclusions, we urge that this administration take the clemency process out of the Department of Justice, create an independent and bipartisan Clemency Board that would report directly to the President, and establish a regular and systemic process for executive consideration of individual cases.

II. The Need for Reform

The need for reform of the federal clemency process has become particularly apparent. Criticism has focused on a wide range of problems, but the most notable are the paucity of clemency grants and the inconsistency in how petitions are treated.

This critique has come from a remarkable range of observers that include leaders among the judiciary, press, academy, and both conservative and liberal political commentators.

Hard data supports these criticisms. The decline in clemency grants has been steady and steep.

President	Clemency Grant Rate	Avg. Grants per Month in Office	Number of Total Grants
Nixon	35.7%	13.8	926
Ford	26.8%	14.1	409
Carter	21.5%	11.8	566
Reagan	11.9%	4.8	410
George H.W. Bush	5.3%	1.6	77
Clinton	6.1%	4.8	457
George W. Bush	1.8%	2.1	200

The current administration has extended this trend, using the pardon power less often than any other modern executive. President Obama ended his first term with 22 pardons and one commutation,[1] giving him a grant rate of less than 1 for each month he has been in office and the lowest total number for a full-term president since George Washington.[2] With almost 400,000 people currently under federal supervision,[3] and hundreds of thousands more living with federal records, this decline cannot be attributed to lack of appropriate candidates for clemency. Moreover, a recent internal review by the DOJ's Inspector General concluded that Pardon Attorney Ronald L. Rodgers engaged in "conduct that fell substantially short of the high standards expected of Department of Justice employees and the duty he owed the President of the United States."

Even the Supreme Court has drawn attention to the Obama administration's failure to use its clemency power. While hearing argument in *Dillon v. United States* on March 30, 2010, Justice Anthony Kennedy unexpectedly raised the paucity of grants. In challenging the government, he asked, "And were there—how many commutations last year? None. And how many commutations the year before? Five. Does that show that something is not working in the system?" The national press took note of this striking exchange.

The following year, ProPublica Journalist Dafna Linzer began a remarkable series of articles in the Washington Post which have painstakingly described the slow work, the inconsistencies, and the ethical breakdowns within the Pardon Attorney's office.

Many others joined this chorus and called for systemic reform of the federal clemency process, and on January 5, 2013 the editorial board of the New York Times concluded that the problem was serious and largely structural, concluding that "It is time for Mr. Obama to vigorously exercise this august and singular responsibility."

Within the span of a few months and in a rare showing of consensus, both the American Constitution Society and the Heritage Foundation issued reports condemning the federal clemency process and urging broad reforms. The ACS report, authored by former U.S. Pardon Attorney Margaret Love, and a Heritage

[1] Dafna Linzer, Commutation request will get a new look: U.S. inmate's case sparked criticism, Wash. Post, July 19, 2012, at A3.

[2] Obama: More Dubious Pardon History-Making, Pardon Power Blog, http://www.pardonpower.com/, Jan. 24, 2013.

[3] Federal Justice Statistics 2009, at 17, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf

Foundation *Legal Memorandum*, written by Paul Rosenzweig, both described the atrophy of the pardon power, identified the placement of the pardon attorney within the Department of Justice as a cause, and commonly urged that the process be pried loose from the hierarchies of the Justice Department.

The reforms recommended here respond to the concerns which underlay this broad and remarkable consensus for reform, and seek to reverse the atrophy of the pardon power through the creation of a better process that will enhance transparency, the application of consistent principles, and the fair consideration of clemency petitions.

III. Three Essential Reform Elements

A. Taking Clemency Out of the DOJ

Expert analysts from across the political spectrum have identified one factor above all other in accounting for the problems with clemency: The placement of the person responsible for evaluating petitions deep within the bureaucracy of the Department of Justice. This delegation of responsibility creates a clear conflict of interest, since pardons and commutations necessarily involve undoing convictions and/or sentences obtained by that same agency. Writing for the American Constitution Society, Margaret Colgate Love argued that "it is essential that control of the process be removed from the dead hand of federal prosecutors who have come to view pardon as 'an affront to federal efforts to fight crime." Paul Rosenzweig, in his Heritage Foundation *Legal Memorandum*, was just as pointed: "… using career prosecutors to screen pardon applications has the natural tendency of subjecting pardon applications to greater scrutiny with less lenity to be expected, because career prosecutors (like any human beings) are products of their culture and less likely to see flaws in the actions of their colleagues."

It is no accident that the precipitous decline in the use of the pardon power coincided with President Reagan's delegation of responsibility to an office nested within the lower tiers of the Department of Justice. The first step in restoring a constitutionally appropriate use of clemency will be to reverse that choice.

To be sure, the lower clemency rate also corresponds with a changing political landscape on criminal justice that has made it more politically costly for any elected official to use this authority. But even in this climate, the federal government's drop in clemency stands out. Many states have not experienced the same standstill in clemency, which suggests something more is going on at the

federal level. The obvious conflict of interest that presents itself when the agency responsible for prosecutors is also responsible for clemency grants certainly stands out as a contributing factor to the decline. There is no reason to keep this power within the Department.

B. Creating a Modern Clemency Board

The president should be advised on clemency petitions by a diverse and distinguished panel rather than a single official. Forty-nine states and the District of Columbia have established a board rather than an individual officer to evaluate clemency petitions (with varying levels of authority), while Rhode Island puts clemency in the hands of the legislature. Only the federal system eschews the wisdom of a small group to leave clemency analysis in the hands of a single lower-level officer.

The key to the success of this board is to make sure it is populated by individuals that represent all the interests at stake in a clemency petition as well as top experts in relevant fields. The board should thus include experts on recidivism risks, sentencing policy, and reentry. A well-rounded clemency board should also include a judge or former judge, a prosecutor, and a defense attorney to help assess the merits of particular cases from all angles.

Just as important as the board's composition is the information it uses to make decisions. In addition to the individual applications before it, the board should be driven by empirical data wherever possible. Therefore, the board should be rigorous in its use of data to assess risks of reoffending and to identify outlier sentences that are disproportionate for the type of offense or offender. Similarly, the board should pay careful attention to the collateral consequences of convictions and data that either support or undermine those consequences in particular instances, so that the board is well positioned to determine when it should relieve individuals of collateral consequences to ease reentry into community and reduce recidivism. Just like any other regulatory agency, this board should be attuned to and report on the costs and benefits of sentences and collateral consequences as well as the costs and benefits of relief from those sentences and collateral consequences.

C. Routinizing Executive Consideration of Clemency

While the present federal clemency system sets out a number of formal obstacles to the consideration of an individual petition, it does not contain any

process elements that help ensure the fair consideration of worthwhile petitions. We propose that a reformed system contain at least three elements that would augur in favor of the fair consideration of well-supported clemency pleas.

First, there should be regular and periodic meetings between the president and the members of a clemency board for the discussion of petitions which have been thoroughly analyzed and found to have merit. Regular meetings will ensure that clemency not fade into the background among the many responsibilities of the president, and would also spur the clemency board to be consistent in its work.

Second, greater transparency should be among the elements of a new system. This should take at least two forms: Proactively describing the primary factors which will support clemency in the present moment, and announcing the reasons for the granting of clemency petitions. Both should be included in an annual report, prepared by the clemency board.

Third, as discussed above, data should support the board's analysis wherever possible, and that data analysis should be included with reports evaluating any commutation petition and in the explanation of petitions which are granted.

IV. The Path to Reform

The current process of clemency consideration was created by executive order, and the creation of a clemency panel outside of the Department of Justice could be established in the same manner. In addition, the establishment of regular meetings with that board and the transparent articulation of clemency standards and relative costs would be solely within the executive's power.

Embracing these recommendations would send a clear and defining message: That the vagaries, abuse, and disuse of this important constitutional power will be addressed, and that the pardon power will be used with principle, regularity, and transparency. The unusual challenge of the pardon power is to do justice while loving mercy, a job made possible by the humble acknowledgment that our laws at times are not perfectly fit to the shapes of human frailties and that our knowledge and experience with laws grows over time, sometimes exposing injustices that were not initially seen or recognized. Constructing a better system for the evaluation of clemency petitions will move our presidents closer to achieving this difficult but important task.