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This Issue in Brief

Mandatory Sentencing: The Politics of the New Criminal Justice.—New mandatory sentencing policies are winning political support in the 50 states and Congress; however, despite stated goals to equalize sentencing and deter crime, the new laws probably can be expected to aggravate prisoners' grievances and serve as simply another bargaining tool in the criminal justice system, asserts Professor Henry R. Glick of Florida State University. Little empirical research exists on the impact of the new sentencing laws, but available evidence strongly suggests that they will have few beneficial results, he adds. The only major change may be an explicit abandonment of the reform ideal and existing, albeit limited, rehabilitation programs.

The Failure of Correctional Management—Revisited.—In "revisiting" the case of correctional management failure (his first article appeared in 1973), Dr. Alvin W. Cohn appears to be painting a drab, bleak picture. Yet, he maintains, from the time the original paper was written until now, he does believe that there has been some meaningful change. While no one could or should argue that corrections has successfully reformed itself or is being reformed appropriately, there have been some significant changes that suggest a brighter future, especially with regard to the status of management, he concludes.

Rethinking the President's Power of Executive Pardon.—Although only superficially understood by most citizens, the President's power of executive clemency has undergone a protracted evolution in terms of legal scope and constitutional interpretation, according to Professor Christopher C. Joyner of Muhlenberg College. Pronounced an "act of grace" by the Supreme Court in 1833, the pardon power in 1927 was deemed an act intended primarily to enhance public welfare. As such, the President's pardoning authority has become broad and multifaceted, immune from review by court action or congressional restriction. A pardon neither obliterates the record of conviction nor establishes the innocence of a person; it merely forgives the offense.

Team Approach to Presentence.—An interdisciplinary team approach is the trademark of the Seattle Presentence Investigation Unit, reports Chuck Wright, Adult Probation and Parole supervisor for the State of Washington. This collective approach is used when most feasible, and has led to effective improvements in investigation, information gathering, report writing and recommen-

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Rethinking the President's Power of Executive Pardon*

BY CHRISTOPHER C. JOYNER, PH.D.

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TWO EVENTS within recent years—President Ford's pardon of Richard M. Nixon on September 8, 1974, and President Carter's proclamation of conditional amnesty for Vietnam draft resisters on January 23, 1977—again have underscored significance of the power of presidential pardon in the American jurisprudental system. However, despite widespread publicity over these two specific case instances, the pardon power in general still remains only superficially understood by most citizens. It is therefore the purpose of this article to examine the practical evolution of the President's pardoning powers, and in so doing, to ascertain the juridical scope and legal implications inherent in such an executive act of clemency.

I. The President's Pardoning Power in Historical Perspective

A. The Traditional Legacy.—The President's power to "grant reprieves and pardons for offenses against the United States" is a direct lineal descendant of executive clemency provisions which had been exercised from the early times by the English Crown.[1] A multiplicity of writers and scholars—both legal and philosophical and including Thomas Hobbes, Sir Mathew Hale, Sir William Hawkins, Sir Edward Coke, and William Eden—explored diverse ramifications of clemency by the monarch in trying to ascertain its true character and proper usage. Further, an examination of the charters granted to the early English continental colonies clearly indicates that the Crown delegated all pardoning power in the colonies, usually to the jurisdiction of the local British executive authority.[2]

B. The Founding Father's Perceptions.—Following the American War for Independence and the attendant estrangement from Great Britain, the framers of the Constitution also saw fit to vest the pardoning power in the executive branch of the United States government. The political history of the new republic, as chronicled during the Constitutional Convention in 1789 by James Madison, provides insight into various policy considerations expressed by the Founding Fathers over the pardon clause, Article II, section 2.

According to Madison's diary, one early critic of the pardon clause argued that the President should not retain power to grant clemency, while another delegate remained skeptical about exercising such a power before conviction, or without the consent of Congress, in cases involving accusations of treason.[3] In addition, there surfaced grave reservations that a President's grant of clemency could become a dangerous device if: (1) it were used to shield his accomplices during an abortive attempt to subvert the Constitution; or (2) it were used to impede investigations by pardoning offenders before formal indictments had been made.[4] Despite these admonitions, however, it remains an irony of history that the most worrisome misgiving posited at the Convention concerned the possibility that treasonous activities instigated by the President's confederates (or his associates) might go unpunished—not because of collusion, but rather because of some sympathetic willingness to excuse a just and proper penalty because of former friendships.[5]

Notwithstanding this, the advocates for executive pardon made convincing argument. Should such a hypothetical conspiracy occur, they contended, testimony by participants surely would be needed in order to secure conviction of the leaders. Accordingly, such testimony might be won only by a grant of clemency from the executive.

* The author wishes to acknowledge his appreciation to Mr. David C. Stephenson, Deputy Pardon Attorney, for his cooperation and assistance in the preparation of this paper.

[1] An excellent history of the ancient practice of pardoning can be found in *The Attorney General's Survey of Release Procedures: Pardon*, Vol. III (Washington, D.C.: Government Printing Office, 1939), pp. 1-53. For a discussion of the pardon in English law, see generally, Sir James F.J. Stephen, *A History of the Criminal Laws of England* (New York: Macmillian, 1902), and Camden Pelham, *The Chronicles of Crime* (London: Reeves and Turner, 1886).

[2] Christen Jensen, *The Pardoning Power in the American States* (Chicago: University of Chicago Press, 1922), p. 8.

[3] Jonathan Elliot, *Madison's Debates on the Federal Constitution* (Philadelphia: J.B. Lippincott Co., 1845), pp. 380, 480, 549, and 562.

[4] W.H. Humbert, *The Pardoning Power of the President* (Washington, D.C.: American Council on Public Affairs, 1941), p. 17.

[5] *Ibid.*, p. 18.

Regarding where to invest the pardoning power, Madison himself believed both the House of Representatives and the Senate were highly ill-suited, chiefly because legislative bodies are guided in their judgments largely by "passion." In conjunction with this was the realization that neither the House nor the Senate could remain in continuous session, and should a local insurrection arise, any delay in using clemency for the insurgents as a bargaining chip might prove disastrous. Writing in *The Federalist* to defend the executive's preogative to pardon, Alexander Hamilton made this latter point abundantly clear:

> But the principal argument for reposing the power of pardoning in this case in the chief magistrate, is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal. If it should be observed, that a discretionary power, with a view to such contingencies, might be occasionally conferred upon the president; it may be answered in the first place, that it is questionable, whether, in a limited constitution, that power could be delegated by law; and in the second place, that it would generally be impolitic beforehand to take any step which might hold out the prospect of impunity. A proceeding of this kind, out of the usual course, would be likely to be construed into an argument of timidity or of weakness, and would have a tendency to embolden guilt.[6]

Thus, as conceived by the Founding Fathers the President's power to pardon was deemed necessary not merely to preserve any manifest considerations of humaneness, but moreso to safeguard the public welfare. In short, the pardon was to be implemented as an instrument of law enforcement.

Consequently, as finally adopted the Constitution conferred upon the President in nondefinitive language the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. Yet, when viewed in the aggregate, the Constitution's framers devoted only a modicum of time and debate to the clemency provision, and not unexpectantly, they made no assertive efforts to outline any terms, to enumerate proper forms, or to designate particular cases pursuant to issuing a pardon. Primarily for this reason, then, the precise nature and legal scope of the pardoning power was left uncertain until subsequent juridical opportunities arose for testing its application and for scrutinizing its judicial interpretation.[7]

II. The Evolving Legal Scope of Executive Power

A. An "Act of Grace."—The constitutional history of the President's power to grant clemency evidences growth both in clarifying its definition and in determining its applicability. In *United States* v. *Wilson,* the first Supreme Court case decided on the pardoning power, Chief Justice Marshall posited: "As this 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; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."[8] Marshall then made his now-famous observation that:

> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court . . . . A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.[9]

Marshall thus in his *dictum* on *Wilson* emphasized "grace" and the private character of the presidential act. Consequently, for nearly one hundred years thereafter, mercy or "grace" was the doctrinal keystone in petitions for executive clemency. However, in the words of one recognized scholar of the American presidency, the circumstances surrounding the *Burdick* decision in 1915 "reduced the doctrine of the Wilson case to palpable absurdity.[10]

In *Burdick* v. *United States,* Marshall's conceptualization of the pardon power was overtaxed fatally. Burdick, a newspaperman, refused on grounds of self-incrimination to testify before a grand jury concerning frauds in the New York customhouse. In an attempt to break down the

[6] Henry Cabot Lodge (ed.), *The Federalist, A Commentary on the Constitution of the United States,* No. 74 (New York: G.P. Putnam's Sons, 1888), p. 465.
[7] See, e.g., W.W. Smithers, "Nature and Limits of the Pardoning Power," *Journal of Criminal Law,* Vol. 1, No. 4 (November 1910), pp. 549-562; Harold W. Stoke, "A Review of the Pardoning Power," *Kentucky Law Journal,* Vol. 16, No. 1 (November 1910), pp. 34-42.
[8] 32 U.S. (7 Pet.) 160 (1833).
[9] *Ibid.*
[10] Corwin, *The President: Office and Powers,* p. 160.

protection afforded by the fifth amendment, President Wilson profferred to Burdick "a full and unconditional pardon for all offenses against the United States" which he might have committed in matters pertaining to his testimony. Interestingly enough, Burdick rejected the pardon and persisted in his contumacy with the unanimous support of the Court. "The grace of a pardon," remarked Justice McKenna rather sententiously, "may only be a pretense . . . involving consequences of even greater disgrace than those from which it purports to relieve."[11] Moreover, he declared, "Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected . . . ."[12] By so positing, the Court initiated a legal metamorphosis in the pardon power's juridical interpretation which culminated in the abandonment of the "grace" qualification 12 years later.

B. An Act of Public Welfare.—The Supreme Court in 1927 sustained the President's right—even against the will of a prisoner—to commute a death sentence to one of life imprisonment. By so doing, the chief executive's pardon powers were subjected to a radical reinterpretation. "A pardon in our days," the Court asserted, "is not a private act of grace from an individual happening to possess power. It is part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[13] Presumably, what this seems to indicate is that by substantiating a commutation order for a deed of pardon, any President is empowered to bestow a full pardon to any person, predicated only on the particular case, its relative circumstances, and his own judgmental perceptions. Implicit in this authority, of course, is the recognition that the substituted penalty is acknowledged by law and, as commonly understood, is less severe than the original penalty prescribed.

C. The Impact of Changing Scope.—That the President's pardon power has undergone profound legal and constitutional changes during the past century is unmistakably clear.[14] Yet, when the extent of executive clemency is narrowly defined and legally scrutinized, several important points should be realized.

First, as borne out through historical practice, the President's pardoning power is broad and unqualified. Excepting cases of impeachment, it encompasses the most trivial, as well as the most serious, offenses against the United States.

Second, while the President possesses the admittedly discretionary authority to grant or deny a pardon to any petitioner, his jurisdiction only extends to Federal offenses; i.e., the President has no formal pardoning authority in violations of state law.

A third point worthy of note is that the Chief Executive's power of clemency cannot be extended to include civil suits (between individuals) wherein only the rights of the litigants are involved.[15]

Fourth, as might be expected, all territories under United States jurisdiction concomitantly fall under the President's power of pardon. Not surprisingly, therefore, the ultimate decision for granting clemency will still rest with the President, irrespective of any decision previously reached or made known by a territorial governor.

Fifth, presidential use of the pardoning authority is immune from review by the courts and is external to the lawful perview of the Congress; the President's sole discretion is the ultimate judge of how, when, and if the pardon power should be activated.

Sixth, unlike practices in some European countries,[16] the President has no authority to grant a posthumous pardon.

Finally, mention should be made of the multifaceted forms clemency has taken during its historical evolution in the United States. Although only two types are stipulated in the Constitution (viz, pardons and reprieves), clemency has been granted by Presidents to individuals in eight forms and to classes of individuals in two forms. Included among these forms are: full pardon; pardon to terminate sentence and restore civil rights; pardon just to restore civil rights; conditional pardon; amnesty; amnesty or condition; reprieve; commutation; commutation on condition; and, remission of fines and forfeitures. Of these pardon after completion of sentence has assumed the greatest frequency.

[11] 236 U.S. 90 (1915).
[12] *Ibid.*, p. 91.
[13] *Biddle* v. *Perovich*, 274 U.S. 486 (1927).
[14] Cf. Edward R. Johnes, "The Pardoning Power from a Philosophical Standpoint," *Albany Law Journal*, Vol. 47, p. 385; W.W. Smithers, "The Use of the Pardoning Power," *Annals* of the American Academy of Sciences, Vol. 52 (March 1914), pp. 61-66; and Henry Weihofen, "Pardon: An Extraordinary Remedy," *Rocky Mountain Law Review*, Vol. 12, No. 1 (December 1939), pp. 112-120.
[15] See 5 *Opinion of the Attorneys General*, p. 532.
[16] This refers, of course, to "rehabilitations" in Bulgaria, Czechoslovakia, East Germany, Hungary and Poland during the 1950's. See Zbigniew K. Brzezinski, *The Soviet Bloc: Unity and Conflict* (Cambridge: Harvard University Press, 1971), pp. 200-205, 222-223, 349.

Although neither Congress nor the courts may dictate when or if the pardoning power may or may not be implemented, it is generally agreed among legal scholars that for a pardon truly to be effective, an "offense" must have been committed. That is to say, an offense may not be anticipated, for if it were, the President would then possess a sanction to brush aside the law—in effect, a legitimate "dispensing" power. Such a lawful entitlement he does not have.

Even so, the Chief Executive may nevertheless grant a pardon at any time during the legal prosecution process, even prior to actual indictment or conviction. Concurrently, the President can reserve the right to execute a pardon for as long as there remain any legal consequences in a particular case.

Respective to the usual pardoning process, the President normally is guided by recommendations from the Attorney General, albeit no legal constraints formally exist on this procedure. Also, it should be realized that once a pardon has been "delivered" (i.e., effectuated), the President is unable to revoke it. In tandem with this, it is still highly doubtful under present statutes whether a pardon could be declared null and void—or for that matter withdrawn—even if it could be demonstrated that the pardoning act was carried out under fraudulent circumstances.

III. The Legal Implications in an Act of Clemency

A. The Pardon's Raison d'Etre.—As mentioned earlier, the rationale for pardons in the United States was inherited from common law traditions found in England. In this regard the power to offer clemency springs from a distinct realization that human institutions of law—administered by human agents—inevitably will remain to some degree defective and inadequate to meet fully the requisites of every individual case or situation; every system of criminal jurisprudence cannot help but retain some residuum of imperfection. Perhaps this patent recognition was most effectively expressed by William W. Smithers when he observed:

> It (the pardoning power) is the common and honest admission of human weakness, the recognition of human fallibility, the cry of human compassion. It is a confession of imperfect wisdom and voices mankind's universal repugnance to the irretrievable and the irrevocable. It is the cautionary protest of the multitude against unanticipated and cruel consequences of governmental deficiencies.[17]

So, because it is virtually impossible to frame laws that appropriately conform to the variant circumstances of each criminal act, or to secure the omniscience of every court, the power to pardon must not be treated lightly as merely an executive privilege. It is, in fact, an official duty, requiring great forethought, patience, and accountability.

B. The Decision to Pardon.—As provided for in Title 28 (Judicial Administration) of the Code of Federal Regulations, three basic procedural rules currently exist for effecting an act of executive clemency: (1) Each pardon seeker must execute a formal petitioning process; (2) there is usually a prescribed 3-year hiatus after a convicted petitioner is sentenced or released from confinement to determine whether he has been socially rehabilitated; and (3) the Attorney General is delegated the chief responsibility to review the pardon and to advise the President on the suitability of the applicant.

In making a pardon decision, the initial responsibility of the President demands inquiry into the particular circumstances of a case. To achieve this, the greatest amount of pertinent information available must be collected from the most reliable sources. Having sifted through the factual data, the President should then consider carefully the judicial proceedings, the prosecution's tactical course of action, the statute of law violated (as well as its intent and purposes), the condition of the public mind during the trial, and the former career and personal character of the accused.

Weighing all the above factors, the Chief Executive finally must reach his own decision on the matter by seeking an unbiased answer as the peoples' public servant to the following paramount question: Will the public welfare be better served by exercising the power of clemency for this particular case? The resultant answer should mirror his decision to pardon.

To be sure, exercising such discretionary, exceptional, and unreviewable authority could signal serious difficulties. In our modern political climate no official is more likely than the President to provoke criticism and charges of favoritism, ca-

[17] Smithers, "Nature and Limits of the Pardoning Power," p. 552. In this regard, former Chief Justice Mitchell of Pennsylvania has written: "The constitution deals with the pardoning power not as a prerogative claimed by divine right, but as an adjunct to the administration of justice, recognized in all civilized governments as necessary by reason of the fallibility of human laws and human tribunals." *Diehl* v. *Rodgers*, 169 Pa. St. 323, 32 Atl. 424 (1895).

price, or even corruption.[18] Further, criticism might well be precipitated by purely local conditions and frustrations, political partisan rancor, or very possibly by public ignorance of the implications and scope of the pardoning power. Nevertheless, the ultimate criterion governing activation of a pardon must remain the President's perception of the public welfare—not the fear of critical intimidation or vociferous complaints.

C. The Effects of a Pardon.—What legal impact does a pardon have upon the recipient? The leading Supreme Court case on this matter is *Ex parte Garland,* decided shortly after the Civil War. By an act passed in 1862,[19] Congress had prescribed that before any person could be permitted to practice law in Federal court, he would have to take an oath affirming that he had never voluntarily borne arms against the United States, nor given aid or comfort to its enemies. Augustus H. Garland, who had been a confederate sympathizer, and hence was ineligible to take the oath, had nevertheless received from President Andrew Johnson that same year "a full pardon for all offenses by him committed, arising from participation, direct or implied, in the Rebellion . . . . "[20] Garland argued that, armed with his pardon, his civil right to practice Federal law should be restored in spite of the prohibitive law. The court agreed.

Speaking for a sharply divided Court, Justice Stephen Field declared:

> The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching (thereto); if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.[21]

Justice Field's liberal view of a pardon's effects would still ordinarily apply where a pardon was issued prior to conviction. Further, he was correct in noting that a pardon aids in restoring the offender to his civil rights, and not vice versa. However, because his language seems sweeping and generalized, there is a recognizable need to posit certain significant qualifications for the pardon's use today.

(1) While a full pardon does indeed remove the legal consequences of the offense, it cannot hope to engender for the pardoned person treatment equal to an individual who never committed the crime. In other words, a pardoned malefactor will not enjoy a legal status identical with an innocent person.

(2) Contrary to popular belief, a pardon does not obliterate the record or stigma of a conviction, nor does it establish the innocence of a person. It merely forgives the offense.

(3) A full or unconditional pardon by the President does not in and of itself restore the recipient to his civil rights. The matter of regaining civil rights rests with the laws of the state in which the offender resides or where he attempts to exercise those rights.

(4) Executive clemency is prospective, not retrospective. Although a presidential pardon may rehabilitate the recipient and give him new credit, it does nothing to restore those rights previously forfeited by conviction.

(5) Despite the obvious beneficial repercussions coming from a "full and complete pardon," some consequences of the crime are left untouched. Civil rights may be restored and legal liabilities can be removed, but no amends are made for past suffering by the offender. Any punishment meted out and incurred is presumed to have been justfully and rightfully imposed. As a consequence, the administering authority is under no obligation to make compensations or restitution.

(6) Finally, no rational rule concerning a pardon's effects can be formulated without clearly distinguishing between those pardons granted because of a person's innocence and those granted for other reasons. A pardon given for innocence carries with it the essence of acquittal, and must therefore possess the concomitant effects of an acquittal. On the other hand, pardons granted for reasons other than innocence should leave stand determination of the recipient's guilt and only relieve him from the legal consequences of that guilt.

[18] Realizing the need for presidential restraint and discretion, Bonaparte has astutely observed: The exercise of any form of executive clemency for whatever purpose is undoubtedly open to grave abuse; responsibility to public opinion for its employment to proper ends should be strict and carefully defined; he who holds and uses or he who advises the holder how to use so delicate and far reaching a power as that of pardon must be ready at all times and to all legitimate critics to render a just account of his stewardship. Charles J. Bonaparte, "The Pardoning Power," *Yale Law Journal,* Vol. 19, No. 8 (June 1910), p. 608.

[19] Chapter 128, "An Act to prescribe an Oath of Office, and for Other Purposes," (July 2, 1862), *U.S. Statutes at Large,* Vol. 12 (1863), p. 502.

[20] *Ex parte Garland,* 4 Wall. 380 (1867).

[21] *Ibid.*

IV. Conclusion

Though neither an original nor exclusive instrument of American jurisprudence, the executive pardon proceeds from the President's power to execute Federal laws, and it entails an action which relieves from criminal punishment the person on whom it is bestowed. A pardon must be accepted by the offender in order to be effective, and its power is immune from Congressional supervision or restriction.

Finally, as practiced today, the power of presidential pardon in the United States is the evolutionary product of nearly 200 years of constitutional law. It is a power, when viewed in the whole, which has been used seldomly and with special deliberation. Hence, due largely to this realization, the Chief Executive's power to grant pardons retains great importance for the judicial process—both in ameliorating the needs of our penal system and in furthering the cause of justice in our social order.

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