Federal Probation

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Mandatory Sentencing: The Politics of the New Criminal Justice

The Failure of Correctional Reform in the United States

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bargaining tool in the criminal justice system, the pardon power in 1927 was deemed an act intended for 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 G. Clark 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 have been the redefinition of the offenses, real and existing, albeit limited, rehabilitation programs.

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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 preemptive to pardon, Alexander Hamilton made this latter point abundantly clear:

But the principal argument for requiring the power of pardoning in this case in the chief magistrate is, that in matters 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 disloyal process of concealing the legislature, or one of its branches, for the purpose of ensuring its inclination, would frequently be the occasion of letting slip the golden opportunity. The loss of an hour, a day, an hour, may sometimes be fatal. If it should be observed, that a discretionary power, with a tendency to abuse itself, was liable to 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 laws and the second place, the use of gravity to obviate the necessity 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 exculpate guilt. 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 more so 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 unexpectedly, 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.

11. The Evolving Legal Scope of Executive Power

A. An "Act of Grace."—"The constitutional history of the President's power to grant clemency evidence 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 posed: "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." Marshall then made his now-famous observation that:

A pardon is an act of grace, proceeding from the power exercised with the consent of the laws, which excuse the individual, as when it is found, 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, its reception is necessary, and which, if rejected, is reduced to the party to whom it is tendered; and if it be rejected, he is then entitled to a trial in a court to test it on his honor... Marshall thus in his dictums 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." In *Burdick v. United States*, Marshall's conflation of the pardon power was overstated 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
protection afforded by the fifth amendment, President Wilson proffered to Burdick "a full and unconditional pardon for all offenses against the United States"; he threatened to secure "his imprisonment 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 sentimentally, "may only be a pretense . . . involving consequences of even greater disgrace than those from which it purports to relieve." Moreover, he declared, "Circumstances may be made to bring innocence under the penalties of the law. If he is brought, escape by confession of guilt implied in the 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. An Act of Public Welfare.—The Supreme Court in 1937 sustained the President's right— even against the will of a prisoner—to commute a sentence of death to 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 administration of public welfare which will be still better served by inflicting less than what the judgment fixed." Presumably, what this seems to indicate is that by substituting a commission act order for a deed of pardon, any President is empowered to bestow a full pardon to a person, predicated only on the particular case, its relative circumstances, and his own judgmental perceptions. Implicit in this authority, of course, is the realization 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. Yet, when the specific elements of this authority "are...minutely to be fixed and legally scrutinized, several important points should be realized. First, as borne out by historical practice, the President's pardoning power is broad and unqualified. Exemplifying instances 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 the extent of the statute. In most instances, 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. Fourth, as might be expected, all territories under United States jurisdiction coterminously fall under the President's power of pardoning. 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 not subject to judicial control. In short, the President's sole discretion is the ultimate judge of when, and if, a pardon power should be activated in extraordinary cases.

Sixth, unlike practices in some European countries, 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 the sentence and restore civil rights; pardon just to restore civil rights; conditional pardon; amnesty; remission of punishment; remission of punishment on condition; remission of fines and forfeitures. Of these pardons after completion of sentence has assumed the greatest frequency.

Although neither Congress nor the courts may dictate when or if the pardoning power may or may not be implemented, it is generally agreed that the President's authority is not to be lightly or capriciously invoked. As Chief Justice Hughes asserted, an "offense" must have been committed. That is, in 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 on his own right to execute a pardon for as long as there remains any legal consequences in a particular case.

Regarding 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 short, in this, it is still highly doubtful whether a pardon could be declared null and void—or for that matter withdrawn—but 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 Value and Effectiveness—As mentioned earlier, the rationale for pardons in the United States is derived from common law traditions found in England. In this regard the power to offer clemency springs from a distinct realization that the President's pardon power has undergone profound legal and constitutional changes during the past century; it is generally agreed that the President's authority is not to be lightly or capriciously invoked. As Chief Justice Hughes asserted, an "offense" must have been committed. That is, in 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.

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B. The Decision to Pardon.—As provided for in "The Constitution" (Article II, Section 2) of the Code of Federal Regulations, three basic procedural rules currently exist for effecting an act of executive clemency. Respectively: (1) The President should 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 relegated 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 statutes 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 President's 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
price, or even corruption. Further, criticism might well be precipitated by purely local conditions and frustrations, political partisan rancor, or apparently just 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, Congress had prescribed that before any person could be permitted to practice law in Federal court, he would have to take an oath asserting 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 the same year "a full pardon for all offenses by him committed, arising from participation, direct or implied, in the Rebellion." 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 removes the penalties and disabilities, and restores him to all his civil rights, to the same extent, if at all, as if he had never committed the offense. Of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the crime. In other words, a pardoned malefactor will be treated by the law, in every respect, as an individual who never committed the crime."

3. The Exercise of Executive Power

The exercise of any form of executive power is subject to the ultimate criterion governing activation of a pardon as just account of his stewardship. The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. The 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.

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 present system and in furthering the cause of justice in our social order.
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