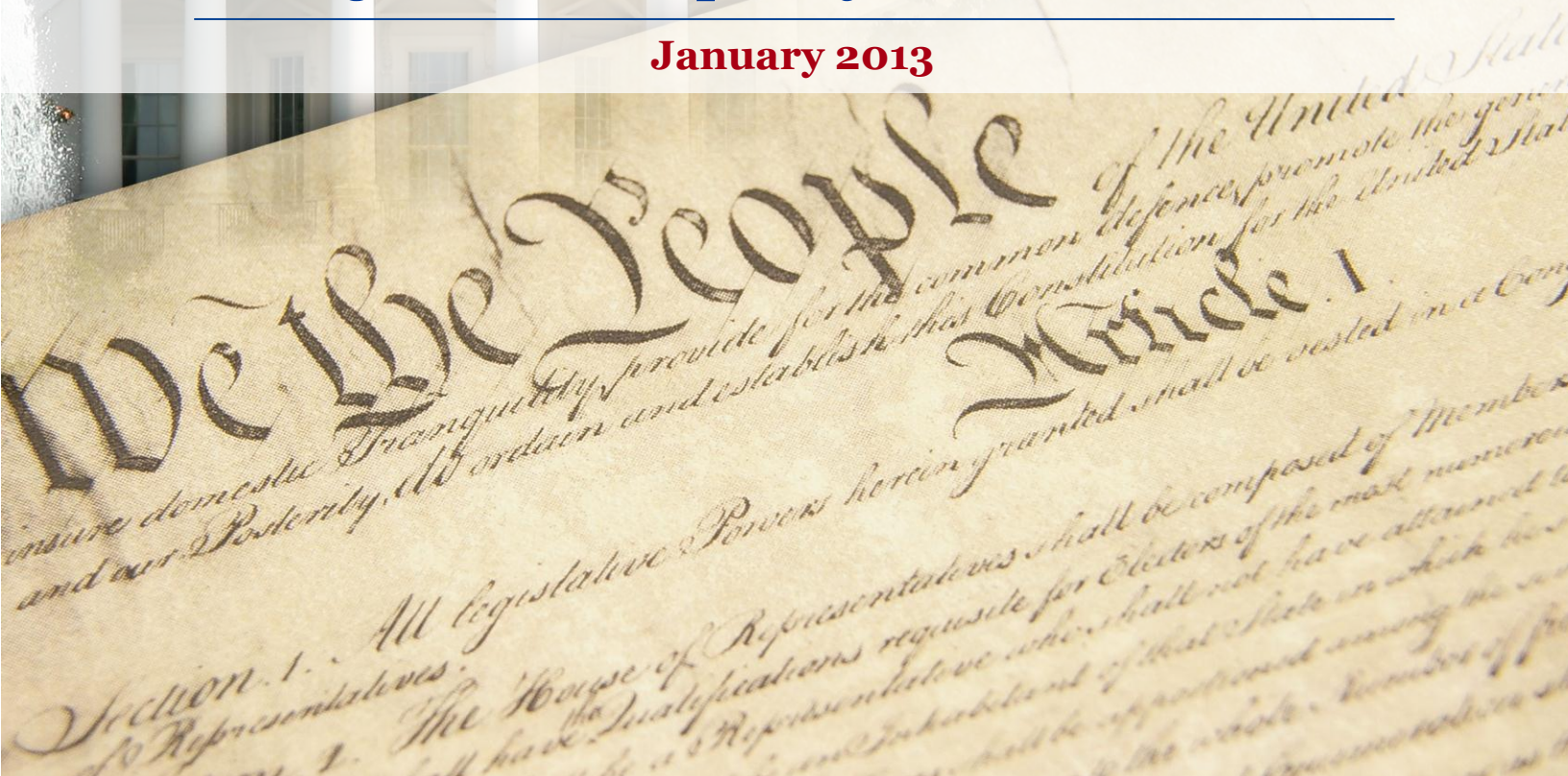




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Toward a More Perfect Union: *A Progressive Blueprint for the Second Term*

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**“Reinvigorating the Federal Pardon Process:
What the President Can Learn from the States”**

by Margaret Colgate Love

Toward a More Perfect Union: *A Progressive Blueprint for the Second Term*

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Reinvigorating the Federal Pardon Process: What the President Can Learn from the States

*Margaret Colgate Love**

I. Introduction

For the past thirty years presidents have been increasingly reluctant to use their constitutional power to pardon. At the same time, there is an increased demand for pardon in the federal justice system to restore rights and shorten prison sentences. The primary reason for the imbalance between supply and demand is that the process for administering the pardon power has lost its vigor, its integrity, and its sense of purpose. The attorney general, steward of the power since the Civil War, has allowed a parochial institutional agenda to inform advice in pardon matters instead of broadly defined presidential policy goals. The three most recent presidents have been willing to live with a dysfunctional pardon process, evidently because they did not regard pardoning as a duty of office and perceived its risks to outweigh its rewards. Without a plan for using the power, and without a reliable system for executing it, pardoning has become a dangerous activity for any president, and a useless vestigial appendage of the presidency. The failure of the pardon process during the 1990s explains why President Clinton's final days in office were marred by pardon-related scandal, a fate only narrowly averted by his successor George W. Bush. President Obama appears to believe he can avoid scandal by not pardoning at all, or making only token use of the power. The first part of this Issue Brief will consider the use of the pardon power in both historical and contemporary contexts.

The second part of this Issue Brief will examine state pardon procedures that suggest ways that presidential pardoning could be restored to a useful place in the federal justice system. While states follow a variety of different administrative models, most have procedures that are more transparent, accountable, and authoritative than the federal process. Some states mandate consultation with elected or appointed boards, some require pre-pardon publication of applications or intended executive action, and some require public hearings and consultation with responsible justice officials. In thirty-two of the forty-four states where the governor is responsible for pardoning, the state constitution requires an annual report to the legislature on pardon grants for that year.

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Experience in the states that have a sound administrative structure suggests that even if a reliable process does not guarantee vigorous pardoning, it at least discourages the sort of irresponsible use (or disuse) of the power that has become the norm in the federal system.

This Issue Brief concludes with three reforms that could reinvigorate the federal pardon process and restore its moral force. First, the process should be guided by clear standards that are applied consistently, and grants should be reasoned and defensible. Second, the process must be administered by individuals who are independent and authoritative, who have the confidence of the president, and who are given the necessary resources to carry out the president’s pardoning agenda. Third, the process must be accessible and responsive to people of all walks of life, and take into account the likelihood that many deserving pardon applicants will not have skilled counsel or well-connected supporters to advocate in their behalf.

II. Disuse of the Pardon Power

Pardon has fallen into disuse in the American criminal justice system and yet there has never been a greater need for it. A power to pardon was included in the federal Constitution because its Framers understood that legislative punishments tend to be harsh and courts strict about imposing them, so that there must be some power in the executive to make “exceptions in favor of unfortunate guilt.”¹ From the earliest years of our nation’s history the power to pardon was used routinely by the president, as it was by state governors, to correct unjust or unpopular results of a legal system whose procedural protections were crude and punishments harsh. With the abolition of federal parole in 1984 and the growth of a punitive regime of collateral penalties, some scholars anticipated that pardon would reclaim a useful role.² That hasn’t happened, in large part because of the way the pardon power is administered by the Department of Justice.

Unlike most state constitutions, the Constitution places no limits on the way the president exercises his power to pardon. Paradoxically, this is precisely what has made the pardon power increasingly difficult for the president to use. For over a century the federal pardon process served the president well because of self-imposed guarantees of transparency, authority, and accountability. But federal pardoning lost its transparency under Franklin Roosevelt, its authority under Ronald Reagan, and its accountability under Bill Clinton, setting the stage for the unhappy end-of-term pardoning experiences that “disgusted” George W. Bush and engulfed Bill Clinton in scandal.³ Now pardon-related

¹ THE FEDERALIST NO. 74 at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

² See, e.g., KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 86 (1989) (speculating that the abolition of federal parole could lead to “an expanded and crucial role for pardons”).

³ See GEORGE W. BUSH, DECISION POINTS 104 (2010) (“One of the biggest surprises of my presidency was the flood of pardon requests at the end. I could not believe the number of people who pulled me aside to suggest that a friend or former colleague deserved a pardon. At first I was frustrated. Then I was disgusted. I came to see the massive injustice in the system. If you had connections to the president, you

scandal is lapping at the door of the Justice Department itself,⁴ and all because the process for administering the power has lost the qualities that once made it the most reliable and productive in the land.

A new paradigm must be developed to encourage the president to use his constitutional power with the courage and capacity the Framers intended. Useful models for a restructured and reinvigorated federal pardon process can be found in the states, which have experimented with various arrangements for managing their own pardon power that include features conducive to transparency, authority, and accountability.⁵ While a sound administrative structure does not guarantee vigorous pardoning, at least it discourages the sort of irresponsible use (or disuse) of the power that has marred the last two presidencies.

III. The Least Respected Power

Pardon is the least respected and most misunderstood of presidential powers. Few know that for the first 180 years of our history presidents made liberal and regular use of their constitutional power, as governors did in the states.⁶ Before there was a federal prison system and the possibility of early release on parole, when prison sentences were mandatory and served in squalid county jails, hundreds of federal prisoners were freed by presidential fiat every year.⁷ When conviction of a felony resulted in civil death in many states, full pardons restored repentant federal criminals to their rights and status.⁸ From time to time, the president was criticized for granting particular pardons, but the ordinary business of pardoning went on month after month, year after year, out of the public eye

could insert your case into the last-minute frenzy.”); see also Margaret Colgate Love, *The Pardon Paradox: Lessons from Clinton's Last Pardons*, 31 CAP. U. L. REV. 185, 196 n.38 (2003) (describing the breakdown of the federal pardon process at the end of the Clinton presidency).

⁴ See Dafna Linzer, *IG Criticizes Justice Pardon Attorney Over His Handling of Inmate's Plea for Release*, WASH. POST, Dec. 18, 2012, http://www.washingtonpost.com/politics/ig-criticizes-justice-pardon-attorney-over-his-handling-of-inmates-plea-for-release/2012/12/18/a6440c6a-495d-11e2-820e-17eefac2f939_story.html. See also *infra* Part II.

⁵ Brief summaries of state pardoning practices and frequency of grants are appended to this issue brief. A more detailed chart showing the source of the power to pardon in every state and procedural constraints on its exercise, along with more detailed state-by-state summaries of pardoning policy and practice, is available at Margaret Colgate Love, *Restoration of Rights Project*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS (2012), www.nacdl.org/rightsrestoration.

⁶ See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1175–95 (2010) (describing the administration of the president's pardon power from the earliest years of the Republic through 1980); W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 95–136 (1941) (describing the Justice Department's administration of the pardon power through the administration of Franklin Roosevelt); see also George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT'G REP. 212 (2004).

⁷ See P.S. Ruckman, Jr., *Presidential Pardons/Commutations by Term, 1789-2009*, <http://pardonresearch.com/prescomp/pardcommTerm.htm>; see also Love, *Twilight*, *supra* note 6, at 1175–87.

⁸ See HUMBERT, *supra* note 6, at 100–101 (noting increase of pardon “to restore civil rights” after 1895).

and without fanfare or controversy, until the 1980s.⁹ What Alexander Hamilton called the “benign prerogative” also played a critical role in resolving political crises.¹⁰

Pardon played a constructive and varied role in the federal justice system for so many years largely because of the attorney general’s central role in administering the power. Lincoln’s Attorney General Edward Bates was the first to see the institutional advantages of controlling access to the president and harnessing the pardon power to the needs of the justice system,¹¹ and later presidents formalized this arrangement in executive orders and regulations.¹² Because the pardon power was largely controlled by the Justice Department, grants necessarily reflected the values and policy preferences of those responsible for prosecuting crime and administering punishment.¹³ At the same time, the advisory role of a member of the president’s cabinet ensured that political as well as law enforcement considerations would inform pardon recommendations.

Until quite recently this system did what it was designed to do. While over the years there have been controversial grants, there were no genuine pardon-related scandals

⁹ See Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 2 (2005) (“For most of this country’s history, the practice of executive clemency has quietly functioned as an ancillary feature of the criminal justice system, without attracting much attention or generating much controversy in the vast majority of cases.”).

¹⁰ THE FEDERALIST NO. 74, *supra* note 1, at 446. Instances where the pardon power was used as a tool of statecraft to “restore the tranquility of the commonwealth” *id.*, are described in Love, *Twilight*, *supra* note 6, at 1173–75.

¹¹ Bates declared that President Lincoln was “unfit to be trusted with the pardoning power” because he was too susceptible to women’s tears. RICHARD N. CURRENT, *THE LINCOLN NOBODY KNOWS* 169 (1958). Pardon Clerk Edmund Stedman reported, “My chief, Attorney General Bates, soon discovered that my most important duty was to keep all but the most deserving cases from coming before the kind Mr. Lincoln at all; since there was nothing harder for him to do than put aside a prisoner’s application . . .” J. T. DORRIS, *President Lincoln’s Clemency*, 20 J. ILL. ST. HIST. SOC’Y 547, 550 (1953) (citing LAURA STEDMAN & GEORGE M. GOULD, *LIFE AND LETTERS OF EDMUND CLARENCE STEDMAN* 265 (1910)).

¹² Love, *Twilight*, *supra* note 6, at 1178–93.

¹³ For example, in 1932, Attorney General William Mitchell commented in a speech to the American Bar Association on the tension that sometimes arose between Justice Department prosecutors, determined to enforce the criminal laws severely, and President Hoover, a veteran practitioner of humanitarian relief:

Reviewing the past three years, I believe that it is in respect to pardons that President Hoover has most often shown an inclination to disagree with the Department of Justice. I suspect he thinks we are too rigid. The pitiful result of criminal misconduct is that the burden of misery falls most heavily on the women and children. If executive clemency were granted in all cases of suffering families, the result would be a general jail delivery, so we have to steel ourselves against such appeals. President Hoover, with a human sympathy born of his great experiences in the relief of human misery, has now and again, not for great malefactors but for humble persons in cases you never heard of, been inclined to disagree with the prosecutor’s viewpoint and extend mercy. We have been glad when such incidents occurred.

HUMBERT, *supra* note 6, at 121 (quoting William Mitchell, Attorney Gen., Address to the American Bar Association: Reform in Criminal Procedure, (Oct. 13, 1932)).

until the process broke down in the Clinton Administration.¹⁴ After the tidal wave of grants on Clinton's final day in office, some urged that responsibility for administering the president's power be removed from the Justice Department,¹⁵ while others thought the Justice Department process could be reformed.¹⁶ But the problems in the Justice Department's pardon process persisted in to the presidency of George W. Bush. Requests from the White House for more favorable recommendations were once again ignored by Justice,¹⁷ and once again White House officials found themselves unable to count on support from Justice when they were deluged with applications from well-connected favor-seekers at the end of President Bush's second term.¹⁸ In 2007 the

¹⁴ Before the final grants, President Clinton complained publicly about the unresponsive Justice Department review process that "existed before I got here." *President Clinton's Statement of his Pardoning Philosophy*, 13 FED. SENT'G REP. 228 (2000) ("I wish I could do some more [pardons] – and I'm going to try. I'm trying to get it out of the system that exists, that existed before I got here, and I'm doing the best I can."); see also *Hearing before the H. Comm. on Gov't Reform on the Pardon of Marc Rich*, 107th Cong. 1st Sess. (2001), (statement of Beth Nolan, White House Counsel, describing fruitless White House efforts to obtain more favorable pardon recommendations during Clinton's final year in office); Love, *Paradox*, supra note 3, at 198–205 (describing the breakdown of the Justice Department pardon process at the end of the Clinton presidency, including Pardon Attorney Roger Adams' recommendation in the fall of 2000 that those interested in a last minute clemency grant should take their cases directly to the White House).

¹⁵ See, e.g., Daniel T. Kobil, *Reviving Presidential Clemency in Cases of "Unfortunate Guilt"*, 21 FED SENT'G REP. 160, 163 (2009) ("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."); Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse?*, 13 FED. SENT'G REP. 177, 178 (2001) ("[A]n organization with a vested interest in prosecuting and convicting people is in charge of recommending whether those convictions should be put aside The real solution is removal of the process from Justice.").

¹⁶ Brian M. Hoffstadt, *Guarding the Integrity of the Clemency Power*, 13 FED. SENT'G REP. 180, 181–82 (2001) (discussing ways the clemency review process could remain within the Justice Department without being unduly influenced by the perspective of prosecutors).

¹⁷ See Dafna Linzer & Jennifer LaFleur, *ProPublica Review of Pardons in Past Decade Shows Process Heavily Favored Whites*, WASH. POST, Dec. 3, 2011, http://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElnVQO_story.html:

In 2006, White House Counsel Harriet Miers became so frustrated with the paucity of recommended candidates that she met with Adams and his boss, Deputy Attorney General Paul McNulty. Adams said he told Miers that if she wanted more recommendations, he would need more staff. Adams said he did not get any extra help. Nothing changed. "It became very frustrating, because we repeatedly asked the office for more favorable recommendations for the president to consider," said Fielding, who was Bush's last White House counsel. "But all we got were more recommendations for denials."

¹⁸ See, e.g., Charlie Savage, *On Clemency Fast Track, Via Oval Office*, N.Y. TIMES, Jan. 1, 2009, A1 (pardon granted to Isaac Toussie without a recommendation from the Justice Department was later revoked after the White House became aware of his controversial reputation in the community); *Hearing Before the H. Comm. on Gov't Reform on the Pardon of Marc Rich*, 107th Cong. 1st Sess. (2001) (statement of Beth Nolan, White House Counsel during President Clinton's final days in office recounted in Love, *Paradox*, supra note 3 at 198 n. 41) (confirming that the Justice Department informed the White House in the fall of 2000 that "they couldn't take any more pardon applications and that they weren't going to be able to review them or get the information to the White House."). See *infra* Part II for an account of the breakdown of the

pardon attorney was forced to resign as a result of an internal investigation into mismanagement of the pardon program.¹⁹ Three years later the Justice Department's Inspector General reported that the new pardon attorney (a former military judge and narcotics prosecutor) was personally processing, and sending forward to the White House, hundreds of recommendations in commutation cases, assisted only by unpaid law student interns, establishing that most prisoner petitions were getting short shrift.²⁰ The pardon process was described as a "bottomless black box" where applications lingered for years before finally being denied without explanation.²¹ In 2011, investigative reporting published in the Washington Post documented outcomes of pardon cases evidently disfavoring racial minorities, and undue influence by members of Congress in favor of wealthy constituents.²² A few months later, the Post reported that the pardon attorney had misled the Bush White House about the import of official recommendations in a case involving a prisoner serving three life sentences for distributing crack cocaine.²³ In the wake of these revelations, the White House asked the Bureau of Justice Statistics to report on how pardons were processed,²⁴ members of Congress and advocacy organizations called for an investigation of the pardon attorney's office,²⁵ and the

pardon process in the final months of the administrations of Presidents Clinton and George W. Bush.

¹⁹ See George Lardner, Jr., *Begging Bush's Pardon*, N.Y. TIMES, Feb. 8, 2008, <http://www.nytimes.com/2008/02/04/opinion/04lardner.html> (describing the backlog of clemency applications in Justice, and the charges that resulted in the pardon attorney's resignation). A more recent scandal has involved his successor. See Linzer, *supra* note 4.

²⁰ See AUDIT REPORT 11-45, OFFICE OF THE INSPECTOR GEN., AUDIT OF THE DEP'T OF JUSTICE PROCESSING OF CLEMENCY RECOMMENDATIONS 31-32 (Sept. 2011).

²¹ See Molly Gill, *Into the Bottomless Black Box: The Prisoner's Perspective on the Commutation Process*, 20 FED. SENT'G REP. 16 (2007). The federal pardon process is described in detail in Samuel Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 35-46 (2005).

²² See Dafna Linzer, *Presidential Pardons: A Lawmaker's Support Improves Criminals' Odds for Mercy*, WASH. POST, Dec. 4, 2011, http://www.washingtonpost.com/investigations/presidential-pardons-a-lawmakers-support-improves-criminals-odds-for-mercy/2011/11/23/gIQA61bVUO_story.html.

²³ Dafna Linzer, *Clarence Aaron Was Denied Commutation, but Bush Team Wasn't Told All the Facts*, WASH. POST, May 3, 2012, http://www.washingtonpost.com/investigations/clarence-aaron-was-denied-commutation-but-bush-team-wasnt-told-all-the-facts/2012/05/13/gIQAEZLRNU_story.html. See also Dafna Linzer, *Obama Administration Seeks New Review of Commutation Request from Clarence Aaron*, WASH. POST, July 18, 2012, http://www.washingtonpost.com/politics/obama-seeks-fresh-review-of-federal-prisoners-commutation-request/2012/07/18/gJQApDm6tW_story.html.

²⁴ The BJS inquiry is intended to test the conclusion of the investigative series described in notes 55 and 60 that whites are favored in the pardon process, but as of this writing a contract had not yet been awarded. See Dafna Linzer, *Details Emerge on Government Study of Presidential Pardons*, PROPUBLICA (Aug. 8, 2012), <http://www.propublica.org/article/details-emerge-on-government-study-of-presidential-pardons>. The "request for proposal" is at http://bjs.ojp.usdoj.gov/content/pub/pdf/sepp_sol12.pdf, and a contract has been awarded to the Rand Corporation.

²⁵ Dafna Linzer, *Congressional Leader Calls for Investigation of the Pardon Office*, PROPUBLICA (May 23, 2012), <http://www.propublica.org/article/congressional-leader-calls-for-investigation-of-the-pardon-office>.

Department's Inspector General recommended that the pardon attorney be disciplined.²⁶ The New York Times editorialized about how the Justice Department's "prosecutorial mindset" had "undermined the process with huge backlogs and delays."²⁷ Meanwhile, weeks from the end of his first term in office, President Obama had issued even fewer pardons than his two predecessors, perhaps hoping to avoid scandal by making only token use of his power. Reports from inside the administration suggested that only a fraction of the favorable recommendations received from Justice had been acted on favorably, with many left pending or returned for a different recommendation, seeming to confirm the President's lack of confidence in the pardon process.

The disintegration of the Justice Department's pardon process, which began in earnest in the Clinton administration and has continued to the present, can be traced to three fateful decisions. The first was Franklin Roosevelt's decision in 1933 to have the Justice Department stop publishing the reasons for its favorable clemency recommendations.²⁸ The decision to stop publishing reasons for grants deprived the public of the factual predicate necessary to hold pardon decision-makers accountable and reinforced the impression that pardoning was mysterious, capricious, and possibly

²⁶ See OFFICE OF THE INSPECTOR GEN., OVERSIGHT AND REVIEW DIV., A REVIEW OF THE PARDON ATTORNEY'S RECONSIDERATION OF CLARENCE AARON'S PETITION FOR CLEMENCY 21 (Dec. 2012) ("[Pardon Attorney Ronald] Rodgers did not represent [the United States Attorney's] position accurately, and his conduct fell substantially short of the high standards to be expected of Department of Justice employees and of the duty that he owed to the President of the United States.").

²⁷ See Editorial, *The Quality of Mercy, Strained*, N. Y. TIMES (Jan. 5, 2013), http://www.nytimes.com/2013/01/06/opinion/sunday/the-quality-of-mercy-strained.html?ref=opinion&_r=0:

Presumably, the president is willing to use acts of clemency to right the wrongs of the sentencing and judicial systems. Yet the same cannot be said of the Justice Department, which has a prosecutorial mind-set. It has undermined the process with huge backlogs and delays, and sometimes views pardons as an affront to federal efforts to fight crime.

See also Samuel T. Morison, *A No-pardon Justice Department*, L.A. TIMES, Nov. 6, 2010 ("[T]he bureaucratic managers of the Justice Department's clemency program continue to churn out a steady stream of almost uniformly negative advice, in a politically calculated attempt to restrain (rather than inform) the president's exercise of discretion.").

²⁸ The practice of publishing reasons for pardon recommendations began in the first Cleveland Administration, and for almost half a century opened a fascinating window into the operation of the post-Civil War federal justice system. Each year, between 1885 and 1932, the annual report of the attorney general detailed (sometimes extensively) his reasons for recommending each of the hundreds of annual clemency grants, providing an unparalleled basis for holding publicly accountable an otherwise unrestrained power of government. But in 1933 this practice ceased, reportedly at the direction of President Roosevelt himself, and the Justice Department's annual report on the pardon program thereafter contained little more than opaque case processing statistics. See Love, *Twilight*, *supra* note 6, at 1191 (noting that for the twenty-five years after 1933, published reports of the pardon attorney contained only bare case statistics, and between 1941 and 1955 no reports were published at all). Between 1958 and 1963 the reports of the pardon attorney detailed policy aspects of the pardon program, as well as President Kennedy's decision to commute dozens of mandatory minimum drug sentences, but thereafter the reports returned to being generally uninformative.

corrupt. It also encouraged both the president and the Justice Department to think that they did not need to be accountable to the public for pardoning.

The second decision came half a century later when Ronald Reagan agreed to a delegation of responsibility for making pardon recommendations within the Justice Department from the attorney general to a career civil servant who reported to officials responsible for overseeing the day-to-day work of federal prosecutors.²⁹ This delegation deprived the president of authoritative and accountable advice from a Senate-confirmed member of his Cabinet, and marginalized the pardon program within Justice.

The third fateful decision was President Clinton's unprecedented public distancing from the established pardon process in several high profile cases,³⁰ which together with his long-running neglect of the routine pardon caseload³¹ set the stage for the scandalous orgy of pardoning on the final day of his term.³² The loss of public confidence in the pardon process that resulted from the blatant cronyism of these final grants has never been acknowledged or addressed. Then, as now, the pardon process was seen to favor the wealthy and well-connected, and not ordinary people with garden variety cases. Then, as now, the Justice Department process produced few favorable recommendations,³³ gave undue advantage to applicants with influential advocates,³⁴ and generally appeared to operate in a random and unfair fashion.³⁵ Over the past fifteen years the pardon process has become so compromised in the public mind, and so

²⁹ See 48 Fed. Reg. 22,290 (May 17, 1982). The 1982 revision of Part I of 28 C.F.R. formalized the attorney general's responsibility for making clemency recommendations to the president, but at the same time it authorized the delegation of this responsibility within the Justice Department to a career official who at the time did not even enjoy executive status,²⁹ and whose recommendations were to be communicated to the White House through subordinate political appointees in Justice whose primary management responsibilities involved oversight of federal prosecution policy and practice.

³⁰ See, e.g., PARDON ATTORNEY REFORM AND INTEGRITY ACT, S. REP. NO. 106-231, at 8 (2000) (commutation of sixteen Puerto Rican terrorists without Justice Department advice); see also Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251 (1999) (describing the pardon attorney refusal to docket a posthumous pardon application on behalf of the first Black West Point graduate).

³¹ Love, *Paradox*, *supra* note 3, at 196 n.38 (2003) (describing irregular consideration of pardons at the White House throughout the Clinton presidency).

³² See *The Controversial Pardon of International Fugitive Marc Rich: Hearing Before the H. Comm. on Gov't Reform*, 107th Cong. 1st Sess. 342–43 (2001) (statement of Beth Nolan, White House Counsel to former President Clinton) (describing the unresponsive Justice Department pardon process at the conclusion of the Clinton Administration, and the ensuing frantic effort at the White House in the final weeks to process the hundreds of clemency requests coming directly to the White House); see also Love, *Paradox*, *supra* note 3, at 191–97 (describing the run-up to final Clinton pardons, the failure of the Justice Department pardon process, staffing of pardons in the White House, and the grants themselves).

³³ See Dafna Linzer, *Obama Has Granted Clemency More Rarely Than Any Modern President*, PRO PUBLICA (Nov. 2, 2012), <http://www.propublica.org/article/obama-has-granted-clemency-more-rarely-than-any-modern-president>.

³⁴ See Linzer, *supra* note 22.

³⁵ See, e.g., Gill, *supra* note 21.

unfriendly to anyone outside the Justice Department, that the president himself no longer relies on it.

Many doubt that the Justice Department process is capable of the kind of reform necessary to restore what Justice Anthony Kennedy called its “moral force.”³⁶ But whether or not Justice remains in its stewardship role, it is clear that major reforms are necessary to restore the pardon process to something that protects and serves the president. State pardon procedures discussed in the following section suggest ways that the federal pardon process could regain the transparency, authority, and accountability that are conducive to more frequent and responsible use of the power. While the president could not constitutionally be compelled to adopt such procedures, he could do so voluntarily, adapting elements of functional state systems to the federal context.

IV. What the President Can Learn from the States³⁷

The constitutions of most states provide for regulation of the pardon power at least to some extent. Even where the governor’s constitutional power is unlimited, creative legislatures have found a way to introduce a degree of accountability and transparency into the pardon process that is foreign to the federal system. In some states no pardon may issue without a public hearing, and in others pardon applications must be published in the newspaper or tacked on the court house door. Frequently the governor is happy to cede some of his power as a way of avoiding unwanted favor-seekers and the controversy that frequently follows an irregular grant. Even in those states where the constitution contemplates no legislative control over the pardon process, the state constitution may require the governor to report after the fact about the pardons he or she has granted, including the reasons for each grant. This modest degree of legislative and popular oversight does not guarantee that the governor will grant many pardons, but it does seem to ensure that the pardons granted will be defensible. It seems noteworthy that none of the states in which pardon-related scandals have recently engulfed the governor insist that the governor share the power or report to the legislature.³⁸

³⁶ Anthony M. Kennedy, Associate Justice, U.S. Supreme Court, Speech at the American Bar Association (Aug. 9, 2003), *reprinted in* 16 FED. SENT’G REP. 126, 128 (2003).

³⁷ Summaries at the conclusion of this paper show generally how the power is exercised in each state, and how frequently pardons are issued. A fuller account of each state’s pardoning policies and practices, including citations to relevant provisions of state constitutions and statutes, can be found in the state-by-state profiles posted on the website of the Nat’l Ass’n of Criminal Def. Lawyers (NACDL). Love, *Restoration of Rights Project*, *supra* note 5.

³⁸ *See, e.g., In re Hooker*, 87 So. 3d 401 (Miss. 2012) (upholding Mississippi Governor Haley Barbour’s controversial final grants despite applicants’ failure to comply with constitutional notice provisions); *Doe v. Nelson*, 680 N.W.2d 302 (S.D. 2004) (unsealing pardons granted by South Dakota Governor Bill Janklow that did not comply with statutory process). In 1991, the departing Ohio governor, Richard F. Celeste, drew protests with clemency orders for a number of individuals on death row, including a man who had raped and killed a seven-year-old girl. After that, Ohio amended the state constitution to require

There are three basic administrative models that govern pardoning in the United States. In six states the governor plays almost no part in the pardon process, and the pardon power resides in a governor-appointed independent board. In twenty-one states the governor shares power with other elected or appointed officials, and in twenty-three states the governor is authorized by law but not required to consult with other officials before pardoning. The wide variety in pardoning policies and practices from jurisdiction to jurisdiction makes it hard to generalize about the effectiveness of any particular administrative model, though some generally tend to produce more pardon grants and fewer pardon-related controversies than others. Based on the frequency of pardon grants over time and the regularity of the pardon process, it would appear that the jurisdictions in which pardon plays the most functional role are those in which the decision-making authority is exercised by or shared with other executive officials.³⁹

A. Independent Board Model

In six states, the governor has little or no role in pardoning, and the pardon power is exercised by a governor-appointed board that is also responsible for prison releases.⁴⁰ These independent pardoning boards are heavily regulated in terms of their procedures, and conduct most of their business in public. The boards in Alabama, Connecticut, Idaho, South Carolina, and Utah are each required by statute to hold a full public hearing before granting a pardon to notify concerned state officials and victims beforehand to enable them to attend and speak and to state their reasons on the record for each grant. The Georgia board reviews all cases on a paper record and issues a written opinion in each case and is required to report annually to the legislature, the attorney general, and the governor. The Alabama board is required to report annually to the governor. The twin requirements of transparency and accountability enforced on all of these six independent boards are conducive to issuing numerous pardons at regular intervals (although the fact that the pardon process involves no elected officials is at least equally important to their effective operation). More than 400 pardons are granted each year in Alabama, Connecticut, and Georgia, and 200 pardons are granted each year in South

the governor to obtain a nonbinding recommendation from the parole board before making a clemency decision. *See also* William Glaberson, *States' Pardons Now Looked at in a Starker Light*, N.Y. TIMES, Feb. 16, 2001, <http://www.nytimes.com/2001/02/16/us/states-pardons-now-looked-at-in-starker-light.html> (reporting on a number of pardon controversies in states whose laws place few controls on the governor's pardon power).

³⁹ Specific constitutional or statutory sources of authority for the statements made in this section can be found in Chart 3 at the *Restoration of Rights Project*, www.nacdl.org/rightsrestoration, and in the state-specific profiles also on the NACDL website.

⁴⁰ *See* CONN. GEN. STAT. § 54-124a(f) (2004). The other five states are Alabama (ALA. CONST. amend. 38 (amending art. V § 124)), Georgia (GA. CONST. art. IV, § 2, para. II), Idaho (IDAHO CONST. art. IV, § 7), South Carolina (S.C. CONST. art. IV, § 14), and Utah (UTAH CONST. art. VII, § 12). In Alabama and South Carolina, the governor retains clemency power in capital cases while in Idaho, pardons of some serious offenses must be approved by the governor. The pardon procedures that apply in each of these states are detailed in the state profiles at www.nacdl.org/rightsrestoration.

Carolina, with an approval rate that ranges in these states from 30 to 60 percent of all applications received. While the Idaho board grants only between thirty and forty pardons each year, this represents more than half of all applications filed, and grants are issued at regular intervals. These boards accept applications as soon as a person's sentence is completed or after a brief additional eligibility period, and most of their business comes from people seeking to avoid employment bars or firearms disabilities. No board takes more than a year to process a typical pardon request.

B. Shared Power Model

In twenty-one of the forty-four states where the governor exercises most or all of the pardon power, the governor's power is limited, either by specific constraints spelled out in the state constitution or by statutory conditions enacted pursuant to specific constitutional authority to regulate the practice of pardoning. In some of these states, the constitution itself provides for a sharing of the power to pardon, sometimes with other elected or appointed officials and sometimes with an administrative board that is also responsible for prison releases. In every one of these "shared power" states, there is a degree of transparency and accountability that seems to encourage responsible (if not reliably generous) pardoning.

There are three basic variations on the "shared power" model. In four states, a pardon may not be granted except with the consent of other high officials sitting with the governor as a board of pardon.⁴¹ In nine states, the governor may not grant a pardon without an affirmative recommendation from a body of elected or appointed officials.⁴² In Rhode Island, the governor may not pardon except with the advice and consent of the state legislature.⁴³ In six states, the governor is required to seek an advisory recommendation from an appointed administrative board before a pardon may issue, though the board's advice is not binding.⁴⁴ California's system is a hybrid that places constraints on the governor only if the person seeking clemency has more than one conviction, in which case the governor must obtain a recommendation from the parole board and approval from a majority of the justices of the State Supreme Court.

⁴¹ FLA. CONST. art. IV, § 8 (a); MINN. CONST. art. V, § 7; NEB. CONST. art. IV, § 13; NEV. CONST. art. 5, § 14. For further details see www.nacdl.org/rightsrestoration.

⁴² ARIZ. CONST. art. V, § 5; DEL. CONST. art. VII, § 1; LA. CONST. art. IV, § 5(E)(1); MASS. CONST. pt. 2, ch. II, sec. I, art. VIII; MONT. CONST. art. VI, § 12; N.H. CONST. pt. 2, art. 52; OKLA. CONST. art. VI, § 10; PA. CONST. art. IV, § 9(a); TEX. CONST. art. 4, § 11(b). For further details see www.nacdl.org/rightsrestoration.

⁴³ See R.I. CONST. art. IX, § 13.

⁴⁴ ALASKA CONST. art. III, § 21; ARK. CONST. art. VI, § 18; KAN. STAT. ANN. § 22-3701(4); MICH. CONST. art. 5, § 14; MO. CONST. art. IV, § 7; OHIO CONST. art. III, § 11. For further details on each of these states see www.nacdl.org/rightsrestoration.

Most of the administrative boards that have constitutional status in this “shared power” model are required by law to hold public hearings at which the prosecutor and victim are allowed to speak, and to make public their recommendations to the governor. Most of these boards set forth clearly the standards they expect a successful pardon applicant to meet. Some of the “shared power” states impose additional transparency and accountability constraints on the governor over and above those that apply to the administrative board, such as a requirement of advance public notice of an intention to grant a pardon. The governor is required under the constitution in a majority of these “shared power” states to make regular periodic reports to the legislature about the pardons he or she has issued, including the reasons for each grant.

Sharing the power with other officials or an administrative board does not guarantee gubernatorial enthusiasm for pardoning, and the experience of the twenty-one states in the “shared power” model is much more mixed than the “independent board” model. Within each of the three basic variations on the “power-sharing” model, there are some states where pardoning is regular and generous, and some where it is infrequent or rare. For example, of the four states that follow the “governor-on-the-board” model, two produce quite a few pardons (Nevada and Nebraska) and two do not (Florida and Minnesota). The “governor-on-the-board” model has resulted in particular mischief in Florida, a state where felony offenders cannot even regain the right to vote unless they are personally approved through a complex clemency procedure that usually involves a public hearing before the governor and three of his cabinet appointees. Of the nine “gatekeeper board” states, three (Delaware, Pennsylvania, and Oklahoma) produce a regular stream of pardon grants, while pardons in the other five states in this group are infrequent (Texas, Montana, and Louisiana) or vanishingly rare (Arizona, Massachusetts, and New Hampshire). There has not been a pardon in Rhode Island for many years, which is hardly surprisingly considering its requirement of legislative advice and consent. Of the six states where the constitution requires the governor to consult with an administrative board, only Ohio and Arkansas have a lively tradition of pardoning.

It is hard to draw any general conclusions about why pardoning thrives in some of these “shared power” states and is either ineffectual or moribund in others. It may be that in some states, there is strong cultural as well as institutional support for pardoning, and few alternative relief mechanisms, which could explain why the governors of Oklahoma and Arkansas have continued to pardon generously while just slightly to the north the governors of Kansas and Missouri have not. Custom and expectation could explain why pardoning thrives in Delaware and Nebraska while there has not been a pardon in Arizona and Rhode Island in years. Custom and expectation could also explain why progressive governors in Minnesota and Massachusetts appear uninterested in pardoning while conservative governors in Nevada and Pennsylvania continue to approve dozens of grants each year. Pardoning is simply a fact of life in some states, a part of the routine housekeeping business of government as opposed to a perk of office or alien presence in

the justice system. Finally, the influence of personal inclinations and political ambition cannot be discounted even in states where the governor shares power with a board, which may account for the waxing and waning fortunes of the pardon power in Ohio and Florida. There are numerous variables, including a recent politically costly mistake by a predecessor that may disincline a governor to pardon even in states where institutional arrangements seem to expect it. The one thing that seems fairly clear and constant in the otherwise decidedly mixed experience of these “shared power” states is that even if institutional support does not guarantee vigorous pardoning, it seems to forestall irresponsible pardoning—unless of course a failure to pardon at all in the face of compelling circumstances can be so characterized.

C. Optional Consultation Model

In twenty-three states, the constitution imposes no prior restrictions on the governor’s pardon power, though some constitutions permit a degree of legislative regulation of the “manner of applying,”⁴⁵ and some require the governor to report to the legislature about pardons granted after the fact.⁴⁶ In eighteen of these states, the legislature has attempted to impose a degree of discipline on the pardon process by authorizing an administrative agency to investigate pardon applicants, hold public hearings, notify concerned officials and victims, and make a public recommendation to

⁴⁵ See, e.g., COLO. CONST. art. IV, § 7 (governor pardons “subject to such regulation as may be prescribed by law relative to the manner of applying”); ILL. CONST. art. V, § 12 (same); ME. CONST. art. V, pt. 1, § 11 (same); MO. CONST. art. IV, § 7 (same); N.Y. CONST. art. 4, § 4 (same); N.C. CONST. art. III, § 5(6) (same); WYO. CONST. art. 4, § 5 (same). Some state constitutions give the legislature a broader authority to regulate the pardon power. See IND. CONST. art. 5, § 17 (governor may pardon “subject to such regulations as may be provided by law”); IOWA CONST. art. IV, § 16 (same); KAN. CONST. art. I, § 7 (same); N.M. CONST. art. V, § 6 (same); WASH. CONST. art. III, § 9 (same).

⁴⁶ See, e.g., CAL. CONST. art. V, § 8; CAL. PENAL CODE § 4852.16 (governor must report to legislature each pardon, stating the facts of the case and giving reasons for grant); COLO. CONST. art. IV, § 7 (governor must report to legislature “a transcript of the petition, all proceedings, and the reasons for his action”); IND. CONST. art. 5, § 17 (governor must report to legislature at next scheduled meeting); IOWA CONST. art. IV, § 16 (governor must report to the legislature every two years on pardons issued and the reasons therefor); KY. CONST. § 77 (governor must file with legislature a statement of reasons with each pardon grant, which must be available to the public); MD. CONST. art. II, § 20 (governor must report to the legislature each grant and reasons therefor); N.J. STAT. ANN. § 2A:167-3.1(1993) (governor must report annually to the legislature the particulars of each grant, with the reasons); N.Y. CONST. art. 4, § 4 (governor must report annually on the particulars of each grant but not his reasons for granting them); TENN. CODE ANN. § 40-27-107 (2010) (governor must report to the legislature the reasons for each clemency grant “when requested”); VA. CONST. art. V, § 12 (governor must report annually to the legislature setting forth “the particulars of every case” of pardon granted, with reasons); W. VA. CODE § 5-1-16 (2012) (governor required to report the particulars of every clemency grant to the legislature, with reasons for the grant); WIS. CONST. art. V, § 6 (governor must communicate annually with legislature each case of clemency and the reasons); WYO. CONST. art. 4, § 5 (governor must report every two years to legislature on grants, with the reasons for each one). The states whose governors are not required to report to the legislature are Hawaii, Illinois, Mississippi, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, and Vermont.

the governor.⁴⁷ While the governor is not constitutionally required to avail himself of the assistance offered, in most cases he does. The Tennessee Constitution does not give the state legislature power to regulate the governor's pardon power, but the legislature has asserted this power nonetheless, requiring the governor to keep a record of the reasons for each clemency grant and to "submit the same to the general assembly when requested."⁴⁸ In California, the courts are the first stop for residents seeking pardon, with the parole board constituting a second level review process.⁴⁹

In almost every one of these "optional consultation" states, there is some provision for informing the public about who has applied for a pardon, either before or after the governor acts. Some states impose this notice obligation on pardon applicants themselves, requiring them to publish their applications in a newspaper and notify concerned officials and victims.⁵⁰ In this fashion, legislatures impose a degree of transparency and accountability on the pardon process even where the constitution does not. While courts have resisted arguments that these legislative restrictions are anything more than simply an effort to be helpful to the governor, they do appear to encourage governors to exercise their power responsibly.

Governors in these "optional consultation" states appear to have concluded that they are on politically firmer ground and likely to be more efficient in exercising their pardon power if they rely voluntarily upon experienced professionals even where they are not required to do so. Thus, for example, all of the 825 pardons granted by Governor Quinn of Illinois between April 2009 and November 2012 were recommended to him by the Prisoner Review Board after hearing from the applicant at one of its regular quarterly hearings. The governor of Iowa issues several dozen pardons annually pursuant to recommendations he receives from his parole board, and the governors of Indiana and

⁴⁷ Of the states in this group, Illinois, Indiana, South Dakota, and Washington are required by law to hold public hearings on all pardon cases they intend to recommend to the governor and to invite participation by the district attorney and victim. *See* 730 ILL. COMP. STAT. ANN. 5/3-3-13(b) (West 2002); IND. CODE § 11-9-2-2(b) (1994); S.D. CODIFIED LAWS § 24-14-3 (2005); WASH. REV. CODE § 9.94A.885(3) (2009).

⁴⁸ *See* TENN. CODE ANN. §§ 40-27-101, 40-27-107. The governor is also required to notify the attorney general and relevant district attorney before any grant of executive clemency is made public, and they in turn are required to notify the victim. *Id.* § 40-27-110. The Tennessee parole board conducts a hearing in every case. *See* TENN. COMP. R. & REGS. § 1100-01-01-.16(1)(b)2, (c)1 (2009).

⁴⁹ The California pardon process is unique in involving the courts in the pardon process. It begins with a recommendation from the court in the county of an individual's residence and then proceeds to the parole board which reviews the case and makes a second recommendation to the governor. *See* CAL. PENAL CODE §§ 4852.06, 4852.19 (West 2012). All of the pardons granted by Governor Jerry Brown to California residents in 2011-2012 were first considered by the California courts, with those residing out of state filing their applications directly with the parole board. *See* Margaret Colgate Love, *Governor's Pardon Power Used Too Rarely*, SAN FRANCISCO CHRON. Dec. 31, 2012, <http://www.sfgate.com/opinion/openforum/article/Governor-s-pardon-power-used-too-rarely-4153130.php#page-1>.

⁵⁰ *See, e.g.*, WIS. STAT. §§ 304.09, 304.10 (2009) (applicant required to attempt delivery of notice to the district attorney, judge, and victim, and also publish notice of application in county paper, or post on courthouse door if there is no such newspaper available).

Washington consider granting a pardon only after a public hearing process that enables anyone who has a view about a case to express it. Almost all of the 144 grants issued by California Governor Jerry Brown in his first two years in office were first considered by the California courts and parole board.⁵¹

There is good reason to abide by the process established by law since governors who issue pardons without doing so frequently find themselves in political hot water over ill-advised grants. For example, Governor Haley Barbour of Mississippi was pilloried in the press and by crime victims after he bypassed the regularly established review process in many of the pardons granted at the conclusion of his term, or disregarded the advice he received pursuant to that process.⁵²

The South Dakota legislature has been particularly creative in managing the governor's pardon power since its constitutional role in the pardon process was eliminated in 1972. The forced deregulation of the pardon power in South Dakota meant that pardon applicants could petition the governor directly without going through the Board of Pardons and Paroles, and the governor was no longer required to report his pardons to the legislature. Undaunted by this executive power grab, the South Dakota legislature proceeded to replicate in a statute the constitutional transparency and accountability safeguards lost in 1972. Thus, in addition to petitioning the governor directly, people interested in obtaining a pardon may file a petition with the Board of Pardons and Paroles seeking its favorable recommendation; publish their petition in a newspaper of general circulation in the county where crime was committed once a week for three weeks; and come before the Board for a public hearing in which the district attorney, sentencing judge, and victim may all participate. The legislature cleverly made this alternative statutory route to pardon more appealing by giving courts authority to seal the record of conviction and the pardon itself where the statutory procedure is used. Equally cleverly, it divided responsibility for appointing the nine-member Board between the governor, the attorney general, and the State Supreme Court, thereby avoiding any suggestion of undue gubernatorial influence over Board recommendations. The State Supreme Court confirmed in 2004 that sealing is available only for pardons vetted through this public process,⁵³ and since then the governors of South Dakota have refused to grant a pardon except upon the Board's recommendation. The public pardon process turns out to be a very efficient one: between sixty and seventy people apply for a pardon each year, the Board recommends more than half of them to the governor, and the

⁵¹ See *supra* note 49.

⁵² See *In re Hooker*, 87 So. 3d 401 (Miss. 2012).

⁵³ See *Doe v. Nelson*, 680 N.W.2d 302 (S.D. 2004) (holding that the governor had no authority to order the sealing of 279 pardons granted between 1995 and 2002 without consultation with the board). The history of the pardon power in South Dakota, including the involvement of the legislature, is reviewed in Eric R. Johnson, *Doe v. Nelson, The Wrongful Assumption of Gubernatorial Plenary Authority over the Pardoning Process*, 50 S.D. L. REV. 156 (2005).

governor customarily accepts the Board's recommendations. The entire process takes less than six months from beginning to end.

With the exception of South Dakota, however, the pardon power in the "optional consultation" states has for the most part ceased to play a reliably vital role in the justice system, primarily because it depends so heavily upon the personal predilections of the incumbent governor. Thus, for example, the immediate past governors of Maryland, Michigan, Virginia, and Wisconsin were enthusiastic about using their pardon power, but the incumbents have been parsimonious in the extreme.⁵⁴ Conversely, the current governors of Illinois and California have revitalized pardoning in their states after decades of neglect and abuse.⁵⁵

While the sort of institutional support for pardoning represented by the "shared power" model does not guarantee a regular stream of pardon grants, it is far more likely to lead to productive pardoning than the personality-driven "consultation" model. Because "shared power" systems generally tend to function with greater transparency and accountability, they inspire public confidence and avoid the kind of scandal that has paralyzed the pardon power in jurisdictions where the power is subject to fewer constraints. The bottom line is that while constraints on the exercise of the pardon power do not guarantee its responsible and constructive use, they certainly seem conducive to that end.

V. Recommendations for Reform of the Federal Pardon Process

State pardoning procedures suggest ways in which the federal pardon process could be restored to its former healthy state so as to make it easier for the president to use the power in a constructive manner. The three characteristics that are key to this restoration are:

- **Authority:** The process must be administered by individuals who are independent and authoritative, who have the confidence of the president, and who are given the necessary resources to carry out the president's pardoning agenda.
- **Accountability:** The process must be accessible and responsive to people of all walks of life, and account for the likelihood that many deserving

⁵⁴ Relevant state profiles can be found at www.nacdl.org/rightsrestoration. See *supra* note 5.

⁵⁵ See Chris Wetterich, *Gov. Quinn Makes Dent in Clemency Backlog*, STATE J.-REG., July 7, 2012, <http://www.sj-r.com/top-stories/x537697530/Quinn-makes-dent-in-clemency-backlog> (noting that Governor Quinn spent his first three years in office dealing with a 2,500-case backlog of recommendations from the state parole board); Love, *supra* note 49 (discussing how California Governor Jerry Brown granted 144 pardons in two years, reviving the pardon process abused and neglected by his three predecessors). Illinois and California profiles are available at www.nacdl.org/rightsrestoration.

pardon applicants will not have skilled counsel or well-connected supporters to advocate on their behalf.

- **Transparency:** The process must be guided by clear standards that are applied consistently, producing grants that are publicly defensible.

Authority - A degree of authority must be restored to the federal pardon process, whether or not it remains housed in the Justice Department. This benefits both the institution of the presidency and the justice system, as well as those who seek and deserve forgiveness. The delegation of responsibility for making pardon recommendations during the Reagan administration to a subordinate career civil servant in the Justice Department went hand-in-hand with a devaluation of pardon as a tool of justice, and produced a prosecutor-controlled pardon process that neither serves nor protects the president. That decision should be reversed. The president must be able to rely on a process that serves his interests above all, one that functions independent of other actors in a justice system in which it is expected to play an integral role. The person or persons responsible for administering such a system must have the confidence of the president, and the necessary resources to carry out the president's pardoning agenda. For example,

One simple and immediate way for the president to reinvigorate the pardons process is to choose a person of stature and energy—say, a federal judge—to steward his administration's pardon duties. At the same time, he can end the department's conflict of interest by replacing the pardons office with a new bipartisan commission under the White House's aegis, giving it ample resources and real independence.⁵⁶

Ideally, making pardon recommendations should remain a responsibility of the attorney general, underscoring the relationship of pardon to the justice system on the one hand, and to the political process on the other. But 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.”⁵⁷ Establishing a panel of distinguished citizens to advise on pardon policy and make recommendations in particular cases would be one way to do this.⁵⁸ Giving the courts responsibility for

⁵⁶ Editorial, N. Y. TIMES, *supra* note 27.

⁵⁷ See *id.*; see also Morison, *supra* note 27.

⁵⁸ See Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED SENT'G REP. 153, 157 (2009) (stating that administrative clemency boards can “take the heat for decisions that turn out badly”); Kobil, *supra* note 15, at 163 (urging the president to “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”). A catalogue of past uses of specialized clemency panels to handle large-scale amnesties in the federal system can be found at Love, *Twilight*, *supra* note 6, at 1173 n.16.

making pardon recommendations, as they do in California, would be another.⁵⁹ The first could be accomplished by presidential fiat, while the second would require congressional action.

Accountability - The president should publicly announce a pardoning policy and standards for considering particular cases, and commit himself to abide by the recommendations of the attorney general. If those recommendations are made public once a grant has been made, whether they are for or against pardon, a degree of accountability will have been restored to the process.

In addition, the pardon process must at least appear to operate fairly and regularly in order to command the kind of public confidence necessary to enable the president to pardon confidently. It cannot be seen to favor the wealthy, the famous, or the well-connected. It must be made accessible and responsive to all who apply, taking into account the likelihood that many deserving applicants will not have skilled counsel or well-connected supporters to advocate in their behalf. The process itself should welcome applicants, and not penalize them for failing to make a full and polished presentation in their own behalf, or subject them to an investigative process that is burdensome and unwelcoming. While it is perfectly reasonable to inquire into a pardon applicant's background, to ensure that the president has all the information needed to make a decision to bestow the sort of mark of favor represented by a pardon, it is not reasonable or fair to disadvantage applicants without education and resources by subjecting them to extensive inquiries even before the customary FBI investigation has been authorized. As to prisoner petitions, the federal courts should permit federal defenders to represent their former clients in clemency proceedings. In recent years it has been possible to evade and manipulate the federal pardon process precisely because the process was not an open one that gave a fair hearing to all. It would be sensible to restore efficiency to the process so that applicants did not have to wait years for a decision. It would also be sensible to apply a presumption in favor of pardon in cases where the applicant had a record of law-abiding conduct and a sensible reason for seeking a pardon.

Transparency - The standards that now guide the Justice Department in deciding whether to recommend that the president grant a pardon or commute a sentence are set forth on the pardon attorney's website, and are generally clear and unexceptionable. Circumstances that might warrant sentence commutations are: "disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner." The inquiry for those seeking post-sentence pardon will look at post-conviction conduct, character, and reputation; seriousness and relative recentness of the offense; acceptance of responsibility, remorse, and atonement; need for

⁵⁹ See *supra* note 49.

relief; and official recommendations and reports.⁶⁰ While these criteria appear reasonable enough on paper, in practice their very subjectivity invites abuse. Because the process itself is not open for public inspection, the only way to monitor how the criteria are applied in practice is to study its results. Until recently, the only results that were publicly available were cases in which a pardon was granted. However, the names of those denied pardon are now also available through the Freedom of Information Act.⁶¹ An investigation conducted by ProPublica compared cases in which pardon was granted with cases in which pardon was denied during the administration of George W. Bush, and concluded that the published criteria were not applied consistently to cases with similar characteristics.⁶²

The key to restoring a degree of transparency in the pardon process is for the Justice Department to return to the practice, abandoned in FDR's Administration, of publishing an annual report explaining the president's pardon policy and practice, and setting forth the reasons for each grant. While publication of pardon applications and public hearings would also go some way to establishing the necessary transparency, they would also burden applicants and discourage pardons in controversial cases. Defending a grant after the fact best balances considerations of efficiency with the need to ensure that subjective standards are being applied fairly. The requirement in many state constitutions of providing an annual report to the legislature on pardon grants, including the reasons for each one, could be transposed into the federal process to considerable advantage.

It is true that the president could not be compelled to adopt any of these reforms short of an amendment to the Constitution. But there is no reason why the president should not impose a degree of discipline on the way he uses his power even if the other branches of government could not require him to do so. Congress might encourage the president to issue grants through a regular accountable process (as the South Dakota legislature has encouraged the governor of that state) by offering a premium legal effect for a pardon obtained through a more functional process (perhaps a vacatur of the conviction record). It might also create a process by which the federal courts could funnel meritorious cases to the president, accompanied by a recommendation for pardon, like the "certificate of rehabilitation" process that constitutes the first step in California's pardon process.

⁶⁰ See U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, SECTION 1-2.112 STANDARDS FOR CONSIDERING PARDON PETITIONS (1997), available at <http://www.justice.gov/pardon/petitions.htm#s3>.

⁶¹ See *Lardner v. Dep't of Justice*, 638 F. Supp. 2d 14 (D.D.C. 2009), *aff'd*, *Lardner v. Dep't of Justice*, No. 09-5337 (D.C. Cir. Oct. 28, 2010) (requiring the Justice Department to release existing lists of the persons denied executive clemency to anyone who requests such records pursuant to the Freedom of Information Act).

⁶² See Linzer & LaFleur, *supra* note 17.

VI. Conclusion

There is not a single state where the governor is as completely unrestricted and unprotected in pardoning as the president is. There is not a single state whose pardon process is as poorly conceived and managed as the federal government's, which has failed to evolve with the changing needs of the presidency and of the justice system over the past one hundred years. The Justice Department's program is hard to understand and even harder to penetrate, operating in secret and accountable to no one. Three successive presidents have been willing to live with this dysfunction, perhaps because they did not regard pardoning as a duty of office, and perhaps because they perceived its risks to outweigh its rewards. But inaction as a strategy has proved to have risks of its own, as both Presidents Clinton and Bush could attest. Without a plan for using the power, and without a reliable system for executing it, pardoning will remain a dangerous activity for the president, and Hamilton's "benign prerogative" consigned to a vestigial appendage to the presidency. State pardon systems suggest ways that federal pardoning could regain its moral force and be reinvigorated, through the articulation of a purposeful pardoning philosophy and a strategy for putting it into practice that includes clear standards, a transparent investigative process, participation of reputable advisors, and disclosure of the reasons for particular grants. While the president could not constitutionally be compelled to adopt such provisions, he could do so voluntarily, adapting elements of functional state systems to the federal context. In the end, it is important to restore "moral force" to the pardon process whatever role the pardon power plays in the criminal justice system, for the institution of the presidency, for the president's personal reputation, and for the integrity of the justice system itself.

MODELS FOR ADMINISTRATION OF THE PARDON POWER

A. Independent Board (6)

Alabama*
Connecticut
Georgia
Idaho*
South Carolina*
Utah

B. Shared Power (20)

• *Governor on Board (4)*

Florida
Minnesota
Nebraska
Nevada

• *Gatekeeper Board (10)*

Arizona
Delaware
Louisiana
Massachusetts
Montana
New Hampshire
Oklahoma
Pennsylvania
Rhode Island**
Texas

• *Advisory Board (6)*

Alaska
Arkansas
Kansas
Michigan
Missouri
Ohio

C. Optional Consultation (24)

California***
Colorado
District of Columbia
Federal system
Hawaii
Illinois
Indiana
Iowa
Kentucky
Maine
Maryland
Mississippi
New Jersey
New Mexico
New York
North Carolina
North Dakota
Oregon
South Dakota
Tennessee
Vermont
Virginia
Washington
West Virginia
Wisconsin
Wyoming

* In Alabama and South Carolina the governor remains responsible for clemency in capital cases, and in Idaho the governor must approve the board's decision to pardon certain serious crimes.

**In Rhode Island the senate must advise and consent to every pardon.

*** In California the governor is required to consult with the parole board and seek approval of the State Supreme Court in recidivist cases only.

PARDONING PRACTICES IN THE STATE

Frequent and Regular (grants more than thirty percent of applications) (14)

Alabama
Arkansas
Connecticut
Delaware
Georgia
Idaho
Illinois*
Iowa
Nebraska
Nevada
Oklahoma
Pennsylvania
South Carolina
South Dakota

Sparing (grants a low percentage of applications) (7)

Florida
Hawaii
Indiana
Minnesota
Texas
Washington
Wyoming

Infrequent/Uneven (recent pardoning, but depends on incumbent governor) (9)

California
Louisiana
Maine
Maryland
Mississippi
New Mexico
Ohio
Virginia
Wisconsin

Infrequent or Rare (few/no pardons in past twenty years) (22)

Alaska
Arizona
Colorado
District of Columbia
Federal system
Kansas
Kentucky
Massachusetts
Michigan**
Missouri
Montana
New Hampshire
New Jersey
New York**
North Carolina
North Dakota
Oregon
Rhode Island
Tennessee
Utah
Vermont
West Virginia

*Illinois makes the “Frequent and Regular” list because of the atypical number of pardons granted by the incumbent governor.

** Michigan and New York make the “Infrequent or Rare” list despite some interest in pardoning by one recent governor.