

# Reviving Presidential Clemency in Cases of “Unfortunate Guilt”



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In the film *Monty Python and the Holy Grail*,<sup>1</sup> King Arthur and his intrepid band of English knights seek the Holy Grail from a castle full of extremely uncooperative Frenchmen. Arthur's quite reasonable request to see the relic prompts the castle's guards to pepper the crusaders with a confusing stream of Gallic invective, causing a befuddled Arthur to ask with great earnestness, "Is there someone else up there we could talk to?"

Proponents of meaningful federal sentencing reform, at least insofar as they have sought an end to overly harsh sentencing measures, have met with similarly dismissive (albeit more polite) responses from Congress. There long has been little interest on the part of legislators in doing away with "truth in sentencing" and reinstating a federal system of parole, or even in abandoning oppressive mandatory minimum sentences.<sup>2</sup> However, unlike King Arthur, there is someone else to whom reformers can talk: the president, whose plenary power to pardon and commute represents the historic mechanism for correcting instances of draconian sentencing.

The problem with asking the president to use pardons and commutations to repair flaws in the federal sentencing system is that, although we live in an era of greatly expanded executive power, the clemency authority has fallen into disuse. The post-Watergate era has been marked by a steady decline in presidential acts of clemency, culminating in the administration of George W. Bush who has trivialized the clemency power into virtual oblivion. This is especially true with regard to commutations, the form of clemency that is best suited to remedying sentencing problems. Although it was once common for presidents to commute significant numbers of sentences, in recent years commutations have been almost nonexistent.

The purpose of this essay is to explore whether the clemency power can be resuscitated to alleviate some of the most punitive manifestations of our current approaches to sentencing. I first will consider how a convincing case might be made to the incoming administration about the need to use the clemency power more aggressively to eliminate overly harsh sentences. I then propose that the president eliminate the Justice Department's role in advising him on clemency requests,

and instead establish a body of experts from diverse disciplines to make clemency recommendations. Finally, I suggest that in commuting sentences, the president utilize his ability recognized in *Schick v. Reed* to commute sentences conditionally, specifically by requiring a period of supervised release and other conditions intended to reduce the risk of recidivism.

## **I. The President Should Utilize the Clemency Authority to Commute Federal Sentences That Are Unfair or Overly Harsh**

Presidents rarely commute sentences anymore, but this has not always been the case. John F. Kennedy granted over 100 commutations in less than three years in office, while President Lyndon Johnson commuted 226 sentences, a number which represented nearly 25 percent of his total grants of clemency.<sup>3</sup> Yet for the past two decades, Presidents Bush, Clinton, and Bush combined to grant a miniscule seventy-two commutations—less than .5 percent of the total commutation applications they received. President Bush over the past eight years has set a new record for stinginess, having granted less than 1/10 of 1 percent of the commutation requests that he received.<sup>4</sup> If President Obama is to be persuaded to revive the clemency power and commute sentences again, a case must be made for why he should deviate from the stingy practices of his most recent predecessors.

At the outset, reform advocates must carefully define what they are asking the president to do: clemency should not—and probably cannot—effect sweeping changes in sentencing policy. Although the clemency power affords the president an important check on the Congress and the judiciary, it is not a mechanism intended to displace the lawmaking function. Surely a president who sought to reinstate parole by aggressively commuting federal sentences across the board would rightly be accused of overreaching, and his actions might be challenged on separation of powers grounds.<sup>5</sup> Moreover, individualized review of 200,000 federal sentences would be an overwhelming task that any president would be reluctant to undertake.

At the outset, reform advocates must carefully define what they are asking the president to do: clemency should

*Federal Sentencing Reporter*, Vol. 21, No. 3, pp. 160–166, ISSN 1053-9867 electronic ISSN 1533-8363  
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<http://www.ucpressjournals.com/reprintinfo.asp>. DOI: 10.1525/fst.2009.21.3.160.

not—and probably cannot—effect sweeping changes in sentencing policy. Although the executive clemency power affords an important check on the Congress and the judiciary, it is not a mechanism that permits the president to displace coordinate branches of government. Clemency was not designed to allow the executive to set up a new sentencing regime contrary to the wishes of Congress. Surely a president who sought to reinstate parole by commuting each and every federal sentence would rightly be accused of overreaching, and his actions might be challenged on separation of powers grounds.<sup>6</sup>

However, it would be entirely appropriate for a president to use his Article II authority in cases—even in a specific group of cases—where he is convinced that the sentencing mechanism is malfunctioning or otherwise operating in a manner that frustrates the broader ends of justice. Clemency was, after all, designed by the framers to address such situations. As Alexander Hamilton noted in *Federalist No. 74*, the pardon power is intended to permit the president to make “exceptions in favor of unfortunate guilt” so that American justice would not be too “sanguinary and cruel.”<sup>7</sup> Clemency is not to be reserved solely for the handful of extraordinary cases in which the innocent have been wrongfully convicted, but is intended also for the guilty, who sometimes deserve “mitigation of the rigor of the law.”<sup>8</sup>

Admittedly, it may sometimes be difficult to distinguish “overreaching” use of the clemency power from proper use of the authority, at least where clemency is employed to address a problem occurring in an entire class of cases. The question is largely one of degree, coupled with executive intention. If the president were to commute scores of sentences after individualized review of all cases in a particular group to achieve outcomes that are more consistent with prevailing notions of justice, this would likely be viewed as appropriate. On the other hand, the commutation of hundreds of sentences to achieve a broad policy goal that is at odds with the will of Congress (for instance, ceasing the “war on drugs”) would look much more like a usurpation of the legislative function.

History also gives us guidance as to how clemency can properly be used by the executive to systematically review an entire group of troubling cases. After the Vietnam War ended, Presidents Ford and Carter used the clemency power to mitigate the sentences of those who had violated the Selective Service laws during this controversial conflict.<sup>9</sup> Thomas Jefferson employed the pardon power to eliminate the sentences of those convicted under the Alien and Sedition Act, which he viewed as blatantly unconstitutional.<sup>10</sup> Governors likewise have repeatedly used the clemency power to review the sentences of abused female offenders who were originally not allowed by the legislature to raise the defense of battered woman syndrome.<sup>11</sup> The Georgia Board of Pardons and Parole reviewed the cases of resident aliens who had become subject to deportation because of unanticipated changes in federal immigration laws and granted 138 pardons.<sup>12</sup> In each

group of cases, changed or unanticipated circumstances, or a seismic shift in perceptions of the justness of punishment, prompted these grants of clemency.

Thus, federal sentencing reformers seeking to utilize clemency as a tool should identify groups of cases that exemplify especially unfair aspects of our current system. Professors Shanor and Miller have persuasively argued that systematic grants of clemency should be used to remedy the vast sentencing disparities that exist between those convicted of possessing crack and those possessing powder cocaine.<sup>13</sup>

Another category that would be appropriate for systematic clemency review is the group of mandatory minimum sentences. Although numerous commentators including the members of the Kennedy Commission<sup>14</sup> have recommended that Congress eliminate mandatory minimum sentencing laws, this does not appear to be imminent. Yet the mandatory minimum sentencing rules continue to create profound dilemmas for federal courts, as U.S. District Judge Joan Gottschall recently noted in *U.S. v. Roberson*.<sup>15</sup> The court sought in *Roberson* to achieve a proper sentence in a case where “Congress had in fact legislated two distinct ways of charging bank robbery in which a firearm was brandished, only one of which bore a mandatory minimum.” In such cases, federal judges across the country are struggling with whether to impose a reasonable Guidelines sentence and then “tack on” the mandatory minimum, resulting in an especially harsh overall sentence; or instead to add the mandatory minimums on to an unusually lenient sentence under the Guidelines, thereby achieving an overall sentence that they consider to be fair given the real offense.<sup>16</sup>

What *Roberson* and scores of cases like it make apparent is that as a result of the mandatory minimums, judges are regularly imposing sentences that they do not believe fit the crime or the circumstances of the particular defendant. Surely, systematic review by the president of the excesses attributable to mandatory minimum sentencing would be consistent with the framers’ directive that clemency should be used to mitigate the rigor of the law. Moreover, as long as the president used the clemency power to shorten excessive sentences based on the particular circumstances of each case (as opposed to simply commuting all mandatory minimum sentences), he could not plausibly be charged with usurping the lawmaking function.

Once specific classes of cases are identified where sentencing rules are malfunctioning, persuasive arguments must be mustered for why the Obama administration should deviate from the “safe” course of inaction that has been followed by presidents in recent years. As Professor Rachel Barkow’s article, makes clear, there are strong institutional and political reasons why the president (and those who advise him) may have no interest in commuting sentences: there are significant possible downsides to commuting sentences (appearing soft on crime; fear of future misbehavior by recipients of clemency), and few potential rewards.<sup>17</sup> Perhaps the only president who has

won praise for generous use of the clemency power is President Lincoln, and that came mostly in retrospect.<sup>18</sup> President Ford's pardon of Richard Nixon eventually has come to be recognized as a courageous act that helped to unite the country after Watergate, but the antipathy the pardon initially stirred probably cost him the 1976 election.

Moreover, incoming administrations recognize that there are a finite number of issues that they can address during their time in office. This is sometimes referred to as the problem of "limited political bandwidth," and freeing convicted criminals from prison has the potential to occupy a great deal of that bandwidth. New administrations inevitably must prioritize the problems that they wish to grapple with. First level issues must be addressed immediately by the administration. For President Obama, solving the economic crisis and conducting two wars would be obvious first level issues requiring immediate attention. Level two issues eventually must be addressed, but are not absolutely crucial—health care reform might qualify as an example of a level two issue for the new administration. Finally, level three issues may be tackled if time and resources allow. I have been told by those with experience in this process of establishing executive priorities that remedying sentencing disparities through clemency would likely be classified as a level three issue, which may account for why governors and presidents often do not get to clemency until the end of their term in office.<sup>19</sup>

Thus, if a president is to be persuaded to revive the power to commute a meaningful number of sentences, it must be conceived of as a higher priority. First, the president and his staff must be convinced that there is a pressing need to commute a significant number of prison terms in order to ensure fairness in sentencing. This might be done by dramatically raising awareness of and concern about sentencing inequities, as Families Against Mandatory Minimums has long sought to do.<sup>20</sup> The differences between Presidents Obama and Bush on matters of law enforcement suggest that the new administration could be more open to using clemency to achieve sentencing reform. Although Obama has not spoken directly about clemency, the website outlining his executive agenda states that "the disparity between sentencing crack and powder-based cocaine is wrong and should be completely eliminated."<sup>21</sup> As an Illinois state senator, Obama demonstrated that he was well aware of the dangers of erroneous convictions and the onerous collateral consequences that attend criminal convictions. He successfully led efforts to require all interrogations in capital cases to be videotaped, and to allow first time offenders to receive relief from civil disabilities.<sup>22</sup> Vice President Biden likewise is sufficiently concerned with inequities in federal sentencing laws to have sponsored the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 that would have eliminated the five-year mandatory minimum for simple possession of crack cocaine.<sup>23</sup>

In addition to highlighting the urgency of acting to redress unfair sentences, it would also be desirable to

increase the potential political payoff to the president for using the clemency power by broadening the constituencies urging the president act. If the only people interested in reviving the use of clemency are sentencing reform advocates, members of the ABA, and the families of federal prisoners, it is unlikely that this will provide sufficient incentive for the Obama administration to deviate from the "safe" course followed by recent presidents. Former Ohio Governor Richard F. Celeste has written about the importance of such support to executives who grant clemency at the state level. After having taken an extremely conservative approach to commuting sentences during most of his eight years as Ohio's governor, Celeste in 1990 commuted twenty-five sentences of battered women who had been convicted of murdering their abusers. Celeste attributed the general acceptance of those commutations to the careful clemency procedure he followed, and to "the large and vociferous community of women activists who supported the review."<sup>24</sup>

Similarly, if the president is to be persuaded to issue commutations, it would be vital to organize a strong, diverse coalition that favors use of the clemency authority. Such a group would certainly include proponents of racial equality in sentencing, since the crack cocaine sentencing scheme affects minorities disproportionately and can be readily redressed if the president were to commute lengthy crack cocaine sentences. In this era of shrinking federal funds, a pro-clemency constituency should also derive support from fiscal conservatives looking for ways to reduce federal spending—it is much more cost effective to release and treat drug users than to incarcerate them for long periods of time.<sup>25</sup> Indeed, in response to severe budget crises similar to that now facing the federal government, various states have used commutations to reduce the costs of incarceration.<sup>26</sup>

Religious leaders are another group whose support for clemency could prove crucial. Although religious leaders are sometimes associated with a punitive "eye-for-an-eye" approach to criminal justice, many members of the clergy support the use of clemency to further the values of mercy, fairness, and equality in sentencing. At the end of President Clinton's second term in office, a group of fifty-two prominent religious leaders called on the president to commute the sentences of federal low-level, nonviolent drug prisoners who had served at least five years imprisonment. This advocacy may well have played a role in President Clinton's decision to grant twenty such commutations.<sup>27</sup>

Law enforcement voices must also be an essential part of the chorus urging clemency. Federal judges and former prosecutors who are willing to speak out against the rigidity of the sentences that are meted out under our current system would offer the president a great deal of political "cover" for using the clemency power. Given the hostility frequently evinced by judges toward mandatory minimums, it should not be difficult to marshal comments similar to these of Judge Weinstein:

Extensive use of mandatory minimums has created grave problems in criminal justice system administration. Under these statutes, a defendant convicted of a particular crime faces what is sometimes an unnecessarily harsh sentence which the judge is powerless to adjust. These minimums are sometimes out of proportion to penalties set by otherwise controlling guidelines. In practice, the bounded discretion of judges is replaced with the unbounded discretion of the prosecutor to choose whether to charge a crime subject to a mandatory minimum or waive the minimum.<sup>28</sup>

Federal prosecutors, whose handiwork would be most directly undone by presidential commutations, are likely to be more difficult to recruit. However, given their close contact with and awareness of the flaws in our sentencing system, it should be possible to persuade some current and former prosecutors to support targeted use of the clemency power.<sup>29</sup>

## II. The Advisory Function for Clemency Should Be Placed in the Hands of an Independent Body of Experts instead of the Justice Department

Assuming that the president can be persuaded that clemency is necessary, commutations will only issue if there is a functioning process that provides the president with the information and sound advice that he requires to exercise his constitutional authority. Unfortunately, there is wide agreement that the federal clemency process is broken. It has recently been marred by the removal of the former U.S. Pardon Attorney in disgrace, by the buildup of a huge backlog of clemency requests, and by the slowing of clemency grants to the barest of trickles.<sup>30</sup> President George W. Bush was forced to take the unprecedented step of revoking a pardon he had granted only a day earlier to real estate developer Isaac Toussi because Bush admitted that he had received inadequate information from his advisors about Toussi's crime and about political donations Toussi's family had made.<sup>31</sup> If the clemency power is to be revived, the current system of processing clemency applications by a handful of attorneys in the Department of Justice must be overhauled.

One approach that might be used is to retain the current process, but seek to improve it incrementally. This could be done by maintaining the Justice Department's role in investigating and advising the president as to clemency, but increasing the number of attorneys processing clemency requests, or allowing the Pardon Attorney to report directly to the Attorney General rather than to the Deputy Attorney General.<sup>32</sup> Either of these suggestions would improve the clemency process at the margins: a larger staff would mean that more clemency requests could be processed, while a more direct reporting chain could raise the Pardon Attorney's profile and influence within the Justice Department.

However, more sweeping changes are needed if clemency is to function once more as an integral part of our system of justice. Given the prosecutorial responsibilities of the Justice Department, there is a conflict of

interest present when its attorneys must also serve as the gatekeepers for clemency. As Evan Shultz has argued persuasively, "the pardon process seems to have been captured by the very prosecutors who run our inevitably flawed criminal justice system."<sup>33</sup> This tension is particularly pronounced when it comes to commutations, a form of clemency by means of which the president shortens or eliminates the very sentences that federal prosecutors have worked hard to impose. Thus, it hardly seems a coincidence that the federal system of allowing a prosecutorial agency to make recommendations on clemency requests is not followed by any states. Although a few state systems provide the attorney general with a vote as part of a body that makes clemency decisions, only the federal system gives the primary authority for processing clemency and advising on clemency requests to a body charged with principally with prosecutorial duties.<sup>34</sup>

Rather, the president should look for advice to either a body of professionals charged with the sole task of reviewing clemency requests, or to a group of volunteers appointed because of their expertise in the many areas relevant to making commutation decisions. Former Ohio Governor Mike DiSalle envisioned such a board as follows:

I would like to give the [clemency] commission complete independence from political considerations by making appointments for life or good behavior, like the justices of the Supreme Court. I should also like to see the membership composed entirely of professional men—a psychiatrist, a jurist, a physician, a sociologist, an educator, perhaps a barrister, and a criminologist. Such a body, thus assured of independence and expertise, could be entrusted with . . . lesser matters of clemency and commutation with more freedom from extraneous pressures than an elected governor has.<sup>35</sup>

Despite the archaic, sexist phraseology, DiSalle was on to something, as certain states are discovering. The states that are most effective in terms of exercising the clemency power tend to be those which entrust a professional board with the power to grant clemency or to make a binding recommendation to the governor.<sup>36</sup> Other states such as Colorado and Michigan are experimenting with clemency boards comprised of expert citizen volunteers charged with the task of advising the governor on exercising the power.

Such Boards offer several advantages over the present system. First, they would allow the president to draw on not just the legal acumen that Justice Department attorneys possess, but on the interdisciplinary expertise of people from across the country. For example, President Obama could appoint to a federal clemency advisory board specialists in sentencing, criminal psychologists, forensic evidence experts, experienced prosecutors, prominent defense attorneys, legal scholars, and distinguished jurists. Such a body would possess wide-ranging expertise in a host of areas relevant to clemency decisions such as assessing the fairness of sentences, evaluating complex legal and factual arguments,

and predicting the likelihood of recidivism. President Ford appointed just such a board of citizen experts to review applications and make clemency recommendations in cases involving persons convicted during the Vietnam War under the Military Selective Service Act or discharged pursuant to the Uniform Code of Military Justice.<sup>37</sup>

Relying on the advice of an expert body would also insulate the president from charges that he is soft on crime or opening the prison gates arbitrarily, allowing him to counter critics by pointing out that he acted on the advice of a board of experts with respect to each grant of clemency. Although responsibility ultimately rests with the president, as many governors have found when making controversial clemency decisions, a favorable recommendation from an advisory board can deflect, or at least diffuse criticism that sometimes attends such grants.<sup>38</sup>

### III. The President Should Grant Conditional Commutations That Require Completion of a Period of Supervised Release and Compliance with Other Appropriate Conditions

Executives are often reluctant to grant clemency because of the potential for embarrassment or even tragedy if a clemency recipient reoffends. Undoubtedly, when it comes to clemency, every governor's or president's nightmare is Willie Horton—the Massachusetts inmate who received a furlough during the administration of Governor Michael Dukakis and used his freedom to kidnap and rape again.<sup>39</sup> If the president is to resume granting commutations, he should put in place a mechanism to help ensure that those whose sentences are commuted are closely monitored to reduce the risk of recidivism. Happily, Congress has provided for supervised release for most offenders who are discharged from federal prison. For example, under 18 U.S.C. § 3583(a), a sentencing court may, and often must, require that “the defendant be placed on a term of supervised release after imprisonment.” In any case in which supervised release was included as part of a sentence (and this would certainly be the case for most drug or firearms sentences), the president should commute only the sentence of imprisonment and leave the court's supervised release requirement intact.

A more difficult case is arguably presented if the president chooses to commute a sentence of imprisonment in which supervised release was not originally contemplated. Under such circumstances, if the president were to impose a condition of supervised release, this might give rise to a challenge by the clemency recipient (once he is out and wants to be free of supervised release) that the president exceeded his power to pardon under Article II by imposing a sentence that was not contemplated by the judge, thereby usurping judicial power. However, the Supreme Court held in *Schick v. Reed*<sup>40</sup> that the president can commute a sentence under virtually any terms that do not otherwise offend the Constitution.<sup>41</sup>

The sweeping language of *Schick* has been followed by the lower courts. In *United States v. Libby*,<sup>42</sup> the district

court upheld President Bush's imposition of a condition of supervised release on Scooter Libby even though he had not served any time in prison, despite the fact that federal law authorizes supervised release only after a period of incarceration. Although Judge Walton was troubled by the fact that President Bush had “effectively rewritten the statutory scheme on an *ad hoc* basis” by creating a sentence that did not exist under federal law, he acknowledged the breadth of *Schick*'s holding and noted that commutation decisions are rarely the province of the courts. By similar logic, it would not offend the Constitution for the president to impose a period of supervised release after imprisonment even in cases where the sentencing judge had not required a period of supervised release.

Using the conditional release mechanism, the president might also predicate the inmate's continued release on the successful completion of a drug rehabilitation regimen or on continued participation in a twelve-step program. Federal “drug courts” are currently experimenting with such mechanisms and are enjoying some success.<sup>43</sup> The president could likewise impose other conditions that would enhance the prospects of success by the inmate such as educational or vocational training. In other cases, the president might condition release upon the inmate making restitution to victims of his crimes. However, by retaining supervisory control over the commuted inmate, the president would have greater assurance that those released into society will not reoffend.

### IV. Conclusion

Clemency is a mechanism that is specifically designed to allow a “second look” at sentences that are overly harsh or unfair. Yet if sentencing reformers wish to try talking to the president rather than Congress about addressing such problems, they will have to marshal all of their powers of persuasion to overcome the inertia that has paralyzed the pardon process. Contrary to the plight of Arthur and his knights, the danger is not that reformers will be met with a stream of criticism or rejected outright. The more insidious peril is that they will simply be ignored. Past presidents have not announced a policy of refusing to grant clemency, yet they have largely managed to avoid fulfilling one of the only responsibilities expressly given to the executive by the U.S. Constitution. This inaction is especially troubling today, when we confront a justice system that is often marred by instances of inflexible, overly punitive sentencing. I have sought in this article to offer a possible road map that might help us return to a meaningful use of the clemency power. Given the important role that clemency has long played—and can still play—in our constitutional system, it is a task well worth pursuing.

### Notes

<sup>1</sup> 20th Century Fox, 1975.

<sup>2</sup> See Federal Parole Bill, H.R. 3072, 109th Cong. (2005); see Federal Prison Bureau Nonviolent Offender Relief Act of 2003, H.R. 3575, 108th Cong. (2003); see also FedCURE

- News: Federal Parole & Re-entry Legislation, <http://fedcure.blogspot.com/2007/08/fedcure-news-and-legislative-updates.html> (last visited Dec. 21, 2008).
- 3 United States Department of Justice, Presidential Clemency Actions by Administration, [http://www.usdoj.gov/pardon/actions\\_administration.htm](http://www.usdoj.gov/pardon/actions_administration.htm) (last visited Mar. 26, 2009).
- 4 *Id.* President George W. Bush received 8,576 commutation petitions, but granted only 11 such requests.
- 5 See generally *INS v. Chadha*, 462 U.S. 919 (1983).
- 6 See generally *INS v. Chadha*, 462 U.S. 919 (1983).
- 7 THE FEDERALIST No. 74 (Alexander Hamilton).
- 8 *Id.*
- 9 Exec. Order No. 11,803, 39 Fed. Reg. 33,297 (Sept. 16, 1974); Exec. Order No. 11,967, 42 Fed. Reg. 4,393 (Jan. 24, 1977).
- 10 11 THE WRITINGS OF THOMAS JEFFERSON 43-44 (A. Bergh ed. 1907) (1853) (letter to Mrs. John Adams, July 22, 1804) ("I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.")
- 11 For example, Ohio governor Richard Celeste commuted the sentences of 25 female prisoners who had been convicted of assaulting or killing their husbands or companions at trials in which they had been unable to offer evidence of battered-woman syndrome. 25 *Women Granted State's Clemency*, COLUMBUS DISPATCH, Dec. 22, 1990, at 1A, col. 1.
- 12 Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT'G REP. 184 (2001).
- 13 See Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons* 13 FED. SENT'G REP. 139 (2001).
- 14 See ABA, Justice Kennedy Commission Reports with Recommendations to the ABA House of Delegates, 71 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.
- 15 573 F.Supp.2d 1040, 1046-48 (N.D. Ill. 2008).
- 16 *Id.* at 1046-48 (describing, *inter alia*, a court that added a one-day sentence for three drug counts—the Guidelines range for which was 78-97 months—onto a 55-year sentence mandated by the statute governing brandishing a firearm during a crime of violence).
- 17 See Barkow, this issue.
- 18 See CARL SANDBURG, ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS 578-92 (2002).
- 19 See generally Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAR. U. L. REV. 185 (2003) (discussing President Clinton's eleventh-hour pardons and commutations); Daniel T. Kobil, *Do The Paperwork or Die: Clemency, Ohio Style?* 52 OHIO ST. L. J. 655, 656 (1991) (discussing Ohio Governor Richard F. Celeste's grants of clemency at the end of his term); see also Margaret Colgate Love, *In Defense of Pardons*, WASHINGTON POST, Nov. 18, 2008, at A27 (arguing that last minutes grants of clemency by presidents are less common than is often assumed).
- 20 For example, FAMM has sought to publicize the stories of individuals whose lives have been blighted by punitive federal sentencing rules. See <http://www.famm.org/ExploreSentencing/FederalSentencing.aspx> (last visited Dec. 21, 2008).
- 21 Change.gov, The Office of the President-Elect, The Civil Rights Agenda, [http://change.gov/agenda/civil\\_rights\\_agenda/](http://change.gov/agenda/civil_rights_agenda/) (last visited Dec. 21, 2008).
- 22 *Senator Obama's Racial Profiling, Videotaping Bills Clear Senate*, 2003 WLNR 13256535, CHI. DEFENDER, April, 3, 2003.
- 23 Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, S.1711, 110th Cong. (2007).
- 24 Richard F. Celeste, *Executive Clemency: One Executive's Real Life Decisions*, 31 CAR. U. L. REV. 139, 140 (2003).
- 25 Jonathan P. Caulkins, C. Peter Rydell, William L. Schwabe, and James Chiesa, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* MR-827-DPRC, 1997, 217 pp., ISBN: 0-8330-2453-1 (a study concluding that treatment of drug abusers reduces drug consumption significantly more than incarceration of drug users, and is much less costly).
- 26 See Press Release, *Governor Patton Orders the Early Release of Non-violent Offenders to Offset Budget Shortfalls for the Department of Corrections*, Kentucky Department of Corrections (Dec. 16, 2002); see also Press Release, *Governor Declares Prison Emergency*, Office of Governor Frank Keating, available at <http://www.ok.gov/osdocs/nr6-13a.html> (last visited Dec. 21, 2008); see also Barbara Hoberock, *Keating May Allow Release of Inmates*, TULSA WORLD, June 10, 1995, at N1; see also Geoff Dornan, *Pardons board to look at reducing prison overcrowding*, Nevada Appeal (Oct. 30, 2008) <http://www.nevadaappeal.com/article/20081030/NEWS/810299954> (last visited Dec. 21, 2008).
- 27 John Hopkins, *8 Virginia Clergy Join Call for Clinton to Release Nonviolent Drug Offenders*, 2000 WLNR 2129744, NORFOLK VIRGINIAN-PILOT, Nov. 19, 2000; see also Chad Thevenot, Coalition for Jubilee Clemency Year 2000 Letter to President Clinton Campaign Final Report and Recommendations for Action, reproduced at <http://www.cjpf.org/clemency/report2000.html> U.S. v. Polizzi, 549 F.Supp.2d 308 (E.D.N.Y., 2008).
- 28 See Pamela Manson, *Utah record producer wants 55-year firearms sentence cut*, THE SALT LAKE TRIBUNE (Sept. 15, 2008) (reporting that a group of 29 federal prosecutors and judges filed an amicus brief on behalf of defendant Weldon Angelos asking the district court to declare mandatory minimum sentences unconstitutional); Edward Fitzpatrick, *R.I. lawyer fuels federal sentencing debate*, PROVIDENCE JOURNAL BULLETIN (Aug. 26, 2007) (describing critique of mandatory minimums by former federal prosecutor David Zlotnick); Terrie Morgan-Besecker, *Create files suit for those serving life sentences*, THE TIMES LEADER, WILKES-BARRE, PA. (Aug. 12, 2008) (reporting that the former Pennsylvania Attorney General had filed suit in federal court against the state Board of Pardons alleging the board is violating the law by refusing to grant clemency hearings to inmates serving life sentences).
- 29 Laura Jakes Jordan, *Pardon chief transferred—Inspector general's report supports allegations of racism, mismanagement*, MEMPHIS COMMERCIAL APPEAL, Feb. 6, 2008 at A11; George Lardner, Jr., Op-Ed, *Begging Bush's Pardon*, N.Y. TIMES, Feb. 4, 2008, available at <http://www.nytimes.com/2008/02/04/opinion/04lardner.html?pagewanted=1&r=1>. (last visited Dec. 21, 2008).
- 30 Jennifer Loven, *In a rare move, Bush revokes pardon 1 day after granting it / GOP donations, new info on prior offense doom case*, HOUSTON CHRONICLE (Dec. 25, 2008) (quoting Bush Press Secretary Dana Perino as saying that granting the pardon may have created "an appearance of impropriety").
- 31 See Brian M. Hoffstadt, *Guarding the Integrity of the Clemency Power*, 13 FED. SENT'G REP. 180, 5 (2001).
- 32 Evan P. Shultz, *Does the Fox Control Pardons in the Henhouse?* 13 FED. SENT'G REP. 177 (2001); see also Love, *supra* n. 16, at 192-193 and fn. 23 (noting that most of the Justice Department officials responsible for overseeing the Justice Department's pardon program were former prosecutors).
- 33 MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION, 26-28 (2006) (describing the Minnesota, Nebraska, and Nevada systems in which the Attorney General sits a member of the body charged with making clemency decisions).
- 34 Michael DiSalle, THE POWER OF LIFE OR DEATH 212 (1965).
- 35 See Love, *supra* n. 30 at 21 (Out of the 13 states that issue more than a token number of pardons, all but one entrusts a

professional board with granting or making binding recommendations to the governor).

<sup>37</sup> Executive Order 11803, "Establishing a Presidential Clemency Board," (September 16, 1974). President Ford appointed a board that consisted of nine men and women with diverse backgrounds including several educators, a former U.S. Senator, the executive director of a paralyzed veterans organization, several attorneys, and a retired Marine Corps general. See <http://www.presidency.ucsb.edu/ws/index.php?pid=23895> (last visited December 21, 2008). The Board received about 21,800 applications and recommended presidential pardons for most individuals. ROBERT D. SCHULZINGER, *A TIME FOR PEACE* 4 (2006).

<sup>38</sup> For example, President Clinton in 2001, and Ohio Governor Richard F. Celeste in 1991 were both widely criticized for failing to obtain input from advisory bodies prior to issuing a number of last-minute pardons and commutations. See Peter Slevin & George Lardner, Jr., *Rush of Pardons Unusual in Scope, Lack of Scrutiny; Back-Door Lobbying Had Large Role in Clinton's Decisions, Observers Say*, WASH. POST, Mar. 10, 2001, at A3 (noting that "more than 30 of the 177 pardons and commutations granted by Clinton on his last day did not go through the Justice procedures"); Love, *supra* note 16 at 204 (noting that Clinton's failure to obtain input from the Justice Department

for his final pardons and commutations made his grants appear suspect); see also Celeste, *supra* note 21 at 141-42 (conceding that Governor Celeste's death penalty commutations seemed "hasty and ill considered" because of his failure to seek the advice of the Ohio Adult Parole Authority).

<sup>39</sup> See Love, *Bush Backers Have Horton Victims Speak*, L.A. TIMES, Oct. 8, 1988, at 1-23, col. 4 (reporting on a press conference in which relatives of Willie Horton's victims described the crimes he committed while free on a weekend furlough); Cohen, *William Horton's Furlough*, WASH. POST, July 8, 1988, at A23, col. 3 (stating that "[t]he Horton episode is a blemish that cannot be dismissed by citing how well Dukakis has handled crime in Massachusetts").

<sup>40</sup> 419 U.S. 256 (1974).

<sup>41</sup> The *Schick* Court held that the pardoning power's limitations "if any, must be found in the Constitution itself." *Id.* at 267.

<sup>42</sup> 495 F. Supp. 2d 49 (D. D.C. 2007).

<sup>43</sup> Terence P. Kemp, *A Federal "Drug Court" That Works—And How It Works*, COLUMBUS BAR LAWYERS QUARTERLY (2008); see also William G. Meyer & A. William Ritter, *Drug Courts Work*, 14 FED. SENT'G REP. 179 (2002); see also Julie Bisbee, *Federal Study Praises Results of Drug Courts*, NEWSOK, June 1, 2008, <http://newsok.com/federal-study-praises-results-of-drug-courts/article/3251122> (last visited Dec. 21, 2008).