

The Ford Approach and Real Fairness for Crack Convicts



MARK OSLER

Professor of Law,
University of St.
Thomas (Minn.)

MATTHEW FASS

Assistant
District Attorney,
Wichita County,
Texas

Ten years ago in these very pages, Charles Shanor and Marc Miller argued that then president Bush should use the constitutional pardon power to mitigate harsh crack cocaine sentences.¹ At that time, a 100-to-1 powder-crack ratio defined cocaine sentencing under both mandatory statutory minimums and the Federal Sentencing Guidelines, meaning that a defendant who sold 500 grams of powder cocaine would get the same sentence as one who sold just five grams of crack cocaine.

Shanor and Miller were right then, and their argument is even more right now. The 100-to-1 ratio is gone from both statute and guideline, replaced by a more rational 18-to-1 ratio through the Fair Sentencing Act of 2010.² That Act, however, was not retroactive to those already serving crack sentences under the former 100-to-1 ratio, creating a glaring unfairness that most likely can be remedied only through presidential action under the pardon power.

Our purpose here is not only to point out this opportunity but also to suggest a systemic approach President Obama could use to bring some measure of fairness to those who remain in prison under the effects of the now-rejected sentencing law for crack cocaine offenses. This suggestion is based on President Ford's thorough and broad examination of more than 21,000 people who petitioned for clemency for offenses related to the draft during the Vietnam War.³ Although Shanor and Miller discussed other models, such as President Kennedy's quiet commutation of several sentences under the Narcotics Control Act of 1956, the Ford approach is the one that would best allow President Obama to address the over-sentencing of crack convicts in 2011. Such systemic action would not only address a very serious issue of justice (the over-sentencing of crack) but also help to restore the public's sense that the pardon power can be used in an open, principled, and rational way.

I. The Matter of Timing

Ten years ago, when Shanor and Miller urged a commutation fix to the crack-powder disparity, such a use of the pardon power risked being seen as a near-total undermining of the (then) present and future law that established mandatory minimums under the 100-to-1 ratio. Conceivably, this

move would have required the administration to maintain a steady stream of commutations for the foreseeable future, because judges continued to follow the law that was in force under the 100-to-1 ratio, only to have those sentences revised by the executive.

The posture of the law is much different now. Because Congress has reformed the mandatory minimum and the guidelines have been amended, commutations would only need to clear out existing cases (provided that commutations altered terms of imprisonment to what they would be under the new law, calculating sentences under an 18-to-1 ratio). Once that process was completed, systemic commutation addressing the issue could end—in other words, the project would be completed.

Moreover, systemic commutations at this point would not conflict with the expressed policy wishes of any of the three branches of government (save Congress's rejection of retroactivity for the change in the crack-powder ratio). The Obama administration advocated for crack law reform nearly from inauguration, and in fact sought a more dramatic change to a 1-to-1 ratio.⁴ Congress, in passing the reform bill unanimously, sent the clear message that the 100-to-1 ratio represented an injustice. Finally, district court judges overwhelmingly condemned the 100-to-1 ratio as inappropriate.⁵

II. The Advantage of Systemic Pardons

Sadly, it hardly bears mentioning that among the constitutional powers people care about, the pardon power has fallen into a state of disrepute—the drunk uncle in the corner no one wants to look at. President Clinton embarrassed himself with a rash of pardons at the end of his second term that seemed at best irrational, and President George W. Bush hardly used the power at all.⁶ As Prof. Berman has accurately described it, “Many, if not most, Americans now likely associate the clemency power with cronyism and scandal, and few have reason to understand the noble and sensible goals that the Framers sought to further by guaranteeing this power to the President in the Constitution.”⁷

Among academics and the public, the recent paucity of pardon activity combined with its connection to political payoffs has led to the (largely correct) perception that the

Federal Sentencing Reporter, Vol. 23, No. 3, pp. 228–232, ISSN 1053-9867 electronic ISSN 1533-8363.
©2011 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy
or reproduce article content through the University of California Press's Rights and Permissions website,
<http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/fsr.2011.23.3.228.

pardon power has not been used in a principled way. Thus, the pardon power is in need of a clearly principled use in discrete cases, at the same time that hundreds of men and women remain in prison under sentencing laws that all three branches of government have condemned. Through a systemic use of the pardon power to commute the sentences of those who have been over-sentenced for crack offenses, one action can both address the crack injustice and begin the process of reidentifying the constitutional power of the pardon with principles the nation is willing to embrace.

Such a systemic use of the pardon power would be consistent with a purpose that the framers of the constitution recognized: the mitigation of laws that simply proved too harsh once set into operation. Alexander Hamilton described exactly this use in *The Federalist*:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.⁸

The question, then, becomes what systemic approach might be best to address the nonretroactive crack cases. Among the several possible approaches to systemic commutation that Shanor and Miller described, two examples from past presidents rise to the top in the current context.

First are the commutations President Ford gave to Vietnam-era draft evaders. To accomplish this massive goal, Ford impaneled a presidential clemency board, which hired staff and reviewed thousands of petitions in just one year, granting about 90 percent of them.⁹ President Kennedy took a second and distinct approach in reviewing a rash of especially harsh narcotics sentences. Whereas Ford engaged in a broad, fast, and relatively public process, Kennedy did little to announce his actions. As set out in the following section, the Ford approach would best address the unjust crack sentences that have outlived the actions of the Fair Sentencing Act of 2010.

III. The Ford Approach

President Ford used a presidential clemency board to implement his clemency program for Vietnam draft evaders, because he wanted every application to be reviewed individually. Commutation options ranged from an immediate pardon to twenty-four months of community service. The board also had the option to deny clemency, an alternative that it used much less often.¹⁰

A. Board Structure and Background

Ford established the Presidential Clemency Board on September 16, 1974, with Executive Order 11803, and the Board was only in existence until September 15, 1975—precisely one year. The Board initially consisted of nine

members, but it was expanded to eighteen members approximately six months into the project because of the large workload.¹¹ As revised, the eighteen-member Board consisted of five lawyers and thirteen nonlawyers.¹² While the Board was in session, it reviewed approximately 21,500 applications and submitted a total of 14,514 recommendations for clemency to the President.¹³

In order to split the workload more efficiently, the eighteen-member Board heard cases in three-member panels. In addition, the Board employed approximately 400 staff attorneys to handle most of the ground-level file reviews. Eventually, the caseload became so heavy that the three-member panels could spend an average of only four minutes on each case.¹⁴

It is important to note that this Clemency Board was created and operated outside of the Department of Justice (DOJ). Former senator Charles Goodell served as chairman, and Board members included such national leaders as Vernon Jordan of the Urban League and Fr. Theodore Hesburgh, president of the University of Notre Dame.¹⁵ Some astute observers of the commutation process urge that such a powerful group acting outside of the DOJ is exactly the mechanism needed today,¹⁶ especially effective for addressing a national issue such as crack sentencing.

B. The Commutation Application Review Process

The Ford process began with an application for a commutation or pardon. Upon receiving the application, a staff attorney would prepare a summary of the case based on official records, the application, and any communication with the applicant.¹⁷ The applicant was then given a thirty-day period to comment on his case summary.¹⁸ After this thirty-day period, the case summary was submitted to Board members for study,¹⁹ and then the cases would be reviewed by three-member panels of the Board.

Staff reporters spent an average of four to six hours preparing a case to present to the Board. The staff attorneys calculated a baseline and identified which mitigating and aggravating factors the Board might apply; however, the ultimate decision still rested with the Board.²⁰

C. The Board's Considerations

In order to create consistency in the cases in which clemency was granted, the Board developed something of a formula. First, the Board calculated a baseline reduction in sentence using the applicant's initial sentence, his time in jail, and other factors.²¹ Three months were deducted for every month of confinement. The baseline was further reduced by one month for every court-ordered alternative service, probation, or parole previously served.²²

After calculating the baseline, the Board considered mitigating and aggravating factors to determine the appropriate amount of clemency, if any. When mitigating factors outweighed aggravating factors, the alternative service assignment would be reduced below the baseline. Conversely, the service assignment could be increased above the

baseline if aggravating factors outweighed mitigating factors.²³ A total of twelve aggravating factors and sixteen mitigating factors were published in the Federal Register.²⁴

One of the Board's important developments was the *Clemency Law Reporter*, which enabled Board precedents to form a type of common law.²⁵ What began as a staff paper illustrating how the Board was applying its mitigating and aggravating factors eventually evolved into a guide to Board precedents and an internal forum for staff-prepared articles on issues of professional concern.²⁶ The *Reporter* included specific definitions of the aggravating and mitigating factors, as well as factual applications of these factors from previous cases. Staff attorneys were instructed to follow the *Reporter* in making preliminary designations of mitigating and aggravating factors in each case as a guide for Board members.²⁷

D. Internal Review Process

Beyond the guidelines in the *Clemency Law Reporter*, the Board set up an elaborate review process up to ensure consistency. Several different internal review processes were used. First, each Board member could refer any panel judgment to the full Board for reconsideration—an option that was used only in about 3 percent of the cases.²⁸ Also, staff attorneys were instructed to flag cases they believed to be inconsistent with Board precedents. A specially trained team, and then the Board chairman, reviewed these cases. The Chairman could then ask the full Board to reconsider a particular case if he saw fit.²⁹

Another review mechanism was a computer system called STAREDEC, which would flag cases that grossly deviated from other cases with similar aggravating and mitigating circumstances. Once the system flagged a case, a staff legal analysis team studied the summary for each case to determine whether the Board's judgment had reasonable justification. The staff attorneys would then filter through the STAREDEC cases and refer select cases to the chairman, who could then refer them to the full Board for reconsideration.³⁰

The final step of internal review came after President Ford approved the Board's case recommendations. The Board sent each applicant a worksheet identifying the specific mitigating and aggravating factors that the Board had identified in his case, and he would be informed about his right to appeal the commutation. By this time the Board had disbanded, so the DOJ Clemency Office reviewed these appeals. However, the Clemency Office applied the Board's precedents when reconsidering the cases.³¹

The operation of the Clemency Board was not very expensive. In 1975, processing each case cost approximately \$700; a total of approximately \$8 million was spent for the entire program.³² The funds were drawn from the President's Contingency Fund.³³ The Department of Justice budget in 1975 was approximately \$2,137,675,000.³⁴ Thus, even if the funds had come out of the DOJ budget in 1975, the costs of the Clemency Board would have been just 0.374 percent of the DOJ budget.

IV. The Kennedy Approach

In contrast to the very large numbers of draft evaders President Ford addressed, President Kennedy faced a different sort of challenge. The 1956 Narcotics Control Act had set strict mandatory minimum sentences for a number of drug-related offenses, a situation that produced lengthy terms for some defendants who were perceived to be of low culpability.³⁵ The 1956 Act was widely seen as overly tough, and most of its mandatory sanctions were repealed in 1970.³⁶ During the Kennedy years, the attorney general's annual reports increasingly reflected the use of the pardon power to commute the sentences of many of those serving time under the 1956 Act.³⁷ This state of affairs culminated with the 1964 report, which revealed that the Director of the Bureau of Prisons had been directed to send out a call to wardens to identify cases for possible commutation, and that "[f] or the first time there is a policy of attempting to systematically review cases which may be deserving of commutation."³⁸

In contrast to the Ford approach, President Kennedy's method kept review of the petitions within the DOJ, using the cloak of secrecy available there. Because it was carried out by existing staff, Kennedy's program addressed only a tiny fragment of the number of cases that Ford's Clemency Board considered.³⁹

At first glance, President Kennedy's quiet approach seemingly has three potential benefits relative to the Ford plan in addressing crack sentences. First, it is cheaper. Second, it is easier in that it does not require the creation of a body of experts outside of the DOJ. Third, it does not invite the same level of public scrutiny that a broader, more public plan would. Ultimately, though, each of these benefits is illusory.

Because it simply could not address as many cases, the Kennedy approach would ultimately be more expensive than the Ford method if one figures in prison costs of those who would remain incarcerated. Furthermore, although keeping the process inside the DOJ would be simpler, this approach is more likely to raise suspicions than the creation of an outside board, which would probably increase credibility provided that the board was carefully chosen; one lesson from President Ford's program is the importance of choosing respected national figures to lead such a project. Finally, in an era of aggressive and often outlandish political attacks, nothing is actually secret in Washington. Those who are critical of President Obama are as likely to trumpet the supposed sin of commutation whether it is committed under cover or in the open. Given that transparency will be achieved willingly or not, boldness seems more in the character of a principled leader.

V. Benefits of the Ford Approach

As those who lived through the period well remember, the United States was greatly divided about what to do with the more than 100,000 draft evaders and draft

deserters from the Vietnam era. A large group of Americans thought that granting unconditional amnesty to these groups of people was the nation's best solution to healing the wounds from Vietnam.⁴⁰ Of course, many people considered any form of break for draft evaders to be a slap in the face to all of those who served in Vietnam. It is fair to say that, although successful, the Ford program had detractors both in the general public and in Congress.⁴¹

The political situation President Obama faces is not terribly different from the one President Ford faced. Certainly, convicted crack dealers are not popular figures warranting great sympathy in U.S. culture, but one should remember that draft dodgers were demonized to at least an equal degree in the 1960s and 1970s. Certainly, President Ford proceeded to lose his next election, but it wasn't because of his commutations, given whom he lost that election to: Jimmy Carter, who did one better than Ford and offered draft evaders an amnesty.⁴²

In sum, the benefits offered by a Ford-style clemency board to address holdover crack cases outweigh the possible costs. Such a bold initiative would accomplish several goals at once. First, it would systemically and thoroughly address a national problem with troubling racial implications. Second, it would begin the important project of once again establishing the exercise of the pardon power as a legitimate part of the President's job, by showing how that power can be used in a consistent, principled way to achieve an important public policy objective.

Finally, using the pardon power systemically to fix the over-sentencing of crack convicts would make real the Obama administration's commitment to offer something new in the field of criminal law.⁴³ If there is a time and a place for hope and change, it is now, and in that place where Americans languish in prison under sentences that no Congressperson saw fit to defend, which the President has condemned, and which judges abhor.

Notes

¹ Charles Shanor & Marc Miller, *Pardon Us: Systemic Presidential Pardons*, 13 FED. SENT. REP. 139 (2001).

² Fair Sentencing Act of 2010, Pub. L. No. 111-220 (2010).

³ Shanor and Miller described both of these systemic approaches, among other options, a decade ago. Shanor & Miller, *supra* note 1, at 142-43.

⁴ Addressing the Crack-Powder Disparity: Hearing Before the Subcommittee on Crime and Drugs and United States Senate Committee on the Judiciary, 111th Congress 10 (2009) (Statement of Lanny A. Breuer, Assistant Attorney General, Criminal Division, United States Department of Justice).

⁵ For example, in a 2010 survey of district judges by the Sentencing Commission, 76 percent of respondents thought that the mandatory minimums for crack cocaine were "too harsh." United States Sentencing Commission, Results of Survey of United States District Judges January 2010 Through March 2010, p. 5 (June 2010), available at http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf (last visited Nov. 24, 2010).

⁶ Margaret Colgate Love suggests that Bush was the more principled of the two, because his inaction was at least in part due to the fact that he was "genuinely offended by the undemocratic cronyism of the pardon end-game." Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. OF CRIM. L. & CRIMINOLOGY (forthcoming 2010).

⁷ Douglas A. Berman, *Turning Hope-and-Change Talk into Clemency Action for Nonviolent Drug Offenders*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 59, 69 (2010).

⁸ THE FEDERALIST NO. 74, at 473 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1966).

⁹ Shanor & Miller, *supra* note 1, at 142.

¹⁰ William A. Strauss & Lawrence M. Baskir, *Controlling Discretion in Sentencing: The Clemency Board as a Working Model*, 51 NOTRE DAME L. 919, 923 (1976).

¹¹ *Id.* at 922 n.19

¹² *Id.* at 924 n.32.

¹³ *Id.* at 922 n.20.

¹⁴ *Id.* at 931.

¹⁵ Executive Order 11803, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=23895> (last visited Nov. 24, 2010).

¹⁶ Daniel T. Kobil, *Reviving Presidential Clemency in Cases of "Unfortunate Guilt,"* 21 FED. SENT. REP. 160, 163 (2009); Berman, *supra* note 7, at 72-73.

¹⁷ Strauss & Baskir, *supra* note 10, at 928.

¹⁸ *Id.* at 928, n.50.

¹⁹ *Id.* at 928.

²⁰ *Id.* at 932.

²¹ *Id.* at 925-26.

²² *Id.* at 926 n.39.

²³ *Id.* at 925.

²⁴ The aggravating factors were (1) other adult convictions, (2) false statement to the Board, (3) use of physical force in the offense, (4) AWOL in Vietnam, (5) selfish motivation for offense, (6) failure to do alternative service, (7) violation of probation or parole, (8) multiple AWOL offenses, (9) lengthy AWOL offense, (10) missed overseas movement, (11) unfit discharge with other offenses, and (12) apprehension by authorities. 39 Fed. Reg. 41351 (1974). The mitigating factors were (1) inability to understand obligations, (2) personal or family problems, (3) mental or physical condition, (4) public service employment, (5) service-connected disability, (6) substantial military service, (7) Vietnam service, (8) procedural unfairness, (9) questionable denial of conscientious objector status, (10) conscientious motivation for offense, (11) voluntary submission to authorities, (12) mental stress from combat, (13) combat volunteer, (14) above-average military performance, (15) decorations for valor, and (16) wounds in combat. 39 Fed. Reg. 41351 (1974).

²⁵ Strauss & Baskir, *supra* note 10, at 932.

²⁶ *Id.* at n.63.

²⁷ *Id.* at 932-33.

²⁸ *Id.* at 934.

²⁹ *Id.*

³⁰ *Id.* at 935.

³¹ *Id.* at 936.

³² William Wallace Anthony, *The Life and Times of the Presidential Clemency Board: A Study of Impeached Executive Branch Decisionmaking*, at 57 (May 1987) (unpublished Ph.D. dissertation, University of Houston) (on file with University of Houston Library).

³³ *Id.* at 52.

³⁴ Federal Reserve Bank of St. Louis, Department of Justice Budget Accounts Listing (1975).

³⁵ Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 651 (1956).

- ³⁶ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).
- ³⁷ Shanor & Miller, *supra* note 1, at 142.
- ³⁸ Annual Report of the Attorney General, 1964, at 63–64.
- ³⁹ In a review of materials provided by the Kennedy Library, we found less than 100 commutations per year of narcotics convictions by President Kennedy.
- ⁴⁰ Joshua Dunton, *To Heal the Nation: The Creation of President Ford's Clemency Program*, at 40–44 (2009) (thesis, University of Waterloo) available at <http://uwspace.uwaterloo.ca/handle/10012/4684> (last visited Nov. 24, 2010).
- ⁴¹ Anthony, *supra* note 32, at 52.
- ⁴² Executive Order No. 11,967, 42 Fed. Reg. 4393 (1977).
- ⁴³ Among other things, the Obama administration has promised a “new dawn of justice,” and “to be smarter on crime and reduce the blind an counter-productive warehousing of [non-violent] offenders.” Berman, *supra* note 7, at 62.