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FEATURE: Executive Clemency

EXECUTIVE CLEMENCY: AN ANCIENT POWER AND A MODERN SOLUTION

By Brendan Keating

Former State of Illinois Governor George Ryan's recent blanket commutation of Death Row inmates has cast unprecedented light on an ancient, complex and increasingly vital power: executive clemency. The former governor's pardons and commutations of inmates sentenced to death are unprecedented in the history of the United States. Steve Mills and Christi Parsons, *The System has Failed*, CHI. TRIB., Jan. 11, 2003, at 1.

While legal scholars and state's attorneys debate the power of the governor to issue such a blanket clemency, another aspect of the clemency power has gone unheralded. While clemencies are often granted to high profile crimes or criminals, or cases in which there has been a gross miscarriage of justice, they are also the only way that most regular people can get their criminal records cleared. In this age of scarce jobs and mandatory background checks, this is a serious issue that will only become more dire in the coming years.

The term clemency is a broad one, and covers any executive act that reduces or remits a punishment. A pardon is a type of clemency in which the conviction is entirely wiped out. A commutation is a reduction in sentence while a reprieve postpones punishment. Daniel Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575-78 (1991). For

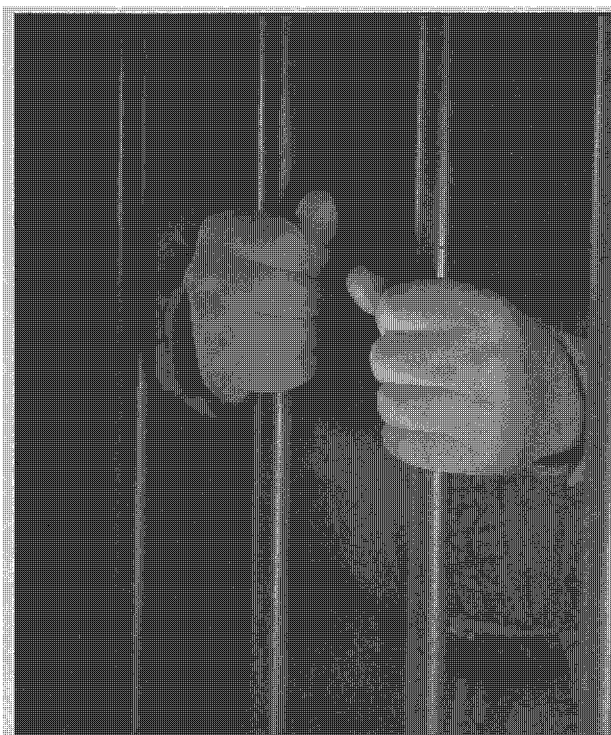
instance, on January 11 former Governor Ryan issued 156 commutations, lessening these sentences from death to life, and pardoned six men, clearing away their conviction entirely. A

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- Marjie Nielsen, Staff Attorney, Chicago Legal Clinic

clemency, in its pardon form, can also be issued to an individual who has already completed his sentence, erasing his criminal record.

The clemency power is so ancient that Plutarch made mention of it 2,000 years ago. In



Roman times if a vestal virgin crossed the path of a condemned man on his way to the gallows, his life was spared. Plutarch, *Numa Pompilius*, in *The Lives of the Noble Grecians and Romans*, 74, 83 (J. Dryden trans., Modern Library ed., 1932). However, this meeting had to be purely by chance and not purposeful.

We might hope that our justice system is less capricious, but the

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clemency power has kept some its mystical nature right into modern times. Several years ago when Pope John Paul II was visiting St. Louis, a man named Darryl Mease was slated for execution. Mease was convicted of a murder in which he brutally killed a paraplegic. However, during a prayer service the Pope requested that the governor of Missouri commute his sentence. Despite the fact that the governor had already presided over 26 executions, he granted the clemency. Terry Ganey, *Carnahan Spares Murderer's Life*, ST. LOUIS POST-DISPATCH, Jan. 29, 1999, at 1.

Part of the magisterial quality of clemency is derived from its historic roots. In England, the clemency power was vested in the monarch. Since all crimes were considered crimes against the throne, and not against the people, it was considered the prerogative of the king or queen to grant a clemency. This power was often used to temper the Draconian punishments of early English law; because so many crimes were given capital sentences, the clemency power could mitigate the harshness of the law. Daniel Kobil, *Sparing Cain: Executive Clemency in Capital Cases*, 28 CAP. U.L. REV. 568, 569 (2000).

Because in English law the clemency power was derived directly from the throne, early American jurisprudence was concerned that there could be no clemency. Nevertheless, the power was vested in each state and today we have 51 different clemency systems, one for each state and one for the federal government.

Each of these systems differs slightly. Though in the majority of states the clemency power still resides with the governor, some states are still wary of vesting so much power in a single executive. In some states, especially those who liberally exercise the death penalty, such as Arizona and Texas, the governor can only commute a sentence with a favorable recommendation from a clemency board. In some states, the clemency power is the exclusive domain of such a board, and others like, Illinois, still retain the vestiges of royalty and vest the

power exclusively with the governor. Illinois has a prison review board that oversees clemency petitions, but the power to grant or deny is still solely the governor's.

For most clemency petitioners in Illinois, the goal is not release from prison or commutation of a sentence, but the erasing of a criminal record. As more and more jobs, schools and licenses require mandatory background checks, a criminal record has become an increasingly difficult obstacle to overcome. For instance, to gain employment as a truck driver, a clean record is

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often required so drivers can cross the border into Canada, a requirement with most shipping companies. Work as a security guard requires a clean record to obtain a license to carry a gun. Employment in health care, child care or obtaining federal aid for school all require the lack of a criminal record. To even set foot on CHA soil with a criminal record can cause the eviction of family members who live there. Fox Butterfield, *Freed from Prison, but Still Paying a Penalty*, N.Y. TIMES, Dec. 29, 2002, at 18. With an increasing amount of inmates being imprisoned and eventually released from jail every year, this is a worrying problem. With nowhere to go and no job prospects, many of these people will be forced back into a life of crime to make a living.

In Illinois, someone with a criminal record has two ways to try to fix this situation. If he was charged without being convicted, or was sentenced to certain types of supervision or probation, he could try to obtain an expungement. An expungement is a request he can file with a clerk of the court in order to erase his criminal record. An expungement can be obtained only in

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a few limited circumstances: if the accused got a not guilty verdict, the case was dismissed, he was given court supervision or he was given a 1410 probation. 1410 probation is a special type of sentence that is usually given to first-time drug offenders. If the accused completes the 1410 probation, he must wait five years and then he can file an expungement. Similarly, if he was given court supervision, he must wait two years after the completion of the supervision to file an expungement. Unless he can show an extreme level of poverty, an expungement will cost him a total of \$180 to file. If he has more than one expungeable charge on his record, they will all be cleared. However, if there is even one conviction on his record, he will need to get a clemency, a much greater ordeal.

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If convicted of a crime, whether it is a misdemeanor or a felony, the only way to remove that conviction from the criminal record is through a clemency petition asking the governor for a pardon. Probation, unless it is 1410 probation, is a conviction. Paradoxically, so is a sentence of “conditional discharge.” Many defendants, after being sentenced to probation, feel like they have gotten off easy, when in fact, they will now carry a record that will haunt them the rest of their lives. Marjie Nielsen, a Staff Attorney at the Chicago Legal Clinic who assists clients with clearing their criminal records, points out the problem that “many people who come to me for help have been misinformed about the impact a guilty plea will have on their lives beyond the end of their sentence. They have often been told that the conviction will disappear from their records after

their terms of probation end, while others are told that their convictions can be expunged.” Unfortunately for these clients, obtaining a clemency is much harder than an expungement, and the results are far less certain.

The clemency process is rather long and involved. After a person has been convicted, and has no appeals pending, only the governor can clear her record. The Prisoner Review Board, which makes clemency recommendations to the governor, receives and reviews detailed executive clemency requests. Each petitioner has the right to a public hearing in front of the Prisoner Review Board regarding this request. The Office of the State’s Attorney is given notice of the hearing and can oppose the request in person or in writing. The Board then makes a recommendation to the governor who either grants or denies the clemency petition.

A clemency petition typically includes a statement by the petitioner. This statement includes her criminal history, particulars about the crime, educational history, work history, personal information and reasons for seeking a clemency. Since a clemency is a matter of executive grace, the petitioner has to persuade the Prisoner Review Board to recommend to the governor that he grant a pardon. Usually, this petition includes letters of recommendation, a resume and anything else the petitioner thinks might help persuade the governor and the board. According to Ms. Nielsen, a strong candidate for clemency will have at least seven years of a clean record, at least five years will have passed since the end of the petitioner’s last sentence, she will have a high school diploma or GED, some significant employment history, and significant changes in her personal life, such as recovery from addiction, sincere religious experience, or a new or renewed commitment to family.

The eccentricities of the clemency system are best displayed in the difference between those

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