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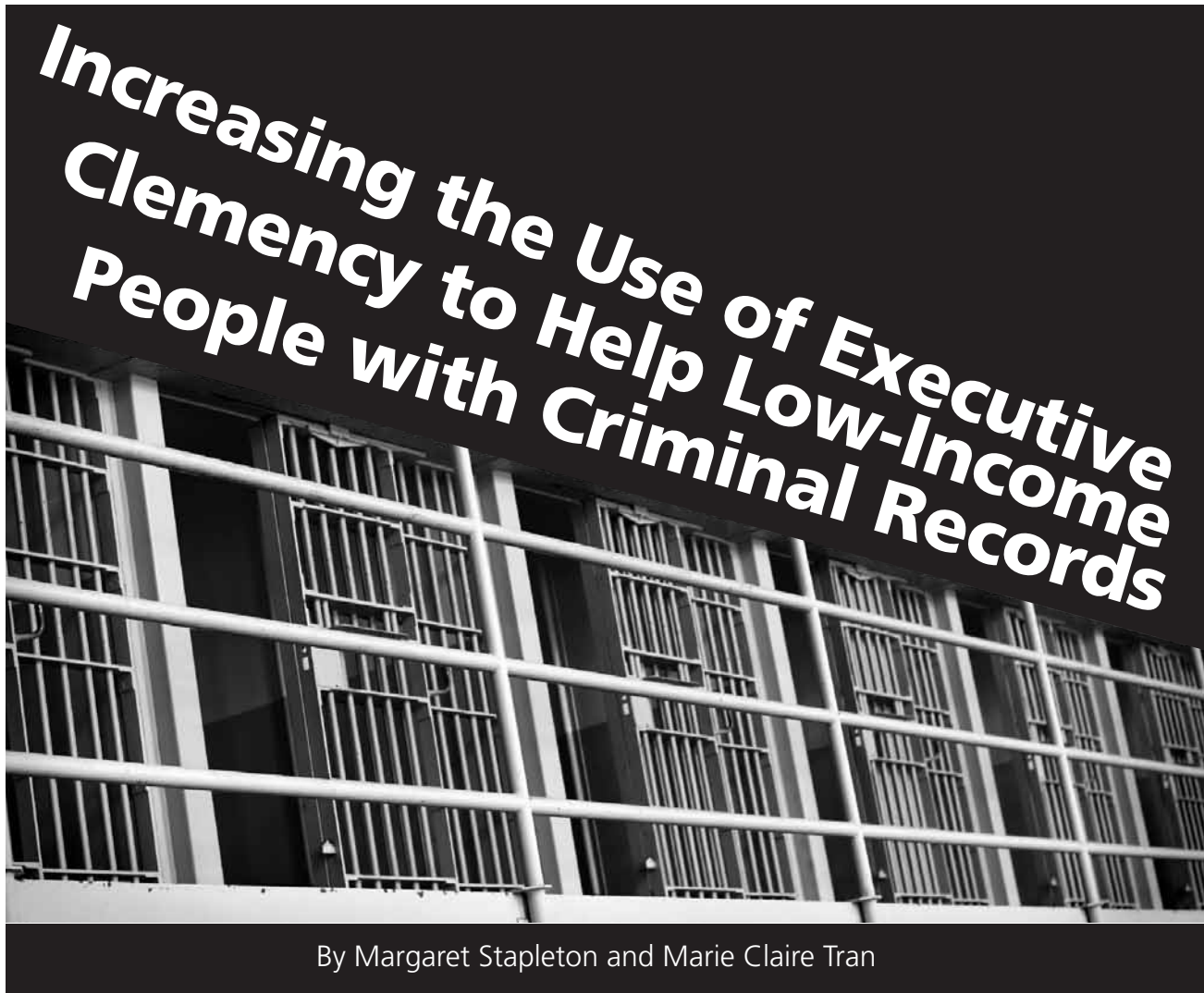
Journal of
Poverty Law
and Policy



To: President-Elect Barack Obama
CC: U.S. Congress
From: Shriver Center

In re: Antipoverty Recommendations

1. Strengthen Civil Rights
2. Reform Health Care
3. Fortify Safety Net
4. Solve Federal Fiscal Problem
5. Preserve Affordable Rental Housing
6. Exercise Executive Clemency
7. Foster Career Advancement
8. Link Economic and Workforce Development
9. Ensure Quality Child Care for Workers
10. Build and Protect Assets
11. Legalize Immigrants
12. Guarantee Leave Policies for Women



Margaret Stapleton
Senior Attorney

Marie Claire Tran
Staff Attorney/Loyola Fellow

Sargent Shriver National Center
on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602

312.263.3830 ext. 234
mstapleton@povertylaw.org

312.263.3830 ext. 230
marieclairetran@povertylaw.org

The United States’ “war on crime” now has more than one in every hundred adults in the United States behind bars.¹ Skepticism is increasing about this war’s efficacy and fairness, and calls are mounting for replacing it with commonsense and less expensive programs—solid education from early childhood on, mental health and addiction services, antipoverty measures and the like—that address the root causes of most crime. And there is some actual movement on dealing with the war’s collateral damage that has fallen disproportionately on black men.²

Two examples of such improvement in the last year: First, the U.S Sentencing Commission, seeking to remedy, at least partially, the disparate racial impact of the federal sentencing guidelines for crack and powder cocaine, issued new, more equitable crack cocaine offense guidelines. The commission made these guidelines retroactive, opening the door for federal judges to reduce the sentences that crack cocaine offenders are currently serving.³

¹See generally PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA IN 2008 (2008), www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

²Black men are nearly twelve times as likely to be imprisoned for drug conviction as adult white men (HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 2 (2008), <http://hrw.org/reports/2008/us0508/us0508webwcover.pdf>).

³Through July 15, 2008, federal courts had considered 10,707 applications for sentence amendments and granted 8,147 (76 percent) of them (see U.S SENTENCING COMMISSION, PRELIMINARY CRACK COCAINE RETROACTIVITY DATE REPORT tbl. 1 (2008), www.uscc.gov/USSC_Crack_Cocaine_Retroactivity_Data_Report_30_July_08.pdf).

Second, on April 9, 2008, the Second Chance Act became law.⁴ Although it took five years to make it through Congress and to the president's desk, the Act is, in the words of the *New York Times*, "a welcome relief from the simplistic lock 'em, up posture of recent decades that has the United States leading the world in incarceration."⁵ It authorizes federal grants to government agencies and nonprofit groups to provide reentry services—including assistance for employment, housing, and substance abuse treatment—to people returning to society from prison.

Given that healthy skepticism about the war on crime is growing, there is no doubt that the next president will receive many recommendations for new initiatives and changes in laws and programs aimed at decreasing the use of the criminal justice system to deal with broader social problems and at repairing the damage done by the country's overzealous war on crime.⁶ To the extent that the president will need buy-in from Congress and federal agencies, turning things around will take time and energy. But the president needs to wait for no one and need not gain majorities in order to exercise his very important power of executive clemency in order to aid in resolving the legal liabilities that make it difficult for many

ex-offenders to reenter society successfully and avoid falling into poverty.⁷

We urge the next president to revive the use of executive clemency upon taking office and use it routinely and often during his term instead of rarely and just in the twilight hours of his last term.⁸ Table 1 shows the steady decline of federal clemency grants in the twentieth century—a decline that means not only that fewer people receive clemency but also that much smaller percentages of overall convictions are pardoned due to the rising numbers of convictions. We also suggest that the president be very public about what he is doing and why. He should publicly announce the standards that he is applying in granting pardons and commutations so that the public in general, and particularly those, such as potential employers, who will encounter the people with pardons and commutations, will have a clear idea of what the pardons or commutations mean.

Grants of executive clemency, one of the president's broadest and most important powers in the criminal justice system, used to be more common and not limited to the political insiders about whom the American public has grown cynical. But, as Justice Anthony Kennedy notes, "[t]he pardon process, of late, seems to have been drained of its moral force A

⁴Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (codified as amended at 18 U.S.C. § 3624).

⁵Editorial, *Seeking Redemption After Prison*, *NEW YORK TIMES*, April 12, 2008, www.nytimes.com/2008/04/12/opinion/12sat3.html?_r=1&ref=opinion&oref=slogin.

⁶Both presidential candidates support programs to help those convicted of crimes succeed after they are released from prison. E.g., Sen. John McCain states: "Ex-convicts need more than a few bucks and a bus ticket out of town. Many will need job training, a place to live, mentors, family counseling, and much more. Beyond government, there are churches and community groups all across our country that stand ready to help even more. And these groups will have the committed support of my administration" (Remarks to the National Sheriffs' Association Annual Conference (July 1, 2008), www.johnmccain.com/Informing/News/Speeches/fb5c9689-00b3-490a-905a-5b455e47f4b8.htm). Sen. Barack Obama has long included ex-offender strategies in his presidential agenda. He calls for reducing recidivism by providing ex-offender supports. His website states: "America is facing an incarceration and post-incarceration crisis in urban communities. Obama will create a prison-to-work incentive program, modeled on the successful Welfare-to-Work Partnership and work to reform correctional systems to break down barriers for ex-offenders to find employment" (Barack Obama & Joe Biden, *Urban Policy*, http://origin.barackobama.com/issues/urban_policy/ (last visited Oct. 15, 2008)).

⁷For deeper analyses of the legal burdens that cause many ex-offenders to experience poverty upon release, see, e.g., John Bouman et al., *Attacking Poverty by Attacking Chronic Unemployment: An Update on Developments in Transitional Job Strategies for Former Prisoners*, 41 *CLEARINGHOUSE REVIEW* 152 (July–Aug. 2007); Kirsten D. Livingston & Vicki Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry*, *id.* at 187; Maria Foscarinis & Rebecca K. Troth, *Reentry and Homelessness: Alternatives to Recidivism*, 39 *id.* 440 (Nov.–Dec. 2005); Cynthia Works, *Reentry—the Tie that Binds Civil Legal Aid Attorneys and Public Defenders*, 37 *id.* 328 (Sept.–Oct. 2003).

⁸For the year-by-year information, see U.S. Department of Justice, *Presidential Clemency Actions by Administration: 1945 to present*, www.usdoj.gov/pardon/actions_administration.htm (last visited Oct. 9, 2008); U.S. Department of Justice, *Presidential Clemency Actions by Fiscal Year*, www.usdoj.gov/pardon/actions_fiscal.htm (last visited Oct. 9, 2008).

Table 1.—Clemency Actions from Presidents Franklin D. Roosevelt to Bill Clinton

President (months in office)	Petitions received	Pardons granted	Commutations granted	Petitions denied or closed without presidential action	Petitions denied	Petitions closed without presidential action
Franklin D. Roosevelt (155 months)	12,541	2,819	488		1,514	8,193
Harry S. Truman (93 months)	5,030	1,913	118	2,887		
Dwight D. Eisenhower (96 months)	4,100	1,110	47	3,179		
John F. Kennedy (34 months)	1,949	472	100	831		
Lyndon B. Johnson (62 months)	4,537	960	226	2,830		
Richard M. Nixon (67 months)	1,699 (P) 892 (C)	863	60	1,650 (P) 964 (C)		
Gerald R. Ford (29 months)	978 (P) 549 (C)	382	22	435 (P) 465 (C)		
Jimmy Carter (48 months)	1,521 (P) 1,046 (C)	534	29		638 (P) 673 (C)	4,194 (P) 326(C)
Ronald Reagan (96 months)	2,093 (P) 1,305 (C)	393	13		969 (P) 318 (C)	612 (P) 905 (C)
George H.W. Bush (48 months)	731 (P) 735 (C)	74	3		676 (P) 429 (C)	220 (P) 296 (C)
Bill Clinton (96 months)	2,001 (P) 5,488 (C)	396	61		6,554 (P) 2,387 (C)	353 (P) 1,159 (C)

P = Pardons, C = Commutations

Source: Office of the Pardon Attorney, U.S. Department of Justice, www.usdoj.gov/pardon/statistics.htm.

people confident in its laws and institutions should not be ashamed of mercy.”⁹ By making executive clemency accessible to those who would most benefit from it—low-income people without the same access as the political elite—the president will advance the cause of ordinary citizens seeking to turn around their lives. A ripple effect could result as governors become emboldened to increase their use of the clemency power as well.¹⁰ Such leadership by the president and the governors may well embolden Congress and the state legislatures also to tackle the difficult issues of crime from a “smart on crime” perspective rather than the “tough on crime” perspective of recent decades. But, until the lawmakers decide to vote based on solid policy instead of to avoid being tagged as “soft” on crime by their opponents in their next primary or general election, the president and the governors should use their clemency powers to cure unfairness and reward rehabilitation.

Definition: What Is Executive Clemency?

Article II, Section 2, Clause 1, of the U.S. Constitution gives the president the “Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”¹¹ This clause allows the president to grant four types of executive clemency: pardons, commutations of sentences, reprieves

from death sentences, and remissions of fines.¹² Here we focus on pardons and commutations of sentences.

The simplest way to distinguish pardons from commutations is by looking at their place on the criminal justice continuum. People who are currently incarcerated seek commutations, where the effect is to shorten prison sentences.¹³ Pardons, by contrast, are sought by former prisoners who have completed their sentences, and the legal effect is to restore the applicant’s basic civil rights.¹⁴ Thus a person who received a commutation may apply for executive clemency again after being released, this time for a pardon. The executive branch regards a pardon as “ordinarily a sign of forgiveness” rather than “a sign of vindication [or of] innocence.”¹⁵ Under this point of view, the pardon negates the fact of conviction but not the fact of guilt—a distinction that defines the scope of legal disabilities removed by a pardon:

[I]f the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of [the] crime would disqualify even though there had been no criminal

⁹Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

¹⁰See MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE x–xi. (2006) (“In most U.S. jurisdictions, executive pardon is the only way to mitigate the impact of collateral legal penalties and disabilities, and the governor has exclusive and unreviewable authority to exercise the pardon power. At the same time, most governors no longer regard pardoning as a routine function of their office. In at least a dozen states where a governor’s pardon is the exclusive means of avoiding or mitigating collateral disabilities, the governor has not exercised the power with any regularity for many years.”).

¹¹U.S. CONST. art. II, § 2, cl. 1.

¹²William M. Landes & Richard A. Posner, *The Economics of Presidential Pardons and Commutations* 1 (University of Chicago School of Law John M. Olin Law & Econ. Working Paper No. 320, 2007), http://ssrn.com/abstract_id=956190.

¹³The category of commutations includes remissions of unpaid fines or restitution orders (Office of the Pardon Attorney, U.S. Department of Justice, Commutation Instructions, www.usdoj.gov/pardon/commutation_instructions.htm (last visited Oct. 9, 2008)).

¹⁴*Recent Presidential Pardons: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Roger C. Adams, Pardon Attorney, U.S. Department of Justice), www.usdoj.gov/pardon/testimony/adams1.htm.

¹⁵*Id.*

prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.¹⁶

Even if the pardon removes legal disabilities, the record of conviction remains since expungement is not generally available for federal conviction records.¹⁷

Typically a person seeking clemency begins the process by filling out an application form specific to either pardons or commutations.¹⁸ The Office of the Pardon Attorney, an office staffed by career attorneys within the U.S. Department of Justice, then reviews the application and conducts an investigation that may include consulting the applicant's warden if a commutation is sought or the U.S. Probation Office if a pardon is sought; retrieving Federal Bureau of Investigation background checks; and soliciting opinions from the prosecutor, sentencing judge, and sometimes the victims involved in the applicant's case.¹⁹ Using the U.S. Attorney's Manual Standards for Consideration of Clemency Petitions, the

Pardon Attorney evaluates all of this information to reach a recommendation on whether to grant or deny clemency.²⁰ In considering pardon requests, the Pardon Attorney looks for "the petitioner's demonstrated good conduct for a substantial period of time after conviction and service of sentence."²¹ As for commutation requests, the Pardon Attorney weighs equitable factors, such as "disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner."²² The recommendation either to grant or to deny clemency is then presented to the president in the form of a report.²³

The president is free to adopt or reject this recommendation because the pardon power conferred by the Constitution is plenary. The Justice Department has promulgated regulations outlining the procedures above.²⁴ However, these "advisory" regulations serve only as "internal guidance" for the Justice Department and therefore do not ultimately bind the president.²⁵ The pardon power is also

¹⁶Memorandum from Walter Dellinger, Assistant Attorney General, U.S. Department of Justice, to the Pardon Attorney (June 19, 1995), www.usdoj.gov/olc/pardon3.19.htm (citing Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARVARD LAW REVIEW 647, 653 (1915)); see also generally Ashley M. Steiner, Note, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 EMORY LAW JOURNAL 959 (1997).

¹⁷Michigan Reentry Law Wiki, *Cleaning Up Criminal Records: Expungement*, http://reentry.mplp.org/reentry/index.php/Cleaning_Up_Criminal_Records:_Expungement (last visited Oct. 9, 2008). The exceptions to this rule are selected drug offenses committed by persons under 21 (*id.*); see also 18 U.S.C. § 3607(c) (2005) (special probation and expungement procedures for drug possessors).

¹⁸See 28 C.F.R. § 1.1 (2008). For forms to obtain a pardon or commutation, see U.S. DEPARTMENT OF JUSTICE, PETITION FOR PARDON AFTER COMPLETION OF SENTENCE, www.usdoj.gov/pardon/forms/pardon_form.pdf (pardon form); U.S. DEPARTMENT OF JUSTICE, PETITION FOR COMMUTATION OF SENTENCE, www.usdoj.gov/pardon/forms/commutation_form.pdf (commutation form).

¹⁹*Hearing Before the H. Comm. on the Judiciary on the Use and Misuse of Presidential Clemency Power for Executive Branch Officials*, 110th Cong. (2007) (testimony of Roger Adams, U.S. Pardon Attorney), www.fas.org/irp/congress/2007_hr/clemency.pdf; see also 28 C.F.R. § 1.6(a).

²⁰*Supra* note 13.

²¹28 C.F.R. §§ 1-2.112. Under this broad standard, the principal factors are (1) postconviction conduct, character, and reputation; (2) seriousness and relative recentness of the offense; (3) acceptance of responsibility, remorse, and atonement; (4) need for relief; and (5) official reports and recommendations (*id.*).

²²28 C.F.R. § 1-2.113.

²³*Id.* § 1.6(c).

²⁴See *id.* §§ 1.1-1.10.

²⁵*Hoffa v. Saxby*, 378 F. Supp. 1244-45 (D.C. 1974); see also 28 C.F.R. § 1.11 ("[The regulations] create no enforceable rights in persons applying for executive clemency, nor do they restrict the authority granted to the President under Article II, Section 2[,] of the Constitution."). Recent presidents have used their authority to bypass the typical clemency procedures (see *supra* note 14 (explaining how typical clemency procedures were not used when Pres. Bill Clinton pardoned Marc Rich)); *Hearing Before the H. Committee on the Judiciary on the Use and Misuse of Presidential Clemency Power for Executive Branch Officials*, *supra* note 19 (explaining how typical clemency procedures were not used when Pres. George W. Bush commuted the sentence of I. Lewis "Scooter" Libby).

largely insulated from judicial review and legislative oversight.²⁶ Given this paucity of limitations, the new president will enjoy wide latitude in which to advance the role of executive clemency in the criminal justice system.

The Role of Executive Clemency in Our Criminal Justice System

Although executive clemency is not a cure-all, it does serve the crucial purpose of being the criminal justice system's "fail-safe."²⁷ The clemency process serves as a place of last resort to rectify errors made during trial. In *Herrera v. Collins*, for example, the U.S. Supreme Court denied habeas corpus to a woman who claimed that new evidence established her innocence with respect to the crime underlying her conviction. In support of its denial, the Court described clemency as "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."²⁸

When used in this context, executive clemency acts as a check on the judiciary.²⁹ In Ohio, for example, former Gov. Richard F. Celeste commuted the sentences of several women convicted of murdering a boyfriend or husband.³⁰ Governor Celeste justified these acts of clemency by pointing out that Ohio law did not recognize battered woman's syndrome; he saw its exclusion from the defense of these women as a fundamental

flaw in their trials and used his pardon power to address that flaw.³¹

The clemency process can also provide relief from sentences that the president deems to be overlong or disproportionate. Commutation can be granted to individual petitioners, such as I. Lewis "Scooter" Libby, whose thirty-three-month prison sentence was found to be excessive by Pres. George W. Bush. Commutations can also be granted categorically, signaling a broader policy objective. Pres. Jimmy Carter, for example, granted amnesty to those who avoided the draft during the Vietnam War to help the country heal its trauma and move past its divisions.³² Similarly some advocates have called on Pres. George W. Bush to commute the sentences of those imprisoned under the federal crack-cocaine laws, which have been found to have a disparate impact on African Americans when compared to federal laws criminalizing the use of powder cocaine.³³ In this context, clemency serves as a check not only on the judges who issue these sentences but also on the legislature that imposes mandatory minimums and other static guidelines on the length of those sentences.³⁴

This "fail-safe" role is especially important given the limited avenues for post-conviction relief in the federal criminal justice system. Unlike state prisoners, federal prisoners have no opportunity

²⁶*Ex Parte Garland*, 71 U.S. (4 Wall) 333, 380 (1866) (Marshall, J.) ("The [pardon] power ... is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency or after conviction and judgment."); but cf. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment) ("[S]ome minimal procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.")

²⁷*Herrera v. Collins*, 506 U.S. 390, 415 (1993).

²⁸*Id.*

²⁹Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, *FORDHAM URBAN LAW JOURNAL* 1483, 1507 (2000).

³⁰Richard F. Celeste, *Executive Clemency: One Executive's Real Life Decisions*, *CAPITAL UNIVERSITY LAW REVIEW* 139, 140 (2003).

³¹*Id.*

³²Charles Shanor & Marc Miller, *Pardon Us: Systemic Presidential Pardons*, 13 *FEDERAL SENTENCING REPORTER* 140 (2000-01), <http://caliber.ucpress.net/doi/pdf/10.1525/fsr.2000.13.3-4.139>.

³³*Id.* at 139.

³⁴Love, *supra* note 29, at 1506.

for parole. Moreover, habeas corpus is becoming much more of an exclusive forum, making executive clemency necessary for prisoners seeking individualized review of their cases.

All the policy and practical reasons that support the robust use of the clemency power by the president equally apply to its use by state governors.

Recommendations

The president taking office should

- make consideration of clemency petitions part of the routine work of the president and make publicly known that the president will be careful but generous in the granting of petitions;
- make his general standards for granting clemency known publicly so that the public will understand the meaning of a pardon or commutation;
- call upon the departments of the federal government under his control, including the military, to honor the clemency grants by repealing barriers and disqualifications of convictions for those granted clemency;
- similarly, call upon employers who do business with the federal government to repeal barriers to employment based on criminal conviction for those granted clemency;
- call upon the people to honor the clemency grants by allowing those with presidential pardons to rejoin civil society fully—for example, by hiring them, renting to them, accepting them into education and job training programs, allowing them to volunteer in community and religious organizations;
- seek authority from Congress to include selective sealing or outright expungement of criminal conviction records as part of the relief provided in a clemency grant;
- convene the governors and encourage them, too, to make frequent and broad use of their clemency powers; and
- increase funding for legal services to assist people with criminal convictions in filing and pursuing clemency from the president or from their state governor.

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