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### Bill Clinton's Parting Pardon Party

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## IV. FREEDOM IN DECLINE

### BILL CLINTON'S PARTING PARDON PARTY

ALBERT W. ALSCHULER\*

#### I. INTRODUCTION

This Article will appear in revised form as part of a book tentatively titled *The Decline and Fall of the Pardon Power: A History*. A brief description of the larger project may be helpful.

The first part of the larger study will examine the near disappearance of executive clemency and how it happened. Between 1860 and 1900, Presidents granted 49% of the applications for clemency they received,<sup>1</sup> and as recently as 1961 to 1980, they granted 28%.<sup>2</sup> In the last complete presidential administration, however, George W. Bush granted only 1.7% of the applications he received.<sup>3</sup> Barack Obama, who is now in the nineteenth month of his presidency, has yet to approve a clemency grant. More than 4,500 petitions await action in the White House or the Department of Justice.<sup>4</sup>

The Justice Department has published rules for executive clemency, which it follows in determining which applications to process and in

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\* Professor of Law, Northwestern University School of Law; Julius Kreeger Professor of Criminal Law and Criminology, Emeritus, the University of Chicago. I am grateful to Margaret Colgate Love for assistance in the preparation of this Article.

<sup>1</sup> See KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 53 (1989).

<sup>2</sup> See Office of the Pardon Attorney, U.S. Dep't of Justice, Presidential Clemency Actions by Administration (1945 to Present), [http://www.usdoj.gov/pardon/actions\\_administration.htm](http://www.usdoj.gov/pardon/actions_administration.htm) (last visited Nov. 27, 2010). From fiscal year 1961 through fiscal year 1980, inclusive, presidents granted 3,603 petitions; 9,270 were either denied by the President or closed without presidential action. A total of 12,873 petitions were considered.

<sup>3</sup> See *id.*

<sup>4</sup> *Id.*

making recommendations to the White House. These rules do not limit the President's constitutionally based power to grant pardons or commutations as he sees fit.<sup>5</sup> Under the Justice Department's rules, pardons are reserved for ex-offenders who apply after they have been released from custody for five years. The principal function of a pardon is to restore an offender's civil rights after he has demonstrated his good citizenship. A prisoner who is still in custody may seek only a commutation of his sentence.<sup>6</sup> For inmates without White House connections, a commutation is the only "get out of prison" type of clemency available.

In the administrations of Presidents Reagan, Bush, Clinton, and Bush, only one-half of one percent of all petitions for commutation were approved. The average number of commutations per year was three. In most years of these administrations, the President did not find even one federal prisoner worthy of early release. George W. Bush approved one-tenth of one percent of the commutation petitions he received.<sup>7</sup>

After 1935, executive clemency was largely confined to pardons to restore civil rights. By that date, parole had eclipsed clemency as a means of releasing prisoners. Congress's abolition of parole in 1984,<sup>8</sup> however, did not revive clemency. Rather, it left the United States for the first time in its history without a functioning mechanism for releasing prisoners prior to the expiration of their sentences. Partly as a result, the federal prison population is now six times what it was then.<sup>9</sup>

The second part of the larger study will examine how presidents whose campaigns played on the public's fear of crime and who closed the door to clemency for applicants without connections opened it for their friends. As the official route to clemency all but closed, a back-door route opened. In the three administrations that preceded Obama's, applicants with political

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<sup>5</sup> See U.S. CONST. art II, § 2, cl. 1.

<sup>6</sup> 28 C.F.R. § 1.2 (2009). A convict who was never sentenced to prison or jail must wait five years from the date of his conviction before seeking a pardon. *Id.*

<sup>7</sup> See Office of the Pardon Attorney, *supra* note 2. Bill Clinton issued more than two-thirds of the eighty-eight commutations that were granted during the twenty-eight years of the Reagan, Bush, Clinton, and Bush presidencies, and as this Article will explain, a significant number of Clinton's grants went to people with White House connections. Clinton issued sixty-one commutations; Ronald Reagan, thirteen; George H.W. Bush, three; and George W. Bush, eleven. *Id.*

<sup>8</sup> See 18 U.S.C. §§ 3551-3625 (2006).

<sup>9</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003 488 tbl.6.13 (2005) (noting that there were 35,781 federal prisoners in 1985); FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, BOP: WEEKLY POPULATION REPORT, [http://www.bop.gov/locations/weekly\\_report.jsp](http://www.bop.gov/locations/weekly_report.jsp) (last visited Sept. 9, 2010) (noting that there were approximately 210,095 federal prisoners on September 9, 2010) (print-out of website as it appeared on date visited is on file with the *Journal of Criminal Law & Criminology*).

connections and/or high-priced, well-connected lawyers bypassed the Department of Justice, disregarded its regulations, and obtained clemency on grounds not available to others. This Article tells part of that story.

## II. BILL CLINTON AND CRIMINAL JUSTICE

In 1862, following the “largest massacre of whites by Indians in American history,”<sup>10</sup> a military tribunal sentenced 303 Sioux Indians to death. Officials on the scene advised President Lincoln that, unless all of the Indians were executed, “private revenge would on all this border take the place of official judgment.”<sup>11</sup> Lincoln, unintimidated, reviewed the record of each case and commuted the sentences of all but thirty-eight of the condemned. After Lincoln won re-election in 1864, a Minnesota senator remarked that if he had executed more Indians he would have carried the state by a larger majority. Lincoln replied, “I could not afford to hang men for votes.”<sup>12</sup>

In 1992, Governor Bill Clinton of Arkansas conspicuously interrupted his presidential campaign in order to be in Arkansas when a seriously brain-damaged murderer was executed. The murderer, Ricky Ray Rector, famously told the officers who took him to his death that he had put the dessert from his last meal aside in order to have it later.<sup>13</sup>

Clinton, who called himself a “new Democrat,”<sup>14</sup> said that Democrats “should no longer feel guilty about protecting the innocent.”<sup>15</sup> Although he once opposed the death penalty,<sup>16</sup> his administration sponsored legislation that, he noted when running for reelection, “expanded the death penalty for drug kingpins, murderers of federal law enforcement officers and nearly 60 additional categories of violent felons.”<sup>17</sup>

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<sup>10</sup> DAVID HERBERT DONALD, *LINCOLN* 392 (1995).

<sup>11</sup> *Id.* at 393. The quoted language was that of Minnesota Governor Alexander Ramsey, but Lincoln received equally threatening messages from General John Pope and Senator Morton Wilkinson. *Id.*

<sup>12</sup> *Id.* at 394.

<sup>13</sup> See Editorial, *When the Murderer is a Woman*, N.Y. TIMES, Jan. 31, 1998, at A14; see also *Ricky Ray Rector*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Ricky\\_Ray\\_Rector](http://en.wikipedia.org/wiki/Ricky_Ray_Rector) (last visited Sept. 14, 2010).

<sup>14</sup> See BILL CLINTON, *MY LIFE* 445 (2004).

<sup>15</sup> See Bill Nichols, *His Record on Crime Scrutinized*, USA TODAY, Apr. 17, 1992, at A6.

<sup>16</sup> See Alexander Nguyen, *Bill Clinton's Death Penalty Waffle—and Why It's Good News for Execution's Foes*, AM. PROSPECT, July 14, 2000, [http://www.prospect.org/cs/articles?article=bill\\_clintons\\_death\\_penalty\\_waffle\\_](http://www.prospect.org/cs/articles?article=bill_clintons_death_penalty_waffle_).

<sup>17</sup> See *Jesse Jackson Plans Voter Drive Rallies*, OMAHA WORLD-HERALD, Oct. 8, 1996, at 12; *Violent Crime Control and Law Enforcement Act*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Violent\\_Crime\\_Control\\_and\\_Law\\_Enforcement\\_Act](http://en.wikipedia.org/wiki/Violent_Crime_Control_and_Law_Enforcement_Act) (last visited Sept. 14, 2010).

This legislation, the Violent Crime Control and Law Enforcement Act of 1994, also granted funds to the states for hiring 100,000 police officers and authorized \$9.7 billion in grants to the states for building prisons. It provided no funds for public defender services and eliminated federal grants for inmate higher education.<sup>18</sup> During Clinton's eight years in office, a time of declining crime rates, state and federal prison and jail populations grew by 592,062 inmates (from 1,369,185 in 1993 to 1,961,247 in 2001).<sup>19</sup>

Clinton also signed the Antiterrorism and Effective Death Penalty Act of 1996, which greatly restricted the use of federal habeas corpus to review state criminal convictions. His signing statement did urge judges to construe the restrictions narrowly to avoid constitutional issues.<sup>20</sup>

Clinton's 1994 State of the Union address endorsed a three-strikes law. His line, "Three strikes, and you are out!" brought the loudest applause of the evening.<sup>21</sup> Clinton's pollster, Stanley Greenberg, had advised him that 80% of the public favored his proposal, but Clinton's Deputy Attorney General, Philip B. Heymann, resigned and protested the measure.<sup>22</sup>

Clinton once voiced concern about the mass incarceration of African-American men. In a 1995 speech at the University of Texas, he said:

[B]lack people are right to think something is terribly wrong . . . when almost one in three African American men in their 20s are either in jail, on parole, or otherwise under the supervision of the criminal justice system—nearly one in three. And that is a disproportionate percentage in comparison to the percentage of blacks who use drugs in our society. Now, I would like every white person here and in America to take a moment and think how he or she would feel if one in three white men were in similar circumstances.<sup>23</sup>

Two weeks after making this statement, Clinton signed legislation restoring the 1-to-100 crack/powder ratio that the United States Sentencing

<sup>18</sup> See The Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. § 20411; see also *Violent Crime Control and Law Enforcement Act*, *supra* note 17.

<sup>19</sup> Bureau of Justice Statistics, U.S. Dep't of Justice, Number of Persons Under Correctional Supervision (last updated Sept. 14, 2010), <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>. During Ronald Reagan's eight years in office, a time of rising crime rates, the increase was 522,106 inmates (from 556,814 in 1981 to 1,078,920 in 1989). During George H.W. Bush's four years, again a time of rising crime, it was 290,265 inmates (from 1,078,920 in 1989 to 1,369,185 in 1993). *Id.*

<sup>20</sup> See Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630, 631 (Apr. 24, 1996).

<sup>21</sup> See Carl M. Cannon, *Victim's Father Sold Clinton on Crime Bill*, BALTIMORE SUN, Mar. 21, 1994, at A1.

<sup>22</sup> *Id.*; see also Editorial, *Truth in Crime Packaging*, N.Y. TIMES, Feb. 18, 1994, at A26; Philip B. Heymann, *The Lock-'em-Up Debate: What Pols Won't Say: '3 Strikes—and We're Out of Money'*, WASH. POST, Feb. 27, 1994, at C1.

<sup>23</sup> William J. Clinton, Remarks at the University of Texas at Austin, 2 PUB. PAPERS 1600, 1602 (Oct. 16, 1995).

Commission had sought to eliminate. In the Anti-Drug Abuse Act of 1986, Congress required one hundred times more powder cocaine than crack to trigger the same mandatory minimum sentences,<sup>24</sup> and the Sentencing Commission had used the 1-to-100 ratio when imposing sentences higher than the mandatory minimums. Congress's and the Commission's actions produced enormous disparities between the sentences of black and white drug offenders,<sup>25</sup> but Clinton declared, "I am not going to let anyone who peddles drugs get the idea that the cost of doing business is going down."<sup>26</sup>

### III. CLINTON AND CLEMENCY

In Clinton's first two-year term as Governor of Arkansas, he commuted seventy sentences, including the life sentence that James L. Surrige was serving for a 1964 murder. Surrige had a record of five felony convictions dating back to 1929, but he was seventy-three and had been diagnosed with terminal cancer. Upon his release on parole following Clinton's commutation, Surrige engaged in a crime spree that included a bank robbery and a murder. He lived another thirteen years. The commutation contributed to Clinton's loss of the governorship in 1980 and prompted his apology as well as a pledge to commute no more first-degree murder sentences. In Clinton's four subsequent gubernatorial terms, he commuted only seven sentences.<sup>27</sup> His successor, Jim Guy Tucker, found "a stack of 2,600 clemency requests" upon taking office.<sup>28</sup>

Clinton granted no pardons or commutations at all in four of his first five years as President,<sup>29</sup> and "six months into his final year in office, he had pardoned less generously than any president since John Adams."<sup>30</sup> During his first year as President, pardon attorney Margaret Colgate Love was ordered to close shop for all applicants without clout. A memorandum

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<sup>24</sup> 21 U.S.C. §§ 841(b)(1)(A)(iii)-B(iii) (2006).

<sup>25</sup> See Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 102-05 (2005).

<sup>26</sup> President Clinton's Statement on Signing Legislation Rejecting U.S. Sentencing Commission Recommendations, 2 PUB. PAPERS 1700 (Oct. 30, 1995). The President added that "[s]ome adjustment [in the crack-power ratio] is warranted" and that the Sentencing Commission should "undertake additional review . . . and . . . report back with new recommendations." *Id.*

<sup>27</sup> See Cannon, *supra* note 21; Editorial, *We Hold the State Just as Guilty*, WASH. TIMES, Oct. 14, 1992, at G2; David Lauter, *Clinton Arkansas Record: He Won a Few, Lost a Few*, L.A. TIMES, May 23, 1992, at A1; Nichols, *supra* note 15.

<sup>28</sup> Doug Thompson, *Governors Find Clemencies Often Become Point of Contention*, ARK. DEMOCRAT-GAZETTE, July 16, 2001, at B1.

<sup>29</sup> See Office of the Pardon Attorney, *supra* note 2.

<sup>30</sup> Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 32 CAP. U. L. REV. 185, 194 (2002).

from the office of the Deputy Attorney General directed her to recommend a “denial of clemency in all cases except those in which a Member of Congress or the White House had expressed an interest.”<sup>31</sup> Love recalls, “While this directive was later retracted, its spirit continued to inform the Justice Department’s administration of the pardon power.”<sup>32</sup>

Fifty-five percent of Clinton’s pardons and 66% of his commutations came in the last year of his eight years as President.<sup>33</sup> When these grants are combined with those he made during his first two years as Arkansas governor, the distribution of Clinton’s clemency grants forms an inverse bell-shaped curve with a long, flat base close to zero at the center.

#### IV. MAKING UP FOR LOST TIME

On January 20, 2001, hours before the inauguration of George W. Bush, President Clinton issued 177 pardons and commutations.<sup>34</sup> More than thirty of Clinton’s grantees had not filed applications with the Department of Justice, and thirty more had filed applications so recently that the Department could not evaluate them in the ordinary course of events.<sup>35</sup> For weeks, the White House had been “inundated” with pardon requests, pardon lobbying, and pardon meetings.<sup>36</sup> White House Counsel Beth Nolan explained:

They were coming from everywhere . . . . We had requests from members of Congress on both sides of the aisle, in both Houses. We had requests from movie stars, newscasters, former Presidents, former first ladies. . . . I refused to go to holiday parties because . . . nobody wanted to know how I was, thank you very much. They wanted to know about a pardon. So I just didn’t go.<sup>37</sup>

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<sup>31</sup> See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1194-95 n.106 (2010). In effect, Love was told what a Chicago Ward Committeeman once told Abner Mikva: “We don’t want nobody that nobody sent.” Institute of Int’l Studies, Univ. of Cal. Berkeley, *Interview with Abner Mikva*, p. 2 of 6, Apr. 12, 1999, <http://globetrotter.berkeley.edu/people/Mikva/mikva-con2.html>.

<sup>32</sup> Love, *supra* note 31, at 1194-95 n. 106.

<sup>33</sup> See Office of the Pardon Attorney, U.S. Dep’t of Justice, *Presidential Clemency Actions by Administration (1945 to Present)*, [http://www.usdoj.gov/pardon/actions\\_administration.htm](http://www.usdoj.gov/pardon/actions_administration.htm) (last visited Nov. 27, 2010).

<sup>34</sup> See Love, *supra* note 30, at 185 n.2.

<sup>35</sup> See Love, *supra* note 31, at 1197 n. 115.

<sup>36</sup> See *The Controversial Pardon of International Fugitive Marc Rich: Hearings Before the H. Comm. on Government Reform*, 107th Cong. 342 (2001) [hereinafter *Controversial Pardon of International Fugitive Marc Rich*] (testimony of Beth Nolan, former Counsel to President Clinton).

<sup>37</sup> *Id.* at 342-43.

Former Attorney General Dick Thornburgh likened the White House in the last weeks of the Clinton administration to a Middle Eastern bazaar.<sup>38</sup> FBI Director Louis Freeh objected to something worse: “[T]he White House went to extraordinary lengths to deceive the Attorney General, myself, the Department of Justice and everyone about who was on the secret pardon list.”<sup>39</sup>

#### A. THE CASE OF MARC RICH AND PINCUS GREEN: A LESSON IN LAWYERING

The outcry that followed Clinton’s January 20 grants of clemency focused particularly on the pardons he granted Marc Rich and his business partner Pincus Green.<sup>40</sup> Rich and Green had been indicted in 1983 on charges of trading with the enemy (conspiring to purchase more than six million barrels of oil from Iran while that nation was holding fifty-two U.S. hostages<sup>41</sup>) and tax evasion (“the biggest tax fraud case in the history of the United States,” according to the chief prosecuting attorney<sup>42</sup>). Both had been fugitives and had lived in Switzerland since their indictments.<sup>43</sup> Rich and Green were on the FBI’s Ten Most Wanted list for several years, and Rich was still on page one of the Justice Department’s Most Wanted International Fugitives list at the time of the pardons.<sup>44</sup> He had become a citizen of Spain (and evidently of Switzerland and Israel as well) and had attempted unsuccessfully to renounce his U.S. citizenship in order to avoid

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<sup>38</sup> See Love, *supra* note 30, at 200 n.45.

<sup>39</sup> *Nomination of Eric S. Holder, Jr., Nominee to be Attorney General of the United States: Hearing before the S. Comm. on the Judiciary*, 111th Cong. 227 (2009).

<sup>40</sup> See, e.g., David S. Cloud et al., *Begging Pardons: Money and Connections Paved the Way Home for Fugitive Marc Rich*, WALL ST. J., Jan. 29, 2001, at A1; Editorial, *An Indefensible Pardon*, N.Y. TIMES, Jan. 24, 2001, at A18; Editorial, *Unpardonable*, WASH. POST, Jan. 23, 2001, at A16; see also *Marc Rich*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Marc\\_Rich](http://en.wikipedia.org/wiki/Marc_Rich) (last visited Sept. 14, 2010); *Pincus Green*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Pincus\\_Green](http://en.wikipedia.org/wiki/Pincus_Green) (last visited Sept. 14, 2010).

<sup>41</sup> See Eric Lichtblau & Davan Maharaj, *Sunday Report: Clinton Pardon of Rich a Saga of Power, Money and Influence*, L.A. TIMES, Feb. 18, 2001, at A1.

<sup>42</sup> *Controversial Pardon of International Fugitive Marc Rich*, *supra* note 36, at 88 (statement of Morris “Sandy” Weinberg, Jr., former assistant U.S. Attorney, Southern District of New York).

<sup>43</sup> In 1799, President John Adams refused to consider clemency for a fugitive outside the United States although the fugitive had a plausible defense and colorable reasons for not returning. Secretary of War James McHenry explained that clemency should be exercised “with great caution and on the fullest information.” See George Lardner, Jr., Op-Ed., *A Pardon to Remember*, N.Y. TIMES, Nov. 24, 2008, at A21.

<sup>44</sup> See Jake Tapper, *Anatomy of a Pardon*, SALON.COM, Feb. 13, 2001, <http://www.salon.com/news/politics/feature/2001/02/13/email>; see also *Marc Rich*, *supra* note 40.



further tax liability.<sup>45</sup> In 2010, *Forbes Magazine* estimated Marc Rich's wealth at \$1 billion, ranking him the 937th richest person in the world.<sup>46</sup> In 2009, it estimated Green's wealth at \$1.2 billion, ranking him 601st.<sup>47</sup>

One of Rich's lawyers, Robert Fink, advised him in late 1998 to add a "white-haired man"—a Washington insider—to his legal team.<sup>48</sup> Rich then retained Jack Quinn, who had been Clinton's White House Counsel and Vice-President Al Gore's Chief of Staff. Rich paid an initial retainer of \$330,000 to Quinn's firm, Arnold & Porter,<sup>49</sup> and the firm's fees ultimately reached at least \$400,000.<sup>50</sup> As Fink advised Rich, Quinn was "not just a pretty face."<sup>51</sup> The Washington lawyer emailed his client on Christmas Day, 2000, "I genuinely believe we have pushed every button,"<sup>52</sup> and indeed he had. Quinn's billable hours included at least two conversations with the President, including a twenty-minute call the night before Clinton issued the pardons.<sup>53</sup>

Quinn knew better than to let the Justice Department's Pardon Attorney examine Rich's application in time to make a difference;<sup>54</sup> the Department's rules, which preclude pardons for people still serving their sentences and for people who have been released less than five years, also preclude pardons for people on the lam.<sup>55</sup> Quinn, however, did approach one Justice Department lawyer—Deputy Attorney General Eric Holder—with whom, according to the *New York Times*, he had a close relationship.<sup>56</sup>

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<sup>45</sup> See *Controversial Pardon of International Fugitive Marc Rich*, *supra* note 36, at 165-66 (noting that Rich's pardon application listed Spanish and Israeli citizenship and suggesting that he might have applied for and obtained Bolivian citizenship as well); see also *Marc Rich*, *supra* note 40.

<sup>46</sup> See *The World's Billionaires: #937 Marc Rich*, [http://www.forbes.com/lists/2010/10/billionaires-2010\\_Marc-Rich\\_THOQ.html](http://www.forbes.com/lists/2010/10/billionaires-2010_Marc-Rich_THOQ.html).

<sup>47</sup> See *The World's Billionaires: #601 Pincus Green*, [http://www.forbes.com/lists/2009/10/billionaires-2009-richest-people\\_Pincus-Green\\_CEAL.html](http://www.forbes.com/lists/2009/10/billionaires-2009-richest-people_Pincus-Green_CEAL.html). Green does not seem to be on the 2010 list. See *The World's Billionaires*, [http://www.forbes.com/lists/2010/10/billionaires-2010\\_The-Worlds-Billionaires\\_Rank.html](http://www.forbes.com/lists/2010/10/billionaires-2010_The-Worlds-Billionaires_Rank.html).

<sup>48</sup> See Alison Leigh Cowan, *Rich Cashed in a World of Chits to Win Pardon*, N.Y. TIMES, Apr. 11, 2001, at A1.

<sup>49</sup> See Tapper, *supra* note 44 (reprinting emails and documents that the House Subcommittee on Government Reform obtained following Rich's pardon).

<sup>50</sup> See Lichtblau & Maharaj, *supra* note 41.

<sup>51</sup> See Cowan, *supra* note 48.

<sup>52</sup> See Tapper, *supra* note 44 (reprinting an email from Quinn to the Rich Foundation with a copy to Marc Rich).

<sup>53</sup> See Cowan, *supra* note 48; Tapper, *supra* note 44.

<sup>54</sup> Following the January 20 pardon, Justice Department officials reported that they had not received Rich's application until January 17. Quinn responded that a courier had hand-delivered the package on January 10. See Tapper, *supra* note 44.

<sup>55</sup> See *supra* text accompanying notes 5-6.

<sup>56</sup> Cowan, *supra* note 48.

On November 18, Holder advised Quinn to take his pardon request directly to the White House.<sup>57</sup> Quinn's Christmas Day email to Rich commented, "I am hopeful that E. Holder will be helpful to us."<sup>58</sup> A January 10 note to Holder declared, "Your saying positive things, I'm told, would make this happen."<sup>59</sup> Beth Nolan, the White House Counsel, who had been Quinn's subordinate when he held her title, telephoned Holder the day before Clinton left office. Holder advised her that his position on the pardon was "neutral leaning toward favorable."<sup>60</sup>

Neither Holder nor anyone at the White House had contacted Mary Jo White, the United States Attorney for the Southern District of New York, who was managing the prosecution of Rich and Green. Nor had Holder or the White House sought the views of the career prosecutors who had worked on the case. White and her staff did not realize that Clinton was considering pardons for the two men until he issued them.<sup>61</sup> Moreover, neither Holder nor the White House had sought the views of the Justice Department's Pardon Attorney.

Holder's role in the Marc Rich pardon became the principal issue at his Senate confirmation hearings when President Obama nominated him to be Attorney General eight years later. Holder acknowledged that he had made "mistakes" and "made assumptions that turned out not to be true." He said, "I think we have to work to improve the pardon process within the Department of Justice. It appears that at the end of every administration there seems to be a deterioration in the process."<sup>62</sup> Holder now has been Attorney General for nineteen months, however, and he has not made or proposed any change in the Department's dysfunctional clemency procedure.

Holder's position on the pardon—"neutral leaning toward favorable"—was more positive than that of anyone on the White House staff. White House Counsel Beth Nolan, Deputy Counsel Bruce Lindsey, all the other lawyers in Nolan's office, and Chief of Staff John Podesta opposed clemency for Rich.<sup>63</sup>

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<sup>57</sup> See Lardner, *supra* note 43.

<sup>58</sup> See Tapper, *supra* note 44.

<sup>59</sup> *Id.*

<sup>60</sup> See Lardner, *supra* note 43; Lichtblau & Maharaj, *supra* note 41, at A17; Robert O'Harrow, Jr., *Secrecy Stressed in Bid to Win Rich's Pardon: Hearing Told of Lawyer's Strategizing*, WASH. POST, Feb. 9, 2001, at A1.

<sup>61</sup> See *id.*

<sup>62</sup> *Nomination of Eric S. Holder, Jr., Nominee to be Attorney General of the United States: Hearing before the S. Comm. on the Judiciary*, 111th Cong. 95-96 (2009).

<sup>63</sup> See *Excerpts from Testimony on Pardon*, N.Y. TIMES, Mar. 2, 2001, at A19 (testimony of John Podesta).

Denise Rich, Marc Rich's former wife, might have had more influence with President Clinton than the members of his staff. After the Richs' daughter Gabrielle died at age twenty-seven of leukemia, Denise Rich and other survivors<sup>64</sup> created the G&P Foundation for Cancer Research.<sup>65</sup> In November 2000, President Clinton appeared at the Foundation's Angel Ball for a second time as Honorary Chairman.<sup>66</sup> Photographs of Denise Rich's presentation of a gold-plated saxophone to the President on this occasion accompanied many later news stories about the pardon.<sup>67</sup>

The President accepted the saxophone and said, "Thank you, Denise. Thank you for everything you've done to make it possible for Hillary and me to serve."<sup>68</sup> Although Clinton did not list Rich's contributions, they included "more than \$1 million to the Democratic Party and its candidates, \$450,000 to Clinton's library fund, \$100,000 to a fund to help Hillary Clinton's Senate campaign, \$10,000 to the President's defense fund, and \$7,375 worth of furniture to the Clintons."<sup>69</sup>

Denise Rich earlier had declined to press for a Justice Department review of her former husband's case, and she initially was reluctant to support his application for a pardon.<sup>70</sup> Their 1996 divorce, prompted in part by his infidelity, had been bitter, but she ultimately acceded to the argument that clearing his name would be a blessing to their children.<sup>71</sup> Soon after she offered her support for a pardon, Marc Rich and Pincus Green, who had not previously contributed to the G&P Foundation, pledged continuing annual gifts of \$500,000 apiece.<sup>72</sup>

Denise Rich sent two letters to President Clinton, one of them drafted by a Marc Rich lawyer and the other drafted with counsel's input. "I am writing as a friend and admirer of yours to add my voice to the chorus of those who urge you to grant my former husband, Marc Rich, a pardon for

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<sup>64</sup> Including Gabrielle's sisters and her husband, but not Marc Rich, who has contributed to cancer research through other charities. See Alison Leigh Cowan, *Rich Pardon Reportedly Followed Pledge to Charity of Former Wife*, N.Y. TIMES, May 1, 2001, at A1.

<sup>65</sup> See The G&P Foundation for Cancer Research, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1506566/> (last visited Sept. 14, 2010); Gabrielle's Angel Foundation, <http://www.gabriellesangels.org> (last visited Sept. 14, 2010).

<sup>66</sup> See Cowan, *supra* note 64.

<sup>67</sup> *Id.*

<sup>68</sup> CBS Evening News: *Questions Being Raised About End-of-Term Pardon President Clinton Granted to Fugitive Financier Marc Rich* (CBS television broadcast, Jan. 25, 2001), available at LEXIS, News, Transcripts, CBS News Transcripts.

<sup>69</sup> James V. Grimaldi & Dan Eggen, *House Panel Expands Probe of Rich Pardon: 3 Former Clinton Aides Subpoenaed*, WASH. POST, Feb. 16, 2001, at A3.

<sup>70</sup> See Cowan, *supra* note 64.

<sup>71</sup> *Id.*; Cowan, *supra* note 64, at A18.

<sup>72</sup> Cowan, *supra* note 64, at A18.

the offenses unjustly alleged and so aggressively pursued," she wrote. "Exile for 17 years is enough."<sup>73</sup>

Rich pressed a White House social secretary for an invitation to a dinner for recipients of the National Medal of the Arts and the National Humanities Medal on December 20. At the dinner, wearing a burgundy gown with fox trim, she was seated at the President's table with such notables as Barbara Streisand and Maya Angelou. Rich sought a private moment with Clinton. According to Jack Quinn, she said simply, "I know you got my letter, and it means a great deal to me."<sup>74</sup>

Beth Dozoretz also made a personal appeal to Clinton. She was a prominent Democratic fund-raiser, a former finance chair of the Democratic National Committee, and a friend of Denise Rich. The President was the godfather of her daughter.<sup>75</sup>

Like Jack Quinn, Denise Rich was more than a pretty face, and on at least one occasion she proved a savvier strategist than some of the professionals. In an email discussion of how to gain Hillary Clinton's support for a pardon, one correspondent reported that he had been advised that Mrs. Clinton, who had just become a New York Senator, would be likely to help if the state's senior Senator, Charles Schumer, endorsed a pardon as well. A discussion of how to approach Schumer followed. "Can quinn tell us who is close enough to lean on schumer?? . . . Jack might be able to tell us quickly who the top contributors are." When one of the lawyers raised the issue with Denise Rich, however, she insisted that no one should discuss the issue with Mrs. Clinton. The First Lady would recognize the perils of the proposal and seek to protect her husband. The idea "would be viewed badly by the recipient."<sup>76</sup> As a lawyer who was also wary of approaching Mrs. Clinton observed, "Frankly, I think we benefit from not having the existence of the petition known."<sup>77</sup>

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<sup>73</sup> See Cowan, *supra* note 48, at A18. Presumably Rich did not refer to the hardship of living on the shore of a Swiss lake surrounded by the Picassos and other notable works that comprise the Marc Rich art collection. See Shawn Tully, *The Lifestyle of the Rich*, FORTUNE, Dec. 22, 1986; Maureen Orth, *The Face of Scandal*, VANITY FAIR, June 2001, at 142. She referred instead to the need to keep journeys from Switzerland quiet to avoid arrest, to the awkwardness of climbing out of restroom windows to elude journalists, and especially to the fact that prosecutors had refused to give Marc Rich immunity from arrest to enable him to attend the funeral of his daughter in the United States. See Mark Honigsbaum, *The Rich List*, OBSERVER MAG., May 13, 2001, at 28; Lichtblau & Maharaj, *supra* note 41.

<sup>74</sup> Cowan, *supra* note 48, at A18.

<sup>75</sup> See Melinda Henneberger, *Pardon Puts New Spotlight on a Clinton Fund-Raiser*, N.Y. TIMES, Feb. 17, 2001, at A12.

<sup>76</sup> See Tapper, *supra* note 44.

<sup>77</sup> *Id.*

Quinn submitted a thick volume of legal briefs and letters to the President. As the *New York Times* reported, however, "At least 52 of the 73 letters described as being 'letters expressing support for the pardon of Mr. Marc Rich' said no such thing."<sup>78</sup> Many were simply testimonials to Rich's charitable contributions.

Quinn also arranged supportive phone calls. Juan Carlos, the King of Spain, spoke with the President to endorse a pardon,<sup>79</sup> and in a farewell call on January 19, Israeli Prime Minister Ehud Barak reiterated his earlier endorsement.<sup>80</sup> Rich had donated generously to Israeli charities, and officials reported that he also had allowed Israeli agents to use his business offices as a cover and had financed clandestine government missions.<sup>81</sup>

During the criminal and congressional investigations that followed the Rich and Green pardons, Denise Rich and Beth Dozoretz invoked their Fifth Amendment privilege and declined to testify.<sup>82</sup> Denise Rich did cooperate, however, after being granted immunity from prosecution.<sup>83</sup> The criminal investigation produced no charges.<sup>84</sup>

## B. OTHER FAREWELL PARDONS

The pardons of Marc Rich and Pincus Green might have been less criticized had they not been accompanied by many other pardons that raised both eyebrows and questions. On January 20, Clinton granted clemency to:

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<sup>78</sup> Cowan, *supra* note 48.

<sup>79</sup> See Tapper, *supra* note 44.

<sup>80</sup> See *Excerpts from Testimony on Pardon*, *supra* note 63, at A19 (testimony of John Podesta).

<sup>81</sup> See Cowan, *supra* note 48. On December 30, Quinn emailed Robert Fink, the New York lawyer, to ask whether the widow of Yitzhak Rabin, the assassinated Israeli Prime Minister, would make a call: "I . . . wonder if you can inquire whether there is a possibility of persuading Mrs. Rabin to make a call to POTUS. He had a deep affection for her husband." Fink forwarded Quinn's request to Avner Azulay, director of the Rich Foundation in Tel Aviv: "Jack asks if you could get Leah Rabin to call the President; Jack said he was a real big supporter of her husband . . ." Azulay replied, "Bob, having Leah Rabin call is not a bad idea. The problem is how do we contact her? She died last November . . ." See Tapper, *supra* note 44. Prime Minister Rabin's daughter later made a teleconference call to the President. See *id.*

<sup>82</sup> See Louis Fisher, The Law: *When Presidential Power Backfires*, 32 PRESIDENTIAL STUD. Q. 586, 594-95 (2002); Jackie Koszczuk & Sumana Chatterjee, *Clinton Frees Aides to Speak About Pardon*, PHILADELPHIA INQUIRER, Feb. 28, 2001, at A2.

<sup>83</sup> See Fisher, *supra* note 82.

<sup>84</sup> *Id.*

### 1. Carlos Vignali

Carlos Vignali had served six years of a fifteen-year term when the President commuted his sentence. Judge David S. Doty, who sentenced Vignali, described him as “one of the top two or three” of a group of thirty conspirators who had shipped about eight hundred pounds of cocaine from southern California to Minneapolis.<sup>85</sup> At his trial, Vignali offered a story of lending money to friends to invest with a group of basketball players—a story so unbelievable that Judge Doty enhanced his sentence for committing perjury.<sup>86</sup>

Judge Doty had written an eight-page letter in support of the clemency application of another drug dealer whose sentence Clinton commuted on the final day of his term,<sup>87</sup> but no one had told Doty that the President was considering clemency for Vignali.<sup>88</sup> He was “aghast” at the commutation when he learned about it.<sup>89</sup> The United States Attorney in Minneapolis strongly opposed clemency, as did the Justice Department’s pardon attorney.<sup>90</sup>

Other voices spoke on Vignali’s behalf. Notably, Hugh Rodham, Hillary Clinton’s brother and a Florida attorney, had accepted fees of \$204,280 from Vignali’s father for promoting Vignali’s case in the White House.<sup>91</sup> When the fees were revealed, both the President and Mrs. Clinton reported that they had been unaware of them. Rodham returned the money at their behest.<sup>92</sup>

Hugh Rodham was not Vignali’s only supporter. Vignali’s father, Horacio Vignali, had made \$160,000 in political contributions since his son’s conviction, most of them to California Democrats. Vignali

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<sup>85</sup> See Richard A. Serrano & Stephen Braun, *Vignali Case Built on Informants, Wiretaps; Commutation: Dealer Who Received Controversial Clemency Was Portrayed at His Trial as a Key Financier of a Cocaine Pipeline*, L.A. TIMES, Feb. 15, 2001, at A1.

<sup>86</sup> See David S. Doty, *Clemency: A View from the Bench of Two Commutations—Vignali and Willis*, 13 FED. SENT’G REP. 161, 162 (2001); Love, *supra* note 30, at 209; Serrano & Braun, *supra* note 85.

<sup>87</sup> Love, *supra* note 30, at 207 (describing the letter Judge Doty sent concerning Kim Willis). The judge also wrote in support of the application of another drug offender, Serena Nunn, whom he had sentenced at about the same time as Vignali and Willis. President Clinton commuted Nunn’s sentence in July 2000. Doty, *supra* note 86.

<sup>88</sup> *Id.*

<sup>89</sup> See *Politics: Criminal Probe of Rich Pardon Opened; Other Developments*, FACTS ON FILE WORLD NEWS DIG., Feb. 14, 2001, at 100A2, available at LEXIS.

<sup>90</sup> See Love, *supra* note 30, at 211.

<sup>91</sup> See Richard A. Serrano & Stephen Braun, *Working the American System*, L.A. TIMES MAG., Apr. 29, 2001, at 10.

<sup>92</sup> See Peter Slevin & James V. Grimaldi, *Hillary Clinton Criticizes Brother; Husband’s Brother Also Lobbied for Pardons but Failed*, WASH. POST, Feb. 23, 2001, at A1.

encouraged the recipients of these contributions and other prominent figures to endorse clemency for Carlos. He obtained favorable letters or telephone calls from two congressmen, two California State Assembly speakers, a cardinal of the Catholic Church, the Los Angeles County sheriff, a Los Angeles County supervisor, a city councilman, and the United States Attorney in Los Angeles.<sup>93</sup> Carlos's clout-less co-conspirators collected no Clinton commutations, and several of them remained in custody when Carlos went home.<sup>94</sup>

## 2. Glenn Braswell

Glenn Braswell's claims about his company's treatment for baldness led in 1983 to mail fraud and perjury convictions and to a three-year sentence.<sup>95</sup> Another client of Hugh Rodham, he paid Rodham a \$200,000 contingent fee for successfully advocating his pardon. After Hillary Clinton complained about her brother's "terrible misjudgment,"<sup>96</sup> and former President Clinton declared that he too was "deeply disturbed,"<sup>97</sup> Rodham returned the money.<sup>98</sup> The Justice Department had not reviewed Braswell's clemency application.<sup>99</sup>

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<sup>93</sup> See Serrano & Braun, *supra* note 91. The senior Vignali was portrayed at the time of the pardon as "an Argentine immigrant who built a fortune in Los Angeles with his own hands, his own sweat and savvy. . . . Through good fortune and smarts, he eventually built a business empire that diversified into body shops, parking lots, real estate and luxury cars." *Id.* More recent journalism noted informant tips to the D.E.A. that both the father and son were drug dealers. See Jeffrey Anderson, *LA's Underground Power Broker*, L.A. WEEKLY, May 27, 2005, at 34, available at LEXIS.

<sup>94</sup> See *id.*; Richard A. Serrano & Stephen Braun, *In Many Drug Cases, Normal Clemency Process Bypassed*, L.A. TIMES, Mar. 5, 2001, at A1 (reporting that Todd Hopson, a Vignali co-defendant serving eighteen years, "more closely fits the model that Clinton, FAMM [Families Against Mandatory Minimums] and others have spoken of—a first-time offender, a minor role in the drug crime, and someone who does not have the money or connections to get out of prison early").

Among the beneficiaries of Clinton's last-day commutations were seventeen drug offenders whom Families Against Mandatory Minimums had recommended. *Id.* The commutation of their sentences appears to have prompted no criticism.

<sup>95</sup> See Kurt Eichenwald & Michael Moss, *Pardon for Subject of Inquiry Worries Prosecutors*, WASH. POST, Feb. 6, 2001, at A1; see also *Almon Glenn Braswell*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Almon\\_Glenn\\_Braswell](http://en.wikipedia.org/wiki/Almon_Glenn_Braswell) (last visited Sept. 14, 2010).

<sup>96</sup> Slevin & Grimaldi, *supra* note 92, at A1.

<sup>97</sup> See Christopher Marquis with Michael Moss, *A Clinton In-Law Received \$400,000 in 2 Pardon Cases*, N.Y. TIMES, Feb. 22, 2001, at A1; Richard A. Serrano & Stephen Braun, *Clinton Brother-in-Law was Paid \$400,000 to Help Win Clemencies*, L.A. TIMES, Feb. 22, 2001, at A1.

<sup>98</sup> Serrano & Braun, *supra* note 97.

<sup>99</sup> See Marquis with Moss, *supra* note 97, at A21.

A Justice Department review would have revealed that the FBI was then investigating Braswell for tax evasion and money laundering.<sup>100</sup> He later was charged with evading more than \$13.4 million in taxes.<sup>101</sup> Four years after his pardon, Braswell pleaded guilty to reduced charges and was sentenced to eighteen months in prison.<sup>102</sup>

### 3. Roger Clinton

The President's half-brother, Roger Clinton, was convicted of distributing a small amount of cocaine in 1985 and served a year in prison. The President gave him a full pardon.<sup>103</sup>

### 4. Henry Cisneros and Linda Jones

While Henry Cisneros was Clinton's Secretary of Housing and Urban Development, his former mistress, Linda Jones, sued him. She alleged breach of an agreement to support her until her daughter graduated from college. Jones also sold tapes she had secretly made of her conversations with Cisneros to a television program, and she alleged on the program that Cisneros had lied to the FBI while that agency was investigating his background prior to his appointment. Attorney General Janet Reno appointed a special prosecutor to investigate the charges.<sup>104</sup>

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Another of Hillary Clinton's brothers, Tony Rodham, supported the pardons that Clinton gave Edgar Allen Gregory, Jr. and his wife Vonna Jo Gregory on March 15, 2000. After being convicted of bank fraud in 1982, the Gregorys, owners of a large carnival company, served terms of probation. The Justice Department's pardon attorney and the prosecuting United States Attorney opposed clemency, advising the White House that the Gregorys' crime was serious and that they had not acknowledged their criminality.

Rodham reported that the Gregorys did not pay him for supporting their pardons. He was, however, a paid consultant to Mr. Gregory on other matters. The Gregorys themselves were major contributors to both Democrats and Republicans and donated to Hillary Clinton's campaign for the U.S. Senate. See Marc Lacey & Don Van Natta, Jr., *Second Clinton In-Law Says He Helped to Obtain Pardon*, N.Y. TIMES, Mar. 1, 2001, at A1.

<sup>100</sup> See Marquis with Moss, *supra* note 97, at A21.

<sup>101</sup> See David Rosenzweig, *Herbal Remedy Magnate Held in Tax Evasion Case*, L.A. TIMES, Jan. 15, 2003, Cal. Metro Section at 1.

<sup>102</sup> See David Rosenzweig, *Man Gets 18 Months for Tax Scheme; A Former Herbal Remedy Magnate Conspired to Evade \$4 Million in Corporate Taxes*, L.A. TIMES, Sept. 14, 2004, Cal. Metro Section at 3.

<sup>103</sup> See Office of the Pardon Attorney, *supra* note 2; David Johnston & Don Van Natta, Jr., *The Clinton Pardons: The Lobbying; Clinton's Brother Pursued Clemency Bids for Friends*, N.Y. TIMES, Feb. 23, 2001, at A1, A15.

<sup>104</sup> See Tamara Jones, *Henry and Linda*, WASH. POST MAG., Feb. 22, 1998, at W10; *Cisneros Probe: An Indictment Many Years in the Making*, WASHINGTONPOST.COM, <http://www.washingtonpost.com/wp-srv/politics/special/cisneros/chronology.htm>; see also *Henry Cisneros*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Henry\\_Cisneros](http://en.wikipedia.org/wiki/Henry_Cisneros) (last visited Sept. 14, 2010); *Linda Medlar*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Linda\\_Medlar](http://en.wikipedia.org/wiki/Linda_Medlar) (last visited



Cisneros left office at the end of Clinton's first term. Several months later, a grand jury charged him with eighteen counts of conspiracy, false statements, and obstruction of justice. It also indicted Jones for bank fraud and money laundering. She allegedly had used part of the more than \$250,000 Cisneros paid her to make a down payment on a house. The grand jury alleged that she had put this property in the names of relatives and had lied about the source of the funds.

Cisneros admitted that he lied to the FBI about the amount of money he paid Jones. He pleaded guilty to a misdemeanor and paid a fine of \$10,000. Jones pleaded guilty to twenty-eight felony counts and was sentenced to three and one-half years.<sup>105</sup> Although neither was eligible for a pardon under Justice Department rules, Clinton pardoned them both.

### 5. John Deutch

After John Deutch resigned as Clinton's Director of the Central Intelligence Agency, CIA security officers discovered that he had "stored hundreds of highly classified intelligence reports on home computers linked to the internet."<sup>106</sup> Fearing that this breach would lead to more serious charges in the impending Republican administration, Deutch entered a plea agreement the day before Clinton pardoned him. He agreed to plead guilty to a misdemeanor and pay a \$5,000 fine.<sup>107</sup>

Clinton's pardon on Saturday morning took the prosecutor who had negotiated the plea agreement by surprise. He had not been consulted and had planned to file the appropriate papers and schedule Deutch's guilty plea on Monday.<sup>108</sup> Deutch had not filed a pardon request with the Justice Department, whose rules would have precluded its consideration.

### 6. Ron Blackley, Jack L. Williams, Richard Douglas, James H. Lake, Alvarez Ferrouillet, Jr., John Hemmingson, and Brook Keith Mitchell, Sr.

Ron Blackley, Chief of Staff to Clinton Agriculture Secretary Mike Espy, was convicted of lying about his receipt of \$22,000 in gifts from farmers who received more than \$400,000 in subsidies during the Clinton administration's first year. He was sentenced to a term of twenty-seven

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Sept. 14, 2010); *Henry Cisneros, Payments Controversy*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Henry\\_Cisneros\\_payments\\_controversy](http://en.wikipedia.org/wiki/Henry_Cisneros_payments_controversy) (last visited Sept. 14, 2010).

<sup>105</sup> See Tony Locy, *Cisneros's Ex-Mistress Pleads Guilty*, WASH. POST, Jan. 16, 1998, at A6.

<sup>106</sup> Bill Miller & Walter Pincus, *Deutch Had Signed Plea Agreement, Sources Say*, WASH. POST, Jan. 24, 2001, at A13.

<sup>107</sup> *Id.*

<sup>108</sup> See *id.*

months.<sup>109</sup> The independent counsel who secured Blackley's conviction later brought Espy himself to trial on charges of accepting substantial gifts from enterprises regulated by the Department of Agriculture. The jury deliberated less than ten hours before finding Espy not guilty.<sup>110</sup>

At Espy's urging, Clinton commuted Blackley's sentence after he had served about half of it. At the same time (again on his last day in office), Clinton pardoned six other people whose convictions the independent counsel had secured. They were Tyson Foods lobbyist Jack L. Williams and lobbyist Richard Douglas, both of whom had made illegal gifts; lobbyist James H. Lake, lawyer Alvarez Ferrouillet, Jr., and insurance executive John Hemmingson, who had made illegal contributions to the congressional campaign of Mike Espy's brother; and farmer Brook Keith Mitchell, Sr., who had unlawfully collected crop subsidies. One month earlier, Clinton had pardoned Tyson Foods executive Archie Schaffer III, who had not yet begun serving his one-year sentence for making illegal gifts.<sup>111</sup> All of the recipients of pardons would have been ineligible for them under Justice Department rules.

#### 7. Richard Riley, Jr.

Clinton pardoned Richard Riley, Jr., the son of his Secretary of Education. After Riley's conviction in 1993 of conspiring to distribute cocaine and marijuana, he had served a term of home confinement.<sup>112</sup>

#### 8. Mel Reynolds

Mel Reynolds, a Democratic Congressman from Illinois, had a sexual relationship with a sixteen-year-old. In 1995, he was convicted in a state court of sexual assault, obstruction of justice, and solicitation of child pornography. Before Reynolds completed his state sentence, he was convicted in a federal court on fifteen counts of bank fraud and lying to

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<sup>109</sup> See Bill Miller, *Espy's Former Chief of Staff Sentenced to 27 Months*, WASH. POST, Mar. 19, 1998, at A5.

<sup>110</sup> See Bill Miller, *Espy Acquitted in Gifts Case: Jury Clears Ex-USDA Chief on 30 Counts Brought by Independent Counsel*, WASH. POST, Dec. 3, 1998, at A1; see also *Mike Espy*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Mike\\_Espy](http://en.wikipedia.org/wiki/Mike_Espy) (last visited Sept. 14, 2010).

<sup>111</sup> See Jerry Mitchell, *Clinton Cleans Espy Slate*, CLARION-LEADER (Jackson, Miss.), Jan. 25, 2001, at 1A, available at LEXIS.

<sup>112</sup> See Office of the Pardon Attorney, *supra* note 2; Amy Goldstein & Susan Schmidt, *Clinton's Last-Day Clemency Benefits 176*, WASH. POST, Jan. 21, 2001, at A1. Clinton also pardoned Stuart Harris Cohn, the brother-in-law of former Democratic Representative Sam Gejdenson. In 1979, Cohn had been convicted of a commodities trading violation. See David Lightman, *Dodd Helped Friend Secure Presidential Pardon*, HARTFORD COURANT, Feb. 24, 2001, at A11.

SEC investigators.<sup>113</sup> Reynolds had allegedly concealed debts to obtain bank loans, used union donations intended for voter registration drives to support his election campaign, directed aides to cash illegally at least \$164,000 in campaign contributions at banks and currency exchanges, and then pocketed much of the cash.<sup>114</sup> Clinton's commutation did not release Reynolds from custody. It simply allowed him to serve the final two years of his sentence at a halfway house.<sup>115</sup> Chicago Mayor Richard Daley,<sup>116</sup> Illinois Senator Dick Durbin,<sup>117</sup> Representatives Charles Rangel, Danny Davis, and Maxine Waters,<sup>118</sup> former Representative Ron Dellums,<sup>119</sup> and the Reverend Jesse Jackson<sup>120</sup> had asked Clinton to commute Reynolds's sentence.<sup>121</sup>

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<sup>113</sup> See *Former Congressman Convicted of Lying*, N.Y. TIMES, Apr. 17, 1997, at A20; see also *Mel Reynolds*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Mel\\_Reynolds](http://en.wikipedia.org/wiki/Mel_Reynolds) (last visited Sept. 14, 2010).

<sup>114</sup> See Mike Dorning, *Clinton Grants Clemency, Frees Reynolds*, CHI. TRIB., Jan. 21, 2001, at C15.

<sup>115</sup> See Kate N. Grossman, *Reynolds Sprung, Thanks to Clinton*, CHI. SUN-TIMES, Jan. 21, 2001, at 2.

<sup>116</sup> See *id.*

<sup>117</sup> See Dorning, *supra* note 114.

<sup>118</sup> See *Lawmakers Weighed in, Too*, SAN ANTONIO EXPRESS-NEWS, Mar. 9, 2001, at 10A.

<sup>119</sup> See *id.*; Lauren W. Whittington, *With Reynolds in Race, CBC Prefers Jackson*, ROLL CALL, Oct. 14, 2003.

<sup>120</sup> See Grossman, *supra* note 115, at 3A; Dorning, *supra* note 114.

<sup>121</sup> One month earlier, Clinton pardoned another former Democratic Member of Congress from Illinois. Dan Rostenkowski, who had headed the House Ways and Means Committee for thirteen years, pleaded guilty in 1996 to mail fraud and served a seventeen-month term. Former President Gerald Ford and other political leaders had written in support of Rostenkowski's pardon, but he would not have been eligible for a pardon under Justice Department rules. See Lynn Sweet, *Clinton Clears Rosty: Pleas from Dem and GOP Leaders Win Pardon for Chicago's "Mr. Chairman,"* CHI. SUN-TIMES, Dec. 23, 2000, at 1; see also *Dan Rostenkowski*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Dan\\_Rostenkowski](http://en.wikipedia.org/wiki/Dan_Rostenkowski) (last visited Sept. 14, 2010).

Clinton's last-day clemency grants included a commutation of the sentence of Peter MacDonald, who had served four terms as tribal chief of the Navajo nation. MacDonald had completed about half of his fourteen-and-a-half-year sentence for burglary and conspiracy to commit kidnapping—charges that arose from his part in a riot in which two of his supporters were killed. MacDonald earlier had been sentenced to five years for racketeering, fraud, and extortion. Former President Jimmy Carter and Representative Patrick Kennedy supported MacDonald's clemency application. See Timothy Barmann, *Kennedy Lobbied Clinton to Get Pardon for Former Indian Leader*, PROVIDENCE J.-BULL., Mar. 4, 2001, at 1B; Office of the Pardon Attorney, U.S. Dep't of Justice, Commutations, Remissions and Reprieves Granted by President Clinton, [http://www.justice.gov/pardon/clinton\\_comm.htm](http://www.justice.gov/pardon/clinton_comm.htm); see also *Peter MacDonald (Navajo Leader)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Peter\\_MacDonald\\_\(Navajo\\_leader\)](http://en.wikipedia.org/wiki/Peter_MacDonald_(Navajo_leader)) (last visited Sept. 14, 2010).

*9. John H. Bustamante and Dorothy Rivers*

Jesse Jackson also successfully advocated clemency for two former officials of his Rainbow/PUSH Coalition. Jackson reported that he spoke with the President in the fall of 2000 about Mel Reynolds, these officials, and Jackson's half-brother Noah Robinson (who had been convicted in a state court of being an accessory after-the-fact to murder and whose life sentence on various gang-related federal convictions Clinton did not disturb<sup>122</sup>). Jackson said of his conversations with the President, "We spent a lot of time together."<sup>123</sup>

One of the Rainbow Coalition officials, John H. Bustamante, had been convicted of fraudulently obtaining nearly \$1 million from an insurance company, but the trial judge concluded that the jury had misunderstood his instructions and ordered a new trial. Bustamante then pleaded guilty to one count of wire fraud, admitting he had used a \$275,000 loan intended for oil exploration for personal expenses that included his son's wedding. Bustamante was placed on probation for five years and ordered to repay the loan, but he had repaid only \$7,168 at the time of his pardon. His pardon request had gone to the White House, bypassing the Department of Justice.<sup>124</sup>

Dorothy Rivers remained on the Rainbow Coalition Board of Directors while she served her five-year, ten-month sentence for fraud, theft, and tax evasion. Rivers, who ran a mental health foundation and a school for children with behavioral disorders, allegedly misappropriated \$1.5 million in grant money intended for these institutions. Prosecutors claimed that she spent the money on such items as a \$35,000 sable coat, five other fur coats, a \$3,500 dress, an \$800 purse, and a New Years Eve party to which guests were invited by a Santa Claus who arrived at their homes in a limousine and presented them with chilled glasses of champagne.<sup>125</sup> The judge who sentenced Rivers declared, "You had two organizations meant to serve the neediest of our citizens that have been destroyed by this. To me, that's not the appearance of evil, that's evil itself."<sup>126</sup>

The Justice Department's rules would have precluded the twenty-month reduction in sentence that Clinton gave Rivers. These rules declare that a convict whose case is still on appeal, as Rivers's was, may obtain a

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<sup>122</sup> See *Robinson v. State*, 495 S.E.2d 433 (S.C. 1998); Michael Abramowitz, *Noah Robinson, In the Shadow of the Rainbow; Jesse Jackson's Half Brother in Jail for Murder*, WASH. POST, July 30, 1992, at C1.

<sup>123</sup> See Todd Lightly & Andrew Zajac, *2 Jackson Pals Won Clemency*, CHI. TRIB., Mar. 11, 2001, at 12.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

commutation only upon a showing of exceptional circumstances.<sup>127</sup> Like Bustamante, however, Rivers bypassed the Justice Department and sought clemency directly from the White House.<sup>128</sup> The United States Attorney in Chicago commented, “We were never asked for any input, and so we provided none. We were not aware this was being considered.”<sup>129</sup>

### 10. J. Fife Symington III

Governor J. Fife Symington of Arizona resigned from office after a jury convicted him of crimes committed before he took office—falsifying financial statements to obtain millions of dollars in development loans. He was sentenced to thirty months in prison, but the Ninth Circuit reversed his conviction because the trial judge improperly removed a juror after deliberations had begun.<sup>130</sup> Symington was attempting to negotiate a guilty plea to reduced charges when Clinton pardoned him.<sup>131</sup>

Clinton, a Democrat, and Symington, a Republican, had been part of a common circle of friends in college, and Symington had come to Clinton’s aid when Clinton struggled in the surf at a 1960s beach party. Both remained close to novelist Thomas Caplan, who had worked on a preparatory school newspaper with Symington and had been Clinton’s college roommate at Georgetown.<sup>132</sup>

In 2000, sometime after Thanksgiving, Symington asked Caplan what he knew about the White House pardon process, and at a White House social event shortly before Christmas, Caplan told Clinton that “Fife wanted to know about the pardon activity.” Clinton replied, “He should apply.” When Caplan asked “how one would go about doing that,” the President said that Symington should send an application to Bruce Lindsey or anyone else in the White House Counsel’s office.<sup>133</sup> Symington and two lawyers then spent thirty hours assembling an application, which they submitted to the White House, bypassing the Department of Justice.<sup>134</sup> The Justice Department’s rules would have precluded a pardon.

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<sup>127</sup> Eligibility for Filing Petition for Commutation of Sentence, 28 C.F.R. § 1.3 (2000).

<sup>128</sup> See Lightly & Zajac, *supra* note 123, at 12.

<sup>129</sup> *Begging Clinton’s Pardons*, DALLAS MORNING NEWS, Jan. 31, 2001, at 3A, available at LEXIS.

<sup>130</sup> See *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999); Pat Flannery, “*The Most Elegant Way to End This Saga*,” ARIZ. REPUBLIC, Jan. 21, 2001, at 22A.

<sup>131</sup> See Pat Flannery, *Symington Was Ready to Make Deal*, ARIZ. REPUBLIC, Jan. 24, 2001, at A1.

<sup>132</sup> See Pat Flannery, *Boyhood Pal Helped Symington Get Pardon*, ARIZ. REPUBLIC, Feb. 25, 2001, at A1.

<sup>133</sup> See *id.*

<sup>134</sup> See Flannery, *supra* note 130.

When the foreman of Symington's jury learned of the pardon, he complained of a two-tiered system of justice, one for the wealthy and powerful and another for everyone else. He said, "I feel like I've been kicked in the gut."<sup>135</sup>

### 11. A. Paul Prosperi

Paul Prosperi, a college classmate of the President, had participated in Clinton's unsuccessful campaign for student body president at Georgetown.<sup>136</sup> He later contributed \$45,000 to Hillary Clinton's White House renovation project and hosted a 1995 fundraiser for the President.<sup>137</sup>

Prosperi, a Palm Beach lawyer, was indicted in 1996 for misappropriating \$7.9 million of a client's funds, failing to pay taxes on some of this money, and hiding his theft by forging securities that he purported to have purchased for the client. At his trial, the court dismissed the government's mail fraud charges on the ground that it had not established adequate mailings, and a jury then convicted Prosperi of tax evasion and forgery. The trial court later set aside the forgery convictions, but at the government's behest, the Eleventh Circuit reinstated them.<sup>138</sup>

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<sup>135</sup> *Id.* While Symington was Governor of Arizona, the Arizona Legislature reduced the penalties for some drug offenses, and it authorized the state's clemency board to review the sentences of some inmates who had been sentenced before the new law became effective. If the board unanimously recommended a commutation and the governor failed to act on the recommendation within ninety days, the board's recommendation would take effect. The law's authors thought that this procedure would save the governor from the need to approve clemency affirmatively.

About 2,400 inmates applied for clemency, and the board determined that the sentences of about 1,500 of them clearly exceeded the sentences they would have received under the new law. Before recommending clemency, however, the board was required to find a "substantial probability" that an inmate would not reoffend. It ultimately recommended sentence commutations for 216 inmates.

Symington rejected all but fourteen of the board's recommendations. He explained in an op-ed, "I have never believed that the state owed any additional breaks to criminals already convicted and sentenced. America has come to be a crime-ridden society, with various liberal elites and media outlets perpetually portraying criminals as victims of society . . ." See Paul Rubin, *Begging Your Pardon*, PHOENIX NEW TIMES, Mar. 15, 2001, available at <http://www.phoenixnewtimes.com/2001-03-15/news/begging-your-pardon/1> (contrasting the case for granting clemency to Symington with the cases he rebuffed as governor).

<sup>136</sup> See *Begging Clinton's Pardons*, *supra* note 129; Maya Bell, *No Pattern to Pardons of Floridians*, ORLANDO SENTINEL, Jan. 29, 2001, at A1; Love, *supra* note 30, at 202.

<sup>137</sup> See Kathryn Quigley, *Clinton Pal Gets Light Fraud Sentence*, PALM BEACH POST, Mar. 3, 2001, at 1A; Peter Slevin, *Access to the White House Opened Door to Clemency*, WASH. POST, Feb. 8, 2001, at A14.

<sup>138</sup> See *United States v. Prosperi*, 201 F.3d 1335 (11th Cir. 2000); Scott Hiaasen, *Prosperi Gets 3 Years, \$25,000 Fine, Old Tax Bill*, PALM BEACH POST, Mar. 28, 1998, at 1B (noting the government's claim that Prosperi had stolen \$7.9 million).

Prosperi, who had been sentenced to three years on the tax counts alone, was awaiting resentencing at the time of his commutation.<sup>139</sup>

Prosperi suffered from myasthenia gravis, a neuromuscular disease that made it difficult to walk, talk, or swallow.<sup>140</sup> The President commuted Posperi's unimposed sentence by declaring, "I . . . hereby commute any total period of confinement that has already been imposed or could be imposed . . . that is in excess of 36 months, and I further commute any such period of confinement to be served in home confinement."<sup>141</sup> At a sentencing proceeding that Prosperi's illness prevented him from attending, Prosecutor Steve Carlton declared, "Thirty-six months of home confinement in an oceanfront house on Jupiter Island can hardly be called punishment."<sup>142</sup> Prosperi had submitted his clemency application directly to the White House.<sup>143</sup> Prosecutors and the Justice Department's Pardon Attorney were not consulted.

### 12. Charles D. Ravenel

Charles D. "Pug" Ravenel was the 1974 Democratic nominee for Governor of South Carolina until a court determined that he resided outside the state and removed him from the ballot. He later ran unsuccessfully for the U.S. Senate and for the House of Representatives and he served briefly in the Carter administration as Associate Deputy Secretary of Commerce.<sup>144</sup> Ravenel had been a friend of Bill Clinton since they and their wives went shrimping together in 1980.<sup>145</sup>

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<sup>139</sup> See Hiaasen, *supra* note 138, at 1B.

<sup>140</sup> See Bell, *supra* note 136.

<sup>141</sup> Love, *supra* note 31, at 1199-1200 n. 124 (quoting Exec. Grant of Clemency to Paul Prosperi, (Jan. 20, 2001) (on file with Office of the Pardon Attorney)).

<sup>142</sup> Quigley, *supra* note 137.

<sup>143</sup> See *id.* Prosperi was not the only Palm Beach lawyer on Clinton's final clemency list. The President also pardoned William Arthur Borders, Jr., who was convicted in 1982 of soliciting a bribe from an undercover agent posing as a defendant in the courtroom of Federal District Judge Alcee Hastings. Borders was later held in contempt and jailed for refusing to testify at the trial that led to Judge Hastings's acquittal. Following Hastings's acquittal, he was impeached by the House and convicted by the Senate, and after that, he became a Member of Congress. He held that position at the time Clinton pardoned Borders and still holds it today. See Kathryn Quigley, *Two Local Lawyers Asked for, and Received, Clinton Clemency*, PALM BEACH POST, Feb. 25, 2001, at 9A; see also Alcee Hastings, WIKIPEDIA, [http://en.wikipedia.org/wiki/Alcee\\_Hastings](http://en.wikipedia.org/wiki/Alcee_Hastings) (last visited Sept. 14, 2010).

<sup>144</sup> See S.C. POLITICAL COLLECTIONS, UNIV. OF S.C., CHARLES D. RAVENEL, PAPERS, 1973-1996, at 2 (2000), available at <http://www.sc.edu/library/scpc/Ravenel.pdf>.

<sup>145</sup> See Peter Slevin & George Lardner, Jr., *Key to Presidential Pardon Is Access: Many Forgiven by Clinton Had Political or Personal Ties*, WASH. POST, Jan. 22, 2001, at A1.

In 1996, Ravenel pleaded guilty to bank fraud and served eleven and one half months.<sup>146</sup> Although he was ineligible for a pardon under the Justice Department's rules, Clinton gave him one.

*13. Edward Downe, Jr., William Fugazy, and Harvey Weinig*

Mary Jo White, the United States Attorney for the Southern District of New York, reportedly was furious with Clinton about several last-minute grants of clemency.<sup>147</sup>

Edward Downe, Jr., a former director of Bear Stearns, pleaded guilty in 1993 to tax and securities violations. The Securities Exchange Commission believed that he was guilty of more serious crimes as well—giving inside information to family and friends that enabled them to profit by \$13 million. Downe applied directly to the White House for a pardon, and U.S. Attorney White learned of his application only the night before it was approved. Downe had contributed \$21,500 to Democratic candidates since 1991 and had given \$1,000 to Hillary Clinton's Senate campaign. Moreover, he was a long-time friend of Senator Chris Dodd, whose letter urging clemency mentioned that he and Downe spoke almost every day.<sup>148</sup>

William Fugazy, a friend of both Mario Cuomo and Rudolph Giuliani, was once known as the limo king of New York. He pleaded guilty to perjury in 1997 after concealing assets in a bankruptcy proceeding. The Justice Department rejected Fugazy's pardon application on the ground that five years had not elapsed since his conviction, but Clinton's former White House Counsel Bernard Nussbaum telephoned his former colleagues on Fugazy's behalf. In addition, Representative Charles Rangel, District Attorney Robert Morgenthau, and Cardinal John O'Connor supported Fugazy's application.<sup>149</sup>

John Catsimatidis, the CEO of a \$2 billion enterprise that included several supermarket chains, endorsed the clemency applications of both Downe and Fugazy. Catsimatidis, a major supporter of Democratic candidates, had pledged to raise \$1 million for the Clinton Presidential Library. After writing letters urging clemency for Downe and Fugazy, he telephoned Clinton's Chief of Staff John Podesta to ask him to bring the

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<sup>146</sup> *Id.*

<sup>147</sup> *See Would You Pardon Them?*, TIME.COM, Feb. 18, 2001, <http://www.time.com/time/printout/0,8816,99871,00.html>.

<sup>148</sup> *See id.*; Lightman, *supra* note 112.

<sup>149</sup> *See* Mark Hosenball, *A Library Link?*, NEWSWEEK, Mar. 10, 2001, available at LEXIS; Editorial, *Pardons on the Sly*, N.Y. TIMES, Jan. 25, 2001, at A22; Greg B. Smith, *Clinton Library Fundraiser Helped Perjurer Get Pardon*, WASH. POST, Mar. 4, 2001, at A2; *Would You Pardon Them?*, *supra* note 147.



letters to the President's attention.<sup>150</sup> Catsimatidis told the press, "In the last 50 years, I don't know of anyone who's gotten a pardon who hadn't paid a lot of money to a lawyer or hasn't known somebody . . . . How do you create a pardon other than talking to people?"<sup>151</sup>

Harvey Weinig, a New York lawyer, pleaded guilty in 1995 to conspiring to launder \$19 million of Cali drug cartel money and to concealing a kidnapping. Prosecutors believed that he and two confederates had skimmed \$2.4 million of the drug money for themselves and that Weinig also had facilitated a ransom payment to the kidnapper. Weinig was sentenced to eleven years and three months.<sup>152</sup>

When Weinig applied for a commutation through Justice Department channels, Mary Jo White opposed it. The pardon attorney echoed White's strong negative recommendation. Weinig's wife, Alice Morey, then turned to what she called "the political route" and orchestrated an effective campaign for clemency.<sup>153</sup>

Morey had earlier retained Reid H. Weingarten, a Washington lawyer whose clients included Clinton's Secretary of Commerce Ronald Brown and his former Secretary of Agriculture Mike Espy. During several visits to the White House, Weingarten argued Weinig's case to Chief of Staff John Podesta, White House Counsel Beth Nolan, and Deputy Counsel Bruce Lindsey. He also persuaded Ronald Brown's widow to write in support of Weinig's application.

Morey's cousin-by-marriage David E. Deyer had been deputy communications director in the Clinton White House. He was still a member of the administration (a senior adviser to the Secretary of the Treasury), and he remained a friend of John Podesta. Deyer discussed the case with Podesta while the two of them jogged in Rock Creek Park and on other occasions, and Podesta ultimately supported a commutation.<sup>154</sup>

Harold Ickes, Clinton's former deputy chief of staff, knew Morey and Weinig because his children and theirs attended the Ethical Culture Fieldston School in Manhattan. He, too, agreed to help, and he discussed Weinig's case with the President on at least two occasions. Weinig had served little more than half his sentence when Clinton ordered his release.<sup>155</sup>

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<sup>150</sup> See *100 Influential Business Leaders*, CRAIN'S N.Y. BUS., June 17, 2002, at 28 (entry for John Catsimatidis); Editorial, *Pardons on the Sly*, *supra* note 149; Smith, *supra* note 149.

<sup>151</sup> Smith, *supra* note 149.

<sup>152</sup> See Benjamin Weiser, *A Felon's Well-Connected Path to Clemency*, N.Y. TIMES, Apr. 14, 2001, at A1.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> See H. REP. NO. 107-454, at 1711 (2002); Weiser, *supra* note 152, at A1.

#### 14. Howard Mechanic

On May 4, 1970, National Guardsmen killed four students at Kent State University. In a protest at Washington University in St. Louis later that day, a student threw a cherry bomb toward a group of firefighters, producing no injury. Howard Mechanic, a senior at Washington University, was charged with the crime. He denied it, and thirty years later, another student admitted throwing the firecracker. Mechanic, however, became the first person to be convicted of violating the 1968 Civil Disobedience Act. A judge who apparently had never been young sentenced him to five years.<sup>156</sup>

Rather than surrender to serve this sentence, Mechanic fled and began calling himself Gary Tredway. For twenty-eight years, he led a largely exemplary life in Arizona as a family man, businessman, and community activist. When Mechanic ran for office under his assumed name, however, he was exposed. Prosecutors agreed to let him serve a four-month sentence for providing false information on a passport application concurrently with his original sentence, and they also agreed not to oppose his application for clemency. Mechanic then went to prison.<sup>157</sup>

Mechanic applied for a commutation of his sentence, and friends in both Arizona and St. Louis established a web site to collect signatures supporting the application. They gathered 30,000 signatures,<sup>158</sup> and several Senators and Representatives endorsed Mechanic's bid as well.<sup>159</sup> President Clinton's last-day clemency released Mechanic after he had served eleven months of his sentence.<sup>160</sup>

Only one aspect of the case raised eyebrows. Rather than give Mechanic the commutation he sought, Clinton gave him a full pardon—a form of relief for which the Justice Department rules made him ineligible. Perhaps the President determined that Mechanic deserved this broader remedy, but he offered no explanation. Observers speculated that the White House's hasty processing of clemency grants had produced a clerical error.<sup>161</sup>

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<sup>156</sup> See Michael Janofsky, *Public Lives: For Ex-Student Protestor, a Pardon Without a Spotlight*, N.Y. TIMES, Feb. 24, 2001, at A6.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See *id.* (mentioning the endorsements of Representatives William Clay of St. Louis and Ed Pastor of Phoenix); *Would You Pardon Them?*, *supra* note 147 (mentioning the support of "several Senators").

<sup>160</sup> See Paul Hampel, *Mechanic Worries the Controversy over Presidential Pardons Will Taint His Own*, ST. LOUIS POST-DISPATCH, Feb. 23, 2001, at A11.

<sup>161</sup> See Love, *supra* note 30, at 202 n.52; *Would You Pardon Them?*, *supra* note 147.

Mechanic told the press, "I got my pardon fair and square. It disturbs me that some people will think that I'm in the same boat as these people who threw hundreds of thousands of dollars around to get their pardons."<sup>162</sup>

*15. Benjamin Berger, Jacob Elbaum, David Goldstein, and Kalmen Stern*

New Square is a Hasidic village thirty-three miles from Manhattan. Families are large, and incomes are low. Most residents do not read newspapers or watch television. Signs posted on trees indicate which side of each street is to be used by women and which by men, and women are forbidden to drive cars.<sup>163</sup>

In 1999, three residents of New Square—Kalmen Stern, Jacob Elbaum, and Benjamin Berger—and one New Yorker—David Goldstein—were convicted of defrauding federal and state governments of \$40 million. Their scams included the creation of a fictitious religious school whose purported students secured thousands of federal Pell grants. Nearly all of the proceeds of the group's elaborate and astonishingly successful crimes were used to benefit the New Square community.<sup>164</sup>

On August 8, 2000, Hillary Clinton, a candidate for the U.S. Senate, visited New Square and met its religious leader, Grand Rebbe David Twersky. According to Clinton and every other witness to the meeting, no one mentioned the possibility of clemency for the New Square conspirators.<sup>165</sup>

On November 7, Clinton carried New Square by a vote of 1,400 to 12.<sup>166</sup> Two Hasidic communities nearby voted overwhelmingly for her opponent.<sup>167</sup>

On December 21, Rebbe Twersky and other New Square leaders were invited to the White House. At a forty-five-minute meeting in the Map Room with the President and the Senator-Elect the next day, the delegation

<sup>162</sup> Hampel, *supra* note 160.

<sup>163</sup> See Randal C. Archibold with Elissa Gootman, *Behind 4 Pardons, a Sect Eager for Political Friends*, N.Y. TIMES, Feb. 5, 2001, at B1; Steve Lieberman et al., *Political Payback Talk Angers Hasidic Leaders*, JOURNAL NEWS (Westchester County), Jan. 25, 2001, at 1A; Michael Grunwald & Christine Hughney, *4 Pardons Probed for Ties to N.Y. Senate Bid*, WASH. POST, Feb. 24, 2001, at A1; see also *New Square, New York*, WIKIPEDIA, [http://en.wikipedia.org/wiki/New\\_Square,\\_New\\_York](http://en.wikipedia.org/wiki/New_Square,_New_York) (last visited Sept. 14, 2010).

<sup>164</sup> See Randal C. Archibold, *4 Who Got Leniency Defrauded U.S. for Religion*, N.Y. TIMES, Jan. 26, 2001, at B1; Steve Lieberman, *New Square's Ex-Clerk Pleads Guilty in Scam*, JOURNAL NEWS (Westchester County, N.Y.), Mar. 16, 2010, at 6A.

<sup>165</sup> Archibold with Gootman, *supra* note 163.

<sup>166</sup> *Id.*; see Bob Dart, *Pardons Probe Looks at N.Y. Vote*, ATLANTA J.-CONST., Feb. 24, 2001, at 1A (reporting slightly different figures: Clinton, 1359 votes; Rick Lazio, 10).

<sup>167</sup> Together, these two communities gave Rick Lazio 3480 votes and Hillary Clinton 152. Archibold with Gootman, *supra* note 163.

urged clemency for the New Square conspirators. Mrs. Clinton did not comment on the request, and she said later that she did not “play any role whatsoever” in obtaining clemency for the group.<sup>168</sup> On his last day in office, however, President Clinton reduced the seventy-eight-month sentence of Kalmen Stern to thirty months, the seventy-month sentence of David Goldstein to thirty months, the fifty-seven-month sentence of Jacob Elbaum to thirty months, and the thirty-month sentence of Benjamin Berger to twenty-four months.<sup>169</sup>

An investigation of the commutations by the United States Attorney's Office in the Southern District of New York produced no charges.<sup>170</sup> Apparently little or no evidence indicated a quid-pro-quo exchange of clemency for votes. The President, however, might have wished to do a favor for a group that recently had given Mrs. Clinton overwhelming support and that might do so again.<sup>171</sup>

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<sup>168</sup> See Clifford J. Levy, *Both Clintons Met Supporters of 4 Hasidim Given Leniency*, N.Y. TIMES, Jan. 24, 2001, at B1.

<sup>169</sup> Office of the Pardon Attorney, *supra* note 2.

<sup>170</sup> See Randal C. Archibold, *Prosecutors Clear Clintons in Clemency of 4 Hasidic Men*, N.Y. TIMES, June 21, 2002, at A1.

<sup>171</sup> Critics speculated that electoral politics also might have played a role in the sentence commutations that Clinton granted in 1999 to sixteen members of FALN, a Puerto Rican terrorist group responsible for 130 bombings. The sixteen had been imprisoned for nineteen years when Clinton released them on the condition that they renounce violence. Their sentences ranged from thirty-five to ninety years. The Archbishop of Puerto Rico, the Cardinal of New York, and ten winners of the Nobel Peace Prize including former President Carter had supported the commutations, while the U.S. Attorney's Office and the FBI had opposed them. Hillary Clinton was a candidate for the U.S. Senate in the State of New York at the time her husband granted the commutations. Congress later passed resolutions condemning the FALN commutations by votes of 95-to-2 in the Senate and 311-to-41 in the House. See Charles Babington, *Puerto Rican Nationalists Freed from Prison; Most Are Heading Home; Controversy over Clemency Remains*, WASH. POST, Sept. 11, 1999, at A02; Charles Babington & David A. Vise, *Clinton Explains Clemency; Politics Had No Role in Decision, President Tells House Member*, WASH. POST, Sept. 22, 1999, at A02; Paul D. Coverdell, Op-Ed., *Free for All*, WASH. POST, Oct. 2, 1999, at A19; David A. Vise & Lorraine Adams, *FALN a Threat, Reno Says; Hatch Faults Justice Dept. as Clemency Report Is Released*, WASH. POST, Oct. 21, 1999, at A27; *Votes in Congress*, WASH. POST, Sept. 12, 1999, at M20; see also *Bill Clinton Pardons Controversy*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Bill\\_Clinton\\_pardons\\_controversy](http://en.wikipedia.org/wiki/Bill_Clinton_pardons_controversy) (last visited Sept. 14, 2010); *Puerto Rican Armed Forces of National Liberation*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Puerto\\_Rican\\_Armed\\_Forces\\_of\\_National\\_Liberation](http://en.wikipedia.org/wiki/Puerto_Rican_Armed_Forces_of_National_Liberation) (last visited Sept. 14, 2010).

16. *Susan McDougal, Stephen Smith, Christopher Wade, and Robert Palmer*

The failed Whitewater real estate venture had four partners—Jim McDougal, Susan McDougal, Bill Clinton, and Hillary Clinton.<sup>172</sup> In May 1996, the independent counsel investigating Whitewater matters, Kenneth Starr, secured convictions on fraud and conspiracy charges of both McDougals and of Jim Guy Tucker, Clinton's successor as Governor of Arkansas.<sup>173</sup>

Susan McDougal was convicted of fraudulently obtaining and misusing a \$300,000 loan backed by the Small Business Administration and of falsifying business records relating to the loan. The loan, ostensibly for McDougal's advertising and public relations firm, was deposited in her and her husband's joint checking account and spent within two months. Most of the funds were used to pay business-related debts, but the money also was used to buy additional land for the Whitewater project, renovate the McDougals' home, contribute to a political campaign of Susan McDougal's brother, and buy groceries.<sup>174</sup>

David Hale, the president of Capital Management Services, a small investment company that made loans backed by the SBA, had approved the loan to McDougal, and he was the principal witness against her. Hale testified that then-Governor Clinton had pressed him to make the unlawful loan. Hale, who had not accused the President of wrongdoing in earlier testimony, was facing serious charges himself. In four hours of videotaped testimony played at the McDougal trial, the President denied Hale's allegations and declared that he was unaware of the \$300,000 loan.<sup>175</sup>

In August 1996, Susan McDougal was sentenced to two years for fraud, but she did not begin serving this sentence. Instead, the independent counsel brought her before a grand jury, granted her immunity from prosecution, and questioned her about the truth of Hale's charges. McDougal, who previously had denied the allegations in unsworn statements, refused to answer. She was held in contempt and jailed for the maximum allowable period, eighteen months. For part of this time, McDougal was locked in a windowless cell in a Los Angeles jail twenty-three hours a day. She was transferred to a federal facility only after the

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<sup>172</sup> See *Whitewater Time Line*, WASHINGTONPOST.COM, <http://www.washingtonpost.com/wp-srv/politics/special/whitewater/timeline.htm>; see also *Whitewater Controversy*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Whitewater\\_controversy](http://en.wikipedia.org/wiki/Whitewater_controversy) (last visited Sept. 14, 2010).

<sup>173</sup> See *Whitewater Time Line*, *supra*, note 172.

<sup>174</sup> See *United States v. McDougal*, 137 F.3d 547 (8th Cir. 1998); Marilyn W. Thompson, *Caught in the Whitewater Quagmire*, WASH. POST, Aug. 28, 1995, at A1.

<sup>175</sup> See *Whitewater Time Line*, *supra* note 172.

American Civil Liberties Union alleged in a lawsuit that Independent Counsel Starr was holding her in “barbaric” conditions to induce her testimony.<sup>176</sup>

When McDougal finally was released from civil confinement, the independent counsel brought her before another grand jury; and when McDougal again refused to answer, he charged her with criminal contempt and obstruction of justice. In March 1999, a jury acquitted McDougal of obstruction and failed to reach a verdict on the contempt charge.<sup>177</sup>

McDougal served four months of her two-year fraud sentence before being released for medical reasons.<sup>178</sup> At the end of his Presidency, Bill Clinton pardoned the former business partner (and apparently former lover<sup>179</sup>) who had resisted pressure to name him as her co-conspirator.

Clinton also pardoned three other people whose convictions the independent counsel had secured. Stephen Smith had been one of Clinton’s senior aides when Clinton was Governor of Arkansas. He had pleaded guilty to mispending part of a \$65,000 loan and paid a \$1,000 fine.<sup>180</sup> Robert W. Palmer had pleaded guilty to falsifying real estate appraisals for Jim McDougal’s savings and loan and had spent a year in home detention.<sup>181</sup> Chris Wade, a real estate broker, had pleaded guilty to bankruptcy fraud and served thirteen months in prison.<sup>182</sup>

Clinton did not pardon Jim Guy Tucker, who had been sentenced to four years of home confinement after his doctor testified that he would

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<sup>176</sup> *Id.*

<sup>177</sup> *See id.*; *see also Susan McDougal*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Susan\\_McDougal](http://en.wikipedia.org/wiki/Susan_McDougal) (last visited Sept. 14, 2010).

<sup>178</sup> *See Whitewater Time Line*, *supra* note 172.

<sup>179</sup> A respected nonpartisan researcher declares that he has “confirm[ed]” on the basis of “interviews with confidential sources and other evidence” that “there was a romantic affair, albeit brief in duration” between McDougal and Clinton. KEN GORMLEY, *THE DEATH OF AMERICAN VIRTUE: CLINTON VS. STARR* 680 (2010).

<sup>180</sup> *See* Linton Weeks, *The Siege of Little Rock; After Six Years of Nonstop Scandal, the Town Is Ready for a Change*, WASH. POST, Mar. 27, 1999, at C1. Smith noted that it was much cheaper to pay the fine than to pay further legal bills. He wrote a work of fiction based on his experience with the independent counsel’s office and called it “The Star Chamber.” *Id.*

<sup>181</sup> *Those Pardoned by Clinton Range from the Unknown to the Famous*, ST. LOUIS POST-DISPATCH, Jan. 23, 2001, at A4.

<sup>182</sup> *Id.*

probably die of liver disease if imprisoned.<sup>183</sup> Jim McDougal died in prison in 1998.<sup>184</sup>

### 17. Lloyd George, Jimmy Wilson, and E. Harley Cox

Three days before leaving office, President Clinton returned to Arkansas and spoke to the Arkansas legislature. He mentioned the flood of last-minute clemency applications. Clinton then visited his old office in the statehouse where a number of legislators augmented the flood by asking him to pardon one of their former colleagues. Lloyd George had been convicted of mail fraud in 1997 after selling an overpriced irrigation system to the state. Although George would have been ineligible for a pardon under the Justice Department's rules, Clinton granted the legislators' impromptu request.<sup>185</sup>

Clinton's parting pardons included one for another former Arkansas legislator, Jimmy Wilson, who had served four and one-half months for selling mortgaged crops and converting government loans to his own use. They also included one for a former president of the Arkansas Bar Association, E. Harley Cox, who had served sixteen months for a fraud that contributed to a savings and loan failure—one that cost the taxpayers \$600 million.<sup>186</sup> Twenty-five of Clinton's 140 final-day pardons went to people from Arkansas.<sup>187</sup>

## V. CRITICISM AND A RESPONSE

Members of President Clinton's political party joined his customary detractors in denouncing the farewell clemency grants. Former President Carter called the Marc Rich pardon "disgraceful."<sup>188</sup> Carter's Chief of Staff Hamilton Jordan wrote that if he had approached Carter with a request for clemency from a contributor to his presidential library, the President "would have thrown me out of the Oval Office and probably fired me on

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<sup>183</sup> See *Whitewater Time Line*, *supra* note 172. Clinton and Tucker were political rivals who once opposed each other in an Arkansas gubernatorial primary. See Dan Balz, *Wunderkind Asks for 2nd Chance*, WASH. POST, May 23, 1982, at A2. See *Jim Guy Tucker*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Jim\\_Guy\\_Tucker](http://en.wikipedia.org/wiki/Jim_Guy_Tucker) (last visited Sept. 14, 2010).

<sup>184</sup> See Neely Tucker, *Final Word on Whitewater Probe Clears Clintons*, WASH. POST, Mar. 21, 2002, at A05; see also *Jim McDougal*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Jim\\_McDougal](http://en.wikipedia.org/wiki/Jim_McDougal) (last visited Sept. 14, 2010).

<sup>185</sup> See Don Van Natta, Jr. & Marc Lacey, *Access Proved Vital in Last-Minute Race for Clinton Pardons*, N.Y. TIMES, Feb. 25, 2001, at 1.

<sup>186</sup> *Those Pardoned by Clinton Range from the Unknown to the Famous*, *supra* note 181.

<sup>187</sup> See *Arkansans Pardoned by Clinton*, ARK. DEMOCRAT-GAZETTE (Little Rock), Feb. 1, 2001, at A6.

<sup>188</sup> See *Carter Calls Pardon of Rich "Disgraceful,"* WASH. POST, Feb. 21, 2001, at A2; Richard L. Berke, *The Clinton Pardons: The Democrats*, N.Y. TIMES, Feb. 23, 2001, at A16.

the spot.”<sup>189</sup> Clinton’s own former Chief of Staff Leon Panetta said that the pardons were “a terrible mistake.”<sup>190</sup> Clinton’s Secretary of Commerce Bill Daley said they were “appalling.”<sup>191</sup> Senator Joe Biden called Clinton’s actions “totally indefensible,” adding, “I think either the president had an incredible lapse in memory or was brain dead.”<sup>192</sup> Representative Barney Frank declared, “It was a terrible thing he did. It was just abusive.”<sup>193</sup> Frank later proposed a constitutional amendment to prohibit presidents from granting clemency between October 1 in an election year and January 21 the following year.<sup>194</sup> *New York Times* columnist Bob Herbert wrote that “Slick Willie” had “betrayed everyone who has ever believed in” him.<sup>195</sup>

On February 18, 2001, former President Clinton published an op-ed in the *New York Times*, “My Reasons for the Pardons.”<sup>196</sup> Clinton’s column focused almost entirely on the pardons granted Marc Rich and Pincus Green. It noted that two highly respected academics had supported Rich’s position that he owed no taxes, but it failed to mention that these authorities had entered a \$100,000 contract with Rich’s lawyers and had based their opinions on the lawyers’ description of the facts.<sup>197</sup>

As initially submitted and published, Clinton’s column declared that Rich’s and Green’s “applications were reviewed and advocated not only by my former White House counsel Jack Quinn but also by three distinguished Republican attorneys.” Clinton did not mention that his former White House counsel was Marc Rich’s \$400,000 lawyer, not a dispassionate advisor. Moreover, according to the *Times*, “During the press run, Mr. Clinton’s office asked that the reference to ‘applications’ be changed to ‘the

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<sup>189</sup> Hamilton Jordan, *The First Grifters*, WALL ST. J., Feb. 20, 2001, at A22.

<sup>190</sup> *All Things Considered, Democrats Reconsider Role Bill Clinton Should Play in Their Party*, (National Public Radio broadcast, Feb. 23, 2001), available at LEXIS.

<sup>191</sup> See John Hassell, *Gore on Sidelines as Democrats Denounce Clinton Pardons*, STAR LEDGER (Newark), Feb. 23, 2001, at 8.

<sup>192</sup> See *All Things Considered*, supra note 190. Former California Governor Jerry Brown remarked, “I don’t think . . . Mr. Clinton started out with a lot of scrupulosity to begin with.” He wondered if “there weren’t sugar plums dancing in his head.” *Hannity & Colmes, Continuing Criticism of Bill Clinton’s Pardon of Marc Rich* (Fox News Network broadcast, Feb. 21, 2001), available at LEXIS.

<sup>193</sup> See Andrew Miga, *Bay State Reps Blast Financier Pardon*, BOSTON HERALD, Feb. 15, 2001, at 6.

<sup>194</sup> See *Presidential Pardon Power: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 11-12 (2001) (statement of Representative Frank).

<sup>195</sup> Bob Herbert, *In America: Cut Him Loose*, N.Y. TIMES, Feb. 26, 2001, at A15.

<sup>196</sup> See William Jefferson Clinton, Op-Ed, *My Reasons for the Pardons*, N.Y. TIMES, Feb. 18, 2001, at 13.

<sup>197</sup> See Michael Kelly, *The Pardoner’s False Brief*, WASH. POST, Feb. 21, 2001, at A23.



case for the pardons' to try to clarify Mr. Clinton's point." Later editions printed the revised language.<sup>198</sup>

The difference between supporting pardon "applications" and supporting "the case for the pardons" was not obvious, but apparently, in Clinton-speak, supporting "the case for the pardons" meant saying anything favorable about Marc Rich or any aspect of his case in any context. The "three distinguished Republican attorneys" who allegedly had supported "the case for the pardons" were all lawyers Marc Rich had retained. These lawyers had argued in court that Rich and his company owed no additional taxes.

The first of the three distinguished Republican attorneys listed by Clinton was Leonard Garment, formerly Special Counsel to President Richard Nixon. His representation of Rich ended after he suggested that Rich consider a plea agreement. "It's a few months," Garment told Rich. "You'll lose weight. It'll be easy. No manacles. You'll come back." When Rich replied, "Not one day," Garment concluded that there was little more he could do, and he resigned from the case.<sup>199</sup> Garment responded to Clinton's op-ed by saying, "It is absolutely false that I knew about and endorsed the idea of a pardon."<sup>200</sup>

The second of the distinguished Republicans was William Bradford Reynolds, formerly Assistant Attorney General in charge of the Civil Rights Division in the Reagan administration.<sup>201</sup> He said of Clinton's statement, "I was astounded."<sup>202</sup>

The third distinguished Republican also rebuffed Clinton's effort to link his legal representation of Marc Rich to support for Rich's pardon.<sup>203</sup> Clinton identified this Republican as "Lewis Libby, now Vice President Cheney's chief of staff."<sup>204</sup> Libby's brief appearance in what the newspapers called "Pardongate" now seems ironic. Before the end of the Bush-Cheney administration, he would be convicted of perjury and disbarred but, thanks to the clemency of George W. Bush, not

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<sup>198</sup> See the "correction" appended to Clinton, *supra* note 196.

<sup>199</sup> See Cowan, *supra* note 48.

<sup>200</sup> See Jill Abramson, *A Clinton Fund-Raiser Is Said to Be Behind Gifts in Rich Case*, N.Y. TIMES, Feb. 18, 2001, at Sec. 1, p. 19.

<sup>201</sup> See James P. Turner, *Used and Abused: The Civil Rights Division*, WASH. POST, Dec. 14, 1997, at C01.

<sup>202</sup> See Richard A. Serrano, *L.A. Leaders' Support Cited in Decision to Free Vignali*, L.A. TIMES, Feb. 19, 2001, at A1, A13.

<sup>203</sup> See *id* at A1.

<sup>204</sup> Clinton, *supra* note 196.

imprisoned.<sup>205</sup> Bush had learned less from Clinton's example than he should have.

## VI. CONCLUSION

This article has reviewed fewer than one-quarter of President Clinton's last-day grants of clemency. Most of the others went to people without White House connections and sparked no controversy.<sup>206</sup> Clinton, however, had been merciless toward crime and criminals until he was the lamest of ducks. Two years prior to leaving office, he had in fact denied twenty of the applications that he approved on his final day, and the applicants had not reapplied.<sup>207</sup>

Clinton's uncontroversial pardons appeared to come too late. They looked too much like "cover" for the others.<sup>208</sup> One critic described Clinton's last-day clemency as "a final self-indulgence, a total loss of control" by a man accustomed to living on the edge.<sup>209</sup> Another spoke of his "undisciplined grandiosity."<sup>210</sup> Although the President's chaotic farewell undoubtedly revealed something about him, it also exposed a misconceived and dysfunctional pardon process.

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<sup>205</sup> See Carol D. Leonnig, *Court Disbars Cheney Ex-Aide*, WASH. POST, Mar. 21, 2008, at A02; see also *Lewis Libby*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Lewis\\_Libby](http://en.wikipedia.org/wiki/Lewis_Libby) (last visited Sept. 14, 2010).

<sup>206</sup> Clinton was sharply criticized, however, for his commutation of the sentences of Susan Rosenberg and Linda Sue Evans. Former members of the Weather Underground, they had served fifteen years of their fifty-eight and forty-year sentences for various weapons, explosives, and destruction-of-property offenses. See, e.g., Eric Lipton, *Officials Criticize Clinton's Pardon of an Ex-Terrorist*, N.Y. TIMES, Jan. 22, 2001, at B4; Jay Nordlinger, *Clinton's Rosenberg Case*, NAT'L REV., Mar. 19, 2001, at 37 (reporting that, although Rosenberg had not been convicted of this crime, she was the getaway driver during a robbery in which a Brinks guard and two police officers were killed); James Toedtman, *The Bush Inaugural; Clinton's Last-Minute Pardons Brother, Patty Hearst, McDougal Among 140*, NEWSDAY, Jan. 21, 2001, at 7 (reporting the criticism of U.S. Attorney Mary Jo White and Senator Charles Schumer). The criticism rested primarily on the seriousness of Rosenberg and Evans's offenses, not on allegations of Clinton cronyism or procedural irregularity. Jay Nordlinger reported, however, "One of those who went to bat for Rosenberg was Congressman Jerrold Nadler, who represents the Rosenberg family on the Upper West Side. As a member of the Judiciary Committee, Nadler had been a key defender of Clinton's at the time of the president's impeachment." Nordlinger, *supra* note 206, at 39.

<sup>207</sup> See Love, *supra* note 30, at 195 n.33.

<sup>208</sup> But they might not have been cover. An alternative hypothesis is that, on his last day in office, Clinton cast aside the "New Democrat" mask and revealed his convictions. His earlier shut-down of clemency, like the interruption of his presidential campaign for an execution in Arkansas and his expansion of the federal death penalty, could have been posturing—just a matter of hanging people for votes.

<sup>209</sup> JOE KLEIN, *THE NATURAL: THE MISUNDERSTOOD PRESIDENCY OF BILL CLINTON* 204 (2002).

<sup>210</sup> Love, *supra* note 30, at 217.

The task of evaluating clemency applications and advising the President on clemency matters is assigned to the agency that has prosecuted all the applicants, the United States Department of Justice. Giving a quasi-judicial role to a partisan agency was never a good idea, and the Department's unsuitability for the task has become increasingly apparent over time.<sup>211</sup> When, in the final months of the Clinton administration, the action shifted from the Justice Department to the White House, the Pardon Attorney and his staff no doubt felt superfluous—like hamsters running on an exercise wheel. These officials' resistance to presidential policy, however, contributed to their loss of authority.

In the Carter administration, Attorney General Griffin Bell informally delegated responsibility for advising the President on pardon matters to subordinate Justice Department officials, and every subsequent attorney general has essentially washed his hands of the process.<sup>212</sup> Since the Reagan administration, Justice Department regulations have provided, "The Pardon Attorney shall submit all recommendations in clemency cases through the Associate Attorney General [the Department's third ranking official] and the Associate Attorney General shall exercise such discretion and authority as is appropriate and necessary for the handling and transmittal of such recommendations to the President."<sup>213</sup>

The Justice Department's regulations indicate its narrow view of the pardon process. For nearly fifty years, these regulations have declared that only ex-offenders who have been released from custody for five years may seek pardons.<sup>214</sup> As a general policy, this practice may be sound; a full pardon usually should await an extended demonstration of good citizenship. But barring even prisoners who allege serious miscarriages of justice or who offer newly discovered proof of innocence from seeking immediate pardons, as the current rules do, is offensive.<sup>215</sup> With two exceptions—

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<sup>211</sup> The larger study of which this Article is a part will suggest that the Justice Department is considerably more partisan today than it was a century ago.

<sup>212</sup> See Love, *supra* note 30, at 192-93 n.23.

<sup>213</sup> See 28 C.F.R. § 0.36 (2009).

<sup>214</sup> *Id.* § 1.2.

<sup>215</sup> Rule 1.2 is headed "*Eligibility for filing petition for pardon.*" *Id.* (emphasis added). It declares:

No petition for pardon should be filed until the expiration of a waiting period of at least five years after the date of the release of the petitioner from confinement or, in case no prison sentence was imposed, until the expiration of a period of at least five years after the date of conviction of the petitioner.

*Id.* Underscoring the declaration that prisoners may seek only commutations of their sentences, the rules declare that only forms for requesting commutations can be obtained from the wardens of federal penitentiaries. Forms for seeking pardons, reprieves, and remissions of fine must be obtained from the Office of the Pardon Attorney. *Id.* § 1.1. Rule

Barack Obama (who has yet to grant clemency to anyone) and Jimmy Carter—every President in the last thirty-five years has approved at least one grant of clemency that the Justice Department's rules would have precluded.<sup>216</sup> Rules that the Department follows and that Presidents disregard underscore the fact that cronies get a brand of justice denied to everyone else.

Even the humanitarian act of granting a posthumous pardon to Lieutenant Henry Flipper required President Clinton to defy the Department of Justice. Flipper, who had been born into slavery, became the first black graduate of West Point.<sup>217</sup> In 1881, fearful of being charged with embezzlement by a bigoted commanding officer, he concealed a shortage of funds that he discovered.<sup>218</sup> A court martial acquitted him of embezzlement but found him guilty of “conduct unbecoming an officer and gentleman.”<sup>219</sup> After a sentencing proceeding that apparently took account of Flipper's affectionate correspondence with a white woman,<sup>220</sup> he was discharged from the army.<sup>221</sup> Before Clinton pardoned Flipper in 1999, the Pardon Attorney had refused to accept an application on Flipper's behalf, citing a Justice Department tradition of refusing to consider posthumous pardons and arguing that such a pardon would be unlawful because the recipient could not accept it.<sup>222</sup>

Since the Reagan administration, Pardon Attorneys, their staffs, and their Justice Department superiors have overwhelmingly been former prosecutors.<sup>223</sup> Not only do prosecutors tend to have a distinct view of

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1.11, however, declares that the rules are advisory, that they create no enforceable rights, and that they do not restrict the President's constitutional authority to grant pardons. *Id.* § 1.11.

<sup>216</sup> Among the grants that departed from the rule that an applicant may not receive a pardon until five years after the completion of his sentence were Gerald Ford's pre-trial pardon of former President Richard Nixon, Ronald Reagan's pardons of FBI agents Mark Felt and Edward Miller while their cases were still on appeal, George H.W. Bush's pre-trial pardon of former Secretary of Defense Caspar Weinberger and his pardons of other Iran-Contra defendants, and Bill Clinton's pardons of fugitives Marc Rich and Pincus Green. George W. Bush's remission of Lewis “Scooter” Libby's sentence of imprisonment departed from the rule that a defendant whose case is still on appeal may obtain clemency only in extraordinary circumstances.

<sup>217</sup> CHARLES M. ROBINSON III, *THE FALL OF A BLACK ARMY OFFICER: RACISM AND THE MYTH OF HENRY O. FLIPPER* 3-4 (2008).

<sup>218</sup> *Id.* at 38.

<sup>219</sup> *Id.* at 139.

<sup>220</sup> *Id.* at 34-35.

<sup>221</sup> *See id.*; *see also* Henry Ossian Flipper, WIKIPEDIA, [http://en.wikipedia.org/wiki/Henry\\_Ossian\\_Flipper](http://en.wikipedia.org/wiki/Henry_Ossian_Flipper) (last visited Sept. 14, 2010).

<sup>222</sup> *See* Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 *IND. L.J.* 1251, 1265 (1999).

<sup>223</sup> Interview with Margaret Colgate Love (Jan. 28, 2010); *see also* Love, *supra* note 30, at 192-93 n.23.

crime and criminals; they also tend to have a fraternal regard for one another and a sense that they should support each other's work.

In the last year of Bill Clinton's presidency, the White House encouraged the Justice Department to submit more positive clemency recommendations. Beth Nolan, the White House Counsel, later testified that the President "wanted to exercise the pardon power more than he had in the past. That he felt he hadn't exercised it fully, and he wanted to be sure that we had a process in place to be sure that pardons moved quickly."<sup>224</sup> She advised the Department that the President "generally believed that restoration of civil rights was important, that if people had served their time and led a good life since then he would be in favor of receiving pardons."<sup>225</sup> After several meetings with Department officials, however, Nolan "found no movement."<sup>226</sup> In August 2000, she "said to Eric Holder, we have to have another meeting, because we're coming up to the end and we need to know that . . . we can move along more pardons."<sup>227</sup> Nolan reported, however, "That produced very little. Sometime I think in November or December I learned that we could expect at most 15 favorable recommendations."<sup>228</sup>

Late in his Presidency—on December 27, 2000—Clinton publicly endorsed the pardon policy that Nolan had described to the Justice Department. He also indicated that the Department was resisting the implementation of this policy:

I have always thought that Presidents and governors . . . should be quite conservative on commutations . . . but more broad-minded about pardons because, in so many states in America, pardons are necessary to restore people's rights of citizenship. Particularly if they committed relatively minor offenses, or if some years have elapsed and they've been good citizens and there's no reason to believe they won't be good citizens in the future, I think we ought to give them a chance, having paid the price, to be restored to full citizenship. . . .

I wish I could do some more of them—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.<sup>229</sup>

Clinton left office with about 3,000 clemency applications unresolved, about 900 of which were applications for pardons.<sup>230</sup> One imagines that a

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<sup>224</sup> *Controversial Pardon of International Fugitive Marc Rich*, *supra* note 36, at 341.

<sup>225</sup> *Id.* at 342.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *President Clinton's Statement of His Pardoning Philosophy*, 13 FED. SENT'G. REP. 228 (2000) (reporting the President's response to a reporter's question after the President announced the interim appointment of Roger Gregory to be a judge of the U.S. Court of Appeals for the Fourth Circuit).

substantial proportion of these applications met Clinton's standard for granting clemency, yet the Justice Department advised the White House that it would make no more than fifteen favorable recommendations.<sup>231</sup> In addition, Pardon Attorney Roger Adams announced in October 2000 that his office would accept no more applications for consideration during the Clinton administration. Adams advised applicants to submit their petitions directly to the White House.<sup>232</sup> The West Wing then took on the job that he had declined—with the consequences described in this article.

Adams, Clinton's last Pardon Attorney, was the same official who, in an earlier position, had authored the memorandum directing his predecessor as Pardon Attorney, Margaret Colgate Love, to recommend clemency only when someone in Congress or the White House had expressed an interest in granting it.<sup>233</sup> He remained Pardon Attorney through most of the George W. Bush administration but was removed from this office after the Justice Department's Inspector General concluded that he had described an applicant as "about as honest as you could expect for a Nigerian."<sup>234</sup> Adams was succeeded on an interim basis by his deputy, Helen Bollwerk, who, upon her arrival in the Pardon Attorney's office, exhibited a souvenir given her by colleagues in a federal prosecutor's office—a monopoly "Get Out of Jail" card with a red circle and an slash drawn through it.<sup>235</sup> She was succeeded by the current Pardon Attorney, Ronald L. Rogers, who, after retiring from the Marine Corps, had worked in the Justice Department's Drug Intelligence Unit (a part of the Criminal Division) for nine years, two-and-one-half of them as the unit's head.<sup>236</sup>

The Pardon Attorney should be someone whose name the President knows. He should in fact be a presidential appointee, someone the

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<sup>230</sup> See Office of the Pardon Attorney, *supra* note 2.

<sup>231</sup> One reason for the Pardon Attorney's refusal to forward more favorable recommendations may have been that his office was understaffed, but earlier Pardon Attorneys had made many more positive recommendations with no larger staffs. See George Lardner, Jr., Op-Ed., *Begging Bush's Pardon*, N.Y. TIMES, Feb. 4, 2008, at A23.

<sup>232</sup> See Love, *supra* note 30, at 198.

<sup>233</sup> See *supra* text accompanying note 31 *supra*; Love, *supra* note 31, at 1194-95 n. 106.

<sup>234</sup> See *Washington in Brief: Pardon Attorney Acted Improperly*, WASH. POST, Feb. 6, 2008, at A2. Adams added, "Unfortunately, that's not very honest." The Inspector General reported other mismanagement by Adams, including threats to retaliate against staffers who complained about his conduct to the Inspector General. *Id.*; see also Lardner, *supra* note 231 (noting that Adams resisted requests for more favorable recommendations from Bush's White House Counsel, Harriet Miers, just as he earlier had resisted such requests from Beth Nolan).

<sup>235</sup> Lardner, *supra* note 231.

<sup>236</sup> See U.S. Dep't of Justice, Justice Department Announces Appointment of Ronald L. Rodgers as Pardon Attorney (Apr. 28, 2008), available at <http://www.justice.gov/opa/pr/2008/April/08-ag-348.html>.

President trusts to help formulate and then implement a consistent clemency policy. Unlike the West Wing neophytes who took on the job in the last days of the Clinton administration, he should be sensible enough to consult line prosecutors before recommending clemency, yet he should be independent enough not to parrot these prosecutors' conclusions. His office should be part of the Executive Office of the President, and he should report to the White House Counsel.

White House staffers and other political actors are likely to be interested in some clemency applications. People with access to the President cannot effectively be excluded from the process, and there is no reason to exclude them. As the last days of the Clinton administration revealed, however, these actors are likely to evaluate each application without much sense of how it compares to others and without a coherent clemency policy. The participation of a trusted, politically savvy Pardon Attorney in the last stages of the process could remedy this deficiency. The inclusion of someone whose only job is evaluating clemency applications could aid the transformation of what is now the back door into the only door and could make this door more open to all.<sup>237</sup>

In 1215, the Magna Carta declared, "To no one will we sell, to none will we deny or delay, right or justice."<sup>238</sup> In the administration of President Bill Clinton, the charter's pledge was broken. Placing the office of the Pardon Attorney in the Executive Office of the President and empowering him to review independently the applications of the powerful and the powerless could begin to renew the promise.

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<sup>237</sup> A bolder plan for reforming the clemency process would assign the task of advising the President to a bipartisan clemency board. The larger study of which this Article is a part will consider this proposal as well as the one described here and will also consider whether the politics of crime make any effort to revive clemency unrealistic.

<sup>238</sup> MAGNA CARTA ch. 40 (1215).