

# THE POLITICS OF EXECUTIVE PRIVILEGE

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## TESTIMONY BY WHITE HOUSE OFFICIALS

Administrations will often claim that White House aides are exempt from appearing before congressional committees. White House Counsels advise lawmakers that “it is a longstanding principle, rooted in the Constitutional separation of powers and the authority vested in the President by Article II of the Constitution, that White House officials generally do not testify before Congress, except in extraordinary circumstances not present here.”<sup>1</sup> Take note of the two qualifications: “generally” and “except in extraordinary circumstances.” Caution here is well advised.

Although White House aides do not testify on a regular basis, under certain conditions they do, and in large numbers. Intense and escalating political pressures may convince the White House that the President is best served by having these aides testify to ventilate an issue fully, hoping to scotch suspicions of a cover-up or criminal conduct. Chapter 4 on the appointment power explained how presidential aide Peter Flanigan testified in 1972 as part of the Kleindienst nomination to be Attorney General. This chapter provides many other examples of Congress taking testimony from White House aides.

### Watergate and Its Aftermath

On March 2, 1973, President Nixon objected to allowing White House Counsel John Dean testify at congressional hearings. Nixon offered more general grounds, under the doctrine of separation of powers, for refusing any White House aide to testify. Under heavy political pressures and with impeachment in the House of Representatives looming, Nixon gradually gave

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1. Letter from White House Counsel Jack Quinn to Rep. William H. Zeff, Jr., Chairman, Subcommittee on National Security, International Affairs, and Criminal Justice, May 8, 1996.

ground, eventually agreeing to allow White House aides to testify before the Senate Select Committee on Presidential Campaign Activities. To emphasize the exceptional nature of allowing these individuals to testify, he set forth certain conditions.

As time went on Nixon relaxed those conditions, such as waiving executive privilege if possible criminal conduct was involved. With these understandings, many White House aides testified before the committee, including John Dean, former special assistant Jeb Magruder, former deputy assistant Alexander Butterfield, former chief domestic adviser John Ehrlichman, former White House aide H.R. Haldeman, former consultant Patrick Buchanan, and former staff coordinator Gen. Alexander M. Haig, Jr.

Confidentiality is especially valued among those who provide legal counsel to the President. Nevertheless, Nixon permitted these White House aides to testify: personal attorney Herbert W. Kalmbach, special counsel Richard A. Moore, Leonard Garment, former special counsel Fred C. LaRue, special counsel J. Frederick Buzhardt, and counsel Thomas H. Wakefield. Other White House aides who testified include Bruce A. Kehrl, Hugh W. Sloan, Jr., Herbert L. Porter, Gordon Strachen, Clark McGregor, William H. Marumoto, L. J. Evans, Jr., and Rose Mary Woods, who was personal secretary to Nixon.<sup>2</sup> Details on Nixon's constitutional position on these committee appearances for Watergate figures are included in Chapter 3 on impeachment. Following the Watergate hearings conducted by Senator Ervin, the House Judiciary Committee held hearings on the impeachment of Nixon. Several White House aides testified at those hearings, including Butterfield, Dean, Kalmbach, and Charles W. Colson.<sup>3</sup>

A White House aide testified about the "Huston Plan" developed during the Nixon years. On June 5, 1970, President Nixon met with FBI Director J. Edgar Hoover, CIA Director Richard Helms, National Security Agency Director Admiral Gayler, and Defense Intelligence Agency Director General Bennett. The purpose was to direct those officials to obtain better information about domestic dissenters. In a memo, White House aide Tom Charles Huston recommended a number of options, including illegal opening of mail, burglary, surreptitious entry, and other methods. President Nixon approved the oper-

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2. "Presidential Campaign Activities of 1972: Senate Resolution 60," hearings before the Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess. (1973). For the particular volumes in which these aides appeared before the Senate Select Committee on Presidential Campaign Activities, see Louis Fisher, "White House Aides Testifying Before Congress," 27 *Pres. Stud. Q.* 139, 141–42 (1997).

3. "Testimony of Witnesses," hearings before the House Committee on the Judiciary, 93d Cong., 2d Sess. (1974); see Fisher, "White House Aides," at 142–43.

ation and submitted the plan to the FBI, the CIA, and the military intelligence agencies for implementation. Five days later he revoked the plan at the insistence of Hoover and Attorney General John Mitchell, but the intelligence agencies ignored the revocation and continued to carry out some of the recommendations, including mail-opening and surveillance.<sup>4</sup> In 1975, Huston was called before a Senate select committee to testify.<sup>5</sup>

The Senate select committee also heard from a number of former White House aides. On December 5, 1975, the committee received testimony from Clark Clifford, former counsel to President Truman; Cyrus Vance, former special representative of the President; and Morton H. Halperin, former assistant for planning, National Security Council staff.<sup>6</sup> The committee's report on assassination plots indicates that other former White House aides appeared in executive session to give testimony: Robert H. Johnson, a member of the National Security Council staff from 1951 to January 1962; Gordon Gray and Andrew Goodpaster, two members of President Eisenhower's staff responsible for national security affairs; Theodore Sorensen of President Kennedy's staff; McGeorge Bundy and Walter Rostow of President Lyndon B. Johnson's staff; and Henry Kissinger and Alexander Haig of President Nixon's staff.<sup>7</sup>

Also in 1975, the House created a Select Committee on Intelligence to investigate the CIA and other parts of the U.S. Intelligence establishment. Several White House aides, former and current, appeared at the hearings: Secretary of State Kissinger (who also served, at that time, in a dual capacity as National Security Adviser); McGeorge Bundy, former assistant for national security affairs to Lyndon B. Johnson; Arthur Schlesinger, former special assistant to President John F. Kennedy, and William G. Hyland, deputy assistant to the President for national security affairs for President Ford.<sup>8</sup>

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4. S. Rept. 94-755, 94th Cong., 2d Sess. 926-27 (1976).

5. "Intelligence Activities: Senate Resolution 21" (Vol. 2), hearings before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 1st Sess. (1975).

6. "Intelligence Activities: Senate Resolution 21" (Vol. 7), hearings before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 1st Sess. (1975).

7. "Alleged Assassination Plots Involving Foreign Leaders," an interim report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rept. No. 94-465, 94th Cong., 1st Sess. 55, 64, 111-13, 148, 156-57, 186-87, 246-54 (1975).

8. "U.S. Intelligence Agencies and Activities: The Performance of the Intelligence Community," hearings before the House Select Committee on Intelligence, 94th Cong., 1st Sess. (1975), Parts 2 and 5.

## Cutting One's Losses

In 1980, a special subcommittee of the Senate Judiciary Committee investigated whether Billy Carter, the President's brother, had influenced U.S. policy or committed criminal activities in his relationships with Libya. White House Counsel Lloyd Cutler and National Security Adviser Zbigniew Brzezinski appeared at the hearings.<sup>9</sup> President Carter instructed all members of the White House staff to cooperate fully with the subcommittee, with the understanding that Carter did not expect to assert claims of executive privilege with respect to these matters. He directed White House staff to "respond fully to such inquiries from the subcommittee and to testify if the subcommittee determines that oral testimony is necessary."<sup>10</sup> Carter was not about to fall on his sword for misjudgments committed by his brother.

In 1986, President Ronald Reagan told executive officials, including those in the White House, to assist in the congressional investigation into the Iran-Contra affair in any way possible, including testifying before Congress. He said he had "already taken the unprecedented step of permitting two of my former national security advisers to testify before a committee of Congress."<sup>11</sup> The two former national security advisers were Robert McFarlane and John Poindexter. Other former White House aides who testified at the hearings included Bretton G. Sciaroni, National Security Council member Lt. Col. Oliver North, and North's secretary, Fawn Hall. The extent to which Reagan waived executive privilege for the Iran-Contra hearings is discussed in Chapter 3 on impeachment.

Even when the White House will not allow an aide to testify, other mechanisms may be offered to satisfy congressional interests. For example, the White House may suggest that the aide meet with a committee or subcommittee chair to respond to inquiries and later answer any written questions submitted by the chair. Such an arrangement occurred in 1981, when Martin Anderson, President Reagan's assistant for policy development, refused to appear before a House Appropriations subcommittee responsible for funding Anderson's budget request for the Office of Policy Development. The subcommittee retaliated by deleting all of the requested \$2,959,000. In doing so,

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9. "Inquiry Into the Matter of Billy Carter and Libya" (Vol. II), hearings before the Subcommittee to Investigate the Activities of Individuals Representing the Interests of Foreign Governments, Senate Committee on the Judiciary, 96th Cong., 2d Sess. (1980).

10. Public Papers of the Presidents, 1980–81 (II), at 1420.

11. Public Papers of the Presidents, 1986, II, at 1595.

it pointed out that the previous heads of the office (Stuart Eizenstat in the Carter years, James M. Cannon in the Ford years, and Kennedy R. Cole in the Nixon years) had appeared before the subcommittee.<sup>12</sup>

White House Counsel Fred F. Fielding offered legal grounds to support Anderson's position. As a senior adviser to President Reagan, Anderson participated in the deliberative process by providing "frank and candid advice." Such candor "is possible only in an atmosphere that insures that the advice will remain confidential."<sup>13</sup> That argument is not persuasive. Cabinet heads are also senior advisers to Presidents and are also part of the deliberative process requiring candor and confidentiality, yet they regularly appear before congressional committees. They are at liberty at any time to decline to respond to committee questions that jeopardize confidentiality. In many cases a committee is interested in specific facts and general policies, not in the deliberative process. Anderson could have agreed to appear with this understanding.

In his legal memo, Fielding said that Anderson "remains willing to meet informally with the Subcommittee to provide such information as he can consistent with his obligations of confidentiality to the President."<sup>14</sup> If he could meet informally, why not formally? Informal meetings also pose some risk to confidentiality and inquiries into the deliberative process. White House aides can fend off such inquiries in informal meetings and can do the same in formal hearings. After the committee mark-up in 1981, Anderson bowed to the needs of reality and prudence by meeting informally and off the record with the subcommittee.<sup>15</sup> After the Senate restored almost all of the funds, Congress appropriated \$2,500,000 instead of the budget request of \$2,959,000.<sup>16</sup>

## The Clinton Years

A series of congressional investigations throughout the Clinton years required a large number of White House aides to appear before legislative committees to testify about procedures and actions involving contacts with the Treasury Department, the dismissals of employees in the Travel Office, White-water, and access to FBI files. President Clinton's handling of pardons and clemency, normally considered a presidential prerogative, also required White

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12. H. Rept. No. 97-171, 97th Cong., 1st Sess. 30 (1981).

13. *Id.* at 62.

14. *Id.* at 63.

15. *Id.* at 30.

16. Budget of the U.S. Government: Appendix, Fiscal Year 1983, at I-C5.

House aides to testify at congressional hearings. In 2002, Tom Ridge declined to testify before a Senate committee, citing separation of powers concerns because of his direct assistance to President Bush. Those actions are discussed at the end of this chapter.

## White House-Treasury Contacts

Congressional hearings in 1994 focused on whether White House aides had inappropriately learned details of a Resolution Trust Corporation (RTC) investigation of the failed Madison Guaranty Savings and Loan. In March 1993, Deputy Treasury Secretary Roger C. Altman became interim chief of the RTC. William Roelle, an RTC senior vice president, said he briefed Altman that RTC had forwarded a criminal referral to the FBI and the U.S. Attorney in Little Rock, naming the Clintons as potential beneficiaries of alleged wrongdoing at Madison. On September 29, 1993, Treasury General Counsel Jean E. Hanson told White House Counsel Bernard Nussbaum of the referrals. Other contacts took place between the Treasury Department and the White House concerning the referrals. Both Houses of Congress held hearings to investigate these contacts.

Among those appearing at the hearings were White House Counsel Lloyd Cutler, who testified that “No White House staff witness has declined to appear.”<sup>17</sup> Also appearing from the White House: Lisa Caputo, press secretary to Hillary Clinton; associate counsel to the President Neil Eggleston; assistant to the President Mark D. Gearan; assistant to the President and deputy chief of staff Harold Ickes; deputy counsel to the President Joel I. Klein; assistant to the President Bruce Lindsey; former White House Chief of Staff Thomas McLarty; associate counsel to the President Beth Nolan; former White House Counsel Bernard Nussbaum; assistant to the President John Podesta; associate counsel to the President Clifford Sloan; senior policy adviser to the President George Stephanopoulos; and Margaret Williams, chief of staff to Hillary Clinton. Some of these White House aides, after testifying before the House oversight committee, were called to appear before the Senate oversight committee as well.<sup>18</sup>

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17. “White House Contacts with Treasury/RTC Officials About ‘Whitewater’-Related Matters” (Part 1), hearing before the House Committee on Banking, Finance and Urban Affairs, 103d Cong., 2d Sess. 12 (1994).

18. “Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation—Washington DC Phase,” hearings before the Senate Committee on Banking, Housing, and Urban Affairs, 103d Cong., 2d Sess. (1994). For citations to the specific hearing White House aides appeared, see Fisher, “White House Aides,” at 145–46.

## Travel Office Firings

On May 19, 1993, seven employees of the White House Travel Office were dismissed with the charge that they followed poor management practices. Dee Dee Myers, President Clinton's press secretary, also stated that the FBI had been asked to examine the records of the Travel Office, suggesting that the employees might have been guilty of criminal actions as well. An effort by House Republicans to demand documents from the administration and investigate what happened was defeated by the Democratically-controlled Judiciary Committee.<sup>19</sup>

After the Republican victories in the 1994 elections, the House Committee on Government Reform and Oversight initiated an investigation that included hearings with former White House aides. Three days were set aside to explore what had happened: October 24, 1995, and January 17 and 24, 1996. Appearing at those hearings were former assistant to the President and White House staff secretary John Podesta and former director of the White House Office of Administration David Watkins.<sup>20</sup>

On May 17, 1995, the Senate created a Special Committee to Investigate Whitewater Development Corporation and Related Matters. The purpose of the committee was to look into a number of White House activities. Did improper conduct occur in the way White House officials handled documents in the office of White House Deputy Counsel Vincent Foster following his death? Did the White House engage in improper contacts with any other agency or department regarding confidential information held by the Resolution Trust Corporation? Was either the report issued by the Office of Government Ethics on July 31, 1994, or related transcripts of deposition testimony, improperly released to White House officials prior to their testimony before the Senate Committee on Banking?

Those issues precipitated testimony from a vast number of White House officials, major and minor. Some were required to make a return appearance. Here are the names: assistant to the President Mark Gearan; former special assistant to the President Sylvia Mathews; deputy assistant to the President Patsy Thomasson; former assistant to the President for management and administration David Watkins; White House deputy press secretary Evelyn

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19. H. Rept. No. 103-183, 103d Cong., 1st Sess. (1993).

20. "White House Travel Office—Day One," hearing before the House Committee on Government Reform and Oversight, 104th Cong., 2d Sess. (1995); "White House Travel Office—Day Two," hearing before the House Committee on Government Reform and Oversight, 104th Cong., 2d Sess. 12ff (1996).

Lieberman; chief of staff to Hillary Clinton, Margaret A. Williams; assistant to the associate counsel to the President Deborah Gorham; executive assistant to the counsel to the President Linda Tripp; former chief of staff Thomas McLarty; chief of staff to the Vice President, John M. Quinn; assistant to the President Bruce Lindsey; special counsel to the President Jane Sherburne; special assistant to the President Carolyn Huber; deputy chief of White House staff Harold Ickes, and many others.<sup>21</sup>

### Security of FBI Files

In June 1996, the House Committee on Government Reform and Oversight learned that the Clinton White House had obtained from the FBI hundreds of confidential files of individuals who had worked in the Reagan and Bush administrations. President Clinton explained that the request for files of people who were no longer with the White House was merely a “bureaucratic snafu.”<sup>22</sup> Critics charged that the White House intended to use the files for partisan, political purposes, hoping to discover and disseminate derogatory information about Republicans. Bernard Nussbaum, who was White House Counsel at the time, acknowledged that the handling of the files marked “a serious breach of privacy.”<sup>23</sup> Both Houses called a number of former and current White House aides to testify.

On June 19, the House Committee on Government Reform and Oversight heard from Jane Dannenhauser, director of the White House Office of Personnel Security in the Nixon, Ford, Reagan, and Bush administrations, until her retirement in March 1993; Nancy Gemmell, who worked for twelve years in the White House Office of Personnel Security; A.B. Culverhouse, White House Counsel for President Reagan; C. Boyden Gray, White House Counsel for President George H. W. Bush; and Richard Hauser, former Deputy White House Counsel for President Reagan.<sup>24</sup>

On the following day, June 20, the Senate Judiciary Committee held hearings to look into both the Travel Office firings and the White House use of FBI files. The committee called these White House aides to testify: Billy Ray Dale, former director of the White House Travel Office; Anita McBride, former di-

21. For the full list, see Fisher, “White House Aides,” at 147–49.

22. Public Papers of the Presidents, 1996, I, at 903.

23. “Security of FBI Background Files, June 26, 1996,” hearing before the House Committee on Government Reform and Oversight, 104th Cong., 2d Sess. 220 (1996).

24. “Security of FBI Background Files, June 19, 1996,” hearing before the House Committee on Government Reform and Oversight, 104th Cong., 2d Sess (1996).

rector of the White House Personnel Office; Mary Kate Downham Carroll, former personnel assistant of the White House Personnel Office; Graven W. Craig, former intern, White House Office of Public Liaison; and Ellen J. Gober, former staff assistant, White House Office of Legislative Affairs.<sup>25</sup>

House Government Reform and Oversight held a second hearing on June 26, focusing on FBI files. It received testimony from several White House Office aides: former White House Counsel Nussbaum; director of White House Office of Personnel Security Craig Livingstone; Anthony Marceca, former detailee to the White House Office of Personnel Security; and Lisa Wetzl, former staffer with the White House Office of Personnel Security.<sup>26</sup> The committee held hearings on two other days, taking testimony from officials outside the White House who were familiar with standard procedures for handling of FBI files.

Senate Judiciary held two more hearings, on June 28 and September 25, to further its investigation into what had become known as Filegate. Gemmill, Livingston, and Wetzl appeared, along with Charles Easley, director of the White House Office of Personnel Security, and Mary Beck, associate director for human resources management, Office of Administration, in the Executive Office of the President. Marceca, at the June 28 hearing, declined to testify, citing the Fifth Amendment privilege against self-incrimination. At a closed-door session on July 18, Marceca repeatedly invoked his Fifth Amendment privilege. Senate Judiciary chairman Orrin G. Hatch announced that he would consider granting Marceca immunity to compel him to testify, but Independent Counsel Kenneth W. Starr said that congressional immunity would interfere with his investigation in the FBI file affair.<sup>27</sup>

Initially, the White House withheld from congressional committees documents related to Filegate. By September, however, the White House agreed to produce 10,000 pages of phone logs and other documents that had been requested by the Senate Judiciary Committee.<sup>28</sup>

The hearings discussed in this chapter do not include the annual hearings on the White House budget conducted by the Appropriations Com-

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25. "White House Access to FBI Background Summaries," hearings before the Senate Committee on the Judiciary, 104th Cong., 2d Sess. (1996).

26. "Security of FBI Background Files, June 26, 1996," hearings before the House Committee on Government Reform and Oversight, 104th Cong., 2d Sess. (1996).

27. "Lisa Clagett Weintraub, 'Aide's Resignation Does Little to Douse FBI File Fires,'" CQ Weekly Report, June 29, 1996, at 1860.

28. George Archibald, "White House Agrees to Turn Over Papers: Avoids Faceoff in FBI-files Probe," Washington Times, September 5, 1996, at A4.

mittees. White House aides in charge of management and administration appear at those hearings on a regular basis to support budget justifications submitted by the White House. For example, these White House aides appeared at the House hearings in 1995: Patsy L. Thomasson, special assistant to the President for management and administration and director of the Office of Administration; John W. Cressman, deputy director, Office of Administration, and Jurg E. Hochuli, director Financial Management division, Office of Administration.<sup>29</sup>

## Presidential Pardons

If any area of White House activity were to be considered off-limits to congressional probes, it would be the President's decision to exercise the power to grant pardons and clemencies. Under the Constitution, the decision is vested entirely in the President. Article II gives the President the power to grant "Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Still, political situations can place in the hands of Congress many documents on the pardon process. The greatest access was during the Clinton years, after his decision in 1999 to grant clemency to Puerto Rican terrorists, followed by the pardons and clemencies he issued on his last day in office, covering Marc Rich and others. To understand the controversial nature of those actions, I need to explain the regular pardon process and the vehement protests that were directed against Clinton's decisions.

### Scope of the Power

There are only two express restrictions on the President's power. The pardon power applies to offenses against the federal government, not against the states and localities. The President may not use the power to countermand a legislative decision to impeach and remove. There is also an implied restriction on the pardon power. Presidents may not use it to compensate individuals for what has been done or suffered; nor can they draw money from the Treasury Department for general amnesties, except as expressly authorized by

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29. "Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1996" (Part 2), hearings before the Subcommittee on the Treasury, Postal Service, and General Government Appropriations of the House Committee on Appropriations, 104th Cong., 1st Sess. (1995).

Congress.<sup>30</sup> The power of the purse belongs to Congress. On the other hand, certain statutory restrictions have been struck down by the Supreme Court as an invalid interference with the pardon power.<sup>31</sup> When a proviso in an appropriations statute attempts to control the President's power to pardon, or to prescribe for the judiciary the effect of a pardon, the statutory provision is invalid.<sup>32</sup>

Finally, presidential abuse of the pardon power may constitute an impeachable offense or lead to restrictive rulings in the courts.<sup>33</sup> Pardons and clemencies offered in return for presidential gain might fall in the category of bribery, and some conditions attached to a pardon could be found by the courts to be unconstitutional, such as conditions that limit First Amendment rights or other core constitutional freedoms.

Otherwise, the President has great latitude in deciding when and how to issue pardons and clemencies. The power of pardon may take a variety of forms: full pardon, conditional pardon, clemency for a class of people (amnesty), commutation (reducing a sentence), and remission of fines and forfeitures.<sup>34</sup> Through its appropriations and taxing powers, Congress may also remit fines, penalties, and forfeitures. Congress, with the support of the Supreme Court and the Justice Department, has vested that discretion in the Secretary of the Treasury and other executive officials.<sup>35</sup> Congress may also legislate a general pardon or amnesty by repealing a law that had imposed criminal liability. Congress derives this power not by sharing the President's pardon power but through its power to legislate and repeal legislation.<sup>36</sup>

Notwithstanding this great range of presidential discretion, under certain conditions congressional committees have successfully sought access to White House documents, White House aides, and even the direct testimony of the President. The most dramatic example resulted from the decision of President Ford on September 8, 1974, to grant a full pardon "for all offenses against the

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30. *Knote v. United States*, 95 U.S. 149, 153–54 (1877). On the primacy of the appropriations power when pitted against the pardon power, see *Hart v. United States*, 118 U.S. 62 (1886); 8 Op. Att'y Gen. 281, 282 (1857); 23 Op. Att'y Gen. 360, 363 (1901).

31. *Ex parte Garland*, 71 U.S. 333, 380 (1866). See 12 Stat. 502 (1862) and 13 Stat. 424 (1865).

32. *United States v. Klein*, 13 Wall. 128 (1872); *Hart v. United States*, 118 U.S. 62 (1886).

33. David Gray Adler, "The Presidents Pardon Power," in *Inventing the American Presidency*, edited by Thomas E. Cronin (1989).

34. Humbert, W. W., *The Pardoning Power of the President* 22 (1941).

35. *The Laura*, 114 U.S. 411 (1885); 8 Op. Att'y Gen. 281, 282 (1857).

36. Humbert, *The Pardoning Power*, at 43–44.

United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.”<sup>37</sup> Some members of Congress thought that Nixon might have made a deal with Ford when nominating him to be Vice President. If Nixon had conditioned the nomination on the promise of a pardon, or conditioned his own resignation on a pardon, the House might have charged Ford with accepting a bribe and impeached him. To allay such concerns, Ford took the extraordinary step of appearing before the House Judiciary Committee to explain the basis for his decision.<sup>38</sup>

To some lawmakers, it seemed improper for Ford to grant a pardon before formal charges had been lodged and without a formal admission of guilt from Nixon. It is established, however, that a pardon may be granted prior to a conviction and even before indictment.<sup>39</sup> Nevertheless, it is risky for a President to invoke the power prior to trial and condemnation. Without the facts produced through the regular trial procedure, a President may inadvertently grant a pardon for offenses that have yet to come to light.<sup>40</sup>

## Basic Procedures

Justice Department regulations spell out the procedures for clemency. A person seeking executive clemency “shall execute a formal petition.”<sup>41</sup> The pardon attorney in the Justice Department “shall submit all recommendations in clemency cases through the Associate Attorney General, who “shall exercise such discretion and authority as is appropriate and necessary for the handling and transmittal of such recommendations to the President.”<sup>42</sup> The Attorney General “shall review each petition and all pertinent information developed by the investigation and shall determine whether the request for clemency is of sufficient merit to warrant favorable action by the President.” Moreover, the Attorney General “shall report in writing his or her recommendations to the President, stating whether in his or her judgment the President should grant or deny the petition.”<sup>43</sup>

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37. Public Papers of the Presidents, 1974, at 61–62.

38. “Pardon of Richard M. Nixon and Related Matters,” hearings before the House Committee on the Judiciary, 93d Cong., 2d Sess. (1974).

39. *Ex parte Garland*, 71 U.S. 333, 380 (1866); 1 Op. Att’y Gen. 341, 343 (1820); *Murphy v. Ford*, 390 F.Supp. 1372 (W.D. Mich. 1975).

40. 2 Op. Att’y Gen. 275 (1825); 6 Op. Att’y Gen. 20 (1853).

41. 28 C.F.R. §1.1.

42. *Id.* at §0.36.

43. *Id.* at §1.6[b].

When the pardon attorney receives a petition for clemency, the office reviews the petition to ensure that the applicant is eligible to apply. Once eligibility is established, the office contacts the warden at the federal prison where the inmate is held, requesting copies of the judgment of conviction, the pre-sentence report, and the most recent prison progress report. The pre-sentence report provides an account of the crime and a description of the defendant's criminal history. The progress report describes the prisoner's adjustment to incarceration and disciplinary history while in prison. The pardon attorney can also contact the U.S. Attorney's office that prosecuted the case and the sentencing judge. A report of approximately five hundred words is prepared for the use of the Deputy Attorney General's office, the Attorney General, and the White House Counsel.<sup>44</sup>

These regulations are advisory on the President. They do not in any way bind his exercise of constitutional power. However, part of the purpose of the regulations is to protect the President from making legal or political blunders because he lacks adequate information. Without close review by professionals in the Justice Department, Presidents can be easily blindsided. In both the clemency decision in 1999 for Puerto Rican terrorists and in his final day in office on January 20, 2002, Clinton ignored the Justice Department guidelines at considerable cost to his reputation.

Margaret Love, pardon attorney from 1990 to 1997, testified before a House subcommittee in 2001 that many of the concerns raised about Clinton's final pardons "are directly attributable" to his decision not to seek the advice of the Attorney General. She noted that "the irregularity and infrequency" with which Clinton acted on pardon applications "was calculated to invite public suspicion about the bona fides of even his most unexceptionable grants." The Clinton administration's "short-sighted and ill-advised" decision to abandon Justice Department assistance "led directly to the reported free-for-all at the end of his term, and the resultant appearance of cronyism and influence peddling."<sup>45</sup>

## FALN Clemency

Clinton's willingness to circumvent the Justice Department on his last day in office was foreshadowed by his offer of clemency on August 11, 1999, to

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44. "Clemency for FALN Members," hearings before the Senate Committee on the Judiciary, 106th Cong., 1st Sess. 100-02 (1999).

45. "The Controversial Pardon of International Fugitive Marc Rich," hearings before the House Committee on Government Reform, 107th Cong., 1st Sess. 30 (2001).

sixteen members of a Puerto Rican terrorist group, the FALN (Armed Forces of Puerto Rican National Liberation). Fourteen accepted the conditions attached to the clemency (such as renouncing violence). They had been convicted and imprisoned for seditious conspiracy in planting more than 130 bombs in public places in the United States, including shopping malls and restaurants. At least six people were killed and approximately 70 injured. The FALN operation marked the biggest terrorist campaign within U.S. borders, yet Clinton's clemency released individuals from prison after serving less than twenty years of terms running from 55 to 90 years.

Clinton's clemency action for the FALN did not receive the formal review of the pardon attorney, the Deputy Attorney General, or the Attorney General. Justice Department officials met several times with advocates for FALN clemency, but did not solicit the views of victims or other law enforcement officials. Background checks by the FBI were not requested. The White House was aware that the FBI was on record as opposed to clemency for the FALN members. Contrary to Justice Department regulations, the FALN members did not "execute a formal petition" to the pardon attorney.

The Justice Department had been involved earlier with the FALN issue, such as when Pardon Attorney Love advised against clemency in 1996.<sup>46</sup> Three years later, Clinton decided to cut the pardon attorney out of the picture. He was not the first President to skirt Justice Department procedures. President Ford pardoned Nixon in 1974 without Justice Department input, and President Bush in 1992 pardoned six Iran-Contra figures without asking for Justice Department advice.<sup>47</sup>

Clemency for the FALN members triggered bipartisan condemnation from lawmakers. Although Democrats in Congress regularly came to Clinton's defense on other matters, most Democrats were either silent on the clemency decision or issued strong public rebukes. Senator Dianne Feinstein (D-Cal.) was blunt: "Some have described these prisoners as political prisoners. They were not. They were terrorists."<sup>48</sup> Similarly, Senator Robert Torricelli (D-N.J.) pulled no punches: "The people of the FALN are not heroes, they are cowards. They hid in the night, they planned bombings against innocent people for a cause that has no merits."<sup>49</sup> Those who defended the clemency did so by arguing in favor of the right of the Puerto Rican people to self-determination and to rid themselves of their status as a "colony." Rep. Nydia Velázquez re-

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46. "No Clemency, Clinton Told," *New York Times*, October 20, 1999, at A21.

47. "Clemency for FALN Members," hearings before Senate Judiciary, at 115.

48. 145 Cong. Rec. S10770 (daily ed. September 13, 1999).

49. "Clemency for FALN Members," hearings before Senate Judiciary, at 62.

marked: “This is not about terrorism, . . . We have had . . . over 100 years of keeping a colony. That is a violation. That is a violation of the civil rights of the people of Puerto Rico.”<sup>50</sup> Torricelli made short work of that argument:

I do not know of any political cause that has less merits than those of the FALN. This is not the African National Congress. It is not any legitimate effort at national liberation. The people of Puerto Rico are in voluntary political association with the United States. They have voted repeatedly and overwhelmingly to be in voluntary political association with the United States. The day, the hour, the moment the people of Puerto Rico decide they do not want political association with the United States, they will have their independence.<sup>51</sup>

Both chambers passed resolutions condemning Clinton’s pardons. The House adopted language stating that Clinton’s decision violated “longstanding tenets of United States counterterrorism policy” and was “an affront to the rule of law, the victims and their families, and every American who believes that violent acts must be punished to the fullest extent of the law.” The House resolution further stated that “making concessions to terrorists is deplorable and that President Clinton should not have offered or granted clemencies to the FALN terrorists.” The resolution passed 311 to 41.<sup>52</sup> The party split: 218 to 0 Republican, 93 to 41 Democrat.

A Senate resolution deploring the clemency to FALN terrorists passed five days later by a vote of 95 to 2.<sup>53</sup> The resolution pointed out that “no petitions for clemency were made by these terrorists, but other persons sought such clemency for them.” Like the House resolution, the Senate condemned the making of concessions to terrorists and said that Clinton should not have granted clemency to the FALN members. Politically, Clinton took a terrific beating. Throughout his administration, he and his party moderates had successfully taken the law-and-order issue away from the Republicans. Clinton supported the death penalty, called for more police on the streets, and took initiatives against international terrorism. Yet nothing could have poisoned his relationship with the law enforcement community more than his clemency order for the FALN.

At Senate hearings, several members of the law enforcement community testified and submitted statements. One of those who appeared was Gilbert G. Gallegos, national president of the Fraternal Order of the Police, the largest

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50. 145 Cong. Rec. H8008 (daily ed. September 9, 1999).

51. “Clemency for FALN Members,” hearings before Senate Judiciary, at 61.

52. 145 Cong. Rec. H8019–20 (daily ed. September 9, 1999).

53. *Id.* at S10818 (daily ed. September 14, 1999).

police organization in the country with 283,000 members. He included the letter he wrote to President Clinton protesting the clemency decision.<sup>54</sup> The police officers who testified at the Senate hearings all reported the same fact: not one had been asked by the administration for his or her views on giving clemency to the FALN members. The only witness who gained entry to the administration was Dr. C. Nozomi Ikuta, an ordained minister of the United Church of Christ. She was able to talk to White House Counsel Jack Quinn, White House Counsel Charles Ruff, Deputy Attorney General Eric Holder, and Pardon Attorney Roger Adams about the clemencies.<sup>55</sup> That is extraordinary access to top administration officials.

When asked about the clemencies, Clinton told two reporters on January 18, 2000, that a President “should rarely commute sentences and should have good reasons for doing so if he does, knowing that they will always be somewhat controversial.”<sup>56</sup> Yet he then said that his White House Counsel, Charles Ruff, “handled it entirely, and only he handled it.” With such politically sensitive decisions, why place the matter in the hands of one person, no matter how gifted and trusted? Why not seek outside assistance from federal agencies to assure that Ruff (and Clinton) had full access to available information and considerations?

In the same meeting with reporters, Clinton insisted that “categorically there was no politics in it.” If there were no politics, why keep the process so closely guarded in the hands of one White House official? Clinton acknowledged that the Justice Department has “its own independent bureaucracy for evaluating these things. And the tradition is that the President doesn’t rule on them, one way or the other, until you get all these recommendations sent to you. And I think what I believe is that—although this operation had a life of its own... is that we should be granting more pardons.”<sup>57</sup> His reference to “independent bureaucracy” was an exaggeration. The pardon attorney’s office consists of six attorneys.<sup>58</sup> The phrase “a life of its own” suggested that there was something unique and highly special about the FALN clemency, implying that the decision was anything but routine and nonpolitical. In a letter to Rep. Henry Waxman (D-Cal.), Clinton insisted that “political considerations played no role in the process.”<sup>59</sup> Clinton’s statement lacks credibility. Political

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54. “Clemency for FALN Members,” hearings before Senate Judiciary, at 8–9.

55. *Id.* at 56–57.

56. *Public Papers of the Presidents, 2000–2001, I*, at 77.

57. *Id.* at 78.

58. “Clemency for FALN Members,” hearings before Senate Judiciary, at 117.

59. “Clemency for the FALN: A Flawed Decision?,” hearings before the House Committee on Government Reform, 106th Cong., 1st Sess. 10 (1999).

considerations on a clemency decision like the FALN always play a role, and they should.

Clinton justified the clemency on various grounds. He said it was requested “by hundreds of people, including President Carter, Bishop Tutu, and many other religious leaders and Members of Congress.” He conceded that “obviously, there were those who disagreed.”<sup>60</sup> This explanation makes the decision sound quite political, with supporters and detractors lining up on different sides. He cited Carter and Tutu to build political support for a decision that was politically unpopular. However, a presidential decision to pardon someone should stand on its merits. It is not better or worse because Carter or Tutu offered support. The decision is meant to be *presidential*, not part of a polling operation.

In that same statement, Clinton said he “did not believe they should be held in incarceration, in effect, by guilt by association.” Here he seriously abuses a well-known expression. Someone becomes a victim of “guilt by association” when arrested and punished because of something a family member or associate did, or perhaps because the person belongs to the race or ethnic group of someone suspected of a crime. The FALN members were in prison because of what *they* did. They conspired to support violence and terrorism. They helped build bombs and transport explosives. Several were caught with weapons in their van on the way to a terrorist attempt. Their intent to commit violence failed because they were first apprehended. As a former law professor, Clinton should know the meaning of “guilt by association.”

Clinton further justified the clemency because “none of them, even though they belong to an organization which has espoused violent means, none of them were convicted of doing any bodily harm to anyone.”<sup>61</sup> The FALN members did not just belong to an organization that “espoused” violence. Their organization *practiced* it. As for not doing any bodily harm to anyone, they worked with an organization dedicated to violent action and they knew it. That knowledge alone was sufficient to justify conviction and incarceration. Several of them intended to commit violence but were arrested before they could complete their assigned task.

Legislative efforts to learn more about the FALN matter came to an end when Clinton invoked executive privilege after congressional subpoenas asked for the records of private deliberations that led to the clemency decision. Cheryl Mills, White House Deputy Counsel, told the House Committee on

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60. Public Papers of the Presidents, 1999, II, at 1513.

61. *Id.*

Government Reform that the President's constitutional authority to grant clemency "is not subject to legislative oversight."<sup>62</sup> Actually, that is an overstatement. Congress conducted considerable oversight on the FALN clemency decision and received thousands of pages of documents related to the decision.<sup>63</sup> Several senior administration officials testified, including Deputy Attorney General Holder and Pardon Attorney Adams.<sup>64</sup>

### Marc Rich et al.

Two years later, Congress and the White House again battled over access to documents concerning presidential pardons. The subject this time were the pardons issued by President Clinton during his last day in office, particularly the pardon of Marc Rich. Pulling an all-nighter, Clinton issued pardons to 140 people and commuted 36 prison sentences. The magnitude of the operation and the nature of the procedures (or lack of them) prompted Pardon Attorney Adams to remark: "I've never seen anything like this." He said that many of the people on the list had not applied for pardons and that there was often no time to conduct record checks with the FBI.<sup>65</sup>

The names included such prominent people as Susan McDougal, Henry Cisneros, Patricia Hearst Shaw, and Clinton's brother, Roger. Media attention also focused on names not well known. One was Susan L. Rosenberg, a one-time member of the Weather Underground terrorist group charged in the 1981 Brinks robbery that left a guard and two police officers dead. She admitted her role in a 1984 New Jersey case, where she was found with a companion loading 740 pounds of dynamite and weapons, including a sub-machine gun.<sup>66</sup>

The commutation of prison sentences for four Hasidic men from New York, convicted of defrauding the government of tens of millions of dollars, stayed in the spotlight for months. After their supporters met with Clinton and his wife in 2000, the religious community voted overwhelmingly for Mrs. Clin-

62. H. Rept. No. 106-488, 106th Cong., 1st Sess. 115 (1999).

63. See the documents reprinted in H. Rept. No. 106-488 and these hearings: "Clemency for the FALN: A Flawed Decision?," hearings before the House Committee on Government Reform, 106th Cong., 1st Sess. (1999); "Clemency for FALN Members," hearings before the Senate Committee on the Judiciary, 106th Cong., 1st Sess. (1999).

64. "Clemency for FALN Members," at 96-148.

65. Amy Goldstein and Susan Schmidt, "Clinton's Last-Day Clemency Benefits 176," *Washington Post*, January 21, 2001, at A1, A16.

66. Eric Lipton, "Pardon Given Ex-Terrorist is Criticized," *New York Times*, January 22, 2001, at A17.

ton that fall in her successful campaign for the U.S. Senate.<sup>67</sup> Federal prosecutors investigated whether President Clinton commuted the four prison sentences as payback for the community's support of her campaign.<sup>68</sup> Also criticized was the pardon of Almon Glenn Braswell, convicted in 1983 of mail fraud and perjury related to his vitamin and health supplement business. He was still under investigation by federal prosecutors on another matter when the pardon was announced.<sup>69</sup> Another focal point was the commutation of a fifteen-year prison sentence for Carlos Vignali, a convicted Los Angeles cocaine dealer. His father, a major donor to Democrats in California, made contributions in excess of \$150,000.<sup>70</sup>

Clinton's family and in-laws were actively involved in these pardons. His brother-in-law, Hugh Rodham, received about \$400,000 for helping two felons (Braswell and Vignali) receive clemency. After the matter became public, he returned the money.<sup>71</sup> Another brother-in-law, Tony Rodham, helped obtain a pardon for a Tennessee couple.<sup>72</sup> The next shoe to drop concerned Clinton's brother, Roger. Several friends described how he received money for promising pardons to two people convicted of drug offenses.<sup>73</sup>

As captivating as these stories were, the lion's share of attention fell on Clinton's pardon of Marc Rich and Pincus Green, charged in 1983 with conduct-

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67. Clifford J. Levy, "Both Clintons Met With Backers of 4 Hasidim Who Got Leniency," *New York Times*, January 24, 2001, at A19; Randal C. Archibold and Elissa Gootman, "Behind 4 Pardons, a Hasidic Sect Desperate for Subsidies, and for Political Influence," *New York Times*, February 5, 2001, at A23; and Christine Haughney, "Orthodox Town Under Scrutiny," *Washington Post*, February 25, 2001, at A6.

68. Michael Grunwald and Christine Haughney, "4 Pardons Probed for Ties to N.Y. Senate Bid," *Washington Post*, February 24, 2001, at A1; and Benjamin Weiser, "Inquiry Focuses on Commuted Sentences for 4 New Yorkers," *New York Times*, February 24, 2001, at A8.

69. Kurt Eichenwald and Michael Moss, "Pardon for Subject of Inquiry Worries Prosecutors," *New York Times*, February 6, 2001, at A3; Michael Moss, "Officials Say Investigation Will Go On Despite Pardon," *New York Times*, February 8, 2001, at A20; and Peter Slevin, "Another Pardon Stirs Controversy," *Washington Post*, February 6, 2001, at A3.

70. Todd S. Purdum, "A Convict in the Storm's Eye Had Plenty of Help," *New York Times*, February 22, 2001, at A21; and Rene Sanchez, "Drug Felon's Powerful Supporters Retreat on Pardon," *Washington Post*, February 24, 2001, at A6.

71. James V. Grimaldi and Peter Slevin, "Hillary Clinton's Brother Was Paid for Role in 2 Pardons," *Washington Post*, February 22, 2001, at A2.

72. Marc Lacey and Don Van Natta, Jr., "Second Clinton In-Law Says He Helped to Obtain Pardon," *New York Times*, March 1, 2001, at A1.

73. Susan Schmidt, "Clinton's Brother Promised Pardons," *Washington Post*, February 24, 2001, at A7; Alison Leigh Cowan, "Allegations on Cash and Pardons Put Focus Back on Roger Clinton," *New York Times*, June 17, 2001, at 16.

ing the largest tax-evasion scheme in U.S. history. Rather than stand trial, they fled to Switzerland. Rich became naturalized as a citizen of Spain, purporting to renounce his U.S. citizenship. Both Rich and Green became citizens of Israel. In 1983, a grand jury issued a 51 count indictment against Rich, Green, and others for wire fraud, mail fraud, racketeering, racketeering conspiracy, tax evasion, and trading with the enemy. The latter charge reflects their purchase of oil from Iran during the 1979 hostage crisis. In 1984, the government filed an amended 65 count indictment. U.S. efforts to extradite Rich and Green from Switzerland and Spain were unsuccessful.

In early 2000, with Clinton in his last year in office, the attorneys for Rich and Green pressed hard for a presidential pardon. One strategy was to have Rich's ex-wife, Denise Rich, meet with President Clinton to discuss the pardon. An e-mail of March 18 from Avner Azulay, a friend of Marc Rich, spoke of sending "DR on a 'personal' mission to NO. 1, with a well prepared script."<sup>74</sup> She spoke with President Clinton at a White House social event. Over the years, she had contributed more than a million dollars to the Democratic Party and donated \$450,000 to Clinton's presidential library in Little Rock. Beth Dozoretz, a close friend of Denise Rich, also played a substantial role as Democratic fund-raiser. She and her husband had visited the Clintons at Camp David and vacationed with them at Martha's Vineyard. Jack Quinn, a former White House Counsel and subsequently one of Rich's lawyers, asked her to contact President Clinton about the pardon request. She did so at least twice and pledged to raise \$1 million for the Clinton library.<sup>75</sup>

In October 2000, Marc Rich and his advisers decided to move on the pardon request. On December 11, the pardon petition was delivered to the White House. Two letters from Denise Rich were attached to the petition. On the evening of January 19, the day before Clinton had to yield power, White House Counsel Beth Nolan called Deputy Attorney General Eric Holder to discuss the Rich pardon. He told her that his earlier position of "neutral" would change to "neutral, leaning towards favorable" if Clinton thought the pardon would yield foreign policy benefits in the Middle East.<sup>76</sup> Denise Rich, after invoking the Fifth Amendment rather than testify at congressional hearings, was given immunity as part of the pardon probe. Beth Dozoretz, when

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74. In re Grand Jury Subpoenas Dated March 9, 2001, 179 F.Supp.2d 270, 277 (S.D. N.Y. 2001).

75. George Lardner, Jr., "House Panel Given List of Clinton Library Donors," Washington Post, March 3, 2001, at A14.

76. Peter Slevin and James V. Grimaldi, "Ex-Aides say They Fought Rich Pardon," Washington Post, March 2, 2001, at A12.

called before the House Government Reform Committee to testify about her role in the pardon of Rich and Green, also invoked the Fifth Amendment.<sup>77</sup>

The House Government Reform Committee held hearings on February 8 and March 1, 2001, taking testimony from former Deputy Attorney General Holder, former White House Counsel Jack Quinn, former counsel to the President Beth Nolan, former deputy counsel to the President Bruce Lindsey, and former White House Chief of Staff John Podesta.<sup>78</sup> A number of documents—including letters, notes, e-mails, and phone logs—that explain the process leading to the Rich pardon are reprinted in the hearings.<sup>79</sup> Additional documents on the Rich pardon appear in a subsequent committee report.<sup>80</sup>

### Clinton's Defense

On February 18, 2001, Clinton defended the pardons of Rich and others in a lengthy op-ed piece for the *New York Times*. He explained that “the common denominator was that the cases, like that of Patricia Hearst, seemed to me deserving of executive clemency. Overwhelmingly, the pardon went to people who had been convicted and served their time.”<sup>81</sup> Yet the most controversial figure, Marc Rich, had not been convicted and had not served time. Clinton conceded that “the process would have been better served had I sought [the] views directly” of Mary Jo White, the U.S. Attorney for the Southern District of New York, whose jurisdiction covered the Marc Rich case.

In the op-ed piece, Clinton claimed that the case for the pardons of Rich and Green “was reviewed and advocated not only by my former White House counsel Jack Quinn but also by three distinguished Republican attorneys: Leonard Garment, a former Nixon White House official; William Bradford Reynolds, a former high-ranking official in the Reagan Justice Department; and Lewis Libby, now Vice President Cheney’s chief of staff.” This would have been a powerful and politically adroit defense, but within hours all three men denied offering any assistance or encouragement to the pardons. Garment said it was “absolutely false that I knew about and endorsed the idea of a pardon.”

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77. Jerry Seper, “Dozoretz had Integral Role in Pardon,” *Washington Times*, March 6, 2001, at A8.

78. “The Controversial Pardon of International Fugitive Marc Rich,” hearings before the House Committee on Government Reform, 107th Cong., 1st Sess. 192, 309 (2001).

79. E.g., *id.* at 75, 80–87, 115, 185, 247, 250, 259, 265, 305, 330, 350–51, 368, 971–72.

80. H. Rept. No. 107-454, 107th Cong., 2d Sess. 463–708 (2002).

81. William Clinton, “My Reasons for the Pardons,” *New York Times*, February 18, 2001, at 12.

Libby, although a former lawyer for Rich, was not involved in the pardon. Reynolds said he “never reviewed nor advocated the pardon.”<sup>82</sup> At that point, Clinton’s office acknowledged that none of the three lawyers had reviewed the pardon application or lobbied for it.<sup>83</sup>

On February 8 and March 1, 2001, the House Government Reform Committee held hearings on the Rich pardon. Several former Clinton White House aides testified that they strongly opposed the decision to pardon Rich. Chief of Staff John Podesta and White House Counsel Beth Nolan thought they had argued successfully against the pardon. Bruce Lindsey, a former counsel to Clinton, said he opposed the pardon because Rich was a fugitive. That factor alone, he said, “was the beginning and the end.” The three Clinton aides testified about the intensity of lobbying efforts for various pardons.<sup>84</sup>

Clinton’s library came under further scrutiny when it was learned that John Catsimatidis, a Clinton library advisory board member who pledged to raise \$1 million for the library, had lobbied successfully for the pardon of convicted perjurer William Fugazy. After the Justice Department denied the request, Catsimatidis appealed directly to Clinton’s chief of staff, John Podesta.<sup>85</sup> Also, former White House lawyer Cheryl Mills, a member of the library’s board, participated in a White House meeting on the evening of January 19, 2001, to discuss the pardon of Rich. The House Committee on Government Reform, watching this story unfold, asked that the library release the names of major contributors. The library agreed to give the committee a list of more than one hundred people who had given or promised to raise at least \$5,000 for the building.<sup>86</sup>

Clinton’s efforts to justify the pardon of Rich and Green invariably backfired, but he tried again in an April 8, 2002 interview with Jonathan Alter of *Newsweek*. In discussing the pardons he issued on his last day in office, he spoke about being “mugged one more time on the way out the door.” An interesting picture. Being “mugged” is the language of an innocent victim, someone attacked and robbed on a street. Clinton was hardly innocent. He seemed

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82. Jill Abramson, “A Clinton Fund-Raiser is Said to be Behind Gifts in Rich Case,” *New York Times*, February 18, 2001, at 17.

83. Joseph Kahn, “Clinton’s Defense of Pardons Brings Even More Questions,” *New York Times*, February 19, 2001, at A1, A15.

84. Peter Slevin and James V. Grimaldi, “Ex-aides Say They Fought Rich Pardon,” March 22, 2001, at A1; “The Controversial Pardon of International Fugitive Marc Rich,” hearings before the House Committee on Government Reform, 107th Cong., 1st Sess. (2001).

85. Greg B. Smith, “Clinton Library Fundraiser Helped Perjurer Get Pardon,” *Washington Post*, March 4, 2001, at A2.

86. Don Van Natta, Jr. and David Johnston, “Clinton Library to Yield Details on Big Gifts,” *New York Times*, March 3, 2001, at A10.

unable to reflect on how much his personal judgments and misjudgments had contributed to—and deserved—the criticism that came his way.

Alter asked: “If you had to do it all over again, would you pardon Marc Rich”? Clinton expressed regret about the personal cost to him, but did not acknowledge any error on his part: “Probably not, just for the politics. It was terrible politics. It wasn’t worth the damage to my reputation. But that doesn’t mean the attacks were true. The fact that his ex-wife—I didn’t think they got along—was for it and had contributed to my library had nothing to do with it.”<sup>87</sup>

Clinton gave Alter three justifications for the Rich pardon: “Number one, the Justice Department said they were no longer opposed and they were really for it. Had I not granted it, it would have been the only one they wanted publicly that they didn’t grant.” Here Clinton shifted the blame to the Justice Department. Did it want the pardon “publicly”? There is no such public record. Clinton’s response assumed that the department and the pardon attorney had some formal role in investigating the pardon petition and in seeking outside comment, but Jack Quinn clearly bypassed that process and went directly to Clinton. As for the department withdrawing its opposition and being “really for it,” that can only refer to the brief conversation between White House Counsel Nolan and Deputy Attorney General Holder on the evening of January 19. That telephone conversation does not represent a department position and it hardly reflects enthusiasm on Holder’s part. He merely told Nolan that if the pardon of Marc Rich would somehow yield foreign policy benefits in the Middle East, he would shift from his former position of “neutral” to “neutral, leaning towards favorable.” It takes a rich imagination to read that as “really for it.”

The second reason offered by Clinton is that Marc Rich “waived his statute-of-limitations defenses so we can get lots of money from him [in a civil suit, if Rich returns to the United States]. Justice Ginsburg’s husband—the tax expert—said he wasn’t guilty. And the Justice Department under President Reagan said he was wrongly indicted in the first place.” In brackets, *Newsweek* inserted this comment: “a claim former Reagan officials deny.” Moreover, there is no evidence that Rich will ever return to the United States to pay any claims in a civil suit. As for Martin Ginsburg’s work, as a tax attorney he only examined the issue of tax evasion. He did not analyze the dozens of other charges included in the grand jury indictment, much less venture opinions about Rich’s guilt or innocence on those charges.

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87. Jonathan Alter, “Life is Fleeting, Man,” *Newsweek*, April 8, 2002, at 44.

The third and final reason is that Clinton received “a request from the government of Israel. They wanted him and [Jonathan] Pollard, and I considered Pollard an unrepentant spy and I didn’t think I could pardon him. And I wanted to do something to support the peace process. Furthermore, [Rich’s] main lawyer was Vice President Cheney’s chief of staff [Lewis Libby] and they [conservative critics] tried to hide that.” It’s quite a stretch to find some relationship between the Rich pardon and the peace process. As for Libby’s role, the credibility of the pardon depends on Clinton’s judgment and the facts surrounding it, not on who provided legal advice to Rich.

Later in the interview, when asked about Rich’s fugitive status, Clinton responded: “Look, I’m not justifying the fugitive status. But if we can get a couple of hundred million dollars, whatever it is he allegedly owes, it is in the interests of the United States to recover from him the way we recovered from other people who violated these oil-pricing schemes.”<sup>88</sup> By implying that Rich was guilty with others in violating oil-pricing schemes, Clinton contradicts the claim that Martin Ginsburg had found Rich to be innocent.

Clinton felt the hurt and frustration that came with the pardons. On that part of the experience he articulated strongly. However, nothing in his public statements suggests that he understood how much his actions and decisions contributed to the damage. Earlier in the *Newsweek* story he offered a comment that opens the door to possible understanding: “The biggest wounds in life are all self-inflicted.”<sup>89</sup>

## Grand Jury Probe

Just as it is rare for Congress to supervise presidential decisions over the pardon process, so is that the case with the judiciary. Yet both Congress and the courts were quite involved in monitoring the Clinton pardons. In February 2001, the Justice Department in the Southern District in New York began to investigate the circumstances surrounding the pardons to Marc Rich and Pincus Green, the four Hasidic Jews, and the role of Roger Clinton. The probe soon widened to cover any of the controversial pardons handed down on Clinton’s last day in office.<sup>90</sup> The following month, the grand jury issued subpoenas to five lawyers who had represented Rich and Green in connection with the pardon application.

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88. *Id.*

89. *Id.* at 41.

90. Dan Eggen, “All of Clinton’s Pardons Subject to Probe,” *Washington Post*, March 13, 2001, at A22.

The lawyers provided some documents in response to the subpoenas, including conversations and communications with Denise Rich, Beth Dozoretz, Eric Holder, Avner Azulay, and others. But they cited the work-product doctrine and the attorney-client privilege as grounds for withholding other documents and testimony. The work-product doctrine protects a lawyer's work product prepared "in anticipation of" litigation. The doctrine keeps the materials out of the hands of adversaries. The attorney-client privilege protects confidential communications made for the purpose of obtaining legal advice.

On December 13, 2001, a federal district judge held that once Rich and Green decided to seek a pardon, their lawyers ceased providing legal services in an adversarial context. By remaining fugitives for seventeen years, Rich and Green avoided further litigation on the criminal charges. Moreover, by going directly to the White House instead of through the pardon attorney and the Justice Department, the attorneys faced no opposing parties or adversaries. The pardon petition went directly to the White House; no copies were filed with the pardon attorney. The efforts of Rich's attorneys were entirely *ex parte*.

The judge concluded that the attorneys functioned principally as lobbyists, not lawyers. They worked with public relations specialists, foreign government officials, prominent citizens, and personal friends of President Clinton. The pardon petition was couched in political, not legal, terms: "Under the circumstances, then, this case will not be resolved through trial, settlement or the withdrawal of the indictment."<sup>91</sup> The judge concluded that Jack Quinn was hired not "for his ability to formulate better legal arguments or write better briefs... [but] because he was 'Washington wise' and understood 'the entire political process.' He was hired because 'he could telephone the White House and engage in a 20-minute conversation with the President.'"<sup>92</sup>

On these grounds, the judge overruled the objections raised by the attorneys regarding the work-product doctrine and attorney-client privilege. As a result of the grand jury inquiry, additional documents would be forthcoming about the process used by Clinton to grant pardons to Rich and Green. The White House was able to withhold many documents from congressional committees by arguing that the President possesses exclusive control over the pardon power. It is much more difficult to make that argument persuasively in the context of a criminal investigation.

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91. *In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F.Supp.2d 270, 278 (S.D. N.Y. 2001).

92. *Id.* at 289.

One would think that presidential power is most secure when it involves powers that are given expressly and solely to the President. Yet probably the gravest injuries to Clinton resulted from the exercise of powers that unquestionably belonged to him: the removal and pardon powers. The range of his actions, from firing people in the White House Travel Office, to giving clemencies to FALN terrorists, to the last-minute pardons of Marc Rich and others, did lasting damage to the legacy of Clinton's years in office. Even if corruption is not proved, the slapdash nature of the process displayed a lack of professionalism, discipline, and judgment. Procedures and due process are important not just to protect individuals but to safeguard presidential power and constitutional government. Clinton's failure to respect procedure opened the door to unprecedented congressional access to documents, judicial review of the pardon process, and public scrutiny of a presidential power formerly considered highly privileged.

## Tom Ridge

After the September 11, 2001, terrorist attacks, President Bush issued an executive order to establish the Office of Homeland Security, to be located within the Executive Office of the President.<sup>93</sup> Because of its location within the President's office and its creation by executive order instead of by statute, the White House argued that the head of the Office of Homeland Security would have protection against testifying before congressional committees. President Bush appointed Tom Ridge to head the office.

In a letter of March 4, 2002, Senators Robert C. Byrd (D-W.Va.) and Ted Stevens (R-Alas.), the chairman and ranking member of the Appropriations Committee, invited Ridge to testify before their committee on April 9, 10, and 11.<sup>94</sup> The White House announced that Ridge would not appear because he was an "adviser" to President Bush, not a Cabinet officer.<sup>95</sup> A letter of March 13 from White House liaison Nicholas Calio advised the two Senators that "members of the President's staff do not ordinarily testify before congressional committees."<sup>96</sup>

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93. 66 Fed. Reg. 51812 (2001).

94. Letter from Byrd and Stevens to Ridge, March 4, 2002.

95. "Letter to Ridge Is Latest Jab in Fight Over Balance of Powers," *New York Times*, March 5, 2002, at A8.

96. Calio's language is cited in a letter from Byrd and Stevens to President Bush, March 15, 2002, at 1.

Not receiving a response from Ridge, Senators Byrd and Stevens wrote to President Bush, pointing out that the budget he submitted to Congress proposed \$38 billion for over eighty federal departments and agencies for homeland defense. It was their position that Ridge “is the single Executive Branch official with the responsibility to integrate the many complex functions of the various Federal agencies in the formulation and execution of homeland defense programs.”<sup>97</sup> They further argued that the duties and responsibilities that President Bush had assigned to Ridge are “much broader in scope than the staff role of advising the President,” and that unless Ridge testified they would have “no recourse but to invite witnesses from more than eighty Federal departments and agencies that participate in homeland defense programs.”<sup>98</sup> Byrd and Stevens renewed their request for Ridge to testify before the Appropriations Committee. They said they had “no interest in questioning Governor Ridge about his private advice to you.” Also, they asked to meet with President Bush to explain their intentions.

The meeting with President Bush did not take place, but the letter from Byrd and Stevens prompted a letter from Ridge to Byrd, offering a compromise designed to “avoid the setting of a precedent that could undermine the Constitutional separation of powers and the long-standing traditions and practices of both Congress and the Executive Branch.”<sup>99</sup> Ridge proposed that he provide a public briefing in April to Senators and members of Congress. Joining him would be executive officials with operational authority over the homeland security programs. Lawmakers would have the opportunity to ask questions of Ridge and the other executive officials, with the proceedings open to both the public and the press.<sup>100</sup> How that proposal protects the constitutional separation of powers and “long-standing traditions and practices” is difficult to fathom. Probably no credible explanation could be offered by the administration. Pressured by both parties, the White House offered an accommodation it hoped would settle the dispute.

While Senators Byrd and Stevens were considering this proposal, Ridge offered to “informally” brief two House committees.<sup>101</sup> He followed through by

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97. *Id.*

98. *Id.*

99. Letter from Ridge to Byrd, March 25, 2002.

100. *Id.*

101. “Ridge to Brief 2 House Panels, but Rift With Senate Remains,” *New York Times*, April 4, 2002, at A15; “Ridge Will Meet Informally With 2 House Committees,” *Washington Post*, April 4, 2002, at A15.

meeting informally with a subcommittee of House Appropriations and the House Government Reform Committee.<sup>102</sup> Ridge also met with a group of Senators to discuss border security issues.<sup>103</sup> Ridge explained that he was willing to meet with lawmakers in “briefings” but not “hearings.”<sup>104</sup>

These artificial distinctions created by the White House—allowing Ridge to meet informally and take questions but not appear formally to take questions, or to participate in briefings but not hearings—added fuel to congressional efforts to create a Department of Homeland Security and have the agency headed by someone who must be confirmed by the Senate and subject to being called to testify. Statutory action would override President Bush’s executive order and neutralize White House arguments about Ridge functioning as a presidential adviser. Congress could have compromised by creating both a statutory agency and a small Office of Homeland Security located in the White House. However, the statute creating a Department of Homeland Security makes no mention of a White House office.<sup>105</sup> The Office of Homeland Security remains within the White House, as a presidential creation. Ridge became head of the Department of Homeland Security.

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The White House is usually insulated from congressional inquiry because of a long-standing comity that exists between Congress and the presidency. By and large, each branch concedes a certain amount of autonomy to the other. However, in clear cases of abuse and bad faith, Congress may require White House aides to appear and give an account of their activities. The White House could minimize such requests by conducting its operations with integrity, good judgment, and respect for Congress. However, the growing reliance on White House aides who have little experience other than helping in a campaign, and little commitment to or understanding of constitutional processes, suggests that future White House mishaps—especially during first terms—will remain more the rule than the exception. As the

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102. “From Bush Officials, A Hill Overture and a Snub: Ridge Meets House Panel in a Closed, Informal Session, but Criticism Persists,” *Washington Post*, April 11, 2002, at A27; “Ridge Briefs House Panel, but Discord Is Not Resolved,” *New York Times*, April 11, 2002, at A17.

103. “Ridge to Brief Senators About Border Security,” *Washington Post*, May 2, 2002, at A2.

104. “On Homeland Security Front, a Rocky Day on the Hill,” *Washington Post*, May 3, 2002, at A25.

105. 116 Stat. 2135 (2002).

White House continues to expand its operations to determine policy and power that used to reside in the executive departments, where legislative oversight is strong, Congress has less reason to grant the White House its customary independence.



politics. President Trump Invoked Executive Privilege. Here's the History of That Presidential Power. President Trump Invoked Executive Privilege. Here's the History of That Presidential Power. U.S. President Donald Trump in the Roosevelt Room at the White House on June 12, 2019 in Washington, D.C., on the day that his administration asserted executive privilege to avoid handing over documents related to a 2020 Census question about citizenship. Mark Wilson/Getty Images. By Olivia B. Waxman. The basic idea behind executive privilege is that an entity like the U.S. government requires a lot of transparency, but also can't function if there's no possible way to speak about things confidentially. Related Stories. Ideas.