Calendar No. 445

106TH CONGRESS, *2d Session* | SENATE | REPORT 106–231

THE PARDON ATTORNEY REFORM AND INTEGRITY ACT

MARCH 9, 2000.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 2042]

The Committee on the Judiciary, to which was referred the bill (S. 2042) to reform the Department of Justice's Office of Pardon Attorney, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

CONTENTS

I. PURPOSE

The purpose of the Pardon Attorney Reform and Integrity Act is to reform the way that the Department of Justice's Office of the Pardon Attorney investigates potential grants of executive clemency, which include pardons, reprieves, commutations and remissions of fines. This legislation is necessary to ensure that the Pardon Attorney, when asked by the President to investigate a par-

ticular proposed clemency grant, identifies and gathers the information and views held by law enforcement, and to make sure that crime victims are not revictimized by being ignored by the clemency process or by hearing of a grant of clemency to their perpetrator on television.

II. Legislative History and Need for the Legislation

A. Legislative History

On August 11, 1999, President Clinton offered clemency to 16 people who had been convicted of a seditious conspiracy that involved the planting of over 130 bombs in public locations in the United States and the killing of 6 people. Those 16 felons belonged to the violent Puerto Rican separatist organizations called the Armed Forces for National Liberation (known by its Spanish initials, "FALN") and Los Macheteros, which have declared war against the United States in order to bring attention to their political views. Approximately 4 weeks later, on September 7, 1999, 11 of those terrorists who accepted the clemency offer were released from prison. The public reaction in America was widespread outrage. In response to public concern, the Judiciary Committee undertook an investigation of the role that the Department of Justice played in facilitating the President's decision.

The investigation began with Chairman Hatch's requests for documents from the Department of Justice and, specifically, its Office of the Pardon Attorney. The Department of Justice responded that those requests presented "important institutional issues" and required additional time for response.[1] Chairman Hatch also requested that representatives of the Department including the Pardon Attorney and agents of the Federal Bureau of Investigation ("FBI") testify at a hearing scheduled for September 15, 1999. In a letter dated September 14, 1999,[2] the Department informed Chairman Hatch that it would not allow the Pardon Attorney or any FBI employees to testify before the Committee because of "the important constitutional and institutional interests implicated by your invitation for testimony and the fact that the hearing may in significant part address the exercise of an exclusive president prerogative." The Department also mentioned that it was reviewing the matter and "consulting with the White House" about how to proceed.[3]

Prior to the Judiciary Committee's hearing, the House and Senate both passed resolutions condemning the President's decision to grant clemency. The House resolution, H.R. 180, passed on September 9, 1999, by a vote of 311 to 41 with 72 present. The Senate resolution, S.J. Res. 33, passed on September 14, 1999, by a vote of 95 to 2.

On September 15, 1999, the Judiciary Committee conducted a hearing and heard testimony from: Rocco Pascarella, a former New York City policeman and victim of an FALN bombing; William P.

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[1] Letter from Jon P. Jennings, Acting Assistant Attorney General, to the Honorable Orrin G. Hatch, Chairman, Committee on the Judiciary (September 7, 1999).

[2] Letter from Jon P. Jennings, Acting Assistant Attorney General, to the Honorable Orrin G. Hatch, Chairman, Committee on the Judiciary (Sept. 14, 1999).

[3] Id.

Newhall, a victim of an FALN bombing; Donald R. Wofford, a former FBI special agent who investigated FALN crimes in New York, NY; Richard S. Hahn, a former FBI special agent who investigated FALN crimes in Chicago, IL; Gilbert G. Gallegos, national president of the Grand Lodge, Fraternal Order of Police in Washington, DC; Reverend Dr. C. Nozomi Ikuta, of the United Church of Christ in Cleveland, OH; and the Honorable Angel M. Cintron Garcia, the Majority Leader of the House of Representatives of Puerto Rico. These witnesses testified about some of the horrible crimes for which the FALN has proudly claimed responsibility and the diligence with which law enforcement agents investigated those difficult crimes and prevented others from occurring. The witnesses also testified about the shock, grief and horror they felt upon learning that the President of the United States had decided to release the FALN and Los Macheteros terrorists from prison.

Following that hearing, Chairman Hatch again asked the Department of Justice to provide documents and testimony concerning its role in the clemency decision. Again the Department of Justice refused. Eventually, the Department turned over several boxes of documents consisting largely of letters in support of clemency, prison records concerning the 16 clemency offerees, and miscellaneous records not directly related to the grant of clemency. The Department withheld all relevant correspondence between it and the White House, including the reports produced by the Pardon Attorney, on the grounds of executive privilege.

Chairman Hatch persuaded the Department to provide testimony to the Committee and scheduled a second hearing for October 20, 1999, to examine the role played by the Department and its Office of the Pardon Attorney in the clemency decision. The Department's witnesses, Deputy Attorney General Eric Holder and Pardon Attorney Roger Adams, repeatedly asserted executive privilege when asked about the substance of advice made available to the President. The Deputy Attorney General conceded that the Department could have done a better job in this matter, and in particular, that victims should not be shut out of the process.

Following that hearing, Chairman Hatch began drafting legislation aimed at reforming the way in which the Office of Pardon Attorney investigates potential grants of executive clemency. Draft legislation was reviewed by Senators from both parties and by the Department of Justice. Chairman Hatch's staff reviewed the Department's draft regulations and met with the Department to discuss them. The parties did not reach an agreement on the best way to structure the needed reforms.

On February 9, 2000, Chairman Hatch introduced S. 2042, the Pardon Attorney Reform and Integrity Act, on behalf of himself and Senators Nickles, Lott, Abraham, Thurmond, Kyl, Ashcroft, Sessions, Smith of New Hampshire, and Coverdell. Senators Murkowski and Helms were later added as additional cosponsors. S. 2042 was referred to the Judiciary Committee.

The bill has the support of individual victims, victims' organizations, law enforcement, and constitutional scholars. Letters in support of the bill were received from the Fraternal Order of Police, the Law Enforcement Alliance of America, Joseph and Thomas Connor, Diana Berger Ettenson, and the National Organization for

Victims Assistance.[4] Letters defending the bill's constitutionality were written by Prof. Akhil Reed Amar, of Yale Law School, and Prof. Paul G. Cassell, of the University of Utah College of Law.

On February 10, 2000, the Judiciary Committee met in executive session to consider the bill, and it was held over to the next meeting. On February 24, 2000, the Judiciary Committee met in executive session with a quorum present and considered and accepted by voice vote a technical and clarifying amendment offered by Chairman Hatch. The bill, as amended, was then ordered favorably reported to the full Senate by voice vote.

B. Need for the Legislation

This legislation is needed because the current Justice Department regulations governing the Office of the Pardon Attorney are inadequate, a fact demonstrated by the events leading to President Clinton's grant of clemency to the members of the FALN and Los Macheteros. Legislation is also necessitated by the inadequacy of the Justice Department's proposed new regulations, which fail to address the legitimate concerns of victims and law enforcement.

1. BACKGROUND: CURRENT REGULATIONS

The Office of the Pardon Attorney was created, and is funded, by Congress. In 1891, the Congress appropriated money for a position (then called the "attorney in charge of pardons") in the Department of Justice that would be charged with reviewing clemency petitions. To this day, the Office of the Pardon Attorney depends on funds appropriated annually by Congress. The Department, through the appropriations process, requests funding for that office each year. In the most recent appropriations legislation, the Congress appropriated $1.6 million for the Pardon Attorney for the fiscal year ending September 30, 2000. This congressional involvement—creation and funding of the office—justifies the exercise of oversight authority by the Judiciary Committee.

Although important, the Pardon Attorney's responsibilities are not complicated: it reviews petitions for clemency and, in appropriate cases, investigates the potential clemency recipients and writes a report and recommendation to the President. Current Department regulations require that the report contain a recommendation to the President on whether to grant or deny the proposed clemency.[5] The regulations also require individuals seeking clemency to submit a petition to the Pardon Attorney[6]; ordinarily, this event triggers the Pardon Attorney's involvement. After receiving such a petition, the Pardon Attorney makes an initial determination as to whether the request merits further investigation. Many do not. If it does, the Pardon Attorney investigates the requested clemency recipient, typically beginning that investigation by contacting the U.S. Attorney's office responsible for prosecuting the case.

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[4] Additional supporters include the FBI Agents' Association, the International Association of Bomb Technicians, Federal Criminal Investigators' Association, the National Association of Police Officers, and the International Brotherhood of Police Officers.

[5] U.S.A.M. § 1.6(b).

[6] U.S.A.M. § 1.1.

What is *not* required of the Pardon Attorney is equally important. The Pardon Attorney is not required to notify victims that a clemency investigation is underway or to interview those victims for their viewpoint. Nor is the Pardon Attorney required to ask law enforcement agencies whether the proposed recipient of clemency could have information related to open investigations or searches for fugitives. There is also no requirement for the Pardon Attorney to assess the risks posed by a particular grant of clemency (especially commutations that result in a release from custody) either on specific individuals (such as victims, witnesses and prosecutors), on particular criminal activity (such as enhancing a particular criminal organization), or on society at large (by weakening the country's real or perceived resolve to fight crime and incarcerate offenders). These areas seem to be basic topics of investigation that an officer of the Department of Justice should pursue.

At the conclusion of its investigation, the Pardon Attorney is required to prepare a report and recommendation for the President.[7] That report should summarize the Pardon Attorney's findings and analyze them in light of generally accepted grounds for granting clemency. In the case of commutations, the United States Attorneys' Manual describes those grounds as follows:

> Generally, commutation of sentence is an extraordinary remedy that is rarely granted. Appropriate grounds for considering commutation have traditionally included disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g., cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action. A combination of these and/or other equitable factors may also provide a basis for recommending commutation in the context of a particular case.[8]

The Pardon Attorney's involvement typically ends soon after the completion of the report, which is sent to the White House. When the petition for clemency is either granted or denied by the President, the Department must notify the petitioner.[9] In cases where the Pardon Attorney has recommended against granting clemency, it is presumed that the President concurs with that conclusion unless, within 30 days after the report is submitted, the President indicates his disagreement.[10] If the President does not act within 30 days in such a case, then the Department must notify the petitioner that the petition is denied, and close the case.[11] The President need not follow the Pardon Attorney's advice—nor is he required to read any report. The President has the final say over clemency matters.

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[7] U.S.A.M. § 1.6(b).
[8] U.S.A.M. § 1–2.113.
[9] U.S.A.M. §§ 1.7, 1.8(a).
[10] U.S.A.M. § 1.8(b).
[11] Id.

2. HOW CURRENT REGULATIONS OPERATED IN THE FALN CLEMENCY REVIEW

a. The absence of applications

The Pardon Attorney began investigating a potential grant of clemency for the FALN terrorists even though none of those terrorists had requested clemency. Indeed, none of the 16 terrorists *ever* filed a petition for clemency. The Department of Justice's regulations require that persons seeking executive clemency "shall execute a formal petition"[12] and state that investigations begin "[u]pon receipt of a petition executive clemency."[13] The absence of petitions from the FALN and Los Macheteros prisoners was not a mere oversight, but rather a result of their belief that the U.S. Government has no right to punish them for committing "political" acts. This is important because it reflects their lack of acceptance of responsibility and feelings of remorse. The filing of petitions is also important as a matter of administration because the requirement avoids the situation in the FALN case where the Pardon Attorney investigated potential offers of clemency to two people who refused to accept it when offered. The decision to investigate a grant of clemency when no petition has been received should always raise this question: Who wants the President to grant clemency, and why, in cases where the potential recipient has not asked for it?

b. The campaign for release

On March 5, 1993, Luis Nieves-Falcon, who is believed to be a member of the FALN, wrote to President Clinton, Attorney General Reno, and Pardon Attorney Margaret Love requesting "immediate and unconditional release from prison of Puerto Rican independence fighters in U.S. jails and prisons" and he enclosed over 4,000 petitions. Love replied by letter on March 18, 1993, informing Nieves-Falcon that clemency is considered only "upon formal application by the individual who has been convicted." Nieves-Falcon again wrote to Clinton, Reno, and Love on March 30, 1993, and again on June 1, 1993, and June 11, 1993. When he wrote again on July 5, 1993, he enclosed 3,000 more letters in support of release. On November 9, 1993, Nieves-Falcon and two others from "Offensiva '92" (one of whom was Jan Susler of the People's Law Office) wrote "[a]s the legal representatives of the Puerto Rican political prisoners in United States custody for their activities in support of the independence and self-determination of Puerto Rico" and asked that their letter be taken as a formal application by the prisoners. Love notified the White House of Offensiva '92's request for the "immediate and unconditional release" of the Puerto Rican terrorists on November 30, 1993.

Over the next few years, Offensiva '92 and other radical groups organized an enormous letter-writing campaign. Thousands of well-meaning people signed form letters, and prominent politicians and activists joined the crusade. Letter writers included former President Jimmy Carter, New York City Mayor David Dinkins, a rep-

[12] U.S.A.M. §§1.1.
[13] U.S.A.M. §1.6 (a).

resentative from the National Lawyers Guild, a senator from Tasmania, Australia, and representatives from the International Association Against Torture, the National Association of Black Lawyers, the United Methodist Church's General Commission on Religion and Race, and U.S. Representatives Jose Serrano (D–NY), Nydia M. Velasquez (D–NY), and Luis V. Gutierrez (D–IL).

As the letter-writing continued, the movement's leaders began seeking—and obtaining—face-to-face meetings with top Government officials. Such meetings occurred on at least nine occasions. Those officials were not just listening—they actually provided strategic advice to the terrorists' sympathizers about how to present the best case for clemency to the President.

c. Victims were shut out

While the clemency advocates were getting face-to-face counsel from high Government officials, no one bothered to notify any of the many victims of FALN and Los Macheteros crimes that clemency was being considered. The victims learned of the clemency offer just like everyone else: on television after the fact. Relatives of people killed by the bombs were revictimized by hearing on the news that the killers of their loved ones were being set free. So, too, were those injured and maimed by FALN bombs. In fact, many people who had been touched physically, emotionally or financially by America's biggest bombing conspiracy felt their wounds re-open on August 11, 1999.

The task of identifying and notifying relevant crime victims is not beyond the capacity of the Department of Justice. In fact, the Department was already well aware of one victim, Joe Connor, whose father was killed by the FALN in the Fraunces Tavern bombing. The Department wrote to Connor while clemency was being investigated and told Connor about the Department's "policy of vigorously investigating and prosecuting those acts of terrorism." The Department certainly could have given Connor the dignity of a letter informing him of the ongoing clemency review. Moreover, due to the Victims Rights and Restitution Act of 1990, it is now routine practice in U.S. Attorney's offices nationwide to notify crime victims of material events in the criminal legal process.

d. Possible information on open cases was not even considered

While victim notification is a relatively recent addition to the Justice Department's responsibilities, asking for information about unsolved cases is not. Yet no one in the Pardon Attorney's Office ever inquired whether the FALN and Los Macheteros prisoners might have information relevant to open investigations or the apprehension of fugitives. Such an inquiry should be self-evident with regard to the FALN and Los Macheteros prisoners because one of their codefendants, Victor Gerena, is on the FBI's "ten most wanted" list. It is also well known that many of the killings associated with the FALN bombings, including the infamous lunchtime bombing of New York's Fraunces Tavern restaurant, remain unsolved. Employees of the Department of Justice should have asked such questions. The failure to do so in this case could very likely mean that Gerena and the other perpetrators of the bombing campaign will never be brought to justice.

e. Effect of clemency on threat of criminal activity not considered

Another area of inquiry that went unexplored is whether law enforcement agents had opinions on whether granting clemency to the FALN and Los Macheteros terrorists would have an impact on terrorism. Such an inquiry would not have taken a lot of effort. The Attorney General herself identified the FALN and Los Macheteros as terrorist organizations posing an ongoing threat to our Nation and concluded that "[f]actors which increase the present threat from these groups [the FALN and Los Macheteros] include renewed activity by a small minority advocating Puerto Rican statehood, the 100-year anniversary of the U.S. presence in Puerto Rico, and the impending release from prison of members of these groups jailed for prior violence."[14] This report came from under the same roof as the Pardon Attorney's. Moreover, another Justice Department official, FBI Director Louis Freeh concluded that the release of the FALN terrorists would "psychologically and operationally enhance" the ongoing violent and criminal activities of Puerto Rican terrorist groups and "would likely return committed, experienced, sophisticated and hardened terrorists to the clandestine movement."[15] Such information has critical import to possible grants of clemency and must be included in any report and recommendation.

f. Information from intelligence agencies

The Pardon Attorney did not interview intelligence agencies concerning possible links between the FALN and Los Macheteros prisoners and state-sponsored crime and terrorism. If the Pardon Attorney had done so, perhaps it would have come to light before the President granted clemency that the FALN and Los Macheteros have close ties to the Cuban Government and quite possibly shared with Cuba the spoils of its crimes in America. According to Jorge Masetti, a former Cuban intelligence agent, Cuba's intelligence agency helped Los Macheteros to plan and execute the $7.1 million Wells Fargo robbery—the biggest cash heist in U.S. history—by providing funding and training, as well as by assisting in smuggling the money out of the country. Some sources estimate that $4 million from the robbery ended up in Cuba. The Pardon Attorney should be obligated by law to uncover such information when it exists and make it available to the President who is considering granting clemency.

g. The pardon attorney's reports did not comply with regulations

Although it submitted a report in December 1996 recommending against the granting of clemency for the FALN terrorists—which should have ended its involvement—the Pardon Attorney produced another report 2½ years later reportedly changing its recommendation. The second report did not recommend either for or against the granting of clemency, violating the Justice Department regulation requiring that in every clemency case the Department "shall report in writing [its] recommendation to the President, stating whether in [its] judgment the President should grant or deny the petition."

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[14] Five-Year Interagency Counterterrorism and Technology Crime Plan, Sept. 1999, at 11 (emphasis added).

[15] Draft letter from FBI Director Louis Freeh to Representative Henry J. Hyde.

3. PROPOSED JUSTICE DEPARTMENT REGULATIONS ARE ALSO INADEQUATE

Legislation is necessary to remedy the deficiencies in the operation of the Office of the Pardon Attorney that were exposed during the pendency of the FALN clemency review. A change of Department regulations will not be sufficient. Despite having half a year since the public outcry over the FALN clemency to reform itself, the Department has suggested only minimal changes in the way it does business. In its draft regulations, the Department agrees that it should ascertain the views of victims, but gives the Attorney General the ability to determine whether or not to do so in each case. The Department's proposal also fails to notify victims when it undertakes a clemency investigation or when it makes available its report to the President.

Equally important, the Department's suggested regulations ignore the Department's main job: to protect law-abiding people from criminal acts. The draft regulations do not require the Pardon Attorney to talk to law enforcement officials about whether a particular person could provide helpful information about criminal investigations or searches for fugitives. Nor would the Department require the Pardon Attorney to ask law enforcement whether a potential release from prison would pose a risk to specific people other than victims or to a broader societal interest such as enhancing a particular criminal organization or decreasing the deterrent value of prison sentences. The Department's proposed regulations also ignore the importance of whether a potential clemency recipient has accepted responsibility for, or feels remorse over, criminal acts.

Even if the Department's proposed regulations were substantially similar to this bill, moreover, those regulations could not overcome what is perhaps the most important weakness of all: regulations are not law. They do not have the force of statutes, and they can be changed very easily. The FALN case proves the need for a statute because the Attorney General ignored even the current, weak regulations in the FALN matter. As discussed above, it is clear that the Pardon Attorney did not follow the Justice Department regulations requiring petitions to be submitted before an investigation into a potential grant of clemency is begun and requiring the Pardon Attorney to make a recommendation either for or against clemency.

III. DISCUSSION

A. Overview of Legislation

S. 2042, the Pardon Attorney Reform and Integrity Act, would provide guidance to the Office of the Pardon Attorney to gather critical law enforcement and victim information in those particular cases in which the President chooses to have that Office conduct a clemency investigation. Such information would include facts and opinions from law enforcement agencies about the risks posed by any release from prison. The bill would also help ensure that the victims of crime will not be shut out of the clemency process. Specifically, the bill would do the following:

- Give victims a voice by notifying them of key events in the clemency process and by giving them an opportunity to submit their opinions;
- Enhance the input of law enforcement by requiring the Pardon Attorney to notify the law enforcement community of a clemency investigation and permitting law enforcement to express its views on:
- The impact of clemency on the individuals affected by the decision—for example, victims and witnesses;
- Whether clemency candidates have information which might help in open investigations and searches for fugitives; and
- Whether granting clemency will increase the threat of terrorism or other criminal activity by enhancing particular organizations or affecting the public perception of the Government's resolve to locate, prosecute and incarcerate criminals.

These provisions would apply only if the President (or his delegate, including the Attorney General) chose to ask the Office of the Pardon Attorney to conduct a clemency investigation in a particular case. This bill would affect only the Pardon Attorney, and would do so only when the President decided to give a case to the Pardon Attorney. Accordingly, this bill would preserve the full range of Presidential constitutional power to exercise the pardon power solely according to the President's best judgment. Moreover, this bill would also leave untouched the current system by which the Pardon Attorney exercises discretion to determine which petitions for clemency lack sufficient merit to justify the commencement of an investigation. The provisions of this bill are not meant to apply to nonmeritorious clemency petitions.

B. Questions About Constitutionality

The Department of Justice has opined that the Pardon Attorney Reform and Integrity Act is unconstitutional.[16] The rationales for this opinion include the general nature of executive power, the pardon power, and the President's need to obtain confidential advice.

1. BILL'S EFFECT ON PARDON POWER GENERALLY

The Department's assertion that the Pardon Attorney Reform and Integrity Act is unconstitutional is based for the most part on the Department's observation that the pardon power "is committed exclusively to the President."[17] According to the Department, "because the President's pardon authority is plenary, even statutes that create what may seem to be only minor incursions on the President's discretion are unconstitutional."[18] Professor Amar has concluded that much of the Department's letter is "irrelevant and overwrought."[19] If the Department's position is correct, the Office

[16] Letter from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, to the Honorable Orrin G. Hatch, Chairman, Senate Committee on the Judiciary (Feb. 17, 2000) ("DOJ letter").
[17] DOJ letter at 2.
[18] *Id.* at 4.
[19] Letter from Akhil Reed Amar, Southmayd Professor, Yale Law School, to the Honorable Orrin G. Hatch, Chairman, Senate Committee on the Judiciary (Feb. 23, 2000) ("Amar letter") at 2.

of Pardon Attorney "as it currently exists" would be unconstitutional.[20]

S. 2042 does not create even a minor "incursion on the President's discretion." It does not modify, restrict or condition the President's exercise of the pardon power in any way. Nor does it attempt to change the effect of any grant of clemency. Rather, it affects how the DOJ's Office of the Pardon Attorney—a congressionally created and funded office—performs its investigation, and its requirements apply only when the President asks the Pardon Attorney to investigate a particular clemency request. The bill does not require the President to ask the Pardon Attorney for advice, nor does it preclude the President from seeking any other information or advice from any source whatsoever, including the Attorney General herself. The bill has no effect on the confidentiality of any information; it does change the law of executive privilege and does not purport to give Congress the right to read any information or advice prepared by the Pardon Attorney or provided to the President.

Because the Department's arguments do not refer to any of the actual terms of S. 2042, it is important to keep in mind the context of the Department's opinion. The Department is known for taking extreme positions in favor of executive rights and prerogatives. This is the same Department that responded to this Committee's requests for documents and testimony by claiming that Congress lacks any oversight jurisdiction whatsoever concerning the operations of the Office of the Pardon Attorney. The Department's position is wrong. Congress clearly does have such oversight jurisdiction, as pointed out by the noted constitutional scholar and Yale Law School Professor Akhil Amar:

> [T]he argument that Congress has no proper role in investigating suspicious pardons or grants of clemency is constitutionally cockeyed. True, the Constitution vests the president and the president alone with the pardon power—but the same is true of the powers to veto laws, to appoint Cabinet officers, to command the Armed Forces, to negotiate treaties, and to do a great many other things. These other powers are not immune from congressional oversight; why should the pardon power be any different? In theory, any one of these powers might be used corruptly—for example, in exchange for a bribe.
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> And, even if a pardon is utterly final, Congress surely has a legitimate role in assessing whether the Justice Department's general system for processing pardon requests needs revamping. (Congress, after all, foots the bill for this and all other executive departments.)[21]

In sum, the Department's hard-line position favoring executive power is irrelevant to S. 2042, which simply is not an "incursion" into the President's pardon power, and is incorrect with respect to jurisdiction over the Pardon Attorney, which is a congressionally created and funded office.

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[20] Amar letter at 4.
[21] Amar, Akhil Reed, "Scandalized," The New Republic, Oct. 11, 1999.

2. CASE LAW CONCERNING THE PARDON POWER

Rather than analyzing cases applicable to Congress' power to regulate the agencies it creates and funds, the Department instead relies upon the few Supreme Court cases concerning congressional attempts to change *the President's authority* pursuant to the Pardon Power. Those cases are not on point with respect to S. 2042 because it does not affect any pardon power decisions. The bill is consistent with the Supreme Court's opinions relating to the pardon power. The bill neither "change[s] the effect of * * * a pardon" as described in *United States* v. *Klein,* 80 U.S. (13 Wall.) 128 (1872), nor will it "modif[y], abridge[], or diminish[]" the President's authority to grant clemency as discussed in *Schick* v. *Reed,* 419 U.S. 256, 266 (1974). In fact, the bill will have no effect whatsoever on the President's ability to exercise the pardon power as he or she sees fit.

Moreover, the Department ignores the fact that, despite *Klein,* the Supreme Court has also *upheld* at least two cases limiting the effect of pardons. In *Carlesi* v. *New York,* 233 U.S. 51 (1914), the Court found that it was within the power of the legislative branch to determine what effect a pardon would have on future criminal sentences. And in *Knote* v. *United States,* 95 U.S. 149 (1877), the Court held that the President cannot use the pardon power to order the treasury to refund money taken from a prisoner—even though that prisoner had been pardoned for the crime that gave rise to the Government's seizure of that money. Even though these cases are no more relevant to the Pardon Attorney bill than those cited by the Department (because the bill does not limit the effect of pardons), the fact that the Supreme Court has approved certain limitations on the President's pardon authority demonstrates that this area of law is not absolutely immune from Congress as the Department suggests.

The fact that S. 2042 does not limit the President's deliberation over pardons is the reason that the Department's heavy reliance on *Public Citizens* v. *Dep't of Justice,* 491 U.S. 440 (1989) is misplaced. There the Court considered the application of a statute, the Federal Advisory Committee Act (FACA), to the Department which would have subjected the process involving judicial nominations to "bureaucratic intrusion and public oversight." Id. at 454 n.9. At issue was the allegation that the Department of Justice could not consult with the American Bar Association concerning judicial nominees unless the ABA made its meetings on the subject presumptively open to the public. Id. at 446–47. The Court reached no firm conclusion about the constitutionality of such a requirement in that case, holding only that the constitutional issues were "serious[]." Id. at 467. FACA, as the concurring Justices construed it, literally applied *to the President himself,* and to any advice—even informal advice from friends-that he might seek. FACA's language literally applied to all groups of persons "utilized by the President." As the Court majority pointed out, a literal reading of the act would seem to deprive the President of the ability to confer in confidence with the NAACP or the American Legion or his own political party.

Obviously, there is a vast difference between FACA, making public what had previously been confidential executive branch delib-

erations, and S. 2042, which has no impact whatsoever on the laws and privileges that shield the Pardon Attorney's work from public view. Justice Kennedy's concurrence in *Public Citizen* expressed fear that the statute in that case would "potentially inhibit the President's freedom to investigate, to be informed, to evaluate, and to consult during the nomination process * * *." Id. at 488 (Kennedy, J., concurring). Nothing in S. 2042 would remotely have these kinds of effects. Indeed, the Pardon Attorney bill explicitly states that the President will retain the ability to seek information and advice from whatever sources he or she chooses.

A Supreme Court decision more directly on point is *Nixon* v. *Administrator of General Services,* 433 U.S. 425 (1977), which concerned a statute that instructs the executive branch on how to maintain Presidential records. The Court rejected as "archaic" the view that separation of powers requires "three airtight departments of government." Id. at 443 (internal quotation omitted). Instead, the Court instructed that "the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." Id. at 443. "Only where the potential for disruption is present," the Court held, "must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Id. In the context of the Pardon Attorney bill, the modest step of requiring the Pardon Attorney to consult with law enforcement and victims would not "disrupt" the proper exercise of the President's pardon power in any way. Indeed, the Department's analysis of the bill does not offer any example of how the bill would disrupt executive functions. To the contrary, the Department's current analysis [22] of the issues relies on the sweeping claim that "any" intrusion by the legislative branch is unconstitutional, without regard to the effects.[23] Whatever the merits of such a broad view of executive power, it is plainly not the law.

3. CONGRESS' ALLEGED ATTEMPT TO INFLUENCE PARDONS

The Department's assertion that the Pardon Attorney bill is unconstitutional because it attempts to allow Congress to express its opinion on clemency matters is utterly without basis. According to the Department, the Pardon Attorney bill is unconstitutional because it "seeks to influence the President's consideration of clemency" and its "manifest purpose" is "to ensure that the President is aware of views that Congress believes the President should consider * * *" [24] This argument is a misreading of both the Constitution and the Pardon Attorney bill.

The Supreme Court tacitly acknowledged in *United States* v. *Klein,* 13 Wall. 128, 139 (1871) that a congressional "suggestion of pardon" does not raise constitutional issues. (The Department ac-

[22] The Department concedes that its current analysis differs from the position its own Office of Legislative Affairs took in 1975. See DOJ letter at p. 5 n.3 (discussing Memorandum for Hon. James. T. Lynn, Director of OMB, from Asst. A.G. Michael M. Uhlman, Office of Legislative Affairs, in which the Office reasons that Congress "might also be able to authorize an executive branch agency to make pardon suggestions").

[23] DOJ letter at 3.

[24] DOJ letter at 3.

knowledges that this is the Department's reading of *Klein*.)[25] Indeed, if it were unconstitutional for Congress to express an opinion on clemency matters, a "sense of the Senate" resolution on pardon matters—including the one condemning President Clinton's decision to free the FALN terrorists—would also be unconstitutional. Clearly, this is not the law.

Moreover, the Pardon Attorney bill does not have either the intent or the effect of making the President aware of certain views. The bill requires the Pardon Attorney to interview certain *sources* of potentially relevant information, but does not require the Pardon Attorney to seek out or report any particular views. The Department seems to assume that the bill requires the Pardon Attorney to express only the view against clemency, an assumption for which there is no basis.

4. NOTICE TO VICTIMS AND CONFIDENTIALITY OF ADVICE

The Department's argument that the bill's victim-notification requirements "impermissibly interfere with the President's right to maintain confidentiality of the pardon decision-making process"[26] is perhaps the Department's weakest point. The Pardon Attorney bill does not require public disclosure of any deliberations or advice given to the President, including the Pardon Attorney's report and recommendation. On the contrary, the bill simply provides victims notice that certain material events in the clemency process have occurred. Analogous notifications to victims are given in most of the criminal proceedings throughout the country due to laws such as the Federal Victims' Rights and Restitution Act of 1990. In fact, the U.S. Attorney's Manual already requires the Pardon Attorney to provide notice to the petitioner when the President grants or denies a clemency request, and when a clemency petition is deemed denied, which occurs in the absence of Presidential action 30 days after the Pardon Attorney submits a report recommending denial of clemency.[27] Revealing such information—even to victims—does not compromise the confidentiality of the President's deliberations and advice any more than notice of a sentencing hearing compromises a judge's ability to talk candidly with probation officers and law clerks.

Moreover, allowing victims to voice their opinions is important both to the interests of justice and to the victims themselves. As Prof. Paul G. Cassell explained in his testimony on behalf of the National Victims' Constitutional Amendment Network before the Subcommittee on the Constitution, Federalism, and Property Rights of the Senate Judiciary Committee:

> Providing victims an opportunity to be heard before clemency decisions are made, as many of these states have done, makes considerable sense both as a matter of public policy and fundamental justice. Just as sentencing judges and prosecutors possess important information about a

[25] DOJ letter at 5 n.3 (discussing Memorandum for Hon. James. T. Lynn, Director of OMB, from Asst. A.G. Michael M. Uhlman, Office of Legislative Affairs, in which the Office reasons that Congress "might also be able to authorize an executive branch agency to make pardon suggestions").

[26] DOJ letter at 5.

[27] U.S.A.M. §§1.7, 1.8.

case, so too do victims have vital information about the effects of the crime that ought to be considered before any clemency decision is finalized. As the President's Task Force on Victims of Crime has explained, No one know better than the victim how dangerous and ruthless the [clemency] candidate was before * * *." Victim participation at the clemency stage is also vital to insure that victim participation at earlier points in the process is not rendered irrelevant. It makes little sense to give victims a right to be heard at proceedings concerning plea bargains, sentencing and parole (as provided in Senate Joint Resolution 3 and in the laws of Missouri and many states) if, after all that, a pardon or commutation can be granted without their involvement or, indeed, even their knowledge. It is, moreover, important that victims be notified that a possible commutation of sentence when that commutation might entail release of an offender. Victims have legitimate interests in release decisions, the President's Task Force concluded, "not only because of the desire for the service of a just sentence but also because of their legitimate fear of revictimization once the defendant is released."[28]

5. OPINIONS CLAUSE

The opinions clause says that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." Art. II, sec. 2. The "principal officer" of the Department of Justice is the Attorney General, not lower level officials such as the Pardon Attorney. As one noted Constitutional scholar put it, "the 'principal Officer' language * * * exemplifies the Founders' expectation that the President will ordinarily pick, act through, and monitor only a handful of personal lieutenants—his inner circle."[29] No one would suggest that the Pardon Attorney is the principal officer of the Department or one of the President's "handful of personal lieutenants."

The Pardon Attorney bill was not meant to apply to situations where the President solicits advice directly from *the* Attorney General. In drafting the bill, we used the term "Attorney General" as a global term meaning the Pardon Attorney or anyone at the Department of Justice because this use is a widely followed convention in legislative drafting. The technical and clarifying amendment—changing the term "Attorney General" to "Pardon Attorney" wherever it appears (except the last paragraph, which requires the Attorney General to promulgate regulations)—alleviates any concerns relating to the opinion clause because it clarifies that the provisions of the Pardon Attorney bill do not come into play when the President solicits opinions and advice directly from the Attorney General. The amendment also adds a phrase explicitly clarifying that the bill shall not be construed to "limit the President's ability

[28] See Statement of Paul G. Cassell on behalf of the National Victims' Constitutional Amendment Network before the Subcommittee on the Constitution, Federalism, and Property Rights of the Sen. Judiciary Committee (May 1, 1999).

[29] Amar, Akhil Reed, "Some Opinions on the Opinion Clause," 82 Va. L. Rev. 647, 667 (1996).

to seek advice directly from the Attorney General or any informal advisor regarding any pardon matter."

6. ARTICLE II EXECUTIVE POWER AND CONGRESSIONAL OVERSIGHT

The Department alleges that the Pardon Attorney bill "may" impinge upon the President's power to "take care that the laws be faithfully executed" and his authority to exert "general administrative control of those officers executing the laws."[30] But it is Congress, not the President, that has the authority—indeed, the responsibility—to examine and legislate the manner in which the Justice Department performs its work. Congress created an "attorney in charge of pardons" within the Department of Justice in 1891, and appropriated money for an "attorney in charge of pardons" in that same year. To this day, the Office of the Pardon Attorney depends on funds appropriated annually by the Congress. In the most recent appropriations legislation, the Congress appropriated $1.6 million for the Pardon Attorney for the fiscal year ending September 30, 2000. This congressional involvement—creation and funding of the office-provides a compelling basis for the Judiciary Committee's investigation and the present legislation. Professor Amar explained:

> The Constitution does no require that such a low-level office even exist. It is up to the Congress to decide whether to create such an office; and how to fund it. The most relevant constitutional power here is Congress's power of the purse, not the President's power of the pardon.[31]

The power of the Congress "to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." *Watkins* v. *United States,* 354 U.S. 178, 187 (1957). The scope of this power is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution. *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 504 n. 15 (1975) (quoting *Barenblatt* v. *United States,* 360 U.S. 109, 111 (1959)). The Supreme Court has also recognized "the danger to effective and honest conduct of the Government if the legislative power to probe corruption in the Executive Branch were unduly hampered." *Watkins,* 354 U.S. at 194–95. Once having established its jurisdiction and authority, and the pertinence of the matter under inquiry to its area of authority, a committee's investigative purview is substantial and wide-ranging. *Wilkinson* v. *United States,* 365 U.S. 408–09 (1961).

Congress also has broad powers under the Constitution to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the Unites States, or in any Department of Officer thereof." The areas in which Congress may *potentially* legislate or appropriate are, by necessary implication, even broader. Thus, in determining whether Congress has jurisdiction to

[30] 30 DOJ letter at 5.
[31] Amar letter at 3.

oversee and enact legislation, deference should be accorded to Congress' decision.

Because of this legal history, the administration of the Department of Justice and its various components has long been considered an appropriate subject of Congressional oversight. Early this century, in *McGrain* v. Daugherty, 273 U.S. 135, 151 (1927), the Supreme Court endorsed Congress' authority to study "charges of misfeasance and nonfeasance in the Department of Justice." In that case, which involved a challenge to Congress' inquiry into the DOJ's role during the Teapot Dome scandal, the Court concluded that Congress had authority to investigate "whether [DOJ's] functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution." *Id.* at 177. These precedents make clear that the Judiciary Committee has jurisdiction to investigate the Pardon Attorney's role in the pardon process, and to enact legislation concerning the way in which that office operates.

IV. VOTE OF THE COMMITTEE

On January 24, 2000, with a quorum present, the Judiciary Committee met in executive session and considered and accepted by voice vote a technical and clarifying amendment offered by Chairman Hatch. The bill, as amended, was then ordered favorably reported to the full Senate by voice vote.

V. SECTION-BY-SECTION ANALYSIS

Section 1.—Short title

The bill is titled the "Pardon Attorney Reform and Integrity Act."

Section 2.—Reprieves and pardons

Definitions. Subsection (a) defines "executive clemency" as any exercise of the President's power under article II, section 2 to grant reprieves and pardons, including pardons, commutations, reprieves and remissions of fines. It defines "victim" to match the definition employed in the Victims Rights and Restitution Act of 1990 (42 U.S.C. 10607(e)).

Reporting Requirement. Subsection (b) requires the Pardon Attorney to prepare a written report and make it available to the President whenever the President asks for an investigation into a particular potential grant of executive clemency. Each such report must contain a description of the efforts made by the Pardon Attorney to comply with the bill's requirements, and must attach copies of any written statements submitted by victims.

Determinations Required. Subsection (c) requires the Pardon Attorney to: (1) determine the opinions of relevant victims concerning potential grants of executive clemency, and to inform those victims that they may submit written statements for inclusion with the Pardon Attorney's report and recommendation; (2) determine the opinions of relevant law enforcement officials about whether specific potential grants of executive clemency are appropriate, whether such grants would cause danger to society, and whether the potential recipients of such grants have accepted responsibility for, or

expressed remorse over, their criminal conduct; (3) determine the opinions of relevant law enforcement officials about whether the potential recipients of executive clemency may have information relevant to ongoing investigations, prosecutions, or efforts to apprehend fugitives; and (4) determine the opinions of relevant law enforcement and intelligence officials regarding whether specific grants of executive clemency would affect the threat of terrorism or other criminal activity.

Notification to Victims. Subsection (d) requires the Pardon Attorney to notify relevant victims of the following material events in the clemency process: (A) when the Pardon Attorney begins a review or investigation of potential grant of executive clemency; (B) when the Pardon Attorney submits its report and recommendation to the President; (C) when the President decides to grant or deny clemency. In addition, when the President's decision to grant executive clemency will result in the release of a prisoner, the Pardon Attorney must notify relevant victims prior to any such release from prison if practicable.

No Effect on Other Actions. Subsection (e) clarifies that this bill does not: (1) limit the President's ability to seek advice directly from the Attorney General or any informal advisor regarding any pardon matter; (2) prevent any Justice Department officials from contacting anyone in connection with the investigation or review of any potential grant of executive clemency; (3) prohibit the inclusion of any information or advice in any report to the President; or (4) affect the manner in which the Pardon Attorney determines which petitions or requests for executive clemency lack sufficient merit to warrant any investigation.

Applicability. Subsection (f) clarifies that this bill does not apply to any petition or request for executive clemency which the Pardon Attorney determines lacks sufficient merit to warrant any investigation.

Regulations. Subsection (g) requires the Attorney General, within 90 days after enactment, to promulgate regulations for compliance with this act.

VI. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 6, 2000.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2042, the Pardon Attorney Reform and Integrity Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Keith, who can be reached at 226–2860.

Sincerely,

(for Dan L. Crippen, *Director*).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 2042—Pardon Attorney Reform and Integrity Act

CBO estimates that implementing S. 2042 could increase discretionary spending by up to $2 million a year, assuming the appropriation of the necessary amounts. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. S. 2042 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

S. 2042 would set requirements for reports written by the Office of the Pardon Attorney, within the Department of Justice (DOJ), regarding petitions for clemency. The legislation would require each report to include opinions of federal, state, and local law enforcement officials, judges, prosecutors, probation officers, prison officials, and victims. In addition, the bill would require the office to notify the victims of each offense committed by an individual who is subject to a grant of clemency.

The Office of the Pardon Attorney receives and reviews approximately 1,000 petitions for clemency each year with 15 full-time staff members and a current annual budget of $1.6 million. Many of the petitions require little investigation beyond gathering a presentence report and any published court options. If a summary denial is not determined after the initial review, further investigation may include contacting victims and officials involved in the case. Currently, the office investigates all petitions for clemency; therefore, we assume all petitions would fall under the provisions of S. 2042.

Based on information from DOJ, CBO expects that S. 2042 could double the workload of the Office of the Pardon Attorney. The increase in workload would stem from the additional time and effort necessary to meet the bill's requirements to contact and determine the opinions of all individuals involved in each case. CBO estimates that implementing S. 2042 would increase discretionary spending by up to $2 million a year, assuming the appropriation of the necessary amounts. The cost to implement this legislation could vary, however, depending on DOJ's interpretation of the requirements that would be established by the bill.

The CBO staff contact for this estimate is Lanette J. Keith, who can be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director of Budget Analysis.

VII. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 2042 will not have direct regulatory impact.

VIII. MINORITY VIEWS OF SENATORS LEAHY, KOHL, AND FEINGOLD

I. INTRODUCTION

President Clinton's August 11, 1999 offer of clemency to 16 members of the FALN, a Puerto Rican separatist group, was an exercise of the Presidential prerogative to grant pardons. We disagree with the President's decision and yet recognize that the U.S. Constitution has expressly granted the President the exclusive authority to take such action.

We believe strongly in the right of victims to be included in all phases of the criminal process, including reviews conducted in connection with petitions for executive clemency. Moreover, we support efforts by the Department of Justice to implement regulations and policies to ensure that victims are included in the clemency process in the future.

Consequently, we share the goals of the sponsors of S. 2042 to protect victims in the clemency process. Given this bipartisan support for the goals of the legislation, the partisan wrapping in which this bill has been cloaked is both unnecessary and unfortunate. Discussion about the bill should focus not on the merits of the President's grant of clemency to 16 members of the FALN, but rather on the propriety and constitutionality of the statute sought to be enacted.

At the time of the Judiciary Committee's reporting of this measure without objection, it was noted that the Department of Justice was consulting with the Chairman, Ranking Democrat and other interested members of the Committee on improvements to their internal guidelines, improvements that could make this bill unnecessary. Rather than pursue those discussions, the majority now seems obsessed with scoring a partisan legislative victory.

Unfortunately, this bill remains a work in progress. Serious concerns about the constitutionality and practical effect of S. 2042 have been raised that need to be weighed carefully. Indeed, according to the Congressional Budget Office Cost Estimate of March 6, 2000, the bill could double the workload of the Office of the Pardon Attorney ("OPA") and more than double the discretionary spending needed for that Office.

Moreover, as discussed in more detail below, the new statutory obligations proposed by S. 2042 could delay the ability of the President to act independently and quickly in those special cases which such prompt attention is warranted.

II. FACTUAL ERRORS IN THE MAJORITY REPORT

Without dissecting or commenting on the accuracy of every factual assertion made in the Committee Report, particularly those

not directly related to the legislation, several errors in the majority report are deserving of correction at the outset.

First, the Report maligns the Justice Department for withholding information sought by the Committee on the grounds of executive privilege. Rpt. at 4. It is worth noting that the privilege was asserted by the President, not the Justice Department. Tr. at 12.

Second, the Report erroneously suggests that after receiving a petition for clemency, the Office of the Pardon Attorney makes an initial determination whether there will be further investigation and that for many petitions there is not. Rpt. at 6. The Pardon Attorney detailed the procedures of his Office at a September 13, 1999, briefing and during his October 20, 1999, testimony before the Committee. He advised that petitions are initially assigned to a line attorney in the Office. That attorney conducts some investigation, such as obtaining the Judgment of Conviction, the Presentence Report and a prison report. Tr. at 18. If the information from those sources is deemed insufficient, or if the petition is deemed to have some merit, further investigation is done—such as the contacting of the appropriate United States Attorney's Office. In short, the Pardon Attorney does *some* investigation in nearly every case and significant work has frequently already been done before a United States Attorney's Office is contacted. Given this fact, S. 2042, as currently drafted, may well apply to far greater numbers of cases than was apparently intended.

Third, the Report states that none of those offered clemency "*ever* filed a petition for clemency." Rp. at 8 (emphasis in original). As the Deputy Attorney General ("DAG") explained during his October 20, 1999, testimony, the clemency petitions for the FALN members "were filed on their behalf by their attorney." Tr. at 38.

Fourth, the majority asserts that the Department's proposed regulations "ignore the importance of whether a potential clemency recipient has accepted responsibility for, or feels remorse over, criminal acts." Rpt. at 12. As set forth in the guidelines already on the books, this is already a factor considered in pardon reviews. See U.S.A.M. §§ 1–2.111; 1–2.112(c).

Fifth, the majority claims that the bill's requirements would "affect only the Pardon Attorney, and would do so only when the President decided to give a case to the Pardon Attorney." Rpt. at 14. As a practical matter, nearly every petition for executive clemency is reviewed and investigated by the Pardon Attorney. Last year, the Pardon Attorney received 1,009 petitions for clemency, 748 of which were for commutations and 261 of which were for pardons.

The volume of petitions has always been high. For example, during the seven years President Clinton has been in office, 5,324 petitions were filed. President Clinton granted 146 pardons and 15 commutations. During President Bush's four years in office, the Pardon Attorney received 1,466 petitions. President Bush granted 74 pardons and 3 commutations. The Pardon Attorney received 3,404 petitions during President Reagan's eight years in office and he granted 393 pardons and 16 commutations. During President Carter's four years in office, the Pardon Attorney received 2,627 petitions. President Carter granted 539 pardons and 29 commutations. During President Ford's two-and-one-half year term,

the Pardon Attorney, received 1,527 petitions. President Ford granted 382 pardons and 22 commutations. Finally, 2,592 petitions were received during President Nixon's abbreviated two terms and he granted 863 pardons and 60 commutations.

The Pardon Attorney advised that he was only aware of two instances where clemency was granted *outside* of the Pardon Attorney process: President Ford's pardon of Richard Nixon and President Bush's pardon of Iran-Contra figures.

In short, this bill will affect nearly every petition for executive clemency because no president will have the time to review, investigate and assess the merits of hundreds of petitions a year without the help of the Pardon Attorney.

Finally, in an attempt to defend against an assertion by the Justice Department that the bill attempts to influence the President's consideration of petitions for clemency, the majority claims that the bill "does not have either the intent or the effect of making the President aware of certain views" and "does not require the Pardon Attorney to seek out or report any particular views." Rpt. at 19. To the contrary, the bill requires the Pardon Attorney to seek out the views and opinions of "law enforcement officials, investigators, prosecutors, probation officials, judges, and prison officials involved in apprehending, prosecuting, sentencing, incarcerating, or supervising the conditional release from imprisonment of the [petitioner]" on a whole host of matters. Sec. 2(c)(2)–(4). It also requires the Pardon Attorney to determine the opinions of victims. Sec. 2(c)(1). Moreover, the bill requires the Pardon Attorney to include as part of any report to the President any written statement submitted by a victim. Sec. 2(b)(2). To claim that the bill does not have the effect of making the President aware of "certain" views is disingenuous. Obviously the bill will have the effect of making the President aware of the views of victims and may make him aware as well of the views of all the people or institutions listed in the bill.

III. SUPPORT FOR INCLUSION OF VICTIMS IN THE CLEMENCY PROCESS

We have expressed concern from the outset that the views of victims should be considered in the clemency review process. By letter, dated September 21, 1999, to Attorney General Janet Reno, Senator Leahy asked to be advised on this issue and inquired whether there were procedures and policies in place to ensure that rights of crime victims are respected in the clemency process.

The Department of Justice responded, by letter, dated September 29, 1999, from Acting Assistant Attorney General Jon P. Jennings, and advised Senator Leahy that "[t]he impact of a crime on a victim(s) is important not only throughout trial and sentencing, but also in considering a petition for executive clemency." The letter confirmed that "[i]n connection with the evaluation of clemency petitions that appear to have some merit or that raise complex factual or legal issues, the Pardon Attorney routinely requests information, comments, and recommendations from United States Attorneys, including, where appropriate, information on the victim impact of a petitioner's crime." The letter also pointed out that the United States Attorneys Manual provides that United States Attorneys "can contribute significantly to the clemency process" by relay-

ing, among other things, "information bout the victim impact of the petitioner's crime." See U.S.A.M. § 1–2.111.

At the hearing of the Senate Committee on the Judiciary on this issue on October 20, 1999, Senator Leahy again reiterated that victims should be consulted about clemency petitions. He also observed that even if the Department's regulations were perfected to require such consultation, the President would always be free to grant clemency outside of the regular process—as President Ford did in pardoning Richard Nixon and as President Bush did in pardoning those convicted of Iran-Contra offenses. Tr. at 27–28.

IV. THE OFFICE OF THE PARDON ATTORNEY

As noted above, at the request of the Committee, the Pardon Attorney, Roger Adams, conducted a briefing on September 13, 1999, to explain the policies and procedures of the office of the Pardon Attorney. He also testified at the October 20, 1999, hearing. The Pardon Attorney explained that the clemency review process begins when a petition arrives at OPA. Petitions for executive clemency are usually signed by the defendant, but may also be signed by an attorney. Petitions are not accepted if they are signed by third parties. Once a petition is accepted, it is assigned to one of the attorneys within OPA for investigation.

In the first stage of investigation, the line attorney will obtain and review the Judgment of Conviction, the Presentence Report prepared in conjunction with the petitioner's sentencing, and a prison report. Legal databases are also reviewed for any reported opinions relating to the petitioner's conviction. According to the Pardon Attorney, "[i]n the large majority of cases" the information available in these documents is usually enough and a short report is prepared, relayed to the Office of the Deputy Attorney General, reviewed by that Office and then, if approved, signed by the Deputy Attorney General and sent to the White House Counsel's Office for review by the President Tr. at 19.

In "a minority of cases," the Pardon Attorney will conduct more extensive investigation. For instance, if the reviewing attorney has questions, the case is a difficult one, the case is likely to attract attention, or the information reviewed suggests that a petition may have merit, the attorney will seek additional information from the relevant United States Attorney's Office ("USAO") Tr. at 19–20. If a United States Attorney's Office is contacted, that Office is asked for a recommendation and a recommendation is sought from the sentencing judge as well. Tr. at 20. The USAO is provided with a copy of the United States Attorneys Manual section that details the role of the United States Attorney in clemency matters. Tr. at 19–20. As this further investigation progresses, OPA retains any correspondence sent by the petitioner or third parties relating to the application. If a representative of the prisoner, such as his attorney or family member, is willing to travel to Washington, a meeting with OPA will be granted. Tr. at 20. Following this more extensive investigation, a report and recommendation is drafted. The report is then sent to the DAG's Office and, when approved, forwarded to the President by way of the White House Counsel's Office.

The report generated by the Pardon Attorney's Office contains a recommendation with regard to the petition for clemency. This rec-

ommendation is frequently, but not always, a "yes" or "no" on the question of granting clemency. In formulating his recommendation, the Pardon Attorney typically considers a variety of factors, including any disparity in sentencing and any opinions of judges and United States Attorneys.

The process of reviewing petitions for executive clemency is extremely confidential. The Office of the Pardon Attorney and the Department of Justice do not make public their reports to the President, the nature of their recommendations or documents submitted in connection with the petition. The information and documents are not subject to disclosure pursuant to FOIA requests and are not even disclosed to the petitioner. Attorney General regulations do permit disclosure "when in the judgment of the Attorney General their disclosure is required by law or the ends of justice." 28 C.F.R. § 1.5.

The Deputy Attorney General testified before the Committee that in his view the Department does "a pretty good job in consulting with victims" but that it "can do a better job." Tr. at 47. He agreed that the Department "ought to think about ways in which we can put mechanisms in place so that the Justice Department * * * makes contact with victims and makes that perhaps a part of our recommendation." Tr. at 47. The Deputy Attorney General further explained that any such mechanisms should be imposed upon the Justice Department as opposed to the Office of the Pardon Attorney because the Pardon Attorney has "a rather small staff." Tr. at 47.

V. CURRENT REGULATIONS

Currently existing regulations and guidelines bear on the executive clemency review process. Regulations pertaining to the Department of Justice are set out in 28 C.F.R. §§ 1.1–1.10. These govern, inter alia, procedures to be followed by persons filing petitions and by the Attorney General in the review of petitions. Regulation § 1.6(a) requires the Attorney General to "cause such investigation to be made of the matter as he/she may deem necessary and appropriate, using the services of or obtaining reports from, appropriate officials and agencies of the Government * * *". Section 1.6(b) requires the Attorney General following the investigation to "report in writing his or her recommendation to the President, stating whether in his or her judgment the President should grant or deny the petition." The regulations further specify circumstances under which a petitioner should be advised of action taken on his petition by the President.

Section 1.10 explicitly limits the regulations as "advisory only and for the internal guidance of Department of Justice personnel" and clearly states that they do not "restrict the authority granted to the President under Article II, Section 2 of the Constitution."

The "exercise of the powers and performance of the functions vested in the Attorney General" by the above-described regulations has been generally delegated to the Pardon Attorney. See 28 C.F.R. §§ 0.35–.36.

The United States Attorneys Manual includes guidelines about when and how United States Attorneys Offices can contribute to the clemency review process. For instance, U.S.A.M. § 1–2.111 states:

> The United States Attorney can contribute significantly to the clemency process by providing factual information and perspectives about the offense of conviction that may not be reflected in the presentence or background reports or other sources, e.g., the extent of the petitioner's wrongdoing and the attendant circumstances, the amount of money involved or losses sustained, the petitioner's involvement in other criminal activity, the petitioner's reputation in the community and, *when appropriate, the victim impact of the petitioner's crime.* On occasion, the Pardon Attorney may request information from prosecution records that may not be readily available from other sources.

(Emphasis added.)

The Manual's guidelines indicate the importance given law enforcement views on clemency petitions, stating that "the United States Attorney's perspective lends valuable insights to the clemency process" and that "[t]he views of the United States Attorney are given considerable weight in determining what recommendations the Department should make to the President." U.S.A.M. § 1–2.111. In addition, the guidelines indicate that in pardon cases involving prominent individuals or notorious crimes "the likely effect of a pardon on law enforcement interests or upon the general public should be taken into account." U.S.A.M. § 1–2.112(B). In addition, the guidelines state that "victim impact may also be a relevant consideration," id., and whether a victim "has made restitution to its victims" is an "important consideration." U.S.A.M. § 1–2.112(C).

The Department of Justice is in the process of drafting amended regulations, for approval by the President, that would specifically require input from victims in the clemency review process. These efforts should be encouraged.

VI. REQUIREMENTS OF S. 2042

The bill would impose statutory requirements on the Pardon Attorney with respect to investigations, notifications and reports to the President. With respect to investigations, the bill would require the Pardon Attorney to determine in each case: (1) the views of victims of the offenses for which clemency is sought on the potential grant of clemency; (2) the views of a variety of law enforcement officials, and prosecutors, probation officers, judges and prison officials, on the propriety of clemency and on whether the petitioner has expressed remorse, accepted responsibility and is a danger to any person or society; (3) the views of relevant federal, state or local law enforcement officials on whether the petitioner may have information relevant to an ongoing investigation or prosecution; and (4) the views of federal, state and local law enforcement on the potential effect that a grant of clemency could have "on the threat of terrorism or other ongoing or future criminal activity." Sec. 2(c)(1)–(4).

With respect to the preparation of the report and recommendation for the President, S. 2042 would require the Pardon Attorney to "make available" to the President a written report, which (1) in-

cludes a "description of the efforts" made by the Pardon Attorney to satisfy the investigative steps detailed above and to make the required notifications; and (2) attaches any written statements submitted by victims. Sec. 2(b)(1)–(2).

With respect to notifications, the bill would require the Pardon Attorney to notify relevant victims of (1) the "undertaking by the Pardon Attorney of *any* investigation of a potential grant of executive clemency in a particular matter or case;" (2) the "making available" of the Pardon Attorney's report to the President; and (3) the decision of the President on the petition. Sec. 2(d) (emphasis added).

S. 2042 contains a provision that purports to exclude from the bill's reach "any petition or other request for executive clemency that, in the judgment of the Pardon Attorney, lacks sufficient merit to justify investigation, such as the contacting of a United States Attorney. "Sec. 2(f).

Finally, S. 2402 directs the Attorney General to promulgate regulations governing the required procedures within 90 days. Sec. 2(g).

VII. THE CONSTITUTIONAL QUESTIONS

The Department of Justice has reviewed S. 2042 as it was introduced and concluded that it is unconstitutional. The Department's views in this regard were relayed in a letter dated February 17, 2000 to Chairman Hatch by Assistant Attorney General Robert Raben.

The principal of constitutional flaw of the bill, according to the Department, is that it would impermissibly infringe on the exclusive pardon power of the President by directly and indirectly influencing the information to be considered by him in the review process. Tracing the history of the pardon power, the Department notes that "the Framers debated, and rejected, possible limitations on the President's authority to grant pardons. A proposal to restrict the President's pardon power by requiring consent of the Senate to pardon decisions was soundly defeated." Raben letter at p. 3 (citing 2 Max Farrand, *The Records of the Federal Convention of 1787* 419 (rev. Ed. 1966)). The Justice Department concludes that "by mandating that the Attorney General make a report available to the President whenever he seeks her advice regarding a clemency petition that is not, in the Attorney General's opinion, patently frivolous, the bill is fundamentally inconsistent with the Framers' decision to exclude Congress from the pardon process. Similarly, by requiring victim notification of various intermediate steps in the clemency review process, the bill seeks to influence the Presidents consideration of clemency." Raben letter at 3.

The Department further argues that "[t]he fact that the bill does not require the Attorney General to submit any of the statutorily required information to the President, and instead requires only that she make such information available to him, does not eliminate the constitutional infirmity." Raben letter at 4. The Justice Department argues that the bill, in violation of the Opinions Clause, U.S. Const. art. 2 § 2, "may unconstitutionally condition the President's power to obtain opinions from his principal officers by requiring that the Attorney General undertake a detailed investigation to gather and make available to the President specific in-

formation each time he seeks her advice" in a clemency matter. Raben letter at 6.

The majority takes issue with Department's legal analysis and factual assumptions about the effect of S. 2042. The Committee Report relies on the opinions of Professor Akhil Reed Amar and Paul G. Cassell in support of its position that the bill is not constitutionally flawed.

Professor Cassell has asserted in his letter of February 22, 2000, that the bill is constitutional, essentially because it "only applies when the President chooses to delegate to the Pardon Attorney the responsibility for initially investigating a clemency request," Cassell letter at 5, and "does not regulate or frustrate the President's deliberation over pardons." Cassell letter at 6.

Professor Amar, who, like the Justice Department, had apparently reviewed S. 2042 prior to the committee technical amendment, states in his letter of February 23, 2000 that the "Raben letter makes some good points; but overstates its case. * * * I think the bill can rather easily be modified to avoid constitutional difficulties. I conceded that even with my proposed modifications, it is possible—though unlikely, I think—that a Supreme Court majority might somehow conclude that the modified version should be invalidated." Amar letter at 2. Amar believes that any such conclusion, however, would be erroneous.

Professor Amar concludes that the first potential constitutional problem—that it "might be seen to infringe the President's pardon power"—could be cured if S. 2042 were to regulate the Pardon Attorney directly, instead of the Attorney General and include language clarifying that the bill would not "limit the ability of the President to seek advice directly from the Attorney General, or any informal advisor, regarding any pardon matter." Amar letter at 3 (internal quotation omitted.) Professor Amar believes that with theses changes, which were made by technical amendment, S. 2042 would be more likely to be upheld as constitutional, although he concedes; "Granted, this statue might at times discourage the President from involving the Pardon Attorney. And this discouragement might perhaps be unwise as a matter of policy." Amar letter at 3.

Professor Amar also raises a second potential constitutional infirmity—the potential violation of the Opinions Clause and the President's right to get information from his Cabinet officers. According to Professor Amar, the President's unfettered freedom "to brainstorm with a trusted cabinet member in a confidential setting is a valuable part of the American Presidency, and should not lightly be altered." Amar letter at 5. Furthermore, the President should be free "to seek advice about pardons from any informal advisor of his choice—his spouse, his pollster, his chief of staff. his best friend, his Cabinet Secretary, his favorite Senator, etc." Amar letter at 3.

Nevertheless, Professor Amar opines that the Constitution would allow Congress to regulate what the Pardon Attorney is required to tell the President but not what the Attorney General must tell the President, drawing a fine constitutional distinction between regulating the Attorney General and regulating the Pardon Attorney. Amar letter at 5. He thus concludes that his proposed modifications would cure this potential constitutional infirmity.

Professor Amar raises yet a third concern. He states: "Were the bill to pass without significant support from members of both parties, the result would in my judgment be constitutionally unfortunate. This is an important bill that seeks to modify the structure of executive department and to adjust the current mode by which the President often exercises an important constitutional power." Amar letter at 5.

Finally, Armar urges the majority to invite further comments from the Justice Department if his suggested modifications are adopted and notes that "giving the Department a chance to review the revised bill would give me more confidence that may proposed revisions would indeed do the trick." Amar letter at 5. This has not been done.

Accordingly, the debate over the potential constitutional and policy pitfalls of this bill is ongoing, underscoring the fact that it remains a work in progress.

VIII. FURTHER CONSIDERATIONS IN LIGHT OF THE PRESTON KING PARDON

On February 21, 2000, Preston King was granted a timely pardon by President Clinton, which allowed him to return to the United States for the funeral of his brother, civil rights activist Clennon W. King Jr.

Preston King, a professor at the University of Lancaster in Britain, was prosecuted in 1961 for the kind of civil disobedience that our country now views as the crux of the civil rights movement. Almost four decades ago, Mr. King refused to report for an Army physical until an all-white draft board in Albany, Georgia addressed him as "mister," as they did white draftees. The draft board, which had first addressed him as "Mr. Preston King" had begun to address him as "Preston" upon learning he was black. For his refusal to submit to this type of state-sponsored discrimination, Mr. King was convicted of draft evasion and sentenced to 18 months in prison. He fled the United States 39 years ago before serving his sentence.

The American public has accepted the timely pardoning of Preston King as a just and worthy exercise of the President's exclusive right to grant clemency. Indeed, even the judge who presided over Mr. King's case in 1961 called for this pardon. In statements to the press, the White House has said that President Clinton took into account all of the circumstances surrounding this matter and came to the conclusion that clemency was warranted.

President Clinton was able to exercise his discretion in an unfettered manner in the King case. He apparently acted speedily to ensure that Mr. King could attend the funeral in the United States of his brother without fear of arrest. As we continue to refine S. 2042 and consider its merits, we should all remember that some requests for pardons are plainly meritorious and deserve the President's quick attention, without unforeseen and unintentional impediment from this bill. We should consider whether the *statutory* obligations to be imposed by S. 2042 could inadvertently delay the ability of the President to act independently and quickly in those special cases when his quick attention is warranted.

IX. CONCLUSION

Although we disagreed with the President's decision on offering clemency to 16 FALN members, we recognize that the power to grant pardons is constitutionally vested exclusively in the unfettered discretion of the President. That being said, we support the rights of all victims to be included in all phases of the criminal process, including in clemency reviews, and encourage the Department of Justice to continue its efforts to amend its regulations to ensure greater participation of victims in the clemency review process.

Rather than approach this matter as an improvement to the process used by Republican and Democratic President alike in order to better include the views of crime victims, the majority insists on packaging this matter in starkly partisan terms. That is both unfortunate and unnecessary.

The version of S. 2042 reported by the Committee raises a number of significant constitutional and practical problems. Addressing these problems in a constructive and bipartisan manner has been unnecessarily complicated by the partisan attacks on the President, his wife, the Attorney General and the Pardon Attorney stemming from the FALN clemencies.

PATRICK LEAHY.
HERB KOHL.
RUSS FEINGOLD.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds no changes in existing law caused by passage of S. 2042.

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