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Pardon Us: Systematic Presidential Pardons

Shortly after the last presidential election, President-elect Bush and President Clinton both observed that the penalty differentials for possession of crack cocaine and powder cocaine are unjustified. They were not the first to do so.

The U.S. Sentencing Commission has studied and sharply criticized the disparate racial impact of the current crack versus cocaine sentencing rules.¹ Scholars have shown troubling differentials in the investigation and system selection for crack and cocaine offenders.² And now Hollywood has added its two cents, illustrating in the movie *Traffic* that some offenders use both crack and powdered cocaine, in which case differential sanctions may be a function of which was being used at the time of arrest.

A president who wants to address issues of proper cocaine punishment and punishment disparities might seek to have Congress and the American people reconsider this issue using the "bully pulpit" or proposing legislation to reduce or end the penalty differential. Another alternative would be to direct the attorney general, who sits as an ex officio member of the U.S. Sentencing Commission, to raise again the issue of crack/cocaine differentials.

Another tool exists: the President might use the pardon power to reduce sentences for a class of people incarcerated for possession of crack cocaine to the level of those imprisoned for possession of powder cocaine, or to some other level fully articulated and justified as principled policy.

Scholars, judges and commentators often emphasize the individualized and mercy-driven nature of the pardon power.³ The use of pardons as a systematic policy tool has not previously received scholarly attention. We consider whether it is constitutional and appropriate to use the pardon power in a systematic way, applied to a group of offenders selected through consistent criteria and processes, and for reasons that may reflect concerns of justice, equality, and wise policy, rather than mercy. We thereafter consider how a president might exercise the pardon power to equalize unjustified sentencing disparities.⁴

1. The Constitutionality of Systematic Pardons

One constitutional objection might be made to systematic use of the pardon power by a president to further a policy goal. If Congress passes a statute that directs differential penalties for two crimes, and the judiciary implements this law, even upholding its constitutionality in the process, does it violate the separa-

tion of powers to allow the president to undo what Congress and the courts have approved?

Of course, the president has an obligation to "take Care that the Laws be faithfully executed." Art. II, § 3. However, we do not believe this obligation overrides, much less obliterates, the distinct constitutional power stating that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Art II, § 2, cl. 1.⁵

Were the faithful execution duty extended so far, it would effectively remove the pardon power from the Constitution altogether.⁶ This power, explicitly given to the Executive responsible for enforcing the law rather than sharing with Congress, should be viewed as a limited exception to the general duty of the president to faithfully execute the laws.⁷ The pardon power qualifies the duty only in connection with enforcement of criminal statutes. It has no bearing on enforcement of regulatory statutes or on private civil actions established by Congress.

Moreover, even as to criminal law statutes, the pardon power operates only as a check on prosecutions or sentences; it in no way alters congressional criminalization of particular behavior. Indeed, because the pardon power is explicit in the Constitution's text, it seems less vulnerable to criticism on separation of powers grounds than the authority of the executive branch, regularly exercised, to decline to prosecute particular cases or to plea bargain for lesser offenses than those recognized by Congress as applicable to particular behaviors.

The Supreme Court has used extremely broad language to describe the pardon power⁸ and has jealously guarded this power from congressional encroachment.⁹ As the most recent substantial Supreme Court case on the pardon power notes, "the pardoning power is an enumerated power of the Constitution and ... its limitations, if any, must be found in the Constitution itself."¹⁰

At least a third of all United States presidents, including many of our greatest presidents, and from the earliest administrations, have used systematic pardons. This long history convinces us that even class-wide pardons, with the potential to dramatically limit the impact of federal criminal laws, are constitutional.¹¹ Though this article is not the proper forum for examining each of these pardons in detail, the following chart gives a striking demonstration of "a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned,



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engaged in by Presidents who have sworn to uphold the Constitution, making as it were such exercise of power a part of the structure of our government...."¹²

1795	Washington	Pardoned participants in the Pennsylvania Whiskey Rebellion.
1800	Adams	Pardoned participants in an insurrection in Northampton, Montgomery, and Bucks counties, Pennsylvania.
1801	Jefferson	Pardoned all persons convicted under the Alien and Sedition Acts.
1815	Madison	Pardoned the Barrataria Pirates who assisted the American Navy during the War of 1812.
1858	Buchanan	Pardoned Mormons involved in the Utah rebellion.
1862-1864	Lincoln	Granted amnesty to Confederate sympathizers.
1865-1868	Johnson	Granted amnesty to Confederate soldiers, officials, and sympathizers.
1893-1894	Harrison & Cleveland	Pardoned Mormon bigamists.
1902	Roosevelt	Pardoned participants in the Philippine insurrection.
1921	Harding	Pardoned dozens of persons jailed under World War I sedition and espionage laws.
1924	Coolidge	Pardoned persons who deserted from military or naval service on or after November 11, 1918.
1945	Truman	Pardoned pre-war convicts who served in the U.S. armed forces during World War II subject to review by presidential board.
1961-1963	Kennedy	Pardoned offenders sentenced under mandatory minimum penalties of Narcotics Act of 1956
1974-1975	Ford	Pardoned Vietnam-era violators of Service Act subject to review by presidential board
1977	Carter	Pardoned Vietnam-era violators of the Selective Service Act.

Pardons used to heal sectional wounds frequently have been conditioned on the loyalty of the pardonees to the United States and the Constitution. James Buchanan's 1858 pardon of Utah settlers required those seeking pardons to "submit themselves to the authority of the federal government." Lincoln's 1863 and Johnson's 1865 and 1867 proclamations required an oath to "faithfully support, protect, and defend the Constitution" and support all acts of Congress and proclamations of the President concerning emancipation of slaves. Theodore Roosevelt's 1902 Philippines proclamation required an oath to "accept the supreme authority of the United States of America in the Philippine Islands."

While a quick review of the historical record makes it difficult to determine the extent to which these were systematic pardons, this review does suggest a history of using the pardon power, not simply as an act of individualized mercy, or as a political tool to reward supporters, but as a tool to reconcile national divisions.¹³ We turn, therefore, to the wise or unwise use of this power.

2. Unpardonable & Irregular Pardons

We join with critics who have argued that the highly controversial pardons issued by President Clinton at the end of his presidency do a disservice to the pardon power with its solid constitutional foundations. Our focus, however, is upon a missed opportunity rather than an abused prerogative, a policy initiative rather than institutional aggrandizement. Idiosyncratic and anemic pardons, and difficulties in sorting out legitimate and illegitimate pardons, are a risk whenever pardons are not articulated and justified on the basis of broader principles.

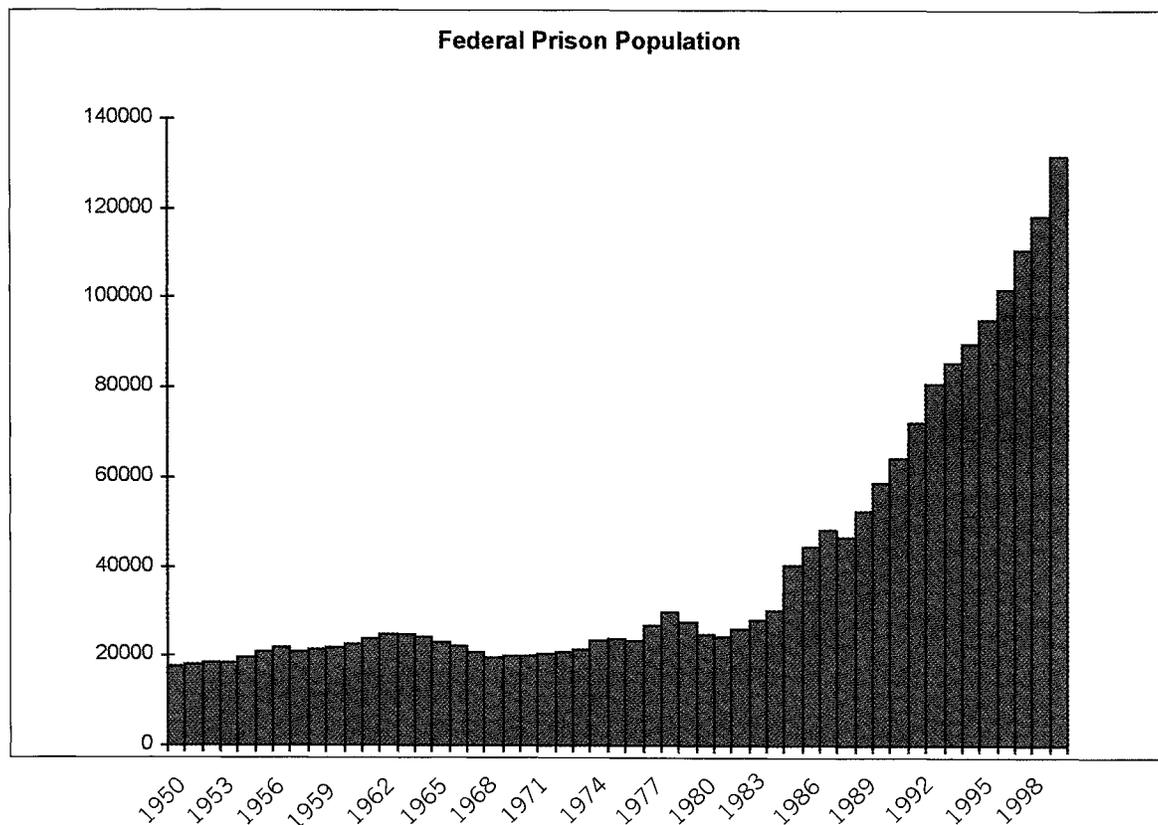
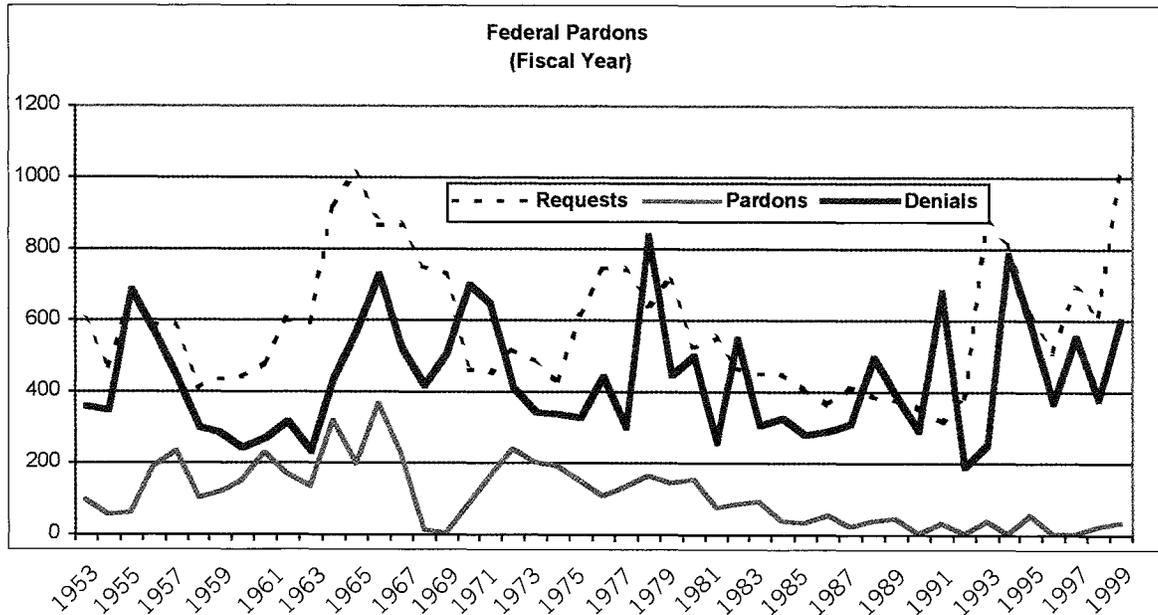
The recent focus on pardon abuse may arise in part from the fact that the federal pardon power has fallen into desuetude. There have been over 20,000 presidential pardons and commutations granted during the twentieth century, and many thousands of additional war-related amnesties falling within the pardon power. However, the vast majority of those pardons occurred before 1980, and the percentage of pardons granted to those sought has been declining steadily for the past 40 years.

Through 1999, President Clinton had issued only 144 pardons (around 3% of all requests through 1999).

PRESIDENT	PARDONS SOUGHT	PARDONS GRANTED	PERCENT GRANTED
Nixon	2,591	923	35.6%
Ford	1,527	404	26.5%
Carter	2,627	563	21.4%
Reagan	3,404	406	11.9%
Bush	1,466	77	5.3%
Clinton	6,622	456	6.9%

By the time he left office, including the 177 last minute pardons, the total number of Clinton pardons had risen to about 450 (around 7% of all requests). During the four years of the elder Bush Administration, 77 pardons were granted. During the eight years of the Reagan tenure, by contrast, 406 pardons were granted. The Carter administration granted 563 pardons, Ford 404 pardons, and Nixon 923 pardons. The preceding chart further elucidates the trend.

Looking back even further, around 1300 pardons and commutations were granted in Lyndon Johnson's five years in office (around 31% of requests), and around 600 pardons were granted during John Kennedy's three years (around 36% of requests). The following chart graphically tracks the use of the pardon power over the last 50 years, examining the relationship between requests for pardons, pardons granted, and denials of pardon requests.¹⁴



The combination of the recent controversial pardons and the highly sporadic use of non-controversial pardons has obscured two important dimensions of the pardon power.

First, when the numbers of pardons are insubstantial, the pardon power offers little possibility for more consistent and substantial executive assessments of sentences.¹⁵ The low and decreasing number of pardons is even more striking in light of size of the federal prison population, which stayed between 20,000 and 25,000 inmates from 1940 through 1980, and ballooned to 136,000 federal inmates by the middle of 2000, and around 150,000 at the present time.

The significance of the small numbers and percentages of pardons in recent years is magnified even further by the fact that, prior to the implementation of the guidelines in 1987, all sentences were subject to standardized executive review of the U.S. Parole Commission. It seems that the elimination of the Parole Commission should have led to an increase in the use of presidential pardons, since one of the two major forms of traditional executive post-conviction review and adjustment is no longer available.

Second, the irregular and seemingly random Clinton pardons obscure the possibility of presidents using the pardon power as a principled, systematic policy tool.

3. Some Modern Systematic Pardons

Presidents have sometimes issued multiple pardons on the same or different dates, and given the same reason for those pardons. Such pardons are not necessarily systematic, unless they are the product of articulated principles applied consistently to an identified group, so that all members of the group who satisfy the principles are pardoned or subject to a standard and reasonably structured process of review.

Wars. The most common form of systematic pardons in the twentieth century appear to be amnesty or clemency for those who avoided military service or even opposed the U.S. during a conflict. The most recent illustration of this type of systematic pardon was President Carter's decision to pardon Vietnam-era violators of the Selective Service Act.¹⁶

Just three years earlier, President Ford had established a nine person Presidential Clemency Board to review applications from among the 100,000 to 300,000 people who refused to register under the Selective Service Act, who otherwise resisted the draft, or who deserted during military service. Between 21,000 and 27,000 people eligible for clemency consideration petitioned the board, and around 90 percent of applications were granted.¹⁷

President Ford's Clemency Board was modeled on President Truman's grant of amnesty to World War II draft violators, who submitted applications for review by a presidentially appointed three person board.¹⁸

Drugs. An example of what may have been systematic, non-wartime, drug offense pardons appears, in brief form, in the Annual Reports of the Attorney General issued during the Kennedy administration. Those reports suggest that there was a large number of pardons or commutations reducing sentences under the Narcotic Control Act of 1956, though the reports must be read closely to see this pattern.

The Narcotics Control Act of 1956 was the policy predecessor to the mandatory drug penalties reenacted into federal law starting in 1986. The 1956 act included mandatory minimum sentences of five to thirty years for various drug offenses.¹⁹ Virtually all of the mandatory penalties in the 1956 act were repealed in 1970 under the leadership of then Representative George Bush.²⁰

The 1960 Report of the Attorney General includes a single page report from Pardon Attorney Reed Cozart. Cozart noted that there were a large number of requests for reduction of drug sentences, and that it "is the general policy not to ask the President to intervene" in cases involving first offenders sentenced to a five year minimum.²¹ A similar note appears in the 1962 report. The 1963 report offers the following revealing explanation of some of the commutations:

The commutations of sentences granted during the past year included many long-term narcotic offenders who, by statute, were not eligible for parole but whose sentences were felt to be considerably longer than the average sentences imposed for such offenses.²²

The 1964 report confirmed that "[a]s in the years preceding, the commutations of sentence granted included some long-term narcotics offenders who, by statute, were not eligible for parole but whose sentences were considerably longer than average." The 1964 report also explicitly refers to efforts to make review of pardons and commutations more systematic:

"During the year, the Director of the Bureau of Prisons was called upon to encourage the wardens of the federal prisons to review cases in their institutions and present to the Attorney General selected cases which they considered to be worthy of clemency and whose sentences could be considered disparate. For the first time there is a policy of attempting to systematically review cases which may be deserving of commutation. As a result, a very sizeable increase in commutations has resulted."²³

While it is not clear whether the Narcotics Act commutations were fully systematic in the sense we suggest, they do combine a statement of principle (disparity) and a suggestion of regularized review to identify similarly situated offenders. Drug offense

sentencing continues to pose problems for sentencing policy and, with respect to some aspects of current federal drug policy, there seems to be bipartisan support for further reforms.

4. Wise Use of Systematic Pardons

Even if systematic pardons are constitutional, are they a desirable tool for the president compared to other possible strategies available to the executive branch, such as advocating changes in the laws, or changing executive charging, plea, or sentencing policies?

A president might believe that a distinction made by a federal criminal law is unconstitutional. This was the basis for President Jefferson's pardons of those convicted of violating the Alien and Sedition Acts, which Jefferson believed to be unconstitutional. A paragraph omitted from the final draft of his message to Congress of December 8, 1801 stated bluntly:

"I do declare that I hold that act to be in palpable & unqualified contradiction to the Constitution. Considering it then as a nullity, I have relieved from oppression under it those of my fellow-citizens who were within the reach of the functions confided to me."²⁴

Under the oath of office, the president not only has the power but the duty to apply the commands of the constitution in the exercise of his office.²⁵

A president also might use systematic pardons when the constitutionality of the conviction and sentence is abundantly clear. The constitutionality of charges and convictions under the Selective Service Act were not at issue, following either World War II or the Vietnam War. Nevertheless, Presidents Truman, Ford, and Carter all believed that a process of amnesty would help to heal the many wounds of war at home. President Kennedy did not suggest that convictions under the mandatory minimum penalties of the Narcotics Act of 1956 were unconstitutional, but he did point to the excessive and unequal sentences imposed under those laws.²⁶

As a political matter, a president might hesitate to issue a series of class-wide pardons in the face of Congressional or public criticism. When Lincoln used the pardon power in 1865, he referenced not only his constitutional authority, but also Congressional support for pardoning a large class of southerners "guilty of treason." When Congress had passed laws calling for forfeiture of property by those in rebellion against the Union, it granted the President the authority to grant pardons or amnesty "on such conditions as he may deem expedient for the public welfare." The legislation was perhaps helpful to Lincoln, but it was also unnecessary, for Lincoln could have granted the pardons without it.

Systematic pardons would likely initiate reconsideration of punishment and incarceration policies by

Congress. Given the political difficulty of generating rich discussions of criminal justice policy, confident and wise chief executives may be in the best position to generate such debate.²⁷ Systematic pardons thus offer the chance for a visible and public dialogue about important legal issues. On the other hand, pardons cannot and should not supplant the legislative role on a continuing basis.

5. Clinton & Bush on Cocaine

On January 18, 2001, CNN's Candy Crowley interviewed President Elect George W. Bush. Crowley asked Bush about "the discrepancy in the sentencing for the use of powdered cocaine, assumed to be an affluent white drug, as opposed to crack cocaine," Bush responded:

Well, that ought to be addressed by making sure the powdered cocaine and crack cocaine penalties are the same. I don't believe we ought to be discriminatory. We ought to be sending a clear signal. My point on drug use is we ought to be doing a better job of helping people cure themselves of an illness. Addiction to alcohol or addiction to drugs is an illness...

Only three days earlier President Clinton issued a detailed statement about the need for reform of the federal penalties for crack, and the disparities created by the current system. In his January 15, 2001 message to Congress, which received little news coverage and is likely to be ignored, Clinton wrote:

We must re-examine our national sentencing policies, focusing particularly on mandatory minimum sentences for non-violent offenders.... One penalty I believe should be changed immediately is the 1986 federal law that creates a 100-to-1 ratio between crack and powder cocaine sentencing policies. This substantial disparity has led to a perception of racial injustice and inconsistency in the federal criminal justice system. Republican and Democratic Members of Congress alike have called for a repeal of this inequitable policy. Congress should revise the law to shrink the disparity to 10-to-1; specifically, the amount of powder cocaine required to trigger a five-year mandatory sentence should be reduced from 500 to 250 grams, while the amount of crack cocaine required for the same sentence should increase from 5 grams to 25 grams. This difference would continue to reflect the greater addictive power of crack cocaine, the greater violence associated with crack cocaine trafficking, and the importance of targeting mid- and higher-level traffickers instead of low level drug offenders.²⁸

It is clear that Clinton did not have these revelations about just federal punishment only in his final

few days in office. In a November 2, 2000 interview with *ROLLING STONE* aboard Air Force One, published after the election, he observed:

[T]he disparities are unconscionable between crack and powdered cocaine. I tried to change the disparities and the Republican Congress was willing to narrow, but not eliminate, them on the theory that people who use crack are more violent than people who use cocaine. Well, what they really meant was that people who use crack are more likely to be poor and, coincidentally, black or brown and, therefore, not have money. Whereas, people who use cocaine were more likely to be rich, pay for it and therefore be peaceable. ...

If President Clinton felt this way about the crack/cocaine sentences, why did he sign the bill in 1995 rejecting the Sentencing Commission's recommendations for reform and maintaining the 100:1 quantity ratio, while at the same time acknowledging the unjust disparity in sanctions?²⁹ Even at the end of his presidency, why didn't he allow his principles to inform his pardon decisions? Could Clinton have issued a class of pardons directed at users of crack cocaine designed to reduce or eliminate the disparity? Would this have been a more appropriate and powerful response than partisan complaints about "racial injustice" and "the Republican Congress"?

6. Preliminary Thoughts About Commuting Crack Cocaine User Sentences

A president who noted the substantial disparity in the treatment of crack and cocaine offenders, the issues of racial bias and sound policy raised by the current federal sentences, and the extensive judicial, scholarly and public commentary revealing the unfairness of the current system, might not merely join the chorus. The president might implement the widespread insight by granting a partial pardon or commutation to a defined class of incarcerated users of crack cocaine and might articulate a more principled policy, such as a 1:1 or 2:1 ratio of crack to powder cocaine user sentences. He might also distinguish offenders based on the extent of their prior record, use of a weapon, or harm to victims — factors relevant to guideline sentencing but sometimes obscured by long mandatory sentences.³⁰

Historical use of systematic pardons suggests the possibility of establishing procedures to review cases and make recommendations over time.³¹ The existence of the Office of Pardon Attorney in the Department of Justice might provide an administrative locus for more systematic procedural review. This office could examine what subclasses of crack cocaine users might receive the benefit of commutations and how to identify them.³² A special pardon or clemency board might be named to implement a carefully demarcated class-wide pardon,

similar to that used by President Ford to deal with national wounds created by the Vietnam War. Within the scope of its charge, the board would reflect the kinds of decisions made by parole and release authorities where that power and discretion remains.

Congress might also provide subsequent support for the exercise of class-wide pardons by adopting legislation consistent with exercise of the pardon power. Were Congress today to abolish or reduce the crack cocaine/powder cocaine disparity, a president might use the pardon power to provide retroactive benefits of such a change to those incarcerated at the time of the statute's passage. Systematic pardons may thus offer an executive remedy for difficult issues of retroactivity, so past offenders will be treated more like present offenders.³³

One of the most common uses of systematic pardons in U.S. history has been to heal the wounds of war at home. For many years in the United States, we have been engaged in a war on drugs. Whatever the judgments of history about the virtue, the wisdom, or the success of this war, it is has produced some laws and some sentences that are widely perceived to be unwise and unfair.

Perhaps, as with the Narcotics Act pardons in the early 1960s and the legislative reform of 1970, the mandatory minimum penalties that now define many federal drug laws will again come to be seen as unwise. Perhaps some systematic review and commutations of unequal and unfair sentences could again help to illuminate the nature of the underlying problem. As in the past, the president might make systematic use of the pardon power to again help to heal our wounds.

Notes

¹ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995). *Compare Amendments to the Sentencing Guidelines for United States Courts*, 60 Fed. Reg. 25,074 (May 10, 1995), with Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. No. 104-38, 109 Stat. 334 (1995).

² See, e.g., Julie Stewart, *The Effects of Mandatory Minimums on Families and Society*, 16 T.M. COOLEY L. REV. 37 (1999); Jefferson Fish, *Rethinking Our Drug Policy*, 28 FORDHAM URB. L.J. 9 (2000); Andrew Sachar, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149 (1997); David Angeli, *A "Second Look" at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211 (1997).

³ "The very essence of the pardoning power is to treat each case individually." *Schick v. Reed*, 419 U.S. 256, 265 (1974). *But see* Justice Holmes' description of the pardon power: "[A pardon] is not a private act of grace ... it is the determination of the ultimate authority that the public welfare will be better served...." *Biddle v. Perovich*, 274 U.S. 480 (1927).

⁴ The differences between pardon, commutation, clemency, and amnesty are slight and not important

for purposes of this paper. Clemency is an umbrella term encompassing pardons, commutations and amnesties. Pardons typically remove the consequences of criminal conviction, though the exact meaning and full impact of pardons has been the subject of debate. Pardons may come with conditions precedent or subsequent. Commutations are partial pardons, usually reducing a sentence but not erasing such consequences of conviction as voting bars, prohibitions from office-holding, restrictions on future gun ownership, and the like. Amnesty, a term used in the context of war or avoidance of military service, is simply a pardon for a war-related crime.

- ⁵ We are mindful of Justice Jackson's framework placing the president's power at its "lowest ebb" when taking "measures incompatible with the expressed or implied will of Congress." Nevertheless, Jackson realized there are situations in which executive power will still prevail. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (conurrence of Justice Jackson).
- ⁶ Congress' "resort to impeachment" was the remedy contemplated for presidential abuse of the pardon power. See *Ex Parte Grossman*, 267 U.S. 87, 121 (1925).
- ⁷ Of course, the law enforced may also be viewed as including the pardon power or as trumped by the constitutional pardon power.
- ⁸ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) ("The [pardon] power thus conferred is unlimited."); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) ("To the executive alone is intrusted the power of pardon, and it is granted without limit."). For example, pardons are regularly granted even after conviction and sentencing, despite the fact that the pardon undoes all or part of a court's final judgment of guilt and the sentence imposed in recognition of that judgment. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject only to review by superior courts in the Article III hierarchy.") As Chief Justice Burger wrote in *Schick v. Reed*, 419 U.S. 256, 266 (1974), "the plain purpose of the broad power conferred ... was to allow plenary authority in the President to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specific number of years, or to alter it with conditions which are themselves constitutionally unobjectionable." See also *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855) (upholding President Fillmore's pardon order that "the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington"). The breadth of the power is illustrated by the existence of substantial scholarly debate over whether the President could pardon himself. One school says there is no provision so limiting the power, the other that principles against self-dealing in the constitutional framework should bar self-pardons. Compare Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996) with Nida & Spiro, *The President as his Own Judge and Jury: A Legal Analysis of the Presidential Self-pardon Power*, 52 OKLA. L. REV. 197 (1999).
- ⁹ "Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders." *Ex parte Garland* 71 U.S. (4 Wall.) at 380; see also *United States v. Klein*.

¹⁰ *Schick v. Reed*, 419 U.S. 256 (1974).

¹¹ Even earlier, Alexander Hamilton recognized the possibility of systematic pardons, at least in a military context, when he wrote in THE FEDERALIST No. 74 that "... [I]n seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall."

¹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (concurring opinion of Justice Frankfurter).

¹³ A review of state clemency policies would probably provide additional illustrations of systematic pardons.

¹⁴ SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, at 471.

¹⁵ See generally Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URBAN L. REV. 1483 (2000).

¹⁶ See Exec. Order No. 11,967, 42 Fed. Reg. 4393 (1977); Proclamation No. 4313, 39 Fed. Reg. 33293 (1974), reprinted in 88 Stat. 2504 (1974) (as amended by Proclamation No. 4345, 40 Fed. Reg. 4893 (1975), reprinted in 89 Stat. 1236 (1975)). See also Proclamation No. 4483, 42 Fed. Reg. 4391 (1977), reprinted in 91 Stat. 1719 (1977) (pardoning persons who may have committed any offense between August 4, 1964 and March 28, 1973 in violation of the Military Selective Service Act). See generally David Shichor & Donald Ranish, *President Carter's Vietnam Amnesty: An Analysis of a Public Policy Decision*, PRESIDENTIAL STUDIES QUARTERLY, at 443 (1980).

¹⁷ *Cf. Clifford Dorne & Kenneth Gewerth, Mercy in A Climate of Retributive Justice: Interpretations From A National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 413 (1999); Paul Verkuil, *A Study of Immigration Procedures*, 31 UCLA LAW REV. 1141 (1984). See U.S. PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT (1975).

¹⁸ Exec. Order No. 9814, 11 Fed. Reg. 14,645 (1946).

¹⁹ Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 651 (1956),

²⁰ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970). See 116 Cong. Rec. H33314 (Sept. 23, 1970) (Rep. Bush), reprinted at 3 FED. SENT. REP. 108 (1990) ("The bill eliminates mandatory minimum penalties, except for professional criminals. Contrary to what one might imagine, however, this will result in better justice and more appropriate sentences").

²¹ Annual Report of the Attorney General, 1960, at 69.

²² Annual Report of the Attorney General, 1963, at 62–63.

²³ Annual Report of the Attorney General, 1964, at 63–64. In a newspaper interview in 1968, Kennedy Pardon Attorney Reed Cozart explained the Kennedy administration response to disparate sentences produced by the (then) new federal narcotics laws: "When Bobby Kennedy became attorney general in 1961, some commutations were granted to equalize this situation, to reduce the disparities. When the wardens told him (Kennedy) how tremendous this boosted prison morale, he ordered the whole process speeded up."

Executive Clemency Cases Growing Each Year, THE SUN-
DAY STAR, Washington, D.C. Jan. 14, 1968.

²⁴ Jefferson, Jefferson MSS Lib. Cong., quoted in full as
appendix A to Albert Beveridge, THE LIFE OF JOHN MAR-
SHALL, VOL. III, pp. 605–606 (Houghton Mifflin Co.).

²⁵ See generally LOUIS FISHER & NEAL DEVINS, POLITICAL
DYNAMICS OF CONSTITUTIONAL LAW (3d ed. 2000). A mod-
ern president might conclude, based on his own con-
stitutional judgment, that cocaine punishments were,
as President Clinton opined to ROLLING STONE, based
on race rather than real differences between crack
and powder cocaine. If so, he might subject such
penalty differentials to strict scrutiny, and conclude
that the sentencing differentials would not withstand
such scrutiny.

²⁶ To return to the cocaine sentencing differentials, a
President might conclude that the differentials were
not race-based despite their disparate impact on poor
urban blacks, and view the differentials as constitu-
tional. See *Washington v. Davis*, 426 U.S. 229
(1976) (no race discrimination when law has disparate
impact but lacks intent to discriminate).

²⁷ The debate over the excessive, unequal and ineffective
mandatory penalties under the Narcotics Act of 1956
may have helped to bolster the repeal of those
mandatory penalties in 1970. Some memory of the
lessons from that era might have helped to stem the
new fondness for very similar provisions that emerged
in 1986 and have haunted the federal system ever
since.

²⁸ PRESIDENT WILLIAM J. CLINTON'S MESSAGE TO CONGRESS:
THE UNFINISHED WORK OF BUILDING ONE AMERICA (Jan. 15,
2001).

²⁹ See Amendments to the Sentencing Guidelines for
United States Courts, 60 Fed. Reg. 25,074 (proposed
May 10, 1995), rejected by Congress in Act of Oct.
30, 1995, Pub. L. No. 104–38, 109 Stat. 334 (1995),
and signed into law by President Clinton.

³⁰ The president might note the disparate racial impact
of current crack and cocaine policies as partial

justification for pardon review, but should not make
race (African American) a factor in determining eligi-
bility in any systematic pardon policy or process. See
Adarand Constructors v. Peña, 515 U.S. 200 (1995).

³¹ The presidential clemency board report submitted to
President Ford contains a very detailed explanation of
that Board's decision-making processes. See U.S.
PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT
(1975).

³² Relitigation of sentences previously given is not a
viable option. Perhaps wardens in federal peniten-
tiaries could be asked to assess their prison popula-
tions for suitable clemency candidates, similar to the
process used in the Kennedy administration, U.S.
Attorneys could be asked to review their records relat-
ing to sentences given for certain classes of crack
cocaine offenders, or petitions could be allowed
whereby prisoners (and their lawyers) would request
consideration for clemency.

³³ One such situation was created when Congress
passed the "safety-valve" provision in the 1994 crime
bill (18 U.S.C. § 3553(f)) to rectify an inequity in sen-
tencing which allowed more culpable defendants who
could provide information about drug sources to the
government to receive lesser sentences than less cul-
pable defendants who did not have such information.
This legislation was not retroactive, so less culpable
defendants sentenced prior to the effective date of
the legislation did not receive its benefits. President
Clinton could have used the pardon power to provide
lesser incarcerations to prisoners sentenced prior to
the safety-valve legislation, but did not do so. Families
Against Mandatory Minimums (FAMM) identified 487
retroactive safety valve cases in the fall of 2000, so
there are likely still a number of such offenders in
federal prison today. See Memorandum from Julie
Stewart, President of FAMM, to Bruce Lindsey, White
House Counsel, Nov. 1, 2000.