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PRESIDENT CLINTON'S ELEVENTH HOUR PARDONS

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BEFORE THE

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UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

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PRESIDENT CLINTON'S ELEVENTH HOUR PARDONS

WEDNESDAY, FEBRUARY 14, 2001

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:07 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Specter, Kyl, DeWine, Sessions, McConnell, Leahy, Kohl, Feinstein, Feingold, Schumer, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We will begin. Good morning. I would like to welcome everyone to today's hearing on the pardons granted by President Clinton just before he left office on January 20, 2001. I would like to thank all of the witnesses who have come here today or who have submitted statements for the record.

The pardons and commutations granted by former President Clinton have been the subject of much debate and public commentary. I think virtually everyone who has examined them has been left with some serious questions as to whether some of them were appropriate. Moreover, I think virtually everyone agrees that the pardons given to Marc Rich and Pincus Green were particularly outrageous, because they were fugitives who had never taken responsibility for their actions, or even appeared in court to challenge them. In fact, the Justice Department had Mr. Rich listed as an international fugitive wanted by the FBI.

Moreover, these pardons allegedly were preceded by lavish gifts, political contributions, and pledged donations to the Clinton Presidential library.

As we have come to find out over recent days, Marc Rich and Pincus Green were indicted in the largest tax evasion case in U.S. history. The record is replete with their stonewall tactics and refusals to produce documents responsive to numerous grand jury subpoenas. Former prosecutors in the case have even described an effort by Mr. Rich and Mr. Green to ship subpoenaed documents out of the country in steamer trunks—a plan which was thwarted by law enforcement, after a tip allowed them to stop the airplane with the documents on it before it took off.

We have also learned that Mr. Rich's ex-wife, Denise Rich, has donated large sums of money to the Democratic Party, reportedly pledged $450,000 to the Clinton Presidential library, and gave ex-

pensive furniture to the President at the end of his term. These gifts and donations raise obvious questions and they deserve an answer.

Pardons to individuals such as these, and under these circumstances, raise serious questions in the public's mind about what does go on in the pardon process, how such decisions are made, and who can be held accountable. Similar questions arose in the summer of 1999 when numerous members of the FALN and Los Macheteros were also granted clemency by President Clinton. This committee examined the process that led to that decision and discovered that, while proponents of the clemency were granted meetings with very high-level government officials, victims were shut out of the process. The concerns of law enforcement were also apparently not heard or were disregarded. For example, many violent acts for which the FALN had claimed credit were never solved. A co-defendant in one case, a man named Victor Gerena, was never brought to justice and remained on the FBI's Ten Most Wanted list. Despite this, none of the individuals granted clemency was asked to provide information to law enforcement on the unsolved cases or the whereabouts of Gerena.

As pointed out by a Washington Post editorial on Monday, there are legitimate questions about some of the last-minute pardons, including the Rich and Green pardons, that "warrant a full accounting." The Post suggests that President Clinton should volunteer a full explanation. I agree. I am one of those who believes that the President's pardon power under the Constitution is absolute, and there is nothing we can do to change what has happened in these particular cases. That being said, I also believe that there is a need in the public interest to have a full explanation of what has gone on so that if there are any improprieties, they will never happen again. There are many appropriate ways President Clinton could do that, in a variety of settings, that would respect the office he used to hold, as well as to help the public understand what has happened.

Our focus at today's hearing will be process. Today we will continue the earlier examination of the pardon process we began during the FALN controversy and examine the role—or lack of role—played by the Justice Department. It appears that as many as 47 of President Clinton's final grants of clemency did not go through the normal process. Many were not investigated or vetted by the Justice Department to any significant degree, and I think we have seen some of the potential problems that can occur when that happens.

Today's hearing will identify for the American people what process is in place and what is the normal role of the Justice Department. We will then turn to a few examples of pardons that did not go through that process and try to understand how they came to be. Finally, we have some distinguished scholars to discuss constitutional and other legal issues that could arise from legislative efforts to revise the current system which members may suggest in the future.

I have delegated authority to Senator Specter to conduct these hearings, and I am very appreciative that he is willing to do so. I cannot imagine anybody better on our side to do so or anybody bet-

ter on the Democrat side other than the ranking minority member, Senator Leahy, both of whom have been prosecutors in the past and both of whom are excellent lawyers.

So that is what we are going to do, and I want to thank all of you again for your attendance today. I look forward to an interesting and informative hearing. I am going to turn the hearings over to Senator Specter and Senator Leahy. We will now turn to Senator Leahy and proceed with the hearings.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. Like you, I will have to leave for another event, but let me say this: I think today's hearing can perform a very useful and constructive service to the American people and to our institutions of Government. Of course, it may not. It can illuminate valuable lessons for the future, or it could turn into partisan recriminations about the past. I would hope and expect that it would do the former.

Now, from what I have read in the press about the pardon of Marc Rich, it appears to me to be an occasion on which I disagree with a President's use of his constitutional pardon power. I have read that this pardon was supported by a number of well-respected lawyers, counsels who have staffed Democrats and counsels who have staffed Republicans. I understand that in addition to Mr. Quinn, who has counseled Democrats, that it also had the backing of Lewis Libby, who is currently serving as the chief of staff to Vice President Cheney.

So, President Clinton's former counsel favored it, Vice President Cheney's chief of staff favored it, and outgoing Prime Minister Ehud Barak favored it. But, frankly, I think they are all wrong. I do not happen to favor this pardon, but I understand the right of a President to pardon.

I understand different people have different views on different pardons. For example, on the Marc Rich pardon, some have said that the prosecution was too aggressive. But one of the prosecutors involved in that case, now mayor of the city of New York, Rudolph Giuliani, felt that Mr. Rich should not have been pardoned. I happen to agree with Mayor Giuliani on this. On other things I disagree with him. Mayor Giuliani thinks, for example, that one of the great traitors of our lifetime, Jonathan Pollard, should be pardoned. And yet, of course, a very respected former prosecutor, Joe DiGenova, feels he should not be pardoned. Some favor—a pardon for Michael Milken. Frankly, I am delighted the President did not grant one.

But, you see, the point I am making: different people take different views. Concerns have been raised about the wisdom of President Clinton's judgment in granting some of these pardons, especially when they were granted in the waning hours and days of his Presidency. Last year, Mr. Chairman, we had a hearing on his clemency decisions regarding certain members of the FALN. I also disagreed with those pardons.

Perhaps this hearing will yield insights that will help guide the current President and future Presidents in the exercise of their constitutional power of clemency. I worked last year with my friend

Senator Hatch in a bipartisan effort to improve the pardon process and to better ensure that crime victims and law enforcement views were taken into account. In advance of this hearing, I wrote the White House Counsel asking what the current White House view is with regard to the pardon process. I asked about efforts to establish procedures to make sure that the opinions of both crime victims and law enforcement are taken into consideration befpre pardon is granted.

President Bush has indicated he has little enthusiasm for congressional investigations of President Clinton's final acts in office, including the pardons. He told reporters yesterday, "I think it is time to move on."

I agree, and I am optimistic that we can make progress on a number of fronts. Senator Hatch and I introduced significant crime legislation yesterday. We expect the Senate today will consider another bipartisan effort that he and I have introduced updating our intellectual property laws. While I rarely predict votes in the Senate, I predict the Senate will pass it.

Now, however, this committee is going to return to the subject of the House hearings last week. We will have the hearings on the pardon of Marc Rich. But we will also review the question of what should be the overall standards for this pardon or any other. I applaud Senator Specter in this regard.

I hope that we will not go into the kind of permanent partisan investigations that we saw in the last two Congresses. I would like to view President Clinton's pardons as a whole and in their historical and constitutional context, not just one or two controversial cases. The President does have the pardon right, as most Governors do. When I was a prosecutor in Vermont, I oftentimes disagreed with the Governor's decision to pardon somebody I might have prosecuted, but I respected the fact that he had an absolute right to do so.

The pardon is absolute. It is absolute for Republican Presidents. It is absolute for Democratic Presidents. I have served with both Republican and Democratic Presidents over the last 26 years. President Carter used the power more than 560 times, President Reagan pardoned more than 400 times, President Bush more than 75 times. President Clinton used his pardon power about the same as President Reagan. There were instances with which I agreed. There were also instances with each of these Presidents where I disagreed.

When the Framers of the Constitution drafted the Pardon Clause in 1787, they considered the potential for Presidential abuse. They debated whether one or both branches of Congress should play a role in the pardoning process. In the end, they rejected proposals to check the power through congressional oversight because, in the words of Alexander Hamilton, "one man appears to be a more eligible dispenser of the mercy of the government than a body of men." And, by an large, our National experience supports this.

Chief Justice Rehnquist wrote in a 1993 decision, "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."

We saw such an example last week when Earl Washington was released from prison after serving more than 17 years, including more than a decade on death row, for a crime he did not commit. Virginia Governor James Gilmore pardoned him based on DNA evidence that proved his innocence. But had there not been an earlier act of clemency by a previous Virginia Governor, Earl Washington would have been executed in 1994 for a crime we now know he did not commit.

There are many pardons granted by President Clinton I support but, unfortunately, they were overshadowed by the Marc Rich pardon. President Clinton made a strong statement by commuting the sentences of more than 20 men and women who were serving long prison terms for relatively low-level drug offenses. Several of them had been victims of domestic abuse. In many cases, the sentencing judge and the prosecutor had recommended in favor of clemency. These are compelling cases for Presidential clemency. I hope at some point we can appreciate the injustice being caused by mandatory minimum sentences which take away from Federal judges the discretion that would allow them to consider the circumstances of the cases before them.

President Clinton commuted the sentence of the first person who was sentenced to death under the Federal drug kingpin statute, David Ronald Chandler. Why? Because it turns out that the star witness was the actual triggerman, Charles Ray Jarrell. He now says that he killed Martin Shuler, his brother-in-law, for family reasons having nothing to do with Chandler. Ben Wittes of the Washington Post reviewed this case in December 1998. He said, "The only system that would err on the side of executing a man whose chief accuser has recanted is one that fundamentally doesn't care whether it executes innocent people." The President stepped in to grant clemency in the right place.

We should keep in mind the old saying that hard cases make bad law. We should not rush to amend the Constitution because of a particular pardon decision we may dislike. In fact, we should not amend the Constitution because we do not like a judicial decision. I have certainly seen a lot of judicial decisions I do not like, but I do not believe we should amend the Constitution as a result of them.

I have seen pardons granted by each of the Presidents I have served with, other than the current President Bush, who has only been in office a few weeks. I have disagreed with some of the pardons of each of these Presidents. But I certainly do not want to take away from them the ability to pardon. So, let's not let public concern over the Marc Rich pardon send us off on a venture to try to tinker with our National charter.

I have a statement, Mr. Chairman, of former Pardon Attorney Margaret Love I would like to put in the record. I will also put my formal statement in the record.

Chairman HATCH. Without objection, so ordered.

[The prepared statement of Senator Leahy follows:]

STATEMENT OF HON. PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Today's hearing may perform useful and constructive service to the American people and our institutions of government. Or it may not. Today's hearing may illu-

minate valuable lessons for the future. Or it may degenerate into partisan recriminations about the past. I hope it will do the former.

From what I have read about the pardon of Marc Rich, it appears to me to be another occasion on which I disagree with a president's use of his constitutional pardon power. I have read that it was supported by a number of well-respected lawyers, by counsels who have staffed Democrats and counsels who have staffed Republicans. I understand that in addition to Mr. Quinn, from whom we will hear today, this effort also had the backing, for example, of Lewis Libby, who is currently serving as the Chief of Staff to Vice President Cheney.

Concerns have been raised about the wisdom of President Clinton's judgment in granting certain of his pardons and about the propriety of the process that led to them in the waning days and hours of his presidency. Last year we had a hearing on his clemency decisions regarding certain members of the FALN. I disagreed with him then, as well.

This hearing may yield insights that will help guide the current president and future presidents in the exercise of their constitutional power of clemency. I had worked last year with Senator Hatch in a bipartisan effort to improve the pardon process and to better ensure that crime victims and law enforcement views were taken into account. In advance of this hearing, last week I wrote to the White House Counsel asking what the current White House view is with regard to the pardon process and about those efforts to establish procedures to ensure that the views of crime victims and law enforcement officials were taken into account when the president considers use of his pardon power.

President Bush indicated that he has little enthusiasm for congressional investigations of President Clinton's final acts in office, including the pardons. Yesterday he told reporters: "I think it's time to move on." I am inclined to agree, and I am optimistic that we can make progress on a number of fronts. Yesterday Senator Hatch and I introduced a major anti-crime and anti-drug crime package, and we expect that the Senate today will be considering another bipartisan measure updating our intellectual property laws. Given that this Committee has chosen to return to the subject of the House hearings last week and to devote today's hearing to the pardon of Marc Rich, I trust that there will be no bandying about of unsupported accusations or the return to the politics of permanent partisan investigation that so tarnished the last two Congresses.

We need to view President Clinton's pardons as a whole and in their historical and constitutional context, not focus exclusively on one or two controversial cases. The pardon power lies with the president, just as it lies with the governor in each of the states. When I was State's Attorney for Chittenden County, I did not always agree when the Governor of Vermont used his clemency power, but I understood that it was his power to exercise as he saw fit.

The pardon power is absolute. It is absolute for Republican presidents, and it is absolute for Democratic presidents. There were numerous exercises of this constitutional power by the Republican and Democratic presidents with whom I have served over the last 26 years: President Carter used this power more than 560 times, President Reagan more than 400 times, and President Bush more than 75 times. They have not always been instances with which I agreed. President Clinton used his clemency power relatively infrequently by 20' Century standards—certainly less than President Reagan used it. I have served with five presidents, Democrats and Republicans, before the current occupant of the White House, and I have agreed with each of them on some of their pardon decisions and disagreed with each of them from time to time, but I recognized that they are and should be the president's decisions to make.

When the Framers of our Constitution drafted the pardon clause in 1787, they considered the potential for presidential abuse of the pardon power. They debated whether one or both branches of Congress should play a role in the pardoning process. In the end, they rejected proposals to check the power through congressional oversight because, in the words of Alexander Hamilton, "one man appears to be a more eligible dispenser of the mercy of the government than a body of men." By and large, our national experience supports that view.

By establishing the pardon power in the Constitution, the Framers recognized the important role it plays in our imperfect justice system. As Chief Justice Rehnquist wrote in a 1993 decision:

"Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. . . . It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence." (*Herrera* v. *Collins*, 506 U.S. 390 (1993)).

We saw such an example just this week, when Earl Washington was released from prison after serving more than 17 years, including more than a decade on death row. Virginia Governor James Gilmore pardoned Earl Washington for the crime that sent him to death row based on DNA evidence that established his innocence. Were it not for an earlier act of clemency by a previous Virginia governor, Earl Washington would have been executed in 1994 for a crime that he did not commit.

In discussing individual pardons, we should not overlook the value of the pardon power in the vast majority of largely uncontroversial cases in which President Clinton and his predecessors have exercised it. Hamilton wrote that the pardon power serves the dual goals of humanity and good policy. Sadly, the many pardons that President Clinton granted in this spirit have been overshadowed by the controversy surrounding the Marc Rich pardon.

President Clinton made a strong statement by commuting the sentences of more than 20 men and women who were serving long prison terms for relatively low-level drug offenses. Several of those released had been victims of domestic abuse. In many cases, the sentencing judge and prosecutor had recommended in favor of clemency. Some of those are compelling cases for presidential clemency. I hope that we will look at those pardons and begin to appreciate the injustice being caused by mandatory minimum sentences by taking away from federal judges the discretion that would allow them to consider the circumstances of the case before them before imposing sentence.

President Clinton also commuted the sentence of the first person who was sentenced to death under the federal drug kingpin statute. David Ronald Chandler was convicted in 1991 of ordering the contract killing of a man named Martin Shuler. The Government's star witness was the triggerman, Charles Ray Jarrell, who recanted his testimony after the trial. Jarrell now claims that he killed Shuler—his brother-in-law—for family reasons having nothing to do with Chandler. Ben Wittes of *The Washington Post* reviewed the Chandler case in December 1998 and concluded as follows:

> "I don't pretend to know whether Chandler procured Shuler's death or which of Jarrell's stories is closest to the truth. . . . What I do know is that the only system that would err on the side of executing a man whose chief accuser has recanted is one that fundamentally doesn't care whether it executes innocent people. If the death penalty is even to make a pretense of being something more than monstrous, the criminal justice system has to stop at nothing to avoid wrongful executions."

I share these views and commend President Clinton for his action in commuting Chandler's sentence. Chandler would have been the first person put to death under federal law since 1963; now he will serve a life term.

If we view the controversies surrounding certain of President Clinton's pardons in the broader context of our constitutional scheme, our justice system, history and pardon practice, we may well learn valuable lessons for the future. But we should keep in mind the old saying that hard cases make bad law: Rushing to amend the Constitution because of a particular pardon decision that we may dislike is no wiser than rushing to amend the Constitution whenever we dislike a judicial decision. We should not let public concern over the Marc Rich pardon -understandable concern, in my view—send us off on yet another reckless adventure to try to tinker with our national charter, and so imperil both the separation of powers and the "fail-safe" mechanisms in our criminal justice system that have served this country so well for so long.

I thank the witnesses for coming today, and look forward to hearing their testimony.

Chairman HATCH. Normally we only have the chairman and the ranking member make statements, but we are going to allow everybody to make statements today. We will put that statement in the record also, Senator.

So we will turn to Senator Specter, and I will turn the gavel over to you, Senator.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. [Presiding.] Thank you very much, Mr. Chairman. My thought about these hearings is that they ought to look

forward to see whether any changes ought to be made on the President's power to pardon, and we will seek not to duplicate what the House of Representatives has done, but we will be taking a look at some specific cases like the Marc Rich case and like the Braswell case to see what procedures have been followed with a view to considering whether there ought to be changes.

When Walter Mondale was a U.S. Senator, in September 1974, he proposed a constitutional amendment which would authorize the Congress on a two-thirds vote of the House and a two-thirds vote of the Senate to overturn a Presidential pardon. The power of the President to pardon is the only power in the Constitution which is not subject to some check and balance, and that power was derived from the monarch's authority in the day when the King could do no wrong. And it was absolute.

When Senator Mondale introduced his constitutional amendment, he quoted Hamilton in the Federalist Papers, expressing the concern that there is a method "in seasons of insurrection or rebellion" for putting a prompt end to domestic instability through a prompt offer of a pardon, so the use of amnesty in the early days of the Republic, but that reason obviously has long since gone.

I believe we ought not to amend the Constitution lightly, but the Founding Fathers provided for amendment procedures for updating in accordance with modern needs. If the Mondale amendment were to be adopted, it would provide an opportunity for congressional legislation as an addendum to establish procedures. There are Department of Justice regulations which require or call for a number of steps to be taken, but President Clinton did not follow those procedures, and, in fact, he is not bound to since he has the absolute power. But if the Mondale amendment were to be enacted, an addendum could be provided so that Congress could set up statutory requirements which would require that the FBI be consulted or the prosecutor be consulted or victims be consulted so that the President would have a full picture on what went on.

Today we are going to be dealing with the Rich case specifically as an illustration of what happened and what might be changed. Two hours before President Clinton's term of office expired, documents were released to the media, including two pages entitled "An Executive Grant of Clemency," and reciting that after considering the request for Executive clemency, but in many situations there had not been a request. And on many of the cases, the Pardon Attorney, who will testify here in a few moments, was not given an opportunity to review the matters in advance. This document is purportedly signed by William J. Clinton on January 20th.

Then another document in the matter, illustratively, for Marc Rich was signed by Roger C. Adams in line with the authority which President Clinton had specified in his document: "I hereby designate and direct and empower the Pardon Attorney as my representative to sign each grant of clemency to the persons named herein. The Pardon Attorney shall declare that his action is the act of the President being performed at my direction." The document signed by Mr. Adams is dated January the 20th.

One question which arises is whether this document was issued on January 20th. On the face, it appears that there were so many that they could not have been issued on January 20th. As of Feb-

ruary the 9th, I am advised that many of the papers to be issued by the Pardon Attorney had not been issued.

So there are a number of legal issues which arise. Can the President delegate power to someone to be exercised after his term ends? Certainly the President had no power to act as President after noon on January 20th. A real question exists as to whether Mr. Adams could carry on duties after the 20th if there is a real issue as to what the Pardon Attorney knew, and we are going to inquire into that here.

There is still one more document, among many others, which is a memorandum to the Director of the Office of Public Affairs from Roger C. Adams, Pardon Attorney, bearing the initials R.C.A., subject, Marc Rich. We will ask Mr. Adams about it. "On the above date, President Clinton granted Mr. Rich a full and unconditional pardon after completion of sentence." Well, there was no completion of sentence. There was no sentence. If the pardon is conditioned upon completion of sentence and there is no sentence, is the pardon valid? What was the President's intent? Did he think Marc Rich was to complete a sentence? Did he instruct Mr. Adams to say that the pardon would be granted upon completion of the sentence? These are all issues to be inquired into.

When the President issued many Executive orders, there was a rush to get them into the Federal Register, which you have to do before the President's term expires. Those which did not make the Federal Register are not valid because the President cannot act after noon on January 20th. And there are many analogies where delegated authority ceases.

Technically, when a person writes a check authorizing the bank to disburse funds, if that individual dies before the check is negotiated, the check is invalid because when a person ceases to live, the bank cannot carry out the delegation of authority. And it may well be that these pardons, many of them, including the pardon to Marc Rich, is invalid. And it may well be that if he returns to the United States, he may do so at his peril.

It is well known that the U.S. Attorney for the Southern District of New York is not pleased with not being consulted and with what was done here. And there is an indictment outstanding, and the criminal law says that on an indictment you can issue a warrant of arrest. And then a person can interpose a pardon as a defense, which might be a way that the pardon would be tested.

Just one other brief comment, following up on what Senator Hatch, the chairman, had to say about the President testifying. I would not invite the President to testify lightly, and I think there needs to be a foundation laid if the President is to be invited to testify. You have Ms. Denise Rich pleading the privilege against self-incrimination, which raises the suggestion of something incriminating having happened, and the allegations about key conversations between Ms. Rich and former President Clinton. If President Clinton is the only witness available, that may create a reason to ask him to testify.

There has been a suggestion of a grant of immunity which has been requested by the House of Representatives. There are reports that the United States Attorney for the Southern District of New York has initiated a criminal investigation. Based on my experi-

ence as a prosecutor, I doubt that the Justice Department is going to rush to grant immunity to Ms. Rich at an early stage if an investigation is to be pursued.

And then there is the e-mail where President Clinton was purported to have talked to the Democratic National Committee, which, again, raises questions.

But we are going to pursue these matters, and we are going to do so without partisanship and with a view to the future as to whether something should be done to improve the procedures for the future.

Senator Feinstein?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thanks very much, Mr. Chairman. I just want to make a couple of remarks on the history of pardons, because pardons have a very colorful history in our country. The Framers of the Constitution clearly set out that the President had an unrestricted constitutional right to pardon and to commute. And as one of the Framers noted, "The only restraint on the abuse of the pardon was the risk of damnation of the President's fame for all future ages."

And in the Federalist Papers, Alexander Hamilton argues that at times of national stress, the Executive might have to move very fast and, therefore, any legislative impediment would slow down a pardon. Hamilton suggested that giving the legislature some or all of the pardon power would politicize the pardon process.

In 1795, George Washington issued pardons to leaders of the Whiskey Rebellion. Jefferson pardoned deserters from the Continental Army and supporters who were convicted under the Alien and Sedition Act. Madison pardoned deserters to entice soldiers to fight in the War of 1812. During the Civil War, Abraham Lincoln gave pardons to Confederate sympathizers in return for loyalty oaths to undercut rebellion. Truman gave amnesty to individuals who violated the draft during World War II. President Nixon gave Jimmy Hoffa a pardon in return for his staying out of union management. President Ford pardoned President Nixon, and so on and so forth.

The history of pardons is certainly a colorful history. I am one that believes that a President is well advised to carefully vet those pardons. And I think most of what has happened happened because these pardons, a large number of them, 140, were made at the very last moment of a President's administration. Some were vetted. Some were not vetted. But I certainly believe that a President should vet pardons, not only with the Department of Justice, with the line prosecutor, with judges, with victims. And we saw that in the Puerto Rican case where none of the victims were consulted, and there was broad concern about those pardons.

I have concerns not only about the Rich pardon but with a number of the other pardons, and I hope to ask questions about them. But the reason I am saying this is because a lot of commentary has arisen as to whether the Congress should in some way adjust or restrict the President's pardoning authority. I do not believe that

under the Constitution we would have the legislative right to do that, and I do not believe it would be well advised to do it.

The pardon and the commutation power is an absolute Executive right under the Constitution of the United States, and I think in terms of long-term history this Nation is probably well served by leaving it that way.

Thanks very much.

Senator SPECTER. Thank you, Senator Feinstein.

Senator DeWine?

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Mr. Chairman, thank you very much. Let me first congratulate you and congratulate Senator Hatch for holding this hearing. It is important that we get the facts out and get them out quickly. And I think it is also important, after we have the facts out, that we move on as a country. So I congratulate you.

There are some very, very troubling questions that have been raised. The more you look into this matter, the more troubling it becomes. And so I think it is important for us to not only get the facts out today, but also to hear from our witnesses, Mr. Adams, for example, in regard to what the normal procedure is, how what happened in this particular case or cases varied from the norm. I think that will tell us a great deal.

I think, though, that we need to be cautious as a country and as a Congress. This is clearly a very, very bad case. But we need to be very cautious that we not let—what I would call abuse of Presidential discretion, abuse of the pardon process, abuse of this power—constitutionally granted to the President of the United States cause us to do something that in the long run we would regret.

I do not believe we should change the Constitution. I do not believe, quite frankly, that we have the legislative power needed to influence future Presidents' decisions concerning the use of the pardon.

As has been pointed out by many people, the pardon power is granted by the Constitution. It actually predates the Constitution. It is not only a part of our Constitution but it is a part of our long, long history, going back to Great Britain. And it was a well-understood and well-accepted power at the time the Constitution was written.

So I think we need to be very, very cautious. This country has survived other mistakes. It has survived other abuses of power. We will certainly survive this grievous abuse of power as well. And I think once we have the facts, then we do need to move on. But I think the American people have a right to know what the facts are. And becuase of this right, and so I again congratulate you, Mr. Chairman, for leading us through this exercise and leading us through this search for the truth.

Thanks very much.

Senator SPECTER. Thank you, Senator DeWine.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I would like to comment first on what I think are the legitimate purposes of this hearing. One of those is to review President Clinton's use of his constitutional power to grant pardons in the closing day of his administration, with an eye toward making recommendations about the process by which the Justice Department reviews requests that the President exercise his power.

We might also consider proposals for a constitutional amendment to limit the President's power in some way, and I frankly do not think that a hearing done in the heat of public and press attention to a particular controversial pardon granted by a single President in the last days of his office is really the best way to give a proposed constitutional amendment the full scrutiny it deserves. But that certainly is a legitimate purpose for a Senate hearing.

I do not believe, however, that holding a hearing simply to add to the public outcry over certain pardons or to launch attacks against the President or people in his administration is an appropriate use of our oversight authority. And so I am a little disappointed at the title of this hearing, "President Clinton's Eleventh Hour Pardons." That sounds like a hearing designed for public relations effect, not for a balanced and forward-looking inquiry about an important constitutional power of our Nation's Chief Executive. And I do want to recognize that the chairman said, both as I heard on the "Today" show and at the beginning of the hearing, that his purpose here is to look to the future, and I do appreciate that.

I have concerns about certain of the pardons myself, as I will discuss in a moment, but we do not have the power in this body to undo President Clinton's pardons, subject of course, to any of the points that the chairman was making about technical legal issues. And so I hope that this hearing is more than just an opportunity for Senators to criticize our last President. I do not think hearings presented for that purpose—and, again, I hope and assume this will not be such a hearing—are consistent with the spirit of cooperation and bipartisanship that we should be trying to create in this new evenly divided Senate.

Now, another purpose of this hearing might be to look at those most recent pardons and see if any lessons can be drawn concerning our criminal laws in this country. While they have not received the attention of the Rich pardon in the media, 20 of the so-called eleventh hour pardons involve people who received harsh mandatory minimum prison sentences for minor, non-violent participation in drug-trafficking conspiracies. Mandatory minimum sentences impose irreversible, tragic consequences on many people in this country, particularly young people and their families. So I hope this committee will examine that issue at some point this year and perhaps learn from the people who were involved in these cases about the human dimension of mandatory minimum sentences and whether they are actually succeeding in accomplishing what their proponents predicted and hoped to accomplish.

As I look at my friend, Mr. Holder, who I think did a superb job in his position, I am reminded of the role of the pardon and the clemency power vis-a-vis the awesome power of the Federal Gov-

ernment to execute people and the role that might play if there are questions of racial disparity, as have been suggested, if there are questions perhaps of innocence, if there are questions perhaps of inadequate legal representation.

The notion of a constitutional amendment would allow the Congress to override by a super-majority the judgment of a President that somebody's life should be spared certainly gives me pause.

Mr. Chairman, while I am not entirely comfortable with the potential tone of the hearing, I do believe that legitimate questions have been raised about the pardon of Marc Rich in particular, and for me, as for many Senators and many Americans, suspicions about this pardon arise from the fact that Marc Rich's ex-wife, Denise Rich, was a large donor to the Democratic Party—not just a large donor, a huge donor. According to press reports based on the research of the Center for Responsible Politics, Ms. Rich donated $867,000 to Democratic Party committees during the Clinton Presidency, and most of that was, of course, soft money. She also donated $66,300 to individual Democratic candidates in hard money. She also contributed $450,000 to President Clinton's Presidential library fund. These kinds of numbers can't help but raise some questions about this pardon.

But let me also say that they put a question squarely to the members of this committee and the Senate as a whole: Will you do what it takes to end this corrupt soft money system that allows contributions of this size to the political parties? This is a system that is now providing at least an appearance of corruption, and not only of our legislative process, not only at our political conventions, but now in the very heart of our criminal justice system.

There are members of this committee who have consistently filibustered our attempts to ban soft money. I am happy to note that Senator Specter has consistently supported reform. But for other Senators who have blocked reform, let me point out that the filibusters in 1994, 1996, 1997, and particularly in 1998 and 1999, when the House had passed a campaign finance reform bill and prevented us from changing the law, basically allowed it to be possible for Denise Rich to make these very large contributions and to raise at least the appearance of impropriety with regard to something as sacred as the pardon power.

And remember, these same questions are going to be raised, and raised legitimately, about anyone that President Bush pardons during his term if friends, family, or associates of the persons pardoned turn out to be contributors to the Bush campaign or to the Republican Party.

So while there may be nothing that we can do about the Clinton eleventh hour pardons, there is something that we very clearly can do as a Congress to address the suspicions that some pardons have been or will be based on improper influence, and that, of course, is to pass campaign finance reform when it comes to the floor of this Senate next month.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Feingold.

Senator Kyl?

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman. Just a couple of comments.

First of all, the President obviously had his reasons for granting these and other pardons. We are not going to know what those reasons are unless the President himself tells us. The only other way that we could learn is if there is a criminal investigation based upon the information that has come to public light so far, information which does indeed raise serious questions about the possibility of improper influence.

But I think that our hearing today needs to focus on two other potential actions. One is a constitutional amendment, which I find no justification for and, frankly, do not see the need for simply because there may have been one abuse of discretion in this case.

There is, however, a second area, and that has to do with statutory reform of the procedures within the Justice Department which are currently regulated by internal Justice Department regulations, which are on the public record. I find that, based upon Mr. Holder's testimony, he did not acquit himself or the Justice Department well in this case. According to his written testimony, he knew that the regular procedures had not been followed. He knew why it was important that those procedures be followed. As the No. 2 person in the Department of Justice, he had a responsibility to see that procedures that were important were followed. And in my view—and I will be anxious to hear from Mr. Holder here—there is nothing that justified his inaction in this case. He was asked by Mr. Quinn, according to his testimony, what his position would be on the pardon of Mr. Rich, this the day before the Clinton administration ended, and according to Mr. Holder's testimony, "I told him that although I had no strong opposition based on his recitation of the facts, law enforcement in New York would strongly oppose it."

So he had a sense that this would be a very controversial pardon. He understood at that time that technically Mr. Rich was not eligible for a pardon under the regulations of the Department of Justice. And he also had to know that the failure to follow the procedures was a deliberate attempt to avoid those procedures because of the likelihood that a pardon would not be recommended if the procedures were properly followed.

My view is that Mr. Holder should have said to Mr. Quinn at that moment, You haven't followed the procedures, you need to follow the procedures, you know what they are, Mr. Quinn, you need to file with the Pardon Attorney, and I am going to call the President and warn him against taking action in this case because we haven't vetted this request, as is the normal case, and that there are dangers in moving ahead with this pardon in the absence of such vetting. That would have been the proper course of action, and I can find nothing that would excuse Mr. Holder from following that course of action.

So my suggestion here is that we also focus on the possibility of legislating a set of procedures which personnel of the Department of Justice would have to follow in the event they became aware of a potential pardon, procedures that would ensure that the pardon request is handled in the proper way. That way at least we could

avoid the kind of problem that occurred here unless a President was blatantly willing to proceed against the recommendation of his own Department of Justice.

I will be anxious to get the witnesses' views on whether such changes in procedure would be a good idea, at least to resolve these kinds of issues in the future.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Kyl.

Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Senator Specter. I will not defend the pardon of Marc Rich. Marc Rich is hardly a sympathetic figure. Charged with a serious violation of law, Mr. Rich chose to flee the United States and renounce his American citizenship.

The circumstances surrounding his pardon involving campaign contributions certainly raise the appearance of impropriety, if not much more. But it is curious to me that the issue of the Presidential power to pardon is being considered today by this committee with the assumption that this action by former President Clinton was the only controversial pardon in recent memory.

Senator Specter has even suggested that former President Clinton be called before this committee. Well, in the interest of balance, fairness, and in the spirit of bipartisanship, should this committee also call former President George Bush to explain why, on Christmas Eve, 1992, he issued a pardon for former Secretary of Defense Caspar Weinberger and five others who had been convicted of lying to Congress in the Iran-contra controversy? It is unlikely that former President Bush will be called or his actions even scrutinized by this committee.

It appears that in our investigation of the Presidential right to pardon, in looking forward, as Senator Specter suggests, we can only reflect on one former President at a time. But if we are sincere about amending the Constitution or reforming the laws relating to pardons, the committee should not confine its inquiry to one action by one President. If this hearing is about genuine reform, it should be open and balanced. It should consider the use of the Presidential pardon historically by Presidents of both political parties. If it is about a parting shot at former President Clinton, then I have to agree with President George W. Bush: It is time to move on.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Durbin.

Senator Sessions?

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

The power to pardon is a legitimate power. It is one that ought to be exercised with great care. I believe in the role of the Pardon Attorney. We had hearings in the last Congress on the Puerto Rican terrorist pardons, which I thought was a breathtakingly inexcusable action by the President, and I believe I suggested to Mr.

Adams that I did not see how he could remain in office as a Pardon Attorney, turning down on a daily basis people who had committed very minor crimes and who lived a life of success and contributed to their community, when those convicted of violent crimes who are still serving their time in jail, and who never even asked for forgiveness or admitted their error are granted pardons.

I think the pardon power is a historic power that the President has, and I do not dispute that. Some say the President can make this decision, there is nothing we can do about it, so we just have to hush and not say anything about it.

From what I hear today, it is unlikely, perhaps, that we will have a constitutional amendment to change it. So what do we do when a President on the last day in office abuses his power to grant a series of pardons that do not meet any fair test of right and justice? Is there no basis for us to question it and to ask perhaps maybe we do need a constitutional amendment, maybe we do need to look at where we are going?

I think it is a proper hearing, and I think we should have a hearing and discuss it and ask ourselves whether perhaps a constitutional amendment, Mr. Chairman, is legitimate. This is an unfettered power, a power given with no review whatsoever, contrary to almost everything else in our Constitution that has checks and balances. So I am not sure it is the right thing, but I am certainly not willing to dismiss it if we are going to have Presidents on their last day in office just granting pardons on these kind of bases.

And, frankly, the pattern here is troubling. Let's talk about the FALN Puerto Rican terrorist group. Fourteen members were pardoned. They had claimed responsibility for 130 bombings in the United States, and the reign of terror resulted in six deaths and permanent maiming of dozens of others. They were pardoned without even an admission of wrongdoing on their behalf, without even a statement that they were sorry for what they had done.

In this batch, President Clinton in the last minute pardoned two members of the Weathermen, a radical terrorist organization whose goal was to overthrow American capitalist society. The first pardon recipient, Susan Rosenberg, was convicted in 1985 for possession of 740 pounds of dynamite, including a submachine gun. The second, Linda Sue Evans, was convicted in 1983 for her role in a bombing in the Senate corridor of the U.S. Capitol Building, as well as for illegally buying firearms.

Marc Rich illegally traded in oil with the terrorist states of Iran, Iraq, and Libya. Each of these regimes sponsored terrorist attacks on American citizens, including the bombing of Pan Am Flight 103 over Lockerbie, Scotland, that we have just had a trial about.

Marc Rich was among the ten most wanted fugitives by the United States Marshals Service after he fled the country immediately prior to his criminal indictment for tax evasion. In addition, Interpol had issued a red notice, which I have here and would offer for the record, for the arrest of Marc Rich in multiple foreign jurisdictions.

Senator SPECTER. It will be admitted without objection.

Senator SESSIONS. I was troubled by the William Borders pardon. He was convicted in 1981 of taking money to bribe a Federal judge who was later impeached, and the evidence against Borders was

overwhelming and conclusive and recorded by the FBI, and the judge was impeached based on the facts arising out of this incident.

So I think this is a series of pardons—and there are some others here that I will not go into at this point—that are very troubling. The American people have a right to have the full facts come out. If we are not going to have a constitutional amendment to allow some sort of review of this unfettered power, at the very least any President needs to know that if he acts irresponsibly, even though he is not seeking re-election and does not have the chance to run for re-election again, that he would be subject to at least review and criticism, if need be, by the Congress.

So, Mr. Chairman, I wish this matter would go away. President Bush says he wishes it would go away. But justice is important. How we handle pardons is important. As a Federal prosecutor for 15 years, I have signed off on pardons. I have objected to pardons and I have not objected to pardons. But I have always tried to consider it objectively and fairly. Has the person served his time? Was the crime exceptionally serious? If it is an exceptionally serious crime, I doubt there should ever be a pardon. If the crime was not exceptionally serious and the person has lived a healthy life since, contributed to his community, the pardon process calls for the Pardon Attorney to do an inquiry. The Pardon Attorney then calls the Federal prosecutor; they called me when I was one many times. They call the victims of the crime. They talk to the Federal judge who tried the case. They talk to the probation officer who supervised the probation. I must say that I never had a pardon request while a person was still in jail. I never even saw one come across my desk where the person was still in jail or a fugitive and hadn't been tried.

So you ask all these people, and the President ultimately makes the decision, and the Pardon Attorney makes a recommendation. Seeing what we have today indicates to me that this system is completely out of control. This was an abuse of process, and the President deserves to be criticized for it. And we need to find out exactly what happened, and I would suggest further that I am not sure from what I have seen, based on the law of bribery in the United States, that if a person takes a thing of value for himself or for another person that influences their decision in a matter of their official capacity, then that could be a criminal offense. And I think at this point, from what I see, the FBI and the United States Attorney's Office in New York ought to be looking at this matter.

I feel real strongly about it, Mr. Chairman, and thank you for your leadership.

Senator SPECTER. Thank you very much, Senator Sessions.

Senator Schumer?

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman.

Mr. Chairman, the issues we are examining today are as perplexing as they are troubling. To my mind, there can be no justification for pardoning a fugitive from justice. It does not matter that the fugitive believed the case against him was flawed or weak. It does not matter that the fugitive was enormously philanthropic. Pardon-

ing a fugitive stands our justice system on its head and makes a mockery of it.

One of the great strengths of our criminal justice system is that it is just that: a system. By allowing someone to choose to opt out of that system by fleeing and then opt into that system to get a pardon perverts the system entirely.

But where does that leave us going forward? All 100 of us in the Senate might disagree with this pardon, but there is a whole lot of nothing we can do about it. In the Constitution, the President's power to pardon is absolute. The President, in the wisdom of the Founding Fathers, can pardon anyone for any reason at all. It is a power of the President that is kept in check only by the ballot box and the judgment of history. To change the Constitution requires careful thought and should not be based on one case or one moment in history. And a statutory framework requiring the President to follow certain steps before issuing a pardon would surely be unconstitutional.

So I think we should be leery of going overboard and launching new rounds of extended congressional investigations and hearings that could divert Congress from the work we need to accomplish this year. Investigations like this one have a way of spinning out of control, and before we know it, summer will be here, and we will still be focused on President Clinton's pardons. That I think would be a disservice to the American people.

It is legitimate to ask questions that are being asked today, but I hope most of my colleagues would agree with President Bush that at some point soon we need to move on. If there are allegations of criminal wrongdoing, that is something for the proper authorities, not this committee, to look at.

To be sure, the President may have unbounded power to grant a pardon, but that does not mean that those seeking pardons can do anything they want to get one.

In the end, I think history will judge some of the pardons we have seen in the last 30 years by many Presidents quite poorly. But I hope that here in Congress we can start soon to focus on the future and not let our quarrels with prior administrations mire us in the past.

Senator SPECTER. Thank you, Senator Schumer.

Senator McConnell?

STATEMENT OF HON. MITCH MCCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator MCCONNELL. I want to commend the committee's efforts, and particularly those of Senator Specter, to try to determine the rationale behind what appears to be an unjustified exercise of the Executive's pardon power. While the President alone possesses the power to pardon, it is important to remember that he is not personally exempt from Federal laws that prohibit the corrupt actions of all Government officials.

If, for example, President Clinton issued a pardon to Marc Rich in exchange for donations to his Presidential library, this would indeed be a violation of 18 U.S.C. Section 201(b). This statute provides, in relevant part, that any public official who accepts anything of value in return for the performance of any official act shall

be fined or imprisoned for not more than 15 years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

But while it may be advisable for us to explore the facts and circumstances that could constitute a violation of this statute, this is ultimately a matter for the U.S. Department of Justice and the United States Attorneys, not the Congress, for it is the executive branch, not we, which must enforce existing law.

And let me be clear. What is at issue here is a potential violation of existing law, and what is needed, if anything, is the enforcement of that law, not the enactment of an additional law, and certainly not a change to our Constitution.

No one would dispute that if in exchange for money a prosecutor dropped charges against an individual who had been indicted, then the prosecutor would be guilty of violating existing Federal law. No one would argue that we needed new laws in response to such a single corrupt act.

Therefore, I urge the Congress to use caution when determining whether legislative action is needed in response to the actions of President Clinton. We should not overreact in response to the misdeeds and misbehavior of one man. We have, in my opinion, unwisely traveled down that road before. After Watergate, we passed an unprecedented restriction on the rights of political speech and association in the name of campaign finance reform, most of which was struck down by the United States Supreme Court as a violation of the First Amendment. And we, of course, continue that debate up to today, and we will resume it on the floor of the Senate next month.

Also, in the wake of Watergate, we enacted an independent counsel statute that took us 20 years to get off the books. Fortunately, we let it expire in 1999, and I hope we have seen the end of that.

And we should be particularly careful about changing our Nation's fundamental document. Our Constitution has been amended 27 times in 200 years, and we all recall that 10 of those were at one time. When we have embarked on the extraordinary course of amending our Constitution, it has typically been done to address extraordinary problems that were not readily solvable through ordinary means, ensuring, for example, that former slaves enjoyed due process and equal protection of the law, guaranteeing that women as well as men are allowed to exercise the franchise, making sure that young Americans who may be required to fight for their country are able to have a say in its governance.

I submit that the potential abuses of Executive power this hearing will explore, as troubling and as inexcusable as they may be, are not so widespread and so major as to warrant changing our Constitution.

In closing, let me again commend the committee, and particularly you, Senator Specter, for these hearings. I think this is an important inquiry, and I am glad that we are having it.

Thank you.

Senator SPECTER. Thank you, Senator McConnell.

Mr. Adams, Mr. Holder, would you rise for the administration of the oath? Do you solemnly swear, Mr. Roger Adams, Mr. Eric Holder, that the testimony you will give before this Senate Judiciary

Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HOLDER. I do.

Mr. ADAMS. I do.

Senator SESSIONS. Mr. Chairman, can I offer for the record a letter I received from Joseph D. Hubbard, a district attorney in Alabama, a fine district attorney who has been given a lot of important cases over the years for the State, who tried the Chandler case that the ranking member referred to earlier. He opposed this pardon, and I wanted to offer a letter for that. He personally participated as a cross-designated United States Attorney and tried the case, and it involved the murder of an informant ordered by a major drug-dealing individual. And he believes the commutation of that sentence was in error.

Senator SPECTER. Without objection, it will be admitted.

We have three panels. We request that the witnesses limit their opening statements to 7 minutes, and the Senators' rounds will be 5 minutes in duration on questioning. So we will set the clock in that way.

Mr. Adams, we will begin with you.

STATEMENT OF ROGER ADAMS, PARDON ATTORNEY, UNITED STATES DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. ADAMS. Good morning, Mr. Chairman. I'm here today at the committee's request to provide information about how my office, the Office of the Pardon Attorney, normally handles clemency petitions and to describe why my office was not able to follow our normal procedures in the case of President Clinton's grants of pardon to Marc Rich and Pincus Green on the morning of January 20, 2001.

Mr. Chairman, I have submitted a statement that I request be made part of the record, and I will summarize—

Senator SPECTER. Without objection, it will be made part of the record in full.

Mr. ADAMS. Thank you.

Mr. Chairman, executive clemency petitions most commonly request relief in the form of pardon or commutation of sentence. The Department of Justice processes requests for executive clemency in accordance with regulations promulgated by the President and set forth at 28 C.F.R. Sections 1.1 through 1.11. These regulations provide internal guidance for Department of Justice personnel who advise and assist the President in carrying out the pardon function, but they create no enforceable rights in persons applying for executive clemency and do not restrict in any way the plenary clemency authority granted to the President under Article II, section 2 of the Constitution. While the regulations thus govern the process for clemency requests submitted to the Department, they do not govern requests submitted directly to the President.

Under the provisions of 28 C.F.R. Section 1.2, a person does not become eligible to file a pardon request with the Department until the expiration of a 5-year waiting period that commences upon the ate of the individual's release from confinement for his most recent conviction, or if no condition of confinement was imposed as part of that sentence, the date of conviction. Moreover, the same regula-

tion stipulates that no petition for pardon should be filed by an individual who is then on probation, parole, or supervised release. As the foregoing indicates, a person who has not yet been convicted or has not fully served the sentence for the Federal crime for which pardon is sought is ineligible for pardon or to apply for a pardon under the regulations that guide the Department of Justice's processing of pardon requests. However, these rules do not bind the President. The President retains the authority under the Constitution to consider a pardon request from an individual who is ineligible to apply under the regulations or who has not applied at all, and to grant clemency to such a person if he believes such action is appropriate.

A pardon request is typically processed in the following manner. The pardon applicant files his clemency petition, addressed to the President, with the Office of the Pardon Attorney. He is free to utilize the services of an attorney or to act on his own in seeking a pardon. The standard form utilized for this process requests information about the offense, the petitioner's other criminal record, his employment and residency history since the conviction and other biographical information, and his reason for seeking a pardon. The application must be signed and notarized, and the applicant must also submit three notarized affidavits and character references who know of his conviction and support his pardon request.

When my offices receives a pardon petition, it is screened to ensure that the applicant is, in fact, eligible to seek a pardon—in other words, that the crime for which the pardon is sought is a Federal offense and that the waiting period has been satisfied.

If the petitioner is ineligible to apply for a pardon under the regulations, he is so informed. If the application is incomplete, further information is sought from the petitioner.

As an initial investigative step in a pardon case, the Office of the Pardon Attorney contacts the United States Probation Office for the Federal district in which the petitioner was prosecuted to obtain copies of the pre-sentence report and the judgment of conviction, as well as information regarding the petitioner's compliance with court supervision and to ascertain the Probation Office's views on the merits of granting the pardon request.

If review of the pardon petition and the data obtained from the Probation Office reveals information that clearly excludes the case from further favorable consideration, my office prepares a report to the President for the signature of the Deputy Attorney General recommending that pardon be denied. Alternatively, if this initial review indicates that the case may have some merit, it is referred to the FBI so that a background investigation can be conducted.

The FBI report, when it is completed, is reviewed by my staff to ascertain whether favorable consideration of the case may be warranted. If the investigation reveals derogatory information of a type that would render pardon inappropriate and warrant denial of the request, my office prepares a report to the President, again, through the Deputy Attorney General, recommending this result.

On the other hand, if the FBI report suggests that favorable treatment may be warranted or in cases which are of particular importance or which raise a significant factual question, the Office of the Pardon Attorney requests input from the prosecuting authority,

either a U.S. attorney, a division of the Justice Department, and in some cases an independent counsel. And we also request information from the sentencing judge.

If the individual case warrants, other Government agencies, such as Internal Revenue Service and INS, may be contacted as well. In appropriate cases in which the offense involved a victim, the prosecuting authority is asked to notify the victim of the pendency of the clemency petition and advise him that he may submit comments concerning the pardon request.

Upon receipt of the responses to these inquiries, my office prepares a report and a proposed recommendation for action upon the case. The report is drafted for the signature of the Deputy Attorney General and is submitted for his review. If the Deputy Attorney General concurs with my office's assessment, he signs the recommendation and returns the report to my office for transmittal to the Counsel to the President. If, on the other hand, the Deputy Attorney General disagrees with the disposition proposed by the Pardon Attorney, he may direct the Pardon Attorney to modify the Department's recommendation. After the recommendation is signed by the Deputy Attorney General, the report is transmitted to the Counsel to the President for the President's action whenever he deems it appropriate.

Now, when the President decides to grant clemency, whether in the form of pardon or commutation of sentence, the Counsel to the President informed the Office of the Pardon Attorney to prepare the appropriate clemency warrant. Typically, if the President intends to pardon a number of applicants, a master warrant of pardon will be prepared for his signature. The signed master warrant bears the seal of the Department of Justice, lists the names of all of the individuals to whom the President grants pardon, and directs the Pardon Attorney to prepare and sign individual warrants of pardon reflecting the President's action to be delivered to each pardon recipient. The preparation of the individual warrants by the Pardon Attorney is, therefore, a ministerial act which simply sets forth the decision that the President has already made. The individual warrant likewise bears the seal of the Department of Justice and reflects that it has been prepared at the direction of the President. When the individual pardon warrant has been prepared, it is sent to the applicant, or his attorney if he is represented by counsel, along with an acknowledgment form that the pardon recipient completes and returns to the Pardon Attorney's Office to reflect that he has received the warrant.

Mr. Chairman, I note that my time has expired. I would be glad to dispense with the rest of my reading summary. It is actually contained in my prepared statement, and I would be glad to—

Senator SPECTER. Well, we are interested in what you have to say, Mr. Adams, as to the procedures, so if you could summarize, we would appreciate it, but take some extra time.

Mr. ADAMS. Let me move ahead with respect to the pardon of Marc Rich and Pincus Green. Mr. Chairman, none of the regular procedures that I have just described were followed.

The first time that I learned the White House was considering these two persons for pardon was shortly after midnight on the morning of Saturday, January 20, 2001. At that time, I received a

telephone call from the Office of the White House Counsel advising me that they were at that time faxing me a list of additional persons to whom the President was considering granting pardons. When the facsimile arrived, among the several names listed were Pincus Green and Marc Rich. Since the fax included no other information about these persons, I telephoned the White House Counsel's Office to advise that I would need additional identifying data in order to request that the FBI conduct criminal records checks on the named individuals.

I might note, Mr. Chairman, I had been contacting the FBI for the past several days with names of persons for whom the White House wanted checks of criminal records and outstanding warrants.

I was told by the White House Counsel staff that the only two people on the list for whom I needed to obtain record checks were Marc Rich and Pincus Green, and that it was expected that there would be little information about the two men because, to quote the words of the White House Counsel's Office, they had been living abroad for several years.

I obtained the dates of birth and Social Security numbers for Rich and Green from the White House Counsel's Office, and I then passed this information along to the FBI by telephone so that the records checks could be completed. Shortly thereafter, the Counsel's Office faxed to my office a few pages that appeared to have come from the clemency petition that had been submitted to the White House on behalf of Mr. Rich and Mr. Green by Jack Quinn and some other attorneys. The information contained in these documents revealed that the pardon request sought clemency for pending charges that had been brought by indictment in the Southern District of New York some 17 years earlier, and that Rich and Green had resided outside of the United States ever since and were considered to be fugitives. At that point, a member of my staff began to conduct a quick Internet search for information about the two men.

While that search was ongoing, I received a facsimile transmission from the FBI of records which confirmed that Rich and Green were wanted fugitives whom law enforcement authorities were willing to extradite for a variety of felony charges, including mail and wire fraud, arms trading, and tax evasion. Because I was concerned that the FBI transmission would not be readable—because it was a second- or third-generation facsimile transmission—if it were itself faxed to the White House Counsel's Office, I wrote a quick summary of the information regarding the outstanding charges against Rich and Green and their fugitive status and faxed that to the Counsel's Office shortly before 1 a.m. on January 20th.

Because of what we had learned about Rich and Green, I also immediately contacted Deputy Attorney General Holder at home through the Justice Department Command Center to alert him that the President was considering pardons to the two men. Mr. Holder indicated to me at that time he was aware of the pending clemency requests by Rich and Green.

After receiving my short summary of the FBI's information about Rich and Green, personnel from the White House Counsel's Office called to ask that I fax them a copy of the material that I received

from the FBI itself, and I did this shortly after 1 o'clock. I also included the limited information about Rich's and Green's fugitive status and the charges against them that my staff had been able to obtain at that point from the Internet.

The only other time the names of Marc Rich and Pincus Green had come to my attention was on the morning of January 19, 2001, when I first saw a copy of a letter dated January 10, 2001, that their attorney, Jack Quinn, had sent to Deputy Attorney General Holder seeking his support for pardons for the two men. The Justice Department transmittal sheet attached to the letter indicated that on January 17th, the Department's Executive Secretariat had assigned the Quinn letter to my office for response and had sent a copy to the Deputy Attorney General's Office for information. My office actually received its copy on the afternoon of January 18th, and on the morning of the 19th, I saw it in our mail.

Because neither Rich nor Green had filed a clemency application with my office and because the White House Counsel's Office had never indicated to me at that point that pardons for these two persons were under consideration, I proceeded to draft a short response on the morning of the 19th—and I decided to hold it until the following Monday—advising Mr. Quinn that neither man had submitted a pardon petition to my office and that if they wished to request pardons, the application forms were available from my office upon request.

What I have just described, Mr. Chairman, is the totality of my involvement and the involvement of the Office of the Pardon Attorney in the Rich and Green pardons. In my prepared statement, Mr. Chairman, I have described how my office prepared the individual warrants that Mr. Rich and Mr. Green, a subject to which you alluded, and how we also prepared those in the other cases. But in the interest of time, I will not go over those now.

[The prepared statement of Mr. Adams follows:]

STATEMENT OF ROGER ADAMS, PARDON ATTORNEY, DEPARTMENT OF JUSTICE

Good morning, Mr. Chairman and Members of the Committee:

I am here today at the Committee's request to provide information about how my office, the Office of the Pardon Attorney, normally handles clemency petitions, and to describe the procedures we followed with regard to President Clinton's grants of pardon to individuals, including Marc Rich and Pincus Green, on January 20, 2001.

Executive clemency petitions most commonly request relief in the form of pardon or commutation of sentence. The Department of Justice processes requests for executive clemency in accordance with regulations promulgated by the President and set forth at 28 C.F.R. §§ 1.1 to 1.11. These regulations provide internal guidance for Department of Justice personnel who advise and assist the President in carrying out the pardon function, but they create no enforceable rights in persons applying for executive clemency and do not restrict in any way the plenary clemency authority granted to the President under Article II, Section 2 of the Constitution. While the regulations thus govern the process for clemency requests submitted to the Department, they do not govern requests submitted directly to the President.

A presidential pardon serves as an official statement of forgiveness for the commission of a federal crime and restores basic civil rights. It does not connote innocence. Under the provisions of 28 C.F.R. § 1.2, a person does not become eligible to file a pardon request with the Department until the expiration of a five-year waiting period that commences upon the date of the individual's release from confinement (including home or community confinement) for his most recent conviction or, if no condition of confinement was imposed as part of that sentence, the date of conviction. Typically, the waiting period is triggered by the sentence imposed for the offense for which the pardon is sought, but any subsequent conviction begins the waiting period anew. Moreover, the same regulation stipulates that no petition for par-

don should be filed by an individual who is then on probation, parole, or supervised release. As the foregoing indicates, a person who has not yet been convicted or has not fully served the sentence for the federal crime for which pardon is sought is ineligible for pardon under the regulations that guide the Department of Justice's processing of pardon requests. However, these rules do not bind the President. The President retains the authority under the Constitution to consider a pardon request from an individual who is ineligible to apply under the regulations or who has not applied at all, and to grant clemency to such a person if he believes such action to be appropriate.

A pardon request is typically processed in the following manner. The pardon applicant files his clemency petition, addressed to the President, with the Office of the Pardon Attorney. He is free to utilize the services of an attorney or to act on his own behalf in seeking pardon. The standard form utilized for this process requests information about the offense, the petitioner's other criminal record, his employment and residence history since the conviction and other biographical information, and his reasons for seeking pardon. The application must be signed and notarized, and the applicant must also submit three notarized affidavits from character references who are unrelated to him, know of his conviction, and support his pardon request. When my office receives a pardon petition, it is screened to ensure that the applicant is in fact eligible to seek a pardon (i.e., that the crime for which pardon is sought is a federal offense and that the waiting period has been satisfied), to determine whether any necessary information has been omitted from the application or whether the applicant's responses to the questions require further elaboration, and to ascertain whether the petitioner has described his efforts at rehabilitation. If the petitioner is ineligible to apply for pardon under the regulations, he is so informed.

If the application is incomplete, further information is sought from the petitioner.

As an initial investigative step in a pardon case, the Office of the Pardon Attorney contacts the United States Probation Office for the federal district in which the petitioner was prosecuted to obtain copies of the presentence report and the judgment of conviction, as well as information regarding the petitioner's compliance with court supervision, and to ascertain the Probation Office's views regarding the merits of the pardon request. If review of the pardon petition and the data obtained from the Probation Office reveals information that clearly excludes the case from further favorable consideration, my office prepares a report to the President for the signature of the Deputy Attorney General recommending that pardon be denied. Alternatively, if the initial review indicates that the case may have some merit, it is referred to the FBI so that a background investigation can be conducted.

The FBI does not make a recommendation to support or deny a pardon request. Rather, the Bureau provides the Office of the Pardon Attorney with factual information about the petitioner including such matters as his criminal history, records concerning the offense for which pardon is sought, his employment and residence history, and his reputation in the community. The FBI report is reviewed by my staff to ascertain whether favorable consideration of the case may be warranted. If the investigation reveals derogatory information of a type that would render pardon inappropriate and warrant denial of the request, my office prepares a report to the President through the Deputy Attorney General recommending such a result.

If the FBI report suggests that favorable treatment may be warranted, or in cases which are of particular importance or in which significant factual questions exist, the Office of the Pardon Attorney requests input from the prosecuting authority (e.g., a United States Attorney, a Division of the Department of Justice, or in some cases, an Independent Counsel) and the sentencing judge concerning the merits of the pardon request. If the individual case warrants, other government agencies, such as the Internal Revenue Service or the Immigration and Naturalization Service, may be contacted as well. In appropriate cases in which the offense involved a victim, the prosecuting authority is asked to notify the victim of the pendency of the clemency petition and advise him that he may submit comments concerning the pardon request. Upon receipt of the responses to these inquiries, my office prepares a report and a proposed recommendation for action upon the case. The report is drafted for the signature of the Deputy Attorney General and is submitted for his review. If the Deputy Attorney General concurs with my office's assessment, he signs the recommendation and returns the report to my office for transmittal to the Counsel to the President. If the Deputy Attorney General disagrees with the disposition proposed by the Office of the Pardon Attorney, he may direct the Pardon Attorney to modify the Department's recommendation. After the recommendation is signed by the Deputy Attorney General, the report is transmitted to the Counsel to the President for the President's action on the pardon request whenever he deems it appropriate.

Similarly, a federal inmate seeking a presidential commutation (reduction) of his sentence files a petition for such relief with the Office of the Pardon Attorney. In contrast to a pardon, a commutation is not an act of forgiveness, but rather simply remits some portion of the punishment being served. An inmate is eligible to apply for commutation so long as he has reported to prison to begin serving his sentence and is not concurrently challenging his conviction through an appeal or other court proceeding. The petitioner is free to append to the commutation application—or to submit separately at a later date—any additional documentation he believes will provide support for his request. In completing the petition, the inmate—or his attorney, if he is represented by counsel—explains the circumstances underlying his conviction; provides information regarding his sentence, his criminal record, and any appeals or other court challenges he has filed regarding the conviction for which he seeks commutation; and states the grounds upon which he bases his request for relief.

When my office receives a commutation petition, we review it to ensure that the applicant is eligible to apply for clemency, and we commence an investigation of the merits of the request. The initial investigative step involves contacting the warden of the petitioner's correctional institution to obtain copies of the presentence report and judgment of conviction for the petitioner's offense, as well as the most recent prison progress report that has been prepared detailing his adjustment to incarceration, including his participation in work, educational, vocational, counseling, and financial responsibility programs; his medical status; and his disciplinary history. We also check automated legal databases for any court opinions relating to the petitioner's conviction. In most cases, this information is sufficient to enable my office to prepare a report to the President through the Deputy Attorney General recommending that commutation be denied.

In a minority of cases, however, if our review of this information raises questions of material fact or suggests that the commutation application may have some merit, or because the case presents significant issues, my office contacts the United States Attorney for the federal district of conviction or the prosecuting section of the Department of Justice for comments and recommendations regarding the commutation request. We also contact the sentencing judge, either through the United States Attorney or directly, to solicit the judge's views and recommendation on the clemency application. As with pardon requests, if the individual case warrants, other government agencies may be contacted as well.

In appropriate cases in which the offense involved a victim, the prosecuting authority is asked to notify the victim of the pendency of the commutation petition and advise him that he may submit comments concerning the clemency request.

Following an evaluation of all of the material gathered in the course of the investigation, the Pardon Attorney's Office drafts a report and recommendation for action on the merits of the commutation request which is transmitted to the Deputy Attorney General. Following his review, the Deputy Attorney General may either sign the report and recommendation or return it to my office for revision. Once the Deputy Attorney General determines that the report and recommendation satisfactorily reflects his views on the merits of the clemency request, he signs the document, which is then forwarded to the Counsel to the President for consideration by the President. Thereafter, when he deems it appropriate, the President acts on the commutation petition and grants or denies clemency, as he sees fit.

When the President decides to grant clemency, whether in the form of pardon or commutation of sentence, the Counsel to the President informs the Office of the Pardon Attorney to prepare the appropriate clemency warrant. Typically, if the President intends to pardon a number of applicants, a master warrant of pardon will be prepared for his signature. The signed warrant bears the seal of the Department of Justice, lists the names of all of the individuals to whom the President grants pardon, and directs the Pardon Attorney to prepare and sign individual warrants of pardon reflecting President's action to be delivered to each pardon recipient. The preparation of the individual warrants by the Pardon Attorney is therefore a ministerial act which simply sets forth the decision that the President has already made. The individual warrant likewise bears the seal of the Department of Justice and reflects that it has been prepared at the direction of the President. When the individual pardon warrant has ' been prepared, it is sent to the applicant, or his attorney if he is represented by counsel, along with an acknowledgment form that the pardon recipient completes and returns to the Pardon Attorney's Office to reflect receipt of the warrant.

If the President decides to commute a prisoner's sentence, the Pardon Attorney's Office likewise prepares the warrant of commutation for the President's signature. Depending upon how many sentences are to be commuted, either a master warrant detailing all of the commuted sentences or individual commutation warrants may

be prepared. After the President has signed the commutation warrant, which bears the seal of the Department of Justice, the Pardon Attorney's Office transmits a certified copy of the document to the Bureau of Prisons to effect the inmate's release. A copy of the warrant is also sent to the petitioner's attorney if he is represented by counsel. Whenever the President grants a pardon or commutation, the Pardon Attorney's Office notifies the prosecuting authority (United States Attorney or Division of the Justice Department), the sentencing judge, the relevant United States Probation Office, the FBI, and any other government agencies whose views were solicited, of the final decision in the matter.

When the President denies clemency, the Counsel to the President typically notifies the Deputy Attorney General and the Pardon Attorney's Office by memorandum that the affected cases have been decided adversely. The Pardon Attorney's office then notifies the pardon or commutation applicant, or his attorney, of the decision. In addition, the Pardon Attorney's Office notifies the prosecuting authority, the sentencing judge, other government agencies whose views were solicited, and, in the case of a commutation, the Federal Bureau of Prisons, of the outcome of the request. No reasons for the President's action are given in the notice of denial.

With respect to the pardon of Marc Rich and Pincus Green, none of the regular procedures were followed. The first time I learned that the White House was considering these two persons for pardon was shortly after midnight on the morning of Saturday, January 20, 2001. At that time, I received a telephone call from the Office of the White House Counsel advising me that they were faxing me a list of additional persons to whom the President was considering granting pardons. When the facsimile arrived, among the several names listed were Pincus Green and Marc Rich. Since the fax included no other information about these persons, I telephoned the White House Counsel's Office to advise that I would need additional identifying data in order to request that the FBI conduct criminal records checks on the named individuals. (I had been contacting the FBI for the past several days with names of persons for whom the White House wanted checks of criminal records and outstanding warrants.)

I was told by White House Counsel staff that the only two people on the list for whom I needed to obtain records checks were Marc Rich and Pincus Green, and that it was expected there would be little information about the two men because they had been "living abroad" for several years. I obtained the dates of birth and Social Security numbers for Rich and Green from Counsel's Office and then passed this information along to the FBI by telephone so that the records checks could be completed. Shortly thereafter, White House Counsel's Office personnel faxed to my office a few pages that appeared to have come from a clemency petition that had been submitted to the White House on behalf of Rich and Green by Jack Quinn, Esq. and other attorneys. The information contained in these documents revealed that the pardon request sought clemency for pending charges that had been brought by indictment in the Southern District of New York some 17 years earlier, and that Rich and Green had resided outside the United States ever since and were considered to be fugitives. At that point, a member of my staff began to conduct a quick Internet search for information about the two men.

While that search was ongoing, I received a facsimile transmission from the FBI of records which confirmed that Rich and Green were wanted fugitives whom law enforcement authorities were willing to extradite for a variety of felony charges, including mail and wire fraud, arms trading, and tax evasion. Because I was concerned that the FBI transmission would not be readable if it were itself faxed to the White House Counsel's Office, I wrote a quick summary of the information regarding the outstanding charges against Rich and Green and their fugitive status and faxed that to Counsel's Office shortly before 1:00 a.m. on January 20th. Because of what we had learned about Rich and Green, I also immediately contacted Deputy Attorney General Eric Holder at home through the Justice Department Command Center to alert him that the President was considering granting pardons to the two men. Mr. Holder indicated to me at that time that he was aware of the pending clemency requests by Rich and Green. After receiving my short summary of the FBI's information about Rich and Green, personnel from the White House Counsel's Office called to ask that I fax them a copy of the FBI record itself. I did so shortly after 1:00 a.m., and also included the limited information about Rich's fugitive status and the charges against him that my staff had been able to obtain from the Internet.

The only other time the names of Marc Rich and Pincus Green had come to my attention was on the morning of January 19, 2001, when I first saw a copy of a letter dated January 10, 2001, that their attorney, Jack Quinn, had sent to Deputy Attorney General Holder seeking his support for pardons for the two men. The Justice Department transmittal sheet attached to the letter indicated that on January

17th, the Department's Executive Secretariat had assigned the Quinn letter to my office for response and had sent a copy to the Deputy Attorney General's Office for information. My office received its copy on the afternoon of January 18th, and on the morning of the I9th, I saw it in our mail. The due date for response indicated by the Executive Secretariat was January 31st. Because neither Rich nor Green had filed a clemency application with my office and because the White House Counsel's Office had never indicated to me that pardons for these two persons were under consideration, I simply drafted a short response on the morning of the 19th, to be held until the following Monday, advising Mr. Quinn that neither man had submitted a pardon petition to my office and that if they wished to request pardons, the application forms were available upon request.

Mr. Chairman, I understand that the Committee is also interested in hearing how the Department of Justice determined the scope of the individual pardon grants made on January 20, 2001. A majority of the persons named on the master pardon warrant had submitted petitions for pardon to the Department of Justice. Their applications specified the offenses for which they had been convicted and for which they sought pardon. In many cases, we had sufficient time to fully process their cases and submit reports and recommendations to the White House in which we discussed those offenses. In these cases, it is clear that President Clinton intended to grant pardons for the offenses so noted and discussed.

Other persons named on the master warrant also submitted petitions to the Department, but they arrived too late for us to submit a report and recommendation. Many of these persons had also submitted their petitions directly to the White House, and in some cases the White House asked the Office of the Pardon Attorney for copies of their petitions. In these cases as well, we are confident that President Clinton intended to grant pardons for the offenses cited in their petitions.

Some of the persons whose names were on the master pardon warrant never submitted petitions to the Department. We have determined the scope of the pardons for these persons in a variety of ways. In some cases, including those of Marc Rich and Pincus Green, the White House Counsel's office sent us, just prior to the granting of the pardons, copies of or excerpts from the pardon requests that these persons or their counsels had submitted to the White House. We therefore drafted the individual pardon warrants to reflect the offenses for which the pardon recipients were convicted (or, in the case of Rich and Green, indicted) as described in these submissions made directly to the White House.

In several other cases in which the Department received nothing from the pardoned person, we were able to determine that the person had been prosecuted by an Independent Counsel. In these instances, we determined that the Independent Counsel conviction is the person's only federal conviction. We therefore are confident that it was this conviction that President Clinton intended to pardon, and drafted the individual warrant accordingly. We obtained information as to dates of conviction and exact offenses for which these persons were convicted from the Internet web sites of several Independent Counsels, and in some cases obtained court documents such as the judgment orders, which give the date of conviction and the United States Code citation for the offense of conviction.

In non-Independent Counsel cases in which we have received either no documents at all or very sketchy information from the White House Counsel in the last hours before the pardons were granted, we have determined in all but one case that the person has only one federal conviction. We are therefore confident that it was this single conviction that President Clinton intended to pardon, and so drafted the individual warrants accordingly. We obtained information as to the date of conviction and the exact charges by contacting United States Attorney's Offices and United States Probation Offices and requesting the judgment orders in each case. We intend to prepare in this fashion the remaining nine individual warrants that have not been completed as of today. The delay in the processing of these warrants is occasioned by the need of the U.S. Attorneys and Probation Officers to request the official records from archived files stored at distant locations, and is not due to any doubt as to the scope of the pardon intended by President Clinton. We expect to complete this task shortly. In one case (that of Adolph Schwimmer), the conviction of which we have knowledge is more than 50 years old. The age of that conviction and Mr. Schwimmer's own advanced age may prolong for awhile the process of confirming that this is only conviction. In any event, we have no knowledge or belief that President Clinton intended to pardon anyone for conduct for which he or she was not at least charged and, in most cases, convicted. Moreover, my office has had no contact of any sort with President Clinton or any of his assistants since the master pardon warrant was signed on January 20th.

Senator SPECTER. Thank you very much, Mr. Adams.

Mr. Holder, if you could direct at least part of your comments to the specific action you took after Mr. Adams called you at 1 a.m. on January 20, 2001, we would appreciate it.

STATEMENT OF ERIC H. HOLDER, JR., FORMER DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. HOLDER. What I would ask, Mr. Chairman, is instead of making a statement, if I could have the statement that I made before the House committee—I think this would be appropriate—to have this made a part of the record here.

Senator SPECTER. It will be made a part of the record without objection.

Senator FEINSTEIN. Would you speak directly into the mike? Thank you.

Mr. HOLDER. What I would like to do is really just touch on a couple of points and then respond to any questions that anybody might have.

First, I think one thing ought to be made clear. The Deputy Attorney General, the Pardon Attorney of the Justice Department, do not decide pardon requests. We make recommendations to the President where the decision is ultimately made. There have been times when we have made, I have made recommendations to the President in favor of a pardon request that was not granted. Conversely, there have been times when I have recommended against pardon requests, and they have been granted. In that list of 140 or so that were granted in that last day of the Clinton administration, there are people on that list that we recommended, I recommended against pardons being granted.

I also would like to place some context, if I can, tell you a little about that last day, that is, the 19th. I was extremely busy that day, and particularly that night. We are looking back now in the relative calm of this room, but on that day, the last day of the administration, I was engaged in personnel matters, death penalty issues, among them the Chandler pardon request. We were dealing with Federal Register matters, and something that took up a lot of my time were specific security concerns we had about the inauguration the next day.

We had specific information that gave us great concern about the safety or the potential safety problems that we were going to have with the incoming President. We were not concerned about the ride from the White House to the inauguration or the inauguration itself, but were very concerned about the ride from the inaugural to the reviewing stand.

At 12 o'clock on that day, which would have been at the time of the inauguration, I was to become the Acting Attorney General. Attorney General Reno would have stopped her responsibilities at that point, and so I spent a lot of time that evening focusing on that issue and the other issues that I have talked about.

As I have indicated in my prepared remarks, there are things I wish I could have done differently on that night, but I want people to try to understand that this was not the only thing on my plate on that evening, and it was not one of the chief things that I had on my plate that evening.

In retrospect, what I think I could have done, what I should have done that evening, was to check with the person on my staff who was responsible for handling pardon matters to see where we stood on the Rich matter. I assume that what had happened—I assume, as I indicated in my remarks, that after the pardon request would have been filed with the White House that it would have been sent to the Justice Department for review.

I also assume that staff contacts were going on between my staff, perhaps the Pardon Attorney staff, and people in the White House Counsel's Office. I did not think that from November the 21st, when I guess I first heard about the possibility of the pardon, until January the 19th that I was the only person in the entire Justice Department who was aware of this matter. In fact, I found out later on that there were, in fact, conversations that occurred between my staff, White House Counsel, and Mr. Adams about other matters, other New York-related pardon matters, that I did not become aware of until after—well, sometime after the 20th. I assumed that those kinds of contacts, those kinds of discussions, were ongoing.

With regard to the question that you asked, Senator Specter, Mr. Adams did call me about 1 or so to tell me about what had transpired in his interaction with the White House Counsel's Office. I had known about that, I believe, from about 11 or 12. Again, as is indicated in my prepared remarks, the person on my staff indicated to me that appearing on a list or there had been some indication to her that the Green and Rich names appeared on a list or it had been indicated to her that a pardon—pardon applications for them were going to be granted, or pardons were going to be granted for them.

By the time that I got that information, I thought that a decision had been made, that the President had rendered a decision, had made up his mind, had considered all the things that he was going to consider, and so I took no action after that point.

Beyond that, I would simply respond to any questions that anybody might have.

[The prepared statement of Mr. Holder follows:]

STATEMENT OF ERIC H. HOLDER, JR., FORMER DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. Chairman, Senator Leahy, members of the Committee, I am happy to have the opportunity to come before you today and to discuss the Justice Department's role in the pardon of Marc Rich.

At the outset I want to emphasize one thing—the career people in the Department worked very hard to process all of the pardon requests that came to them in the waning days and hours of the Clinton Administration. They are not to be faulted in this matter, As for my own role, although I always acted consistent with my duties and responsibilities as Deputy Attorney General, in hindsight I wish that I had done some things differently with regard to the Marc Rich matter. Specifically, I wish that I had insured that the Department of Justice was more fully informed and involved in this pardon process.

Let me be very clear about one important fact—efforts to portray me as intimately involved or overly interested in this matter are simply at odds with the facts. In truth, because the Marc Rich case did not stand out as one that was particularly meritorious, and because there were a very large number of cases that crossed my desk that similarly fit into this category, I never devoted a great deal of time to this matter and it does not now stick in my memory. By contrast, I did spend time monitoring cases, especially in those last days, involving people who were requesting commutations of disproportionately long drug sentences.

I would like to briefly go through a chronology of the relevant events so as to explain the Department's involvement in this matter. I think my first contact with the Rich case came in late 1999 when Jack Quinn, the former White House counsel, called me and asked me to facilitate a meeting with the prosecutors in the Southern District of New York concerning a client of his named Marc Rich. This was not an unusual request. Over the years other prominent members of the bar and former colleagues, Republicans and Democrats, had asked me to arrange similar meetings with other offices around the country. Mr. Rich's name was unfamiliar to me. I believe that Mr. Quinn explained that he wanted the U.S. Attorney's office to drop charges that had been lodged against his client because of changes in the applicable law and Department policy. I asked a senior career person on my staff to look into the matter, and ultimately the prosecutors in the U.S. Attorney's office declined to meet with Mr. Quinn, Neither I nor anyone on my staff ever pressed the prosecutors to have the meeting. We simply deferred to them because it was their case- In candor, if I were making the decision as United States Attorney, I probably would have held the meeting. In my view the government—and the cause of justice—often gains from hearing about the flaws, real or imagined, cited by defense counsel in a criminal case. But my only goal was to ensure that the request for a meeting was fully considered. Consequently, I gained only a passing familiarity with the underlying facts of the Rich case, and after the prosecutors declined to meet with Mr. Quinn I had no reason to delve further into this matter.

On November 21, 2000, members of my star and the United States Marshals Service and I had a meeting with Mr. Quinn. Though it was one of eight meetings I had on my schedule that day, I remember the meeting because Mr. Quinn's client had a good idea about using the Internet to help the Marshall's Service dispose of properties that had come into its possession as a result of forfeiture actions. Mr. Quinn has recently stated that after the meeting he told me he was going to file a pardon request on behalf of Mr. Rich at the White House. I have no memory of that conversation but do not question Mr. Quinn's assertion. As comment would have been a 2

fairly unremarkable one given my belief that any pardon petition filed with the White House would ultimately be sent to the Justice Department for review and consideration.

Mr. Quinn has also recently stated that he sent a note to me about the Rich case on January l0'". I never received that note. The correct address of the Justice Department does not appear on the correspondence. The note ultimately surfaced on the desk of the Pardon Attorney on January 18'", less than 48 hours before the pardon was signed by the President.

On Friday, January 19' of this year, the last full day of the Clinton Administration, when I was dealing with such issues as the death penalty, pressing personnel matters and security issues related to the next day's inauguration, I received a phone call from Mr. Quinn at about 6:30 p.m. He told me that I would be getting a call from the White House shortly, and he asked me what my position would be on the pardon request for Mr. Rich. I told him that although I had no strong opposition based on his recitation of the facts, law enforcement in New York would strongly oppose it. Given Mr. Rich's fugitive status, it seemed clear to me that the prosecutors involved would never support the request. But I did not reflexively oppose it because I had previously supported a successful pardon request for a fugitive, Preston King, who, in the context of a selective service case, had been discriminated against in the 1950s because of the color of his skin.

Shortly after my conversation with Mr. Quinn, I received a phone call from the White House Counsel, Beth Nolan, asking me my position. I am not sure if it was Ms. Nolan or Mr. Quinn who brought to my attention that Prime Minister Barak had weighed in strongly on behalf of the pardon request, but this assertion really struck me. With that significant piece of new information I ultimately told Ms. Nolan that I was now "neutral, leaning towards favorable" if there were foreign policy benefits that would be reaped by granting the pardon.

Even after my conversation with Ms. Nolan on the evening of January 19th, I did not think that the pardon request was likely to be granted given Mr. Rich's fugitive status. I continued to believe this until I actually heard that his name had been placed on a list of pardons to be granted by the White House. I was informed of this list around eleven o'clock, perhaps midnight, on the night of the 19th. In retrospect, I now wish that I had placed as much focus on the Rich case as I did on other pardons involving people such as Derrick Curry, Dorothy Gaines and Kemba Smith, all of whom had received extraordinarily long drug sentences which, I strongly believe, were not commensurate with their conduct. Though I am speculating somewhat, had I known of the reported meeting that night between the President and counsel for Mr. Rich, I might have become more active in this matter, even at that

late date, sensing that there was a real possibility the pardon request might be granted.

On the morning of Monday, January 22nd of this year, Mr. Quinn called me. I returned his call some four or five hours later. He asked me what steps needed to be taken to ensure that his newly-pardoned client was not detained by international law enforcement authorities when he traveled. We talked about how he might get detainers removed from computers and notify Interpol of the pardon, and about similar things of a technical nature. At no time did I congratulate Mr. Quinn about his efforts. If I said anything to him about his having done a good job, it was merely a polite acknowledgment of the obvious—that he had been surprisingly successful in obtaining a pardon for this particular client,

As you can see from these facts, attempts to make the Justice Department, or me, the "fall guys" in this matter are rather transparent and simply not consistent with the facts. I, and others at the Justice Department, had nothing to gain or lose by the decision in this matter; we had no professional, personal, or financial relationship with Mr. Rich or anyone connected to him; and, to the best of my knowledge, none of us ever saw the Rich pardon application. Indeed, it is now clear, and this is admittedly hindsight, that we at the Justice Department—and more importantly, former President Clinton, the American public, and the cause of justice—would have been better served if this case had been handled through the normal channels.

I have now ended a twenty five year public service career. All that I have from that time is the good work I think I have done, its impact on people and, I hope, a reputation for integrity. I have been angry, hurt and even somewhat disillusioned by what has transpired over the past two weeks with regard to this pardon. But, I've tried to keep foremost in my mind the meeting I had at my house with Derrick Curry and his father the week after his sentence was commuted by President Clinton, I know that my attention to that and similar cases made a difference in the lives of truly deserving people. Of that I am proud and grateful.

Senator SPECTER. Thank you, Mr. Holder.

Mr. Adams, you testified that when you talked to White House Counsel about these two men, you were told that they were "living abroad"?

Mr. ADAMS. That's correct, Senator.

Senator SPECTER. That is all? Nothing about their being fugitives?

Mr. ADAMS. The word "fugitive" did not come to my mind right then. The fact that the phrase "living abroad" caught my attention, and I decided that even though they hadn't asked for much, that I really wanted to do at least the limited FBI record check that we could do, which was for outstanding warrants and criminal history.

Senator SPECTER. But when you were told they were living abroad, you were not told that they were under indictment?

Mr. ADAMS. No, sir, I was not.

Senator SPECTER. Or that they were fugitives?

Mr. ADAMS. First, I was not told they were fugitives. I learned that from the FBI. I was told that they were under indictment when the White House Counsel's Office, I think as I testified, a few minutes after our initial conversation faxed me a portion of the request for pardon that Mr. Quinn had filed for these two men with the White House, and that indicated that they were under indictment, a particular indictment in the Southern District of New York dating from 1983.

Senator SPECTER. Mr. Adams, you testified that these warrants were to be delivered to the individuals who were to be pardoned?

Mr. ADAMS. That is correct.

Senator SPECTER. Was the document on executive grant of clemency ever delivered to Mr. Marc Rich?

Mr. ADAMS. The individual pardon warrants of both Mr. Rich and Mr. Green which I had been directed to prepare by President

Clinton's signing of the master warrant—it was delivered—at least it was put in the mail; I don't think it has been delivered now to their counsel, Mr. Quinn. It is a standard procedure when a clemency applicant is represented by counsel and the request is approved, we deliver the documents to the person's counsel.

Senator SPECTER. Was there anything that you knew factually from the President about Mr. Marc Rich besides the fact that his name appeared on this master list?

Mr. ADAMS. Anything I knew from the President about Marc Rich?

Senator SPECTER. Yes.

Mr. ADAMS. No, Senator. What I have testified to and what is in my statement is the entire scope of my dealings with the White House on it. The dealings were through counsel, through the White House counsel.

Senator SPECTER. And, Mr. Adams, when was this document, Executive Grant of Clemency, which recites—when was it prepared?

Mr. ADAMS. Probably prepared some day last week. It was prepared after January 20th.

Senator SPECTER. Well, the document recites on its face, "In accordance with these instructions and authority, I have signed my name and caused the seal of the Department of Justice to be affixed hereto, and affirm that the action is the act of the President being performed at his direction, done at the city of Washington, District of Columbia, on January 20, 2001, by direction of the President. Roger C. Adams, Pardon Attorney."

And you are saying that this recitation is inaccurate?

Mr. ADAMS. It is inaccurate in the sense that there was no physical way we could sign—or I could prepare individual warrants and sign them all on January 20. It has been customary for many years that the individual warrants reflect the date of the grant, as set out in the master pardon warrant. But it is understood that we are not physically able to prepare or deliver—

Senator SPECTER. Well, Mr. Adams, I can certainly understand why you couldn't get them all completed, but I just want to be emphatic or clear for the record that the recitation that it was done on January 20, 2001, is not accurate.

Mr. ADAMS. It is true I did not sign it on January 20. That is true, but it certainly reflected the action of the President, then President Clinton, taken on January 20.

Senator SPECTER. Well, the action of President Clinton was taken on the master executive grant.

There is another document which I know you are aware of, Mr. Adams, which has the insignia of the Department of Justice Pardon Attorney, stamped in January 20, 2001, memorandum to Director of Office of Public Affairs from Roger C. Adams, R.C.A., Pardon Attorney; subject: Marc Rich.

"On the above date, President Clinton granted Mr. Rich a full and unconditioned pardon after completion of sentence," close quote, and it purports to bear your initials. Are those, in fact, your initials?

Mr. ADAMS. Yes, they are, Senator.

Senator SPECTER. This may obviously be simply a mistake, or it may reflect that it is customary for the President to specify par-

dons, as many of these documents did. This is one of many which contain a recitation. The language is "a full and unconditioned pardon on completion of sentence."

What are the facts behind this memorandum, Mr. Adams?

Mr. ADAMS. OK. What you have in front of you, Senator, that is a standard memorandum that my office prepares to the Office of Public Affairs to notify the Public Affairs Office that a pardon has been granted. The standard form recites that it is for pardon after completion of sentence because that is the situation with the vast, vast majority of pardons.

Senator SPECTER. Is there any suggestion at all that President Clinton intended this pardon to apply after Mr. Rich fulfilled his sentence?

Mr. ADAMS. I don't believe there is, Senator. What happened was we prepared that document in my office about 2:30, 3 in the morning, on the 20th. Unfortunately, we just didn't—we used the standard boilerplate language which recites "pardon after completion of sentence." It was simply an error on our part, you know, a direct result, I believe, of the fact that this was a very unusual situation.

This request had come in very late. We were frankly tired. We didn't catch it. We should have. It was a mistake in our part. We should have not used that—

Senator SPECTER. Mr. Adams, pardon me for interrupting, but my yellow light is on and I intend to observe the time, as all Senators will.

This document, which is the executive grant of clemency for Marc Rich, is the document which has to be delivered to him to be effective, right?

Mr. ADAMS. It has to be signed. I am not sure it has to be delivered to him.

Senator SPECTER. Well, you said that these documents were delivered, but it has to be signed. Does the President of the United States have any authority to act as President after noon on January 20?

Mr. ADAMS. His term certainly ends on noon on January 20.

Senator SPECTER. Well, if he has no authority to act after noon on January 20, does he have the authority to delegate any authority to you?

Mr. ADAMS. Well, I think when he delegated the authority to me, he was President. It seemed to me appropriate that we would continue to carry out those instructions, particularly given the fact situation here. It was obvious that there was no way this many individual warrants could be completed by noon on the 20th. I was simply carrying—as a ministerial act, I was carrying out the actions of—

Senator SPECTER. Well, that is a consequence of having it done in the early morning hours of January 20. Well, the legal consequences have to be determined, but I thank you for providing the factual information.

My red light is on. We will turn to Senator Feinstein.

Senator FEINSTEIN. Thanks very much, Mr. Chairman. If I might just be allowed an observation first, before I ask my questions.

One of the things that I see increasing in this country is the campaign that surrounds a pardon request. People who file for a par-

don or a commutation then get their families or friends or their attorneys to really go out and organize a campaign. A lot of well-meaning people get involved and they put on a lot of pressure, and even more well-meaning people get involved. I think Mr. Holder is one of them, for example, and something like this can really ruin their entire career.

I think if there is a message from these hearings, it is for to people who get involved in these pardon requests to really know the facts before they get involved. I see this with the Rich case, I see it with the Vignali case, I saw it with the FALN case. There really is a constituency pressing on the chief executive to deliver a pardon. And they really don't get involved with the nature of the crime or the nature of the sentence. Obtaining a pardon just becomes a kind of political pressure point. In those cases, obviously the result was successful, and it will probably take a number of good people down with them, and I think that is really too bad.

Mr. Adams, let me ask this question. Section 1.6(b) of the Rules Governing Petitions for Executive Clemency, which allows crime victims to be notified of and heard regarding certain clemency petitions, took effect on September 28 of the year 2000.

Mr. ADAMS. That is correct.

Senator FEINSTEIN. I would be interested in an accounting of how that section has operated for thess past 4 months. Let me begin with this question: In how many cases did the Attorney General attempt to notify the victim of a petition in the last 4 months?

Mr. ADAMS. I can't give a—the Attorney General did not attempt to do it personally in any case. There were a number of cases, eight or ten anyway, where there were victims and we asked—the standard procedure, the way to ask is my office—if the case is being seriously considered or if it is a case of some moment that we want to do a very complete report on and there are victims, we asked the United States attorney's office to contact victims. I would estimate 8 or 10, not necessarily in the last 4 months.

Senator FEINSTEIN. Of the 140?

Mr. ADAMS. Yes. First of all, Senator, those regulations, they only applied to petitions filed after that particular date. But let me hasten to add that even before those regulations went into effect, we routinely asked U.S. attorneys' offices to contact victims in cases where there were victims. Many of those 140 cases involved situations where there were no victims, drug cases. Society is clearly a victim, but that is not the type of case contemplated by those regulations.

Senator FEINSTEIN. Mr. Holder, do you agree with that that in eight or ten cases the victim was notified by your Department?

Mr. HOLDER. I simply don't know, Senator. Those are the kinds of things that typically happen. The Pardon Attorney's Office and perhaps people on my staff might be involved, but I simply don't know.

Senator FEINSTEIN. I think, Mr. Chairman, I would very much appreciate in writing some indication of on how many occasions was this section of the rules actually followed, if we might submit that as a written question to them.

Senator SPECTER. Is that feasible to obtain, Mr. Adams?

Mr. ADAMS. Sure, we can give you—

Senator SPECTER. Well, then consider it a request.

Mr. ADAMS. We can give you a listing of cases in which we contacted victims. I would request, though, that we not be constrained to start on September 28 because we had been doing that before the regulations went into effect.

Senator FEINSTEIN. Well, since the rule went into effect, I am just curious, has it been followed, and when it wasn't followed, why not.

Mr. ADAMS. When there is a victim in the case and we are, as the rule says, seriously considering the case, believe the case might have some merit, or for other reasons—

Senator FEINSTEIN. So you are prepared to say in every case where there are existing victims, the rule has been followed?

Mr. ADAMS. No, I am not prepared to say that because there are many cases, Senator, and this is an important point, where there were victims, but we do not believe the case merits a pardon or a commutation. We believe the case is of such lack of merit that it is not even worth the time to go the United States attorney's office to—

Senator FEINSTEIN. Of those cases where there was merit—for example, in the FALN case, no victim was contacted. That was certainly a case that you probably thought perhaps didn't have merit, but you are saying then you wouldn't contact the victim?

Mr. ADAMS. Not necessarily. If I believed the case did not have merit and I was going to do a summary denial of that—propose the case be handled by way of summary denial, I would not ask the U.S. attorney—first of all, I wouldn't ask the U.S. attorney for his views anyway in most cases because it is not worth getting them involved. It is a waste of their time. It is also not worth going to victims in the vast majority of cases where I believe routine, quick denial of the petition is warranted.

Senator FEINSTEIN. I want to speak just for a moment, if I might, about a California case in which there was clearly a campaign for a commutation. Carlos Vignali received a 15-year sentence for his role in a drug operation that moved 800 pounds of cocaine from California to Minnesota so it could be converted to crack. He petitioned for commutation of his sentence.

The relevant United States attorney in Minnesota strongly opposed the petition, and Vignali's trial judge, whom the Department of Justice did not consult, says that if asked, he would have opposed the petition. The same judge supported a couple of other requests for clemency. Ultimately, the President commuted Mr. Vignali's sentence to time served, about 6 years.

Did you make a recommendation in this case?

Mr. ADAMS. Yes, we did, Senator.

Senator FEINSTEIN. I take it I am not supposed to ask what that recommendation is because of executive privilege, but you did make a recommendation in that case?

Mr. ADAMS. Yes, Senator, we did.

Senator FEINSTEIN. Could I ask one more quick question?

Senator SPECTER. Sure.

Senator FEINSTEIN. Why didn't your staff contact the trial judge in the case?

Mr. ADAMS. I am not prepared to discuss what we did in specific cases and specifically with respect to the Vignali case, but let me attempt to deal with your question more generally.

When we go to the United States attorney's office for his or her opinion in a case, be it a commutation case or a pardon case, we routinely ask that that office contact the sentencing judge on our behalf. And we tell them if they don't want to do that, let us know and we will contact the sentencing judge.

We go to the U.S. attorney's office for a variety of reasons. One, the case may appear to be meritorious or, two, we just need more information from the U.S. attorney's office. The pre-sentence report is incomplete. The petitioner has made unusual claims that can only be answered by the United States attorney or his staff.

In most cases, if we ask the U.S. attorney to contact the sentencing judge, he does so. Once in a while, he doesn't. If we believe that the situation is such that we have enough information in my office to make our report and recommendation without contacting the sentencing judge, we wouldn't.

Senator FEINSTEIN. Thank you.

May I enter into the record the appellate brief in this case, please?

Senator SPECTER. Absolutely, Senator Feinstein.

Senator FEINSTEIN. Thank you very much. My time is up.

Senator SPECTER. And consider it a request from the committee, Mr. Adams, that Senator Feinstein has made. If it is administratively feasible, if you could list those which you have not contacted victims where you conclude it is a matter that is unmeritorious and unlikely to be pursued, that would be fine.

Senator DeWine?

Senator DEWINE. Thank you, Mr. Chairman.

Mr. Holder, I want to give you an opportunity to respond to the written statement testimony from Jack Quinn. You have touched on some of this already, but I want to specifically deal with some of his comments.

This is from the testimony of Jack Quinn that has been submitted: "I personally notified Mr. Holder in his office on November 21, 2000, that I would be sending a pardon application directly to the White House. I told him then that I hoped to encourage the White House to seek his views. He said I should do so."

Later on in the testimony he says, "On December 11, 2000, I delivered a two-inch-thick pardon application to the White House, more than 5 weeks before the pardon was granted on January 20. While the application was under consideration, I wrote Mr. Holder on January 10, 2001, and asked him to weigh in at the White House with his views."

Later in the testimony it says, "Still later, I called Mr. Holder the night of January 19 and told him that Mr. Rich's pardon was receiving serious consideration at the White House, and that I understood he would be contacted before a decision would be made at the White House."

Could you comment on those?

Mr. HOLDER. Yes.

Senator DEWINE. Walk us through the dates and tell us where your recollection is the same as Mr. Quinn's and where it might not be.

Mr. HOLDER. With regard to the November 21 notification, I guess you might call it, from Mr. Quinn, I don't have any recollection of that, but I don't doubt his assertion there that he said that. We had a meeting in my office that day on another matter, as I indicate in my statement. So I assume that what he says is, in fact, accurate that he did tell me about his intention to file something with the White House.

That would have been something that would not have been awfully remarkable in my mind because I worked under the assumption that anything filed with the White House would ultimately find its way to the Justice Department. I had been told that, in fact, something was filed on December 11, and again I assume—that is, filed with the White House; I again assume that is true.

Senator DEWINE. But excuse me. Staying with the 21st, you don't therefore recall saying anything to him, since you don't recall the conversation?

Mr. HOLDER. No, but again I am not saying—I am saying I don't recall it. I don't have any basis to dispute what he says. I just don't recall the conversation.

The January 10th letter is something, I guess, that Mr. Adams touched on in his opening statement. That is a letter that I never saw. It apparently got into the Justice Department mail system, was sent to the Pardon Attorney for a response. There is an indication that it was sent to the Deputy Attorney General's office, I think, for notification or something along those lines, but I never actually saw that letter, the January 10th letter, which I think contained or attached a letter from Mr. Quinn to the President on January 5th.

I did have a call with Mr. Quinn on January 19, in which he indicated to me that I would probably be receiving a call from the White House shortly thereafter. And I indicated to him, I think, as I said in my written remarks, that based on his recitation of the facts, I was not strongly opposed to the pardon request.

But what I want to make clear is that at all times in my interaction with this, this was not something that was for me a priority matter because I didn't think this was something that was likely to happen, given the fact that Mr. Rich was a fugitive. In the time that I have been Deputy Attorney General, I am aware of only one case in which a pardon request was granted to a fugitive.

Senator DEWINE. Let me make sure I understand the facts. So you did know that he was a fugitive under the facts as recited to you by Mr. Quinn?

Mr. HOLDER. Yes, I knew he was a fugitive.

Senator DEWINE. You knew he was a fugitive, and still you said you wouldn't necessarily have any objection to that? Didn't the fact that he was a fugitive bother you?

Mr. HOLDER. Sure, it did, but assuming—again, what I said to the White House counsel ultimately was that I was neutral on this because I didn't have a factual—I didn't have a basis to make a determination as to whether or not Mr. Quinn's contentions were, in fact, accurate, whether or not there had been a change in the law,

a change in the applicable Justice Department regulations, and whether or not that was something that would justify the extraordinary grant of a pardon.

Senator DEWINE. So the fact that he was a fugitive did not take it out of the realm of possibility? You didn't say, well, gee, he is a fugitive, therefore I wouldn't be in favor of this. You came down neutral based on the facts as given to you by Mr. Quinn. I just want to make sure I understand your rationale here or your thought process.

Mr. HOLDER. Essentially, what I was trying to say—what I tried to convey was that I didn't have a basis to make a determination. Again, assuming that what Mr. Quinn said—I didn't reflexively -I did not reflexively say that I was opposed to this because he was a fugitive, having had that experience with, I guess, Mr. Preston King, who was a fugitive and who ultimately was granted a pardon that I supported. But I did not think, given the fact that he was a fugitive, that this was ever a matter likely to be successfully concluded from Mr. Rich's perspective.

Senator DEWINE. Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator DeWine.

Senator Kohl?

Senator KOHL. Thank you, Senator Specter.

Mr. Adams and Mr. Holder, one of the questions this raises which resonates across the country today is fairness, the ability of the average citizen to have equal access to power and to government, to redress, to have their grievances considered. Of course, in theory, that is what America is all about.

We all know that sometimes reality is not the same as theory, but our job here, your job and our job, is to do everything we can to bring that as close to possibility as we can in this country. And there probably isn't one person across this country today who is familiar with this case who doesn't think that it is a question of power, connection, money, and that, in fact, is how this pardon occurred. Without the power, the connection, the money, there is no doubt that this pardon would not have occurred. At least that is the perception across the country.

Now, what is your response? You are part of the system. I don't think you can just walk away from it, nor do I think you want to. So what do you say to the people of our country who are saying this stinks because if you are rich or powerful or well-connected, you can get something done, and if you are not, you can't get anything done? So the Government is not a Government of the people, by the people, for the people.

Mr. HOLDER. Well, let me take a stab at—well, I am sorry, Senator.

Senator KOHL. Mr. Holder, go ahead.

Mr. HOLDER. Just speaking on behalf of what happens in the Justice Department, and certainly speaking specifically about the work of Mr. Adams, his predecessors and the people who work in the Pardon Attorney's office, I think the American people should be reassured that they make their determinations and recommendations based only on the information that is in front of them. Big guys and little guys, I think, get treated equally within the Pardon Attorney's office, and I am proud of the work that they have done.

I appointed Mr. Adams to be Pardon Attorney. He is a capable guy and I think has done a very good job.

Beyond that, it is hard to say what goes into the final determination that any President makes in deciding whether or not to grant a pardon, who the President listens to, what influence a particular person might have. I think the thing again that I am most familiar with is what happens within the Justice Department aspect of the process, and I think there people are treated the same.

Mr. ADAMS. I really can't add much to that, Senator. We obviously -I hope it is obvious—we do treat everybody the same. I am not at all interested in—

Senator KOHL. I guess I am not so much pointing a finger at you because, as you have pointed out, there is a system in place here and we know how the system works.

Are you prepared to say that in terms of fairness and access, which all people should theoretically have the same, in fact, in this case that didn't happen at all?

Mr. HOLDER. Again, it is hard to say. I don't know what precisely motivated the President and whom he spoke to, what were the things that were going through his mind as he decided to look upon the pardon request favorably.

And it is true—I mean, I am not naive and I don't want to, you know, give the American people a bill of goods. Connections obviously help. I mean, there are—to be very honest with you, we get requests or we get expressions of support from Members of Congress for people who are perhaps better connected than the average guy.

But I think what the folks in the Pardon Attorney's office have done is a good job in really trying to separate that from the substance and really ought to be the motivating things in deciding what kinds of recommendations they are going to make. But, yes, there is no question that certain people have an ability to get more, quote, unquote, "influential people" to weigh in on their behalf. I think that is true.

Senator KOHL. Would you say that in this case, being as conspicuous as it has become, the American people to need to know from whomever, however, what that justification for this pardon was? Do you think that people at the highest level should speak out and help to put this case to rest by justifying the pardon?

Mr. HOLDER. Let me figure out a way that I can respond to this question and de-dynamite it perhaps. I mean, I think that certainly the American people, I guess, want to know ultimately what happened here, and to the extent that that could be explained, I think we would be the better off for it.

But, you know, the former President—no President, I think, has an absolute duty to explain those kinds of decisions. It seems to me that the Constitution, in making the power as unfettered as it is, in some ways anticipates the notion that you would want to have a President exercising that power obviously responsibly, but without any kind of collateral fears. I think that is probably the best answer I could give.

Senator KOHL. Mr. Adams, do you want to say something?

Mr. ADAMS. I think, Senator, what you are asking for is sort of my—are you asking for my opinion of the whole—

Senator KOHL. Yes, of course.

Mr. ADAMS. Well, I mean I really have to—I do have an opinion on what happened in this situation. But, you know, I have to tell you, Senator, I am here as a representative of the Justice Department and to give you facts and information that came to my attention. And I just don't think it is appropriate for me to express my personal—

Senator KOHL. What is your opinion? We are interested in your opinion.

Mr. ADAMS. I just don't think it is appropriate for me to give an opinion on that question of—the question you asked. I just would prefer not to give a personal opinion, given the position that I held then and hold now.

Senator KOHL. Well, why wouldn't you want to give us your opinion?

Mr. ADAMS. Well, as I indicated, Senator—Mr. Holder has a comment.

Mr. HOLDER. Senator, maybe if I could just interpose, I mean Mr. Adams is a career Justice Department employee, and he is a person who I am sure has called these things as he has seen them. And regardless of what his personal opinion is, he is a good lawyer, and good lawyers have to frequently do that, put aside their personal opinions and make determinations based only on the facts and the law.

I think I can understand how he feels uncomfortable. I was a Justice Department lawyer myself, a trial lawyer, for 12 years. And I would ask, to the extent you would see it would be appropriate, to not make him express a personal opinion, and to the extent we can restrict the questioning of him to the way in which he performed his official function. But it is only a request, I think, that I would make actually on behalf of all the career people within the Department.

Senator KOHL. Well, you are a Pardon Attorney in the Justice Department.

Mr. ADAMS. That is correct.

Senator KOHL. So when pardons occur, Mr. Adams, you have an interest in what happens. Forget about anything else. You are an American, you care. You are an important person in the process and you like to see pardons occur in an orderly way just because that is a man taking pride in his job, and I would sure that would describe you.

Mr. ADAMS. That is basically correct, sure.

Senator KOHL. And in this case, do you feel good about that pardon?

Mr. ADAMS. All I can tell you, Senator, is that this case was clearly not—this was a very unusual situation. The Rich and Green case were not handled anything approaching the normal way. I guess I have a parochial interest in seeing that they—I would prefer that things be handled the normal way. But when a President, for whatever reason, decides not to handle things in an orderly -in a way in conformity with the regulations, there is very little that I can do about it.

Senator KOHL. You may feel terrible about it, which you obviously apparently do, but you are pointing out to us there is nothing you can do as a matter of fact.

Mr. ADAMS. That is correct. If the President decides to not follow the procedures, as is any President's right—in other words, if he doesn't want input from the Justice Department, if he doesn't want an investigation from my office, you know, I can't force one down his throat.

Mr. HOLDER. One thing I would like to add, Senator, in terms of the big guy/little guy thing and questions of influence, a fair number of the pardons that were granted were, I think as maybe Senator Feingold indicated, pardons of people who were serving extremely long drug sentences. These were by no stretch of the imagination people who were wealthy or connected, and yet there were people who advocated on their behalf.

And so as I said before, I think I have to concede that certainly there are certain people who have an ability to get people of influence to lobby on their behalfs. But the fact that you don't have that does not necessarily mean that a pardon request will be unsuccessful.

Senator KOHL. Thank you, thank you much.

Senator SPECTER. Thank you, Senator Kohl.

Senator Kyl?

Senator KYL. Thank you, Mr. Chairman.

Just for the record, Mr. Holder, about the time you became the Acting Attorney General, a very close friend of my mine said, is that a good idea, given the fact that Eric Holder was the No. 2 person in the Clinton Department of Justice? I said, yes, I think it is; I have had very professional dealings with Eric Holder and I have no doubt that he will acquit himself properly in that role.

And it is in that context that I am really disappointed in the inaction that characterized your treatment of this matter during the time that you were aware of it. I am speaking about the Rich pardon primarily occurring on the 19th and the 20th of January.

You excuse your failure to pay more attention to this because you testified you assumed that Rich's fugitive status would result in a denial. Is that correct? That is what you just testified to.

Mr. HOLDER. Well, that among other things. I used that as one of many things that caused my inaction in this pardon.

Senator KYL. And yet that fugitive status and the other factors were not sufficient to cause you to come down in opposition to the pardon when you were specifically asked by the White House, by Beth Nolan. In fact, you expressed neutrality, even leaning favorable, notwithstanding your knowledge that he was a fugitive and notwithstanding the fact that you knew at that point that it had not gone through regular Justice Department process.

Mr. HOLDER. Well, I mean again the leaning favorable aspect of that recommendation was conditional, if there were a foreign policy benefit that we would reap from the grant of the pardon. I had been told that Prime Minister Barak had weighed in heavily, or something along those lines, strongly in favor of the pardon. And it was on that basis that I went from neutral, which was a term that I mean to imply -I didn't have enough of a factual background to decide the case one way—or to make a recommendation one way

or the other, but that if there were a foreign policy benefit that might be reaped or that could be reaped, I would lean favorably.

Senator KYL. Those benefits would be outside of the purview of your jurisdiction. Your jurisdiction pertained to the facts relative to the alleged crime and the facts relative to the fugitive status, conviction, if there is one, time served, and so on. Is that correct?

Mr. HOLDER. Well, no. I mean, the Justice Department is not a place that only deals with things within our borders. The Attorney General and I met on a regular basis with the National Security Advisor. We were involved in a great many foreign policy discussions, as other departments in the executive branch are.

Senator KYL. With respect to possible solutions to prevent this kind of issue arising in the future, wouldn't you agree that confronted with the knowledge that this application had not gone through regular Justice Department channels, confronted with the knowledge that you knew very little about it as a matter of fact, and that you assumed that the facts were so negative that it wouldn't even be strongly considered to be granted by the White House, then wouldn't you agree that it would have been better for you to say, if you are telling me there is an international factor, then that is something you have to weigh, but you need to know that apparently there was apparently a deliberate effort to avoid vetting this in the proper way through regular channels in the Justice Department, and that the President—to Beth Nolan now—the President should be advised of that because he may be under the impression that this has been properly vetted because of your communication with me?

Mr. HOLDER. At the time, I didn't know that there had been an effort or whatever to avoid the vetting. I assumed, in fact, that there were conversations going on at a staff level about this matter in the same way that staff-level conversations I found out subsequently were going on about New York-related cases.

Senator KYL. Could I just interrupt you there, though? It is a reasonable assumption that somebody would have told someone, and yet it is now the last minute and this is just before the administration is going out of office. You are being asked for your recommendation and the usual procedure is for a whole raft of documents to be submitted to you, a whole series of recommendations from the Pardon Attorney, and so on, and you are the one that makes the final recommendation, then, on this matter.

And you had none of that, so you knew at that time anyway that whatever conversations may have occurred within the Justice Department that the proper procedures had not been followed because you didn't have a recommendation from those below you. You had no basis upon which to make a recommendation to the White House, other than what Quinn might have told you.

Mr. HOLDER. Yes, and what I—my interaction with the White House I did not view as a recommendation, because you are right. I didn't have the ability to look at all the materials that had been vetted through, the way we normally vet materials.

And as I indicated in my written testimony, if there were ways in which I would redo this, there were certain things I would have done differently. And I think the one thing that would have changed this whole thing, if I had said to the person on my staff,

what is the status of the Rich matter, again assuming that there were these conversations that were going on—if I had said that to her and found out from her that there were no ongoing conversations, that I think would have fundamentally changed the way in which the Justice Department approached this case generally and how I approached the case specifically. But I did not do that and I admit that.

Senator KYL. You acknowledge that as a failure on your part.

Just a last question. If Jack Quinn says that he took from your conversation with him and your conversation with Beth Nolan enough of a positive recommendation, or at least not a negative reaction, to be able to argue to the President that he had run it by Justice or run it by you, or words to that general effect, creating the impression with the President that you approved of it, would you disagree with that characterization of Mr. Quinn?

Mr. HOLDER. Well, I think running it by Justice is actually a pretty good description of what happened. Somebody at the White House had to know that whatever I said was based on a process that did not allow me to have the kinds of materials that Mr. Adams normally gave me. I mean, somebody in the White House had to know this.

Again, I don't know if it is inadvertence, design, or whatever, but somebody had to know that any recommendation or comment from Holder is not based on the kinds of materials that he normally has access to. The White House never sent to us the pardon application that had been filed with them.

As Mr. Adams indicated, his interaction with them was at 1 or 12, whatever it was, in the morning. So for people to think that the Deputy Attorney General is speaking on behalf of the Justice Department in the way that he normally does when it comes to making pardon recommendations, given this record, I don't think is supported by the facts. And there obviously had to be people in the White House who knew that.

It might not have been the President. You know, it might not have been the President, but at least somebody, it seems to me, in the chain had to know that I didn't have in front of me all the normal materials that I would have had in expressing a recommendation.

Senator KYL. Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Kyl.

Thank you very much, Mr. Holder and Mr. Adams. If you gentlemen would step back but remain for the balance of the hearing, we would appreciate it. There may be some follow-up question we would like to ask.

I would like to combine the second and third panels because we are running if late, if Mr. Quinn, Mr. Becker, Mr. Gormley and Mr. Schroeder would step forward, please.

Welcome, gentlemen. Thank you very much for coming in. We make it a practice to swear in fact witnesses, not expert opinion witnesses, so we will proceed at this time.

Professor Benton Becker comes to this panel with a very distinguished record. He is at the University of Miami now. He has had important Government positions, including being counsel to former

President Gerald Ford at the time the pardon was granted to President Nixon.

The clock will be set at 7 minutes for the witnesses and 5 minutes for the Senators.

Professor Becker, we will call on your first.

STATEMENTS OF BENTON BECKER, PROFESSOR OF CONSTITUTIONAL LAW, UNIVERSITY OF MIAMI, PEMBROKE PINES, FLORIDA

Mr. BECKER. Thank you, Mr. Chairman. I am pleased to have this opportunity to appear before this committee to comment on the language of the Constitution that provides at Article II, section 2, that "The President of the United States shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." That is all that the text of the Constitution has to say on the subject of pardons.

Twenty-7 years ago, in the early days of the Ford administration, I was honored to undertake the task of researching the historical precedents pertaining to Presidential pardons, seeking to determine the constitutional scope of Presidential pardons. Little constitutional change has occurred in this Nation since 1974.

With a very narrow, limited exception, the Presidential power to issue pardons is indeed absolute, and under almost all circumstances not subject to review by the judicial branch. The sole exception whereby a Presidential pardon may—and we have never had that occur in our country—be the subject of judicial review pertains to instances where a grant of a Presidential pardon concurrently satisfies the elements of and the evidentiary requirements of a Federal bribery or other Federal acceptance of gratuity statutes.

I do not represent to this committee that that is the case in the Rich and Green pardons. Such circumstances have been most appreciatively non-existent in our country. But approximately 20 years ago, in the State of Tennessee, Tennessee successfully suffered through litigation disputing the constitutionality of initiating criminal prosecution against its then seated Governor in a criminal case, wherein it was asserted that the Governor of the State of Tennessee regularly engaged in the wholesale sale of pardons and commutations.

I am advised that this committee is considering what legislative enactments, if any, it might undertake to prohibit or to deter future Presidents from issuing Presidential pardons similar to those granted to Messrs. Rich and Green.

Initially, I would affirm that any constitutionally valid legislative enactment that undertakes to restrict the President's pardoning power under Article II, section 2, must be enacted as a constitutional amendment. A legislative enactment adopted by a majority of both Houses of Congress and signed by the President restricting the Presidential pardoning power in any manner would clearly be unconstitutional.

Therefore, Senators, any change in the law on the subject of Presidential pardons must, by necessity, require a change in the Constitution of the United States. I do not recommend passage of a constitutional amendment on this subject. A proposed constitutional amendment granting congressional or senatorial approval or

veto authority over Presidential pardons is, in my view, unwise and unnecessary.

The Founding Fathers placed that absolute power, albeit undemocratic power, in the Constitution, in recognition of the fact that governmental adherence to the letter of the law does not in all instances result in justice. And to hedge against those instances of injustice a non-reviewable pardon power was granted to the President. There is little doubt in my mind that that power was not meant for people like Messrs. Rich and Green, but that does not, in my view, justify tampering with or cluttering our Constitution.

Mr. Chairman, I would simply ask that the remainder of my statement be admitted into evidence.

Senator SPECTER. Without objection, your full statement will be made part of the record.

Mr. BECKER. Thank you, sir.

[The prepared statement of Mr. Becker follows:]

STATEMENT OF BENTON BECKER, PROFESSOR OF CONSTITUTIONAL LAW, UNIVERSITY OF MIAMI, PEMBROKE PINES, FLORIDA

I am pleased to have this opportunity to appear before the Judiciary Committee of the US Senate to discuss Article II, Section 2 of the United States Constitution, which provides, "President shall have power to grant Reprieves and Pardons for offenses against the United States except in cases of impeachment." That is all the text of the Constitution has to say on the subject of pardons. Twenty-seven years ago, in the early days of the Ford Administration, I undertook the task of researching the historical precedents pertaining to presidential pardons seeking to determine the constitutional scope of the pardoning authority of Presidents. Little constitutional change has occurred on this issue since 1974.

With a very narrow, limited exception, the presidential power to issue pardons is absolute, and under almost all circumstances, not subject to review by the judicial branch. The sole exception, whereby a presidential pardon "may" (such exception, fortunately having never occurred in history) be the subject of judicial review pertains to instances whereby the grant of a presidential pardon concurrently satisfies all elements of, and the evidentiary requirements for, federal bribery or other criminal statutes. Should such occur, and I do not represent that the Rich/Green pardons constitute such an instance, only after a prudent determination that solid unimpeachable evidence of criminal wrongdoing exists.

Such circumstances are, and have been, thankfully, almost non-existing. Approximately twenty years ago, the State of Tennessee successfully suffered through litigation disputing the constitutionality of initiating criminal prosecution action against its seated Governor in a criminal case wherein it was asserted that the Governor of the State regularly engaged in the wholesale sale of pardons and commutations. May our nation never be made to suffer similar humiliation.

I am advised that the Senate Judiciary Committee is considering what legislative enactment, if any, it might undertake to prohibit and/or deter future Presidents from issuing presidential pardons similar to those granted to fugitive financiers Marc Rich and Pincus Green. Initially, I would affirm that any constitutionally valid legislative enactment that undertakes to restrict the President's pardoning power under Article 13, Section 2 must be enacted as a Constitutional Amendment. A mere legislative enactment, adopted by a majority of both houses of Congress and signed by the President restricting the presidential pardoning power in any manner would be unconstitutional. Therefore Senators, any change in the law on the subject of presidential pardons must, by necessity, require a change in the Constitution of the United States.

I do not recommend passage of a Constitutional Amendment on this subject. A proposed Constitutional Amendment granting Congressional or Senatorial approval or veto authority over presidential pardons is, in my view, unwise and unnecessary. The Founding Fathers placed this absolute power, albeit undemocratic power, in the Constitution in recognition of the fact that governmental adherence to the letter of the law does not, in all instances, result in justice. And, to hedge against those instances of injustice, this non-reviewable pardon power was granted to the President. There is little doubt in my mind that this power was not meant for people like

Misters Rich and Green, but that does not justify tampering with. . . or cluttering, the Constitution.

My experience with the presidential pardoning power dates back to 1974 and was at the time interwoven with the question of ownership and possession of the records of the Nixon presidency. On August 9, 1974, Richard Nixon departed the White House to San Clemente. He left behind, in neatly packaged and sealed boxes stored on the forth floor of the Executive Office Building, five and one-half years of accumulated records, papers and tapes, including all tape recordings from the Oval Office. At noon on August 9, 1974, Gerald R. Ford became President by prearranged timing of the Nixon resignation. It was forcefully argued by many in the White House staff that the newly sworn-in President was only a custodian or bailee of the Nixon records, papers, and tapes left behind in the White House. Within twenty-four hours after Mr. Nixon's departure, President Ford's inherited Chief of Staff, Alexander Haig, reported that the former President had landed successfully, had unpacked his bags and had telephoned Haig demanding the immediate transmittal of all "his" records, papers and tapes.

President Ford directed his Attorney General, William Saxbe, to instruct the Department of Justice to prepare a legal opinion on the subject of who, Richard Nixon or the US government, owned the records, papers and tape recordings accumulated during the five and half years of the Nixon administration. And furthermore, if ownership was determined to have been

vested with the former President, what right, if any, did President Ford have to refuse to transfer the records, papers and tapes to San Clemente?

The Department of Justice's opinion presented to President Ford within one week, concluded that primarily through custom and tradition, and only partially through law, the records, papers and tape recordings accumulated during the presidential term of the former president were the exclusive personal property of the former President and that there was no legal justification to refuse their transfer to the former President. I could not then, and I have not in the succeeding twenty-seven years, found either fault or error in the factual or legal conclusions contained in the Justice Department opinion. Nonetheless, Robert Hartmann's and my advice to President Ford was to ignore the Justice Department opinion and to refuse the Nixon transmittal request. My advice, rendered to a two-week occupant of the Oval Office, was to disregard (indeed, to disobey) the law, and retain possession of the records of the Nixon administration at all costs. President Ford sought to create a device whereby the Nixon records could be held by the Ford White House, in effect placed in a holding pattern, and thereby providing an opportunity for the courts and the Congress to act. Richard Nixon's subsequent execution of the Deed of Trust transferring the records and tapes to the General Services Administration served as that holding device for the Ford presidency.

President Ford, like the rest of the nation, had been given only twenty-four hours for transition before assuming the presidency. It is fair to note that virtually every Nixon White House staff person inherited by President Ford urged President Ford to comply with the Justice Department's recommendation to send all documents, papers, and tapes to their "rightful owner" in San Clemente. Much was said in the Oval Office at that time, some catchy and not so catchy. To his credit and courage, President Ford ignored the advice of his own Justice Department, his Chief of Staff and his newly inherited White House Staff. He ordered that no records, papers and tapes be sent to San Clemente.

I was asked by President Ford to research the scope of the presidential pardoning power.

Several legal issues were obvious and easily discernible; other, like land mines concealed in American jurisprudence, awaited an opportunity to explode. Those issues included

1. Presidential authority to grant a pardon pre-conviction, and in the case of Richard Nixon, a pardon pre-indictment. The precedents were clear on this question both at common law and in our judicial history. No constitutional prohibition prevented pre-indictment pardons, in fact, they appear often in our history.
2. Presidential authority to grant pardon without specifically delineating the precise federal criminal statutes for which the recipient had been pardoned. If a person receives a pardon and thereafter is prosecuted, the charged individual virtually pleads the pardon at bar as a defense to the pending charge, however, if a pardon defense is plead, it is incompetent under the pleader to point with specificity to his or her pardoned act and statutes. Failing such specificity of proof by the accused, the defense will fail. Nonetheless, the precedents were clear. An executive grant of a pardon does not require a specific recitation of statutes or criminal acts. By my reading of the news accounts of the large grouping of one hundred and forty pardons in one document signed by President Clinton, I read

that some twenty-plus pardoned individuals (not Misters Rich or Green) filed no pardon applications. . . causing the validity of those pardons, in my mind, to be questionable. The question is, absent a pardon application, or any other record, what was the individual pardoned for?. . . and within what period of time?

3. Whether a presidential pardon granted to Richard Nixon would, in fact, accomplish its preventive prosecution purpose. The reasoning, partly political and partly legal, was elementary; what purpose would be served by pardoning Richard Nixon, if thereafter the law allowed for the criminal prosecution of Richard Nixon by sovereigns other than the United States? In fact, that was precisely what the law allowed. The law of this nation is that a pardon issued by the President protects individuals from subsequent prosecution for the pardoned acts only, and only in federal courts for federal crimes.

Simply stated, Richard Nixon's September 1974 pardon did not serve as a bar against any subsequent prosecution against him that might have commenced, and could have commenced in, for example California. California could have elected to proceed, post-pardon, with a criminal prosecution of Richard Nixon, alleging the former president conspired with others to violate California's criminal burglary statute in the matter of the Los Angeles break-in by the White House Plumbers of Daniel Ellsberg's psychiatrist's office.

Even though one of the charged defendants in that would be prosecution may have possessed a blanket presidential pardon, sovereign states are sovereign, and precedent upon precedent allows subsequent state prosecutions of individuals holding federal pardons. The sovereign states of this Union are free to elect what consideration, if any, their courts will afford to federal pardons. Many states provide an informal degree of comity to recipients of federal pardons, but the vast majority of states, including California, jealously refuse to dilute their exclusivity and sovereignty of this issue.

Although each of these issues provided me with some significant measure of sleeplessness at the time, with the passing of twenty seven years, they have evolved to the exalted statues of academic discourse. Some would argue that is where these issues have always belonged.

And that is, in my view, where the question of constitutionally amending the pardoning process belongs. That process ought not be politicized, through the inclusion of Congressional approval or veto authority. It ought not be trivialized by mandatory preconditions requiring the maintenance of specific types of memos and records. I urge this Committee to trust history, and our presidential historians, to judge the propriety of presidential grants of pardon; and to trust the judgement and the good sense of the American people. I urge this Committee to resist the momentary temptation to unnecessarily clutter the Constitution.

Senator SPECTER. We will proceed with Professor Gormley at this time, Professor of Law at Duquesne University School of Law. He specializes in constitutional law, civil rights litigation, First Amendment legal writing, and property, a very extensive background, with a J.D. from Harvard Law School in 1980 and a B.A. from the University of Pittsburgh summa cum laude.

We welcome you here, Professor Gormley, and look forward to your testimony.

STATEMENT OF KEN GORMLEY, PROFESSOR OF CONSTITUTIONAL LAW, DUQUESNE UNIVERSITY, PITTSBURGH, PENNSYLVANIA

Mr. GORMLEY. Thank you very much, Senator Specter. I appreciate your invitation and the invitation of Senator Hatch and the entire committee to be here.

I have a modest degree of expertise in the subject of pardons. I am the author of the biography of Archibald Cox, the Watergate special prosecutor, and, flowing from that, became interested in the Ford pardon of Richard Nixon and organized a program at Duquesne University in 1999 on the subject of the pardon on the 25th anniversary.

After an admittedly short period of time to reflect and research for today's hearing, I still have to say I find myself hesitant when it comes to any constitutional revision of the Presidential pardon power.

First, if you take a look at the large number of pardons granted in our country's history, over 13,000 in the 20th century alone, there are a surprisingly small number that have come under attack as illegitimate. There are plenty of colorful ones, some controversial, some allegedly designed to further the political or personal interests of a President.

But I am not sure there are enough, or enough egregious ones to justify an amendment, no matter how one constructs it. Unless there is a clear track record of abuse or dysfunction, I think, over many years and many administrations, I would be inclined to err on the side of not upsetting the constitutional apple cart.

As I understand it, one consideration at this time is an amendment that would give Congress power to enact rules by which the President or the Department of Justice would have to adhere in dispensing pardons, and that would certainly prevent the President from bypassing DOJ procedures, as arguably as we just heard occurred in the case of several of President Clinton's pardons, and indeed some other pardons in the past 30 years or so.

I worry, however, that that kind of a constitutional amendment would do serious harm to separation of powers even if it was limited to simply procedures, dealing with procedures by which the President and Department of Justice were required to process pardons, because it could still be used, in effect, I think, Senators, to wrestle a core executive function away from the President. We could discuss that in the question period if you would like.

The most attractive alternative, at least on the surface, would be the so-called Mondale amendment that you described, Senator Specter, that was introduced shortly after President Ford's pardon of Richard Nixon in 1974. Something like that would certainly avoid the most serious constitutional concerns. It would keep the pardon power lodged in the executive branch. It would presumably limit Congress' involvement to extreme cases. In many ways, it is similar to the Senate's power to advise and consent with respect to Presidential appointments, treaties, and so on.

But I still worry that the constitutional retooling in order to accomplish even that, a benign amendment like the Mondale amendment, would have unwanted consequences. I suppose here I agree with Hamilton and Madison that the pardon power uniquely is best reposed in one person, the head of the executive branch. I fear that pardons by committee, which this could become, would not be a good thing.

My greatest worry is that it would strip the President of the pardon power during moments of passion, during moments of crisis when he or she needed that pardon power the most. President Ford's pardon of Richard Nixon, I think, is a great example of that. As you remember, at the time President Ford granted that pardon in 1974, the public reaction was outrage, disapproving, and it didn't die down in a 100-day period either. It may have well cost Gerald Ford the election in 1976.

Twenty-7 years later, however, the Ford decision to pardon Nixon to bring finality to the Watergate crisis is viewed by many scholars and citizens, including myself, as a good thing, something that really did heal the country. Would the Ford pardon have survived a Mondale amendment? I can certainly see a scenario where it would not have because of the passions of the time. I could see a two-thirds vote to overturn that.

On the plus side, a Mondale type amendment would allow us to get at some of these, as I call them in my prepared statement, bad pennies. It would turn up a few abuses, but it would also create, I think, Senators, a powerful temptation for Congress and for the American public to interject themselves in the most lonely and difficult of the pardon decisions.

The wisdom of many pardon decisions, I think, as we are going to see, is only judged with a period of time and reflection. So allowing a legislation veto even with a high two-thirds threshold might rob the President of his or her ability to act with swiftness, definitiveness and courage in the most difficult of circumstances. And the cost to the Nation, it seems, might far exceed the benefit of rooting out the occasional bad coin.

Those are my preliminary thoughts. I want to say that I believe that hearings like this are extremely important. I agree with your comments, Senator Specter and Senator Sessions, that it is extremely important for us in a democratic republic to have these things out in public and to put future Presidents on notice that it is the best thing for all concerned to follow the Department of Justice procedures and to do these things according to certain procedures.

I welcome your questions and I thank you for the privilege of testifying, Senator.

Senator SPECTER. Thank you very much, Professor Gormley.

[The prepared statement of Mr. Gormley follows:]

STATEMENT OF KEN GORMLEY, PROFESSOR OF CONSTITUTIONAL LAW, DUQUESNE UNIVERSITY, PITTSBURGH, PENNSYLVANIA

Good morning. My name is Ken Gormley. I am a Professor of Constitutional Law at Duquesne University in Pittsburgh. I should begin by saying, Senator Hatch, that it is a special honor to join you at these Committee hearings. I formerly taught at the University of Pittsburgh School of Law—your alma mater—where Dean W. Edward Sell still brags about you as his best student in over a half century. I greatly appreciate the invitation of yourself, my own Senator, Senator Arlen Specter, as well as the entire Committee to appear here today. I hope that I can offer some thoughts, however brief, that are of some assistance. Specifically, I intend to discuss possible Constitutional amendments to the existing Presidential pardon power contained in Article II, Section 2, clause 1, and attempt to assess each.

I have a modest degree of expertise in the subject of Presidential pardons. I am the author of "ArchibaldCox: Conscience of a Nation," the biography of the first Watergate Special Prosecutor. In connection with my work on that book, I had the privilege of interviewing President Gerald R. Ford, and was struck by the passion with which he defended his decision to pardon his predecessor, Richard M. Nixon. In 1999, I organized a program at Duquesne University entitled "President Ford's Pardon of Richard M. Nixon: A 25–Year Retrospective," broadcast on C–SPAN television. This program brought together many of the key figures in the Ford and Nixon Administrations, who directly participated in the events culminating in the pardon of Richard Nixon. Like many Americans, I once viewed the decision of President Ford to grant that pardon as a bad one, at the time he made it in 1974. Yet time and historical perspective led me to reassess that view. With the benefit of 25 years' hindsight, I came firmly to the conclusion that President Ford's controversial decision was "the right thing for the country" (as President Ford told me at the

Duquesne program), regardless of what one felt about Richard Nixon's possible offenses.

I begin with this introduction only because my general reaction, after an admittedly short period of reflection and research to get prepared for today's hearing, is that this esteemed Committee (and the Senate as a body) should proceed cautiously in this terrain. I do believe that some possible amendments to the existing pardon power might be more Constitutionally sound, and less disruptive to our tripartite system of government, than others. Although I do not intend to get into the merits of any of the specific pardons granted by President Clinton at the end of his term—because I frankly do not know enough about the facts to offer an intelligent assessment of them—I hope that I can at least assist the Committee in discussing some of the possible amendment concepts under consideration, and how these might affect the Framers' broader Constitutional scheme.

My conclusion is that a proposal like the so-called Mondale Amendment that was briefly considered in 1974, allowing a President's pardon to be overridden by a two-thirds vote of both the House and Senate, would be least offensive to our existing system of government and the concomitant notion of separation of powers. However, I still find myself leaning towards caution when it comes to any Constitutional revision, since it will impact future Presidents for as long as our democratic republic exists. Before investing the time and energy necessary to guide a Constitutional amendment through Congress, and thereafter obtain the requisite ratification of three-fourths of the States, I believe that it is essential for this Committee to gauge not only the potential benefits, but also the possible costs. Each time we tinker with the original work-product of the Framers, we risk producing unintended consequences. In this case, I am not convinced that the benefits of tinkering—however sensible in one sense—warrant the possible disruption of a system that works reasonably well.

As a starting point, without giving you a law school lecture, I thought that a brief history of the Presidential pardon power might make sense. This, in turn, will help shape an understanding of the impact of several possible Constitutional amendments.

I. History of the Pardon Power

The literature on the pardon power is rather limited. The same is true of the historical evidence of what the Framers had in mind when they adopted this provision in the Convention of 1787. This much can be said as a general sketch. The pardon power in England, which derived from the Roman tradition, was extremely broad. As early as 7th century A.D. there are records of Kings possessing such a power. By 1535, the pardoning power was firmly lodged in the Crown. Pursuant to English common law, the King had flexible powers to pardon offenses either before or after indictment, conviction or sentencing. He could grant full or partial pardons; he could make them conditional or unconditional. The great legal commentator William Blackstone wrote that the purpose of this sweeping power was to enable the sovereign to show mercy in appropriate cases; to instill loyalty in his subjects; and to advance the interests of the state. Admittedly, there were abuses of the pardon power from the start—some Kings went so far as to charge monetary fees to dispense absolution. Yet the practice became entrenched, and took root in the American colonies from the time of settling. Under the Virginia Charter of 1609, the Charter of New England of 1620, as well as most colonial charters of the 17th century, the Governor or Proprietor was authorized to pardon individuals for criminal acts—although certain crimes like murder or treason were often excepted.

My own state—Pennsylvania—was a fairly typical example. William Penn, the Proprietor, was authorized to "remit, release, pardon, and abolish whether before judgment or after all Crimes and Offenses whatsoever committed within the said Country against the said Laws," with an exception being made for "Treason and willful and malicious Murder." Only the King had the power to overrule Penn's decision as Proprietor.

During the Constitutional Convention of 1787, the debate on the Presidential pardon power was quite limited. Neither the original Virginia Plan nor the New Jersey Plan contained a pardon provision. It was Alexander Hamilton of New York, along with Charles Pickney and John Rutledge of South Carolina, who successfully pressed for inclusion of a Presidential pardon power at the Convention. The sparse historical clues suggest that these draftsmen believed that the Chief Executive should possess a pardon power in order to dispense mercy, in certain instances, just as kings and governors had done. As Hamilton would later write in Federalist No. 69, on March 14, 1788: "In most of these particulars the power of the President will

resemble equally that of the King of Great Britain and of the Governor of New York."

Roger Sherman of Connecticut attempted to introduce a motion that would require the "consent of the Senate" to validate Presidential pardons. Sherman's motion was swiftly rejected. Members of the Convention viewed it as transferring too much power to an already powerful Senate. The Convention also rejected a proposed amendment, offered by Edmund Randolph of Virginia, that would have excepted "cases of treason" from the pardon power. The Convention did, however, agree to insert the words "except in cases of impeachment" at the end of the pardon language, the only real limitation on the President's discretion. (This was probably influenced by the historical clash in 17th century England during which the Earl of Danby, Thomas Osborne, was impeached by Parliament but pardoned by King Charles II, spawning a lengthy constitutional crisis.)

James Iredell of North Carolina (later a Justice of the U.S. Supreme Court), directly addressed the Constitutional Convention's concern that the President might abuse the pardon power in order to obscure his own guilt in criminal conduct. Iredell responded: "Nobody can contend upon any rational principles, that a power of pardoning should not exist somewhere in every government, because it will often happen in every county that men are obnoxious to a lawful conviction, who yet are entitled, from some favorable circumstances in their case, to a merciful interposition in their favor." He went on to declare: "When a power is acknowledged to be necessary, it is a very dangerous thing to prescribe limits to it. . . ." In Iredell's view, the only true restraint upon abuse of the pardon power by a President was the risk of "damnation of his fame to all future ages. . . ."

During the ratification process, the details of the pardon provision were likewise subject to little discussion or debate. James Iredell, now a member of the North Carolina ratifying convention, argued that the pardon power should naturally be reposed in the branch of government "possessing the highest confidence of the people—the executive branch." Alexander Hamilton, defending the pardon power in Federalist No. 74, concluded that "one man (the President) appears to be a more eligible dispenser of the mercy of the government, than a body of men." Hamilton went on to articulate, in Federalist 74 (March 25,1788), an oft-quoted justification for the Presidential pardon power:

"[T]he principal argument for reposing the power of pardoning in. . .the Chief Magistrate is this: in seasons of insurrection and rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which. . .it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity."

Hamilton further argued that a pardon power, vested in the Chief Executive, would allow the President to foster humanity while accomplishing sound public policy: "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary or cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance."

It is safe to say that the pardon power has been used by Presidents for a host of purposes, in the 214 years since its inclusion in the Constitution. A review of some of the most noteworthy (and controversial) pardons in American history reveals a colorful assortment of Presidential absolutions. In the large number of pardons granted in the nation's history—over 13,000 in the 20th century alone—there are a surprisingly small number that have come under attack as illegitimate, at least with the benefit of historical hindsight.

II. Noteworthy Pardons in American History

From the inception of the new nation, the Presidential pardon power was exercised with regularity, often in controversial cases. President George Washington issued a pardon, in 1795, to leaders of the Whiskey Rebellion in Pennsylvania. President John Adams pardoned rebels involved in Fries' Rebellion, and also used the pardon power to end the Tariff Insurrection of 1800. President Thomas Jefferson pardoned deserters from the Continental Army; he also pardoned a number of Jeffersonian Republicans (his political supporters) who had been convicted—under the

Alien and Sedition Act—of treason for publishing anti-Federalist political materials during the previous Federalist Administration. President James Madison pardoned deserters, in order to entice soldiers to fight the War of 1812. After the war, he pardoned Jean Lafitte's pirates, who helped win the Battle of New Orleans. President Andrew Jackson pardoned the Barataria pirates. President James Buchanan exercised the pardon power to end a serious crisis in Utah, excusing Mormon settlers who clashed with federal troops during the forced removal of Brigham Young as Governor of the state. (President Grover Cleveland later pardoned numerous Mormon settlers, to shield them from prosecution for polygamy.) During the Civil War, President Abraham Lincoln dispensed pardons generously to Confederate sympathizers—in return for loyalty oaths—in an effort to undercut the rebellion. After Lincoln's death, President Andrew Johnson granted pardons by the thousands, including to leaders of the Confederacy, in order to heal a divided nation. (His "Christmas Proclamation of 1868," which absolved "all persons guilty of treason and acts of hostility," generated considerable anger within Congress.) Yet these pardons remained viable, despite repeated attempts by Congress to limit Johnson's power.

In more modern times, President Warren G. Harding speeded up the commutation of Socialist Party leader Eugene Debs, so that Debs could return home for Christmas. President Harry Truman granted amnesty to select individuals who had violated the draft during World War II. President Richard Nixon issued several controversial pardons, including one to Teamsters President Jimmy Hoffa for jury tampering, on condition that Hoffa stay out of union management. President Gerald Ford issued the historic pardon to Richard M. Nixon. President Jimmy Carter granted amnesty pardons in 1977 to those individuals who had avoided the draft during the Vietnam War, as a means of healing deep internal wounds from that conflict. President Ronald Reagan pardoned New York Yankees owner George Steinbrenner for illegally funneling money into Nixon's 1972 Presidential campaign; he also commuted a foreign spy's life sentence to seek the release of American citizens imprisoned abroad. President George Bush pardoned oil tycoon Armand Hammer, convicted of making unlawful contributions to the Nixon campaign during the Watergate period. Bush also triggered a controversy when he absolved six alleged participants in the IranContra scandal, including former Secretary of Defense Caspar Weinberger, whom he believed had acted out of a sense of patriotism. And President Bill Clinton has generated considerable controversy with respect to several pardons, particularly (as this Committee is well aware) his pardon of financier Marc Rich, a commodities trader convicted in the early 1980's of conspiracy, tax evasion, and racketeering, who had fled to Switzerland.

During the course of the 20th century, Presidents collectively exercised their power under Article II, section 2 to pardon over 13,000 individuals, and to commute the sentences of thousands more. (Only two Presidents, James Garfield—who was assassinated after several months in office and William H. Harrison never exercised the pardon power at all.) Franklin D. Roosevelt, who held office for three terms, pardoned 2,721 individuals. Harry S. Truman granted 1911 pardons. Dwight D. Eisenhower pardoned 1110. John F. Kennedy pardoned 472. Lyndon B. Johnson issued 959 pardons. Richard Nixon, in six years, pardoned 863. President Ford pardoned 381 individuals. Jimmy Carter pardoned 534. Ronald Reagan granted 393 pardons. George Bush issued 74. And Bill Clinton dispensed 396 pardons during two terms in office.

III. Supreme Court Interpretation of Pardon Power

Consistently, the United States Supreme Court has interpreted the President's pardon power in extremely broad terms. In *United States* v. *Wilson* (1833), Chief Justice John Marshall defined the power like this:

"As this power has been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

"A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate. . ."

Nearly a hundred years later, the Supreme Court shifted away from viewing a pardon sheerly as an act of grace. Rather, the Court suggested that it was a means of empowering the President to accomplish swift, decisive good for the country, especially during situations involving political upheavals or emergencies. As Justice Oliver Wendell Holmes, Jr. wrote in *Biddle* v. *Perovich* (1915), the pardon was "not

a private act of grace from an individual happening to possess power," but an act designed to further "the public welfare."

In the interests of furthering that welfare, the Supreme Court has consistently backed up the President's pardon power, even when it has collided with legislation, however well-intentioned. In two Civil War era cases—*Ex Parte Garland* (1867) and *Klein* v. *United States* (1872)—the Court concluded that the President's pardon power could not be restricted by legislation. In Garland, the Court invalidated an act of Congress that would have required lawyers admitted to the bar of the United States courts to take a loyalty oath, because that law indirectly clashed with the President's pardon power (the President had already pardoned Garland for his involvement in the Civil War). In *Klein*, the Court enforced a presidential pardon that allowed the recipient to recover property, despite an Act of Congress that attempted to cause such property to be forfeited. As the Court wrote in *Garland*: "The power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed cannot be fettered by any legislative restrictions."

This theme has been a constant one. In *Ex Parte Grossman* (1925), Chief Justice Taft wrote that "whoever is to make (the pardoning power) useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it." In the 1974 case of *Schick* v. *Reed*, involving the commutation by President Eisenhower of a military prisoner's death sentence, the Court reiterated the same theme, stating that the pardon power "cannot be modified, abridged, or diminished by the Congress."

In sum, few Presidential powers have been interpreted so broadly. Any modification of the President's sweeping pardon power under Article II, Section 2 would necessarily require an amendment to that provision.

IV. Possible Amendments

In considering possible adjustments to the current pardon provision, it is first worthwhile to rule out certain approaches that would create upheaval within our Constitutional system. Eliminating the pardon power entirely, or shifting it to another branch of government (the legislature or judiciary), would undermine the Presidency in ways that the Framers of the Constitution certainly deemed unacceptable. Pursuant to a long standing Anglo-American tradition, the pardon power has historically been vested in the President (or King), to achieve mercy in special cases, and to resolve crises by uniting the nation at times when swift action is necessary. Abolishing this power would amount to abolishing a piece of tradition rooted in centuries' worth of American history, erasing the compelling arguments of Alexander Hamilton in Federalist Nos. 69 and 74, that won the day during the ratification process. Moreover, since the pardon power is itself a "check" on the powers of the legislative and judicial branches—when it comes to criminal sanctions that may prove to be too stiff or inflexible in particular instances—removing this power from the executive branch would defeat its central purpose.

Likewise, a proposed Constitutional amendment giving Congress power to enact a code of rules which the President (and/or the Department of Justice) would be mandated to follow in dispensing pardons, would upend the existing Constitutional framework. On its surface, such a plan might have some appeal. It would permit Congress to bind a President to standards akin to those Justice Department regulations presently governing pardons, and thus prevent the President from bypassing Department of Justice procedures, as arguably occurred in the case of several of President Clinton's pardons. Yet such a Constitutional amendment would in effect obliterate the separation of powers between the executive and the legislative branches. The President, pursuant to Article II, Section 1, stands as the Chief Executive. The power to initiate, oversee, and terminate criminal prosecutions rests with the President alone, along with his subordinates in the executive branch, including the Attorney General. A Constitutional amendment authorizing Congress to establish ground rules for the processing and granting of pardons, would (in essence) wrestle a core executive function away from the President.

This would create several potential problems, with respect to the existing balance of power. A future Congress bent on thwarting the President's pardon powers, for political or other reasons, could shrink the parameters of his legitimate pardons (via legislation), making it almost impossible for a Chief Executive to exercise that Constitutional power. A future Congress bent on achieving the opposite goal, i.e. allowing a proliferation of pardons to achieve certain political goals, could tailor the legislation to permit—or even mandate—the President to grant pardons in cases he found unpalatable or unworthy of clemency. This option, therefore, leads to troublesome complications.

The most attractive alternative, at least on the surface, would be one similar to the so-called Mondale Amendment, introduced in Congress shortly after President Ford's controversial pardon of Richard M. Nixon in 1974. That proposed amendment, offered during the 93rd Congress by Senator Walter Mondale of Minnesota, would have added the following sentence to the existing pardon clause: "No pardon granted an individual by the President under section 2 of Article 11 shall be effective if Congress by resolution, two-thirds of the members of each House concurring therein, disapproves the granting of the pardon within 180 days of its issuance."

Certainly, an amendment drafted in the image of the Mondale Amendment would avoid the most serious Constitutional concerns raised by other options. First, it would keep the pardon power lodged firmly in the executive branch. Second, it would sidestep the problem of the legislature meddling in the details of the pardon process; the President alone (in conjunction with the Attorney General under his command) would establish procedures for considering and granting pardons. Third, the most worrisome threat to separation of powers would be deflated. Rather than granting Congress a loose, far-reaching veto power over Presidential pardons, such an amendment would presumably limit Congress's involvement to extreme cases. Only where two-thirds of the members of both chambers of Congress agreed that a pardon should not have been granted could the President's decision be trumped. Given this high hurdle, Congress's exercise of power in this realm would be reserved for unusually egregious circumstances.

There is some surface appeal to such a proposed amendment, which is not unlike the Senate's power under Article II, section 2, clause 2 to advise and consent with respect to Presidential appointments, treaties, etc. Yet my instincts nonetheless warn me against a hasty campaign to adopt such an amendment.

At least two reasons trigger my sense of concern and caution. First, I am not convinced that the relatively small number of putatively-questionable pardons, in the 214-year history of our Constitutional experiment, warrants tinkering with a system that generally works. As a student and admirer of the Constitutional genius that guided the Framers in devising the most durable charter known to human-kind, my instincts warn me—as a general rule—to disfavor Constitutional amendments except where absolutely necessary. Unless there exists a clear track record of abuse or dysfunction, over a period of many years and many Administrations, I would be inclined to err on the side of leaving the Constitutional applecart undisturbed.

Second, and perhaps most importantly, I worry that a Constitutional amendment—even one as benign as the Mondale Amendment—might produce unintended consequences, defeating the laudable purposes for which the pardon power was created in our Anglo-American system of laws. Alexander Hamilton was correct, I believe, when he stated that the pardon power is best left in the hands of a single official, who heads the Executive Branch. (This point was also made by James Madison in Federalist No. 74.) Granting pardons by committee would turn into an unwieldy, messy political process. Even worse, it might strip the President of the pardon power during moments of stress and crisis when he or she most needs to exercise that power.

President Ford's pardon of Richard M. Nixon provides a useful example. At the time President Ford issued this controversial pardon on September 8, 1974, the nation was weary from Watergate. Many citizens were shocked when Ford appeared unexpectedly on television, on a serene Sunday morning, and absolved Mr. Nixon of all potential federal crimes committed during his second term in office. Large segments of the American citizenry were outraged that the former President would escape prosecution for his participation in the Watergate coverup, especially after digesting the recently-released transcripts of the Watergate tapes. The public reaction to Ford's exercise of the pardon power was loud, angry and disapproving. It may well have cost Gerald Ford the election of 1976.

Yet twenty-seven years later, Ford's decision to pardon Nixon, to bring finality to Watergate, is largely viewed by scholars and public figures and citizens alike as an act of courage that proved beneficial to the nation. It provided the nation "A Time to Heal," as President Ford suggested in the title of his own autobiography. It gave the President a swift and decisive way to end the national obsession with Watergate, and move on to conducting the business of the nation.

Would the Ford pardon of Richard M. Nixon have survived a Constitutional provision like the Mondale Amendment? The answer, of course, is a matter of historical speculation. Yet it is not difficult to imagine a scenario in which two-thirds of the Congress would have voted to overturn Ford's unpopular and controversial decision. Some Representatives and Senators would have undoubtedly voted along strict party lines to invalidate the pardon. Others, even if sympathetic to the newly-installed President Ford, might have succumbed to public pressure and voted to overturn the Presidential action in order to "save face" with their constituents.

In the end, a provision like the Mondale Amendment would allow the public itself to exert considerable influence upon the viability Presidential pardons, during times of high emotions and passion. These are precisely the times, however, when public influence is most dangerous. It cannot be denied that certain "bad pennies" will inevitably sneak into the mix, if the Presidential pardon power remains strong, as it currently exists in the Constitution. Jefferson was suspected of favoring his Anti-Federalist supporters with the Presidential pardon power. Lincoln was accused of granting a disproportionally large number of pardons to friends from Kentucky. ("Pardon brokers" purported to have influence with pardoning authorities in Washington, during this period, and extracted lucrative fees.) President Bush came under fire for pardoning various Iran-Contra defendants; Independent Counsel Lawrence Walsh and others charged that Bush was protecting himself from legal difficulties and embarrassment that would flow from having to testify at the defendants' trials. President Clinton, since leaving office, has been roundly criticized for pardoning fugitive financier Marc Rich, presumably in return for some direct or indirect *quid pro quo*.

The Mondale Amendment would allow Congress to sift through the pile of Presidential pardons during each Administration and extricate any bad pennies. In one sense, then, it would be productive; it would certainly turn up a small number of abuses. It is beyond dispute that some pardons have been premised upon political and personal gain.

My worry, however, is that a Mondale-like amendment would simultaneously create an irresistible temptation for Congress and the American public to interject themselves into the most controversial and lonely pardon decisions that face a President—such as those confronted by Gerald R. Ford (during Watergate) or Abraham Lincoln and Andrew Johnson (during the Civil War) or James Buchanan (during the clash between federal troops and Mormon settlers in Utah) or George Washington (during the Whiskey Rebellion). In such cases, contemporaneous judgment is far less useful than historical perspective. The wisdom of the most controversial pardons in American history, it seems, cannot be judged on the spot. Allowing a legislative veto, even with a high twothirds threshold, might rob the President of his ability to act with swiftness and definitiveness and courage in the most difficult circumstances. The cost to the nation, it seems, might far exceed the benefit of rooting out the occasional bad coin.

It must be remembered, moreover, that the Presidential pardon power—even as currently constructed in the Constitution—is not an unlimited one. There are a number of built-in restraints on the power, which (at least to a certain extent) soften the potential damage that can occur due to an occasional bad decision. First, the pardon power applies only to federal crimes; state crimes (which typically exist hand-in-hand with federal offenses) can still be prosecuted. Second, the pardon power eliminates only criminal punishment; civil liability—which can pose a substantial problem for a pardon recipient—remains undisturbed. Third, the pardon power does not apply to cases of impeachment. Fourth, since pardons do not necessarily occur at the end of a President's term (many are granted in mid-term), a President could still be impeached and removed from office for certain gross abuses of the power.

Finally, even if this Committee were to recommend to the full Senate the adoption of a Constitutional amendment similar to the Mondale Amendment, I would strongly recommend at least two modifications. First, the proposed 180-day period during which Congress is permitted to act seems far to long. One of the crucial features of the pardon power, historically, has been to permit the Chief Executive to act swiftly, decisively and with finality to bring an end to crises that threaten the well-being of the entire nation. A period of 60 days or 90 days seems more than adequate to allow Congress to methodically examine the President's pardons and determine if there are any of questionable merit. Only extreme cases would warrant the exercise of the legislative veto power, in any event, under a provision like the Mondale Amendment. In moments of crisis and delicate negotiation, the value of a well-timed pardon would be rendered hollow, if it hung in limbo conditioned upon a long Congressional approval process.

Second, if the Senate were to amend the existing pardon language of Article 11, section 2, it would make good sense to take the opportunity to make clear that the President cannot pardon himself or herself. Both during the Iran-Contra matter, and more recently during the Monica Lewinsky scandal that plagued the Clinton Administration, much speculation and scholarly debate centered upon the question whether the President could Constitutionally pardon himself. The general consensus was that: A) this seemed implicitly inappropriate and impermissible, but B) nothing in the Constitution or its history expressly forbade it. Although I have not advocated, in my testimony today, that a Constitutional amendment of any sort is the

best course, if this Senate were to choose to move forward with a Mondale-type amendment, or any other change in the language of Article II, Section 2, it would make good sense to clear up this ambiguity and make explicit that a President cannot pardon himself or herself.

CONCLUSION

The great bulk of Presidential pardons, over the 214-year history of the Constitution, have been dispensed with an appropriate level of caution, leading to only rare assertions of abuse. It is true that controversies inevitably erupt with respect to certain politically-charged pardons. Yet the passage of time often softens the light in which they are viewed.

Absent a consistent pattern of Presidential misuse, my strong instinct is to leave the power undisturbed. Although a Mondale-type amendment has some merit, it also has some drawbacks. The most difficult, lonely pardon decisions might be compromised by the injection of Congressional and public input. Controversial pardon decisions might easily be overturned due to high emotions and political passions, during moments in American history when such influences are the most dangerous. In the end, although the existing system is not perfect, it seems best to leave pardon decisions to one man or woman occupying the White House, with a strong presumption that they will be dispensed legitimately.

This is not to say that the recent controversy, involving the pardon of Marc Rich by President Clinton, has not served a valuable purpose. It remains a stark reminder to future Presidents that it is in the best interest of all concerned to scrupulously adhere to Justice Department procedures, and avoid the sort of controversy that has triggered today's hearings. So long as a President acts in conjunction with a careful Justice Department, and a vigilant Pardon Attorney, the number of mistakes and "bad pennies" will be kept to a minimum.

James Madison argued in Federalist No. 74 that the pardon power should be lodged in a single individual—the Chief Executive—and that in the long run this would be a safe repository. "The reflection that the fate of a fellow creature depended on his *sole fiat*," Madison wrote, "would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind."

As James Iredell (later Justice Iredell) stated during the Constitutional ratification process, the President who abused this sacred power would face the most serious risk of all—"damnation of his fame to all future ages. . . ."

Thank you for the privilege of testifying before this Committee today, on a matter of such great Constitutional importance.

Senator SPECTER. We now turn to Professor Christopher Schroeder, a doctor of law from the University of California, a master of divinity from Yale, a bachelor's degree from Princeton in 1968. Professor Schroeder is the Director of Programs and Public Law, and Co-Chair of the Center for the Study of Congress at Duke University.

Thank you for joining us, Professor Schroeder, and we look forward to your testimony.

STATEMENT OF CHRISTOPHER H. SCHROEDER, PROFESSOR OF LAW AND PUBLIC POLICY STUDIES, DUKE UNIVERSITY, DURHAM, NORTH CAROLINA

Mr. SCHROEDER. Thank you, Mr. Chairman and members of the committee, and thank you for the opportunity to be here today.

I have submitted written testimony which largely whistles the same tune as my two preceding colleagues. This may be a rare moment in which you have three academics here who largely agree with one another. Rather than summarize that testimony, let me just make three preliminary remarks about the nature of the pardon power and why I concur that at this time amending the Constitution to change it in some way would be unwise.

If you look at the power in the text, three aspects of it jump out at you immediately. It is very broad; it applies to every Federal of-

fense except impeachment. There are no standards and it is unreviewable. You look at a power like that and one of your immediate reactions is, ouch, this is a power that can be abused. That is right; it can be.

Then you go back and you look at the Philadelphia convention records and the ratifying convention records and the debates surrounding the ratification of the Constitution and you see, lo and behold, the founding generation was perfectly aware of all three of these characteristics. They well understood that an unreviewable power was subject to abuse. They well understood that they were making it unreviewable. They debated a suggestion to involve the Senate in the process at the Philadelphia convention and decided not to adopt it.

In the end, what persuaded them to loose such a rogue and vagrant power and house in the office of the President? Well, fundamentally, two things: one, a felt incapacity to identify in advance all the circumstances under which a pardon of some kind or an act of clemency might be warranted either in the national interest or in the interests of justice or in the interests of mercy, and, second, a sense that on some occasions, again impossible to identify in advance, some element of dispatch might be necessary.

The examples they used are probably not applicable any longer. The idea that a pardon given to a participant in a treason conspiracy before he or she had been tried might enable us to honor the other accomplices and suppress the treasonous plot in an expeditious manner may not be applicable today. But that is still a value that would be lost with the recommendation to subject a pardon to a 180-day review, and you can think of circumstances even today where that might matter.

It would have mattered, I think, in the Preston King case where, in the interests of humanitarian concerns, that pardon was granted when it was in significant part in order to allow Mr. King to come to the country in a timely manner to attend his brother's funeral.

You can imagine circumstances that we hope will never arise in which we do have some difficulties with some foreign power and we have the potential of getting information from a spy, say, and we haven't tried him or her yet. Yet, it is felt in the interests of the Nation that we might be able to extract that information in return for a conditional pardon. Well, how often will those circumstances occur? Who knows? It really is impossible to say.

I have got two background principles with which I approach any question of amending the Constitution, though, that also for me tilt the scale further in the direction of inaction at this time.

One, Mr. Chairman, you have mentioned, that we ought to be very careful before we amend the Constitution. It has only been done, as others have noted, 17 times since the first Congress. The stability of that document is one of the virtues of it and one of our National assets, and we just ought to be very careful before we do it.

The corollary to that to me is we ought to make sure before we amend the Constitution that we have exhausted non-constitutional means to at least round off some of the rough edges that we might see in a situation. It might not be a perfect substitute for an amendment, but there are some legislative proposals, such as some

version of S. 2402 that was introduced and voted on in committee in the last Congress, that would add some more transparency to the process.

I think there may be some other ideas, some of which I mention in my testimony, that the Congress could constitutionally take that would fall short of amending the document. Any kind or review provision is inevitably going to be most successful in grabbing and preventing unpopular pardons, perhaps with the two-thirds provision only high unpopular pardons.

But the difficulty is, as Professor Gormley has noted, in our history there have been good unpopular pardons and there have been bad unpopular pardons. It is just that we can't tell them at the time. We are consumed by a passionate moment, as in the case of the Nixon pardon. I think, in retrospect, that one has borne up fairly well.

I was also myself personally -I will express a personal opinion—opposed to President Bush's pardon of Defense Secretary Weinberger and the other five, and I have come to look a lot more kindly on that pardon as time has gone on and as I have come to understand in more detail the way the independent counsel statute works, among other things. So that is the cost you pay.

The question, then, for you is whether the cost is worth it for the benefit you would gain in preventing a future Marc Rich. I think that the prospects of this kind of event, a last-hour pardon that has a lot of questionable features to it, is one that is relatively, if not highly unlikely to occur in the future. I say that not wanting myself to express any definitive opinion about the Rich pardon because I don't yet know all the facts either. There is certainly a lot of interest in learning more of those facts.

Those are my considerations and why in my written remarks I recommend against a constitutional amendment. I look forward to answering any questions you may have.

Senator SPECTER. Thank you very much, Professor Schroeder.

[The prepared statement of Mr. Schroeder follows:]

STATEMENT OF CHRISTOPHER H. SCHROEDER, PROFESSOR OF LAW AND PUBLIC POLICY STUDIES, DUKE UNIVERSITY

Mr. Chairman, Senator Leahy and members of the Committee. My name is Christopher H. Schroeder. I am a professor of law and public policy studies at Duke University. During the Clinton Administration, I worked for some time in the Office of Legal Counsel at the Department of Justice, including a period as the acting head of that office. As you know, one of the important functions of that office is analyzing and preserving the legitimate scope of the President's constitutional powers, including those of chief executive officer of the United States. Since returning to teaching, issues of executive power and the relationship between the Congress and the President have been among my areas of research and scholarship.

I thank you for the invitation to discuss with you proposals to amend the President's power to grant reprieves and pardons. I will not be commenting upon the justifications for any of President Clinton's late-term acts of clemency, but will confine my remarks to inquiring into whether or not amending the President's pardon power is warranted at this time. In particular, I will discuss my reservations concerning proposals for a Constitutional amendment subjecting Presidential pardons to Congressional disapproval by a two-thirds vote of both chambers taken with 180 days of the pardon. While reasonable minds may disagree, I respectfully submit that going forward with such a proposal is both unjustified at this time and unwise from the perspective of preserving the strengths of the current Constitutional system.

THE PRESIDENT'S BROAD POWER OF REPRIEVES AND PARDONS

The Constitution vests in the President "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Art. II, § 2.

As Presidents have exercised this power throughout the nation's history, three features of that power have often elicited comment. First, the power is very broad in scope. Second, the power is vested exclusively in the President, and cannot be "modified, abridged or diminished by the Congress." *Schick* v. *Reed*, 419 U.S. 256, 266 (1974). Third, Presidents have used the pardon power for a wide variety of purposes.

The Supreme Court has repeatedly recognized the broad scope of the pardon power. For example, in *Ex Parte Garland*, the Supreme Court summarized the reach of a presidential pardon as follows:

The power thus conferred is unlimited, with the exception [in cases of impeachment]. It extends to every offence known to law, and may be exercised at any time after its commission . . .[W]hen the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents . . . the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. Ex Parte Garland, 71 U.S. (4 Wall.) 333, 380–81 (1866). In addition to the full power of pardon, the power to grant "reprieves and pardons" encompasses all forms of clemency, including pardon, amnesty, commutation, remission of fines, and reprieve. *See* Daniel Kobil, "The Quality of Mercy Strained: Wresting the Pardoning Power from the King," 69 *Tex. L. Rev*. 569, 575–78 (1991) (collecting authorities).

Second, the President's power is also not subject to restriction or limitation by the Congress. To quote again from Ex Parte Garland: This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions. Ex Parte Garland, 77 U.S. at 380.

Third, experience has also demonstrated that Presidents have exercised the power for apparent purposes that have ranged from playing important strategic roles in matters of great public concern and interest, to giving individualized effect to a changed sense of what is just or merciful in a particular case. Some Presidential pardons that have played strategic roles in national affairs include President Jefferson's pardon of persons who had been charged and convicted under the Alien and Sedition Act for publishing criticisms of Federalist government policies; the pardons of President Lincoln and Johnson of participants on the side of the Confederacy after the Civil War, and President Bush's pardon of participants in the Iran-Contra affair. The most famous pardon of this sort in American history may be President Ford's pardon of former President Nixon, a decision sufficiently unpopular at the time that it contributed to President Ford's defeat in the next election.

"The benign prerogative of mercy" has been exercised in very particularized circumstances as well, where the specific facts of an individual case have moved the President to grant clemency. Among the recent pardons by President Clinton is that of Aldoph Schwimmer, who had been convicted and served his criminal sentence for violations of the Neutrality Act when he ferried aircraft to Israel during its war for independence, as well as those of several persons serving sentences under federal laws carrying mandatory minimums, sentences that seem quite disproportional when compared to others. President Clinton's pardon of Preston King, who had protested racially discriminatory treatment by his draft board, eventually fleeing the country, also falls within this category. Of course, strategic pardons also can have, and most of them have had, elements of individualized mercy or justice in them as well.

These are just two significant types, not meant to be exhaustive. At the end of the day, anyone who has examined the history of Presidential pardons can only conclude that the motives and rationales behind them have been quite diverse, and as an entire group they resist all efforts to identify a set of necessary or sufficient conditions for a pardon to be granted. The elastic and standardless nature of the pardon power helps account for the comment of President Carter's pardon attorney, John Stanish, that "[t]here never has really been much rhyme or reason to clemencies in the past." Krajick, "The Quality of Mercy," 5 *Corrections Magazine* 46, 53 (June, 1979) (quoting John Stanish).

None of these three elements of the pardon power were inadvertent. In each case, the records of the Constitution Convention and the Ratifying Conventions reflect consideration of them.

In the case of the broad scope of the pardon power, an amendment offered by Luther Martin at the Philadelphia Convention would have made the power exercisable only after conviction, and another by Edmund Randolph proposed to except cases of treason from among the pardonable offenses. 1 *The Records of the Federal Convention of 1787* 626–27 (M. Farrand ed. 1911). After discussion of the need for great flexibility in the scope of the power, Martin withdrew his motion. Randolph's failed by a vote of 8 to 1.

The Framers concluded that pardons might be useful in advance of conviction to further national interests, such as in situations where granting pardon to a captured spy might produce significant military intelligence. Randolph's motion was explicitly offered because of his fear that the power might be abused in the case of treason. Such pardons, he argued, could be given to agents of the very President doing the pardoning, in which case the power to pardon might enable the President to offer it in exchange for assistance in covering up the President's own guilt. Yet the fear of Presidential abuse did not prevail against the concern that the President have maximum flexibility in exercising the power.

Likewise, placing congressional restrictions on the President's power was explicitly proposed during the Constitutional Convention, in the form of a proposal by Roger Sherman to give the President power to reprieve until the next session of the Senate, and the power to pardon only with the consent of the Senate. 1 *The Records of the Federal Convention of 1787* 419 (M. Farrand ed. 1911). Like Randolph's proposal, this one failed 8 to 1.

The conviction that flexibility was a paramount value in regards to the pardon power seems to have proceeded from the sense that it was impossible to anticipate in advance all of the circumstances in which it might be useful to fulfill the power's two grand purposes: to provide the President a valuable policy instrument in the pursuit of national objectives, and to make available the possibility of mercy in individual cases. As James Iredell expressed it in debate during the North Carolina ratifying convention:

"Nobody can contend upon any rational principles, that a power of pardoning should not exist somewhere in every government, because it will often happen in every country that men are obnoxious to a lawful conviction, who yet are entitled, from some favorable circumstances in their case, to a merciful interposition in their favor . . .[Yet] it is impossible for any general law to foresee and provide for all possible cases that may arise . . .Where a power is acknowledged to be necessary, it is a very dangerous thing to prescribe limits to it . . .For this reason, such a power ought to exist somewhere; and where could it be more properly vested, than in a man who had received such strong proofs of his possessing the highest confidence of the people?" Address of James Iredell, North Carolina Ratifying Convention (July 28, 1788), reprinted in 4 *The Founders Constitution* 17 (P. Kurland & R. Lerner ed. 1987). Alexander Hamilton expressed much the same sentiments in Federalist 74, when he wrote: "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes of so much necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance." "Federalist 74," reprinted in *The Federalist* 500–01 (J. Cooke ed. 1961).

Thus we can see in the debates surrounding the ratification an awareness of the salient characteristics of the pardon power. Those who wrote and ratified the Constitution made the power broad and unreviewable so that it could be utilized in circumstances where the public interest or the interest of individual justice or mercy called for its use, in the judgment of a single individual, the President of the United States. As they were endorsing this power, they were quite cognizant that its unreviewability was a source of potential abuse. Still, in settling on the present text of the pardon clause, the considered judgment of the Founding Era was that the clause's positive virtues and usefulness represented the greater value when compared to its costs.

STANDARDS TO BE MET FOR AMENDING THE PARDON POWER

In light of this history, any amendment to qualify the President's pardon power ought at the very least to bear the burden of persuasion by pointing out considerations earlier overlooked or underappreciated which now justify a conclusion opposite to that reached by the Founding generation. The burden here, I would further suggest, is greater than simply convincing us that faced with the task of drafting a Constitution today, we would come to a different conclusion as to whether or not it ought to contain a power identical to in one now found in Article II, Section Two, Clause 1. The fact that we are speaking of amending the Constitution, as well as the more particular fact that we are speaking of amending a provision in the Constitution that has stood unchanged for over two centuries, raise additional considerations that must themselves weigh in the balance.

Before even reaching an assessment of the pardon power as an isolated provision, we ought to recognize that the stability of the Constitution is a separate national asset that itself needs to be valued. Throughout our history, reverence for the Constitution itself has come to be one of the shared values that unifies an extraordinarily diverse citizenry. As the world's oldest written Constitution, it has acquired that status in significant part because it was been so remarkably stable, amended only seventeen times after the First Congress produced the Bill of Rights, which completed the Constitutional design promised during the ratification process. Its provisions have come to stand for more than ordinary legislative enactments ever can, simply in virtue of the fact that they are Constitutional provisions.

Years ago, the noted American legal philosopher Lon Fuller captured an aspect of this sentiment when he warned that: We should resist the temptation to clutter up [the constitution] with amendments relating to substantive matters. [In that way we avoid] . . . the obvious unwisdom of trying to solve tomorrow's problems today. *But [we also escape the] more insidious danger [of] the weakening effect [such amendments] have on the moral force of the Constitution itself* " Lon Fuller, "American Legal Philosophy at Mid-Century," 6 *J. Legal Educ.* 457, 465 (1954), as cited in Hearings on Proposed Flag Desecration Amendment Before the Subcomm. on Constitution of the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (June 6, 1995) (statement of Gene R. Nichol) (emphasis added). More recently, in direct response to current proposals to change the pardon power, Chicago Law Professor David Currie has been quoted as saying, "I'm not one for tampering with the Constitution. Something has to be very seriously wrong before you mess with it, lest it become something like an ordinary law." David Currie, quoted in Peter Nicholas, "Judging the Cons of Power to Pardon," Philadelphia Inquirer Washington Bureau (February 8, 2001).

Respect for the stature that our Constitution has as a practical matter achieved in the civic life of our country ought not, of course, prevent us from revising features of it that have come convincingly to be called into significant question. Still, concern that frequent efforts to amend may well have the effect of reducing it to something like an ordinary law ought to cause us to pause before doing so, in order to assure ourselves by convincing evidence that the document truly does contain a systemic flaw. Even then, prudence further dictates that we have thoroughly explored non-amendment options that can address all or some of the deficiencies we believe that we have found. Non-amendment devices need not even be perfect substitutes for constitutional amendment, but if they can ameliorate the perceived deficiencies at acceptable costs, they may reduce the magnitude of the constitutional deficit to the point where the wiser course is to settle for these alternatives rather than to pursue the amendment option. Close examination of the calls to amend the pardon power indicates that proposals to amend it fail on both these fronts.

The immediate stimulus for proposals to amend the pardon power—the perceived deficiency in its current formulation—are perceptions of abuse by former President Clinton. The suggestion is that he has used the pardon power for self-serving reasons in situations where the legitimate purposes of the power would not have supported clemency. I am not in a position to evaluate such charges with respect to any of the recent pardons or commutations of former President Clinton. Even if these perceptions prove to be accurate, however, it would be highly doubtful that the abuses of a single President justify revising the pardon power. Before doing that, one needs to take into account the entire history of the use of the power, and reasonable projections about its future use, with attention to what an amendment will cost as well as what it will achieve.

No one can deny that it would be impossible to justify every act of clemency by American Presidents as solely advancing either some national policy interest or the interests of individual justice or mercy. This should come as no surprise to us. It would not have surprised the Founders, who understood full well that "enlightened

statesmen will not always be at the helm." Federalist 10 (Madison) in *The Federalist* 60 (J. Cooke ed. 1961). Unfettered power is subject to abuse, and always will be. Fully aware of this, the drafters and ratifiers of the Constitution adopted the pardon power as we now see it. The relevant question is whether limiting the power would count as a substantial improvement.

Subjecting presidential pardons to subsequent Congressional approval, it must be conceded, will predictably enable the Congress to intercept some patent abuses, and the availability of such review will discourage Presidents from exercising the power in abusive ways in additional cases as well. It will inevitably do more than this, however.

For one thing, it will enable the Congress to intercept highly unpopular acts of clemency, regardless of whether or not they abuse the power. Both our better selves, as well as the interests of the country, ought to counsel that we do not wish to impair the ability of Presidents to undertake unpopular acts of clemency that he or she considers well justified. Some of the most important pardons in our nation's history have been highly unpopular at the time. Leading such a list must be President Ford's pardon of former President Nixon. That pardon might well have not survived Congressional review. Democrats would have decried the pardon as inexcusably preventing a trial that would have brought all the facts of President Nixon's involvement in the Watergate affair to full public light. Indeed, many Democrats did just that, although because President Ford's action was unreviewable, they were helpless to do anything other than protest after the fact. Had the matter been put to a Congressional vote, however, it is quite conceivable that a sufficient number of Republicans would have found it in their own best political interests to reject the pardon. They may have feared that if they did not so vote that they would be held accountable in the next election, as President Ford himself was, losing to President Carter in 1976. President Bush's pardon of Casper Weinberger and five others indicted for Iran-Contra related offenses was also unpopular in many circles and may well have been thought difficult to justify by members of Congress, were they in a position of responsibility for it.

With the passage of time, each of these pardons has come to seem more meritorious to me than when they were first announced. Although I objected to President Ford's action at the time, I now believe that he did the country a great service by sparing us the spectacle of a former President standing in the dock for trial. The Watergate debacle, coming on the heels of the Vietnam War, contributed enough to the public cynicism about the national government as it is. The trial of Richard Nixon could only have exacerbated matters. The Iran-Contra pardons, which I also opposed at the time, have also acquired greater legitimacy in my eyes as time has passed.

The entire affair arose out of statutes that can reasonably be characterized as the criminalization of a foreign policy dispute. While the Congress has the constitutional authority to exercise its power of the purse as it did, this feature of the case, combined with the extremely strong incentives that the now-defunct Independent Counsel statute created to seek indictments, did produce circumstances under which President Bush might reasonably have concluded that Defense Secretary Weinberger and the others had been treated with undue harshness. I suspect that I am not alone in these reassessments.

The class of unpopular pardons is not confined to those related to national political disputes. Clemency can be used as a means for a President to instigate or participate in a debate over the justice of laws under which people have been incarcerated. A number of President Clinton's recent acts of clemency assisted individuals serving mandatory minimum sentences under circumstances that highlight the unfairness such minimums can on occasion produce. Clemency provides an especially powerful statement of a President's opinion of the appropriateness of such sanctions. One can perhaps imagine President Bush at some time in the future pardoning prolife activists sentenced under federal statutes that protect access to family planning clinics, in order to serve a similar purpose.

Acts of clemency such as these will of course produce political opposition. Many people favor ever tougher sentences in the war against drugs, and the clash between pro-life and prochoice convictions is a staple of our politics. I am not aiming to declare either side of either debate the morally superior view, but rather to point out that congressional review of pardons will reduce unpopular acts of clemency, either in situations in which they are unpopular enough to be overruled during the review, or because Presidents choose not to incur the political risks. (It is one thing to pay a political price for an effective action. That same price can well be too steep if the action risks ultimately being ineffective because it is overturned by others.) In advance, one simply cannot determine which unpopular clemencies will come to be seen as statesmanlike acts of courage. What one can determine is that subsequent

congressional review will lessen the number of unpopular clemencies granted by Presidents, costing the country some acts of courage as the ineluctable price to be paid for intercepting some abuses.

Congressional review will also impair the ability of the President to act with dispatch. The fact that the pardon will not be final for 180 days may prevent clemency from being effective when we would want it to be. It may be that national security interests of some urgency require the cooperation of an informant, but the non-final nature of an offered pardon causes the informant to remain silent. It may be that the humanitarian purposes of the pardon are substantially reduced in value by the non-final nature of a pardon. Preston King, for instance, might have been unwilling to risk return to the United States for his brother's funeral if his pardon had remained non-final for 180 days.

In sum, Congressional review will skew acts of clemency toward the politically popular, away from the politically unpopular, thus reducing the willingness of Presidents to take actions whose merit emerges only with the passage of time. It also reduces the usefulness and value of the power in situations in which urgency seems required. These are not costs that we ought to incur based on our assessment of the recent pardons alone.

Beyond these considerations, Congressional review of pardons also has the adverse consequence of vesting in the Congress a power that will be in considerable tension with the Constitutional design of separated powers. As one means of protecting individual liberty, the Constitution establishes a system of criminal justice in which the Congress enacts the laws, the executive applies the laws, and the judiciary review the factual accuracy of the executive's judgments. As a general proposition, this set up evinces a belief that legislative bodies are ill equipped to apply and review the application of laws to individual cases. In fact, the prohibitions on both ex post facto laws and bills of attainder, Art. I, § 9, cl. 3, are textually explicit testaments to the belief that Congress should not be able to assess individual culpability and punishment, and that these are tasks which, in the interests of individual liberty, are best assigned to the executive and the judiciary. Congressional review of presidential pardons would involve the Congress in just such tasks. After the facts of an individual's actions are known, in reviewing a pardon decision, Congress would be placing itself in a position to determine the appropriateness of punishment on an individual basis. While a duly ratified constitutional amendment would make such review constitutional, this would not eliminate the evident tension between the prohibitions on ex post facto law and bills of attainder that such an amendment would create.

NON-AMENDMENT OPTIONS

Whatever enthusiasm remains for placing Constitutional limitations on the President's pardon power ought to be dispelled by the prudential principle that amending the Constitution should be a remedy of last resort, adverted to only after other ameliorative options have been exhausted. Here, Congress has by no means exhausted the non-Amendment options available to it.

While Congress lacks the legislative power to place direct limitations on the President's power to pardon, there are steps it can take that will go some distance in reducing the likelihood of future abuses.

- First, insofar as people have objected to the absence of input from victims or their families, prosecutor or trial court judges, Congress can enact legislation making notification of such persons a condition subsequent to the receipt by the Department of Justice of request for a pardon. While I make no judgment here as to the details of S. 2042 from the last Congress, that legislation illustrates such an approach. It may also be that regulations issued by the Department of Justice under existing statutory authority could acccomplish substantially the same objectives.
- Second, Congress could also rely upon its power of the purse to prohibit any Department of Justice involvement in the investigation, processing or preparation of documents with respect to any pardon for which such notification had not been given. The Constitution prevents Congress from restricting access by the President to the Attorney General and others with whom he or she may wish to consult, but it can prohibit the expenditure of public funds for activities ancillary to the exercise of the pardon power itself.
- Third, as a hortatory measure, Congress could go on record as advising the President not to proceed with any clemency as to which he or she had not received Department of Justice advice on a set of enumerated criteria regarding the worthiness of the clemency. In a similar vein, Congress could urge the President to issue a presidential directive stating his or her intentions to comply with

such procedures, and stating that any pardon requests received by the Executive Office of the President should be referred to the Department of Justice for such advice, with an appropriate proviso for exigent circumstances. This would place a burden of public justification on the President for pardons that proceeded through non-standard channels.

Of course, these measures would fall short of preventing the President from exercising the pardon power autonomously. Scholars such as Yale Law Professor Charles L. Black have argued that through the power of the purse the Congress has the Constitutional authority to reduce the President's staff to one—but that one could be assisting the President in writing grants of pardon. *See* Charles L. Black, "The Working Balance of the American Political Departments," 1 *Hastings Const*. L. O. 13, 15–16 (1974). Nor would they prevent a determined President from executing a grant of clemency to which the Congress, as well as the overwhelming majority of the American public, would object. Still, I believe such measures would go a long way to ameliorate the difficulties that have prompted these hearings. While I do not share the view that any revisions in statutory law are warranted at this time, should you disagree with me, I urge that measures short of amending the Constitution are the proper steps to take.

Thank you for inviting me to share my views with you. I look forward to answering any questions you may have. I would be happy to work with committee staff to explore any of the non-Amendment options I have suggested above.

Senator SPECTER. Mr. Quinn, you were not here when we started the panel and since you may be, in part, a fact witness, I would like you to stand and take the oath.

Mr. QUINN. Certainly.

Senator SPECTER. Do you, Jack Quinn, solemnly swear that the testimony you will give before this Committee on the Judiciary of the U.S. Senate will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. QUINN. I do.

Senator SPECTER. Mr. Quinn, we are taking a look at the pardons of Mr. Rich and Mr. Green as illustrative for looking forward as to what action might be taken in the future. You have already testified as to the facts before the House committee, and we are interested in a focus on what we might look to in the future, but the 7 minutes are yours, so we are interested in hearing whatever you have to say.

STATEMENT OF JACK QUINN, ATTORNEY, QUINN AND GILLESPIE, WASHINGTON, D.C.

Mr. QUINN. I appreciate it, Senator.

Senator Specter, distinguished members of the committee, I appreciate this opportunity to provide information about the pardon of Marc Rich. I am well aware that all of you have already expressed your disapproval of this pardon. I don't expect to be able to change your mind about that today, but before the hearing is adjourned I hope that all of you will know that I presented a case on the legal merits, I pursued my client's interests vigorously and ethically, and I believe this pardon was based on the legal and diplomatic considerations presented to the President.

My principal mission upon being retained in this matter in the spring of 1999 was to help bring resolution to the indictment against Mr. Rich at the Justice Department. During an intensive period of review that lasted for several months, I learned that the Rich indictment grew out of a patchwork of energy regulations enacted in the Carter administration and repealed on President Reagan's first day in office.

Those regulations attempted to limit the price of oil, but as a result of their many exceptions they created powerful incentives for major U.S. oil companies to try to avoid these price caps. One way to do so involved linking price-controlled domestic oil transactions with non-price-controlled foreign transactions in dealings with international oil resellers.

U.S. oil producers structured transactions that provided additional profits on foreign transactions to compensate them for their inability to maximize profits on regulated domestic transactions. My client facilitated this and profited from these linkages. The complex resulting transactions are central to Mr. Rich's indictment.

For reasons I can explain, it is critical that you keep in mind the linked nature of these transactions because it is the failure to see this linkage that led to a mistaken view of the tax charges that are at the heart of Mr. Rich's indictment.

The indictment against Mr. Rich was unique for two very important reasons. First, prosecutors used the Racketeer Influenced and Corrupt Organizations Act, RICO, when they indicted Mr. Rich. It was one of the first times they had done so in a case not involving organized crime. Ignoring what I believe was clear congressional intent, the New York prosecutors used the RICO sledgehammer to attack Mr. Rich for what amounted to what he thought was no more than a regulatory dispute.

In 1989, as you know, the Department of Justice changed its guidelines for the use of the RICO statute, essentially prohibiting its use in tax cases like this one. It did so on the heels of widespread criticism of the use of RICO in cases like this. I have cited several examples of this criticism in my testimony, but just as an example, on the pages of the Wall Street Journal which repeatedly recognized that the U.S. attorney's office in New York was misusing RICO, and it cited the Marc Rich case as a prominent example of that abuse, in 1989 Yale-trained lawyer and weekly columnist Gordon Crovitz wrote, and I quote, "It is worth taking a second look at Mr. Giuliani's first big RICO case. This was the much celebrated 1984 case against Marc Rich, the wealthy oil trader. A close reading of the allegations shows that these effectively reduced to tax charges. The core of the case is that Mr. Rich wrongly attributed domestic income to a foreign subsidiary. Again, this sounds like a standard civil tax case, not RICO."

Unfortunately, by the time the Department of Justice had finally reigned in its tactics, the Southern District prosecutors had used RICO and its asset forfeiture provisions to coerce Mr. Rich's companies into a $200 million guilty plea just to survive. And Mr. Rich had been labeled a racketeer and fugitive for not returning from his headquarters in Switzerland to be subjected to what he believed, rightly or wrongly, would be an unfair and prejudicial racketeering trial. Indeed, once his companies had been forced to plead guilty by the use of the RICO statute, Mr. Rich believed, again rightly or wrongly, that he stood virtually defenseless as an individual to similar charges.

The second unique aspect of this case was that although the prosecutors were still trying to subject Mr. Rich to criminal penalties, the major U.S. oil companies that had structured the very

transactions at issue in the indictment were themselves pursued only civilly.

In fact, when the United States Department of Energy independently examined transactions involving one of Mr. Rich's major trading partners, ARCO, it concluded that ARCO had improperly failed to account for the linked domestic and foreign transactions, and thereby had violated the excess pricing/profits regulations. Yet, DOE pursued ARCO only on a civil basis for violations of the regulations. The Southern District of New York never indicted any of the U.S. oil companies that structured these transactions.

I want to emphasize this point. The same Department of Energy recognized that the Marc Rich companies had correctly taken into account the linked nature of the transactions on their books. Despite this, the prosecutors attacked the same transactions in their indictment against Mr. Rich. They took the position directly contrary to the DOE regulators that the domestic and foreign transactions should not be considered linked for U.S. tax and energy purposes. So DOE used the administrative process to collect hundreds of millions of dollars in civil penalties from ARCO, while the Southern District criminalized the conduct of Mr. Rich based on an exactly contradictory analysis of the same facts.

This was not just my conclusion. Two of the most preeminent tax authorities in the Nation, Professors Bernard Wolfman of Harvard and Martin Ginsburg of Georgetown, analyzed the transactions at issue and concluded that the Marc Rich subsidiary correctly reported its income from those transactions.

So in October 1999, I turned to a man with whom I had worked in the past and for whom I have immense respect, then Deputy Attorney General Eric Holder. I first met with Mr. Holder about the Rich case in late October 1999. I met with him to provide him with an overview of the flaws in the outstanding indictment against Mr. Rich. This conversation and other contacts with Mr. Holder are reflected in the documents I have provided to the committee.

According to my notes of a November 8, 1999, telephone conversation with Mr. Holder, several weeks after our first meeting, he told me that he and other senior DOJ officials thought that the refusal of the Southern District to meet with Mr. Rich's attorneys was ill-considered and, in fact, in his word, "ridiculous."

At Mr. Holder's suggestion, I wrote to Mary Jo White, the U.S. Attorney for the Southern District of New York, on December 1, 1999, asking that her office reexamine the charges against Mr. Rich. I was denied even a meeting. This left us at an intractable impasse, and so eventually I sought a pardon.

I know you say he was a fugitive, how could you do that? As a general rule, I don't disagree that pardons should not be granted to alleged fugitives, but there have been exceptions for unique circumstances. Mr. Rich is certainly not the first person who has been pardoned despite his alleged fugitivity.

As you heard earlier, Presidents Wilson, Truman and Carter pardoned all of the draft evaders of their eras, despite their fugitivity. Mr. Holder himself advocated a pardon granted to a fugitive who had received prejudicial treatment because of his race.

I argued my case, though certainly dissimilar from those, as another reasonable exception because I thought our legal arguments

were compelling and because the Government's now admitted misuse of RICO had created the very situation, Mr. Rich's absence, that the Government cited in refusing to discuss the merits of the case.

As Senator DeWine earlier recited, I personally notified Mr. Holder in his office on November 21, 2000, that I would be sending a pardon application directly to the White House. I told him then that I hoped to encourage the White House to seek his views. He said that I should do so, and I did later encourage the White House to seek his views.

At no time did I attempt to circumvent the Justice Department or prevent its views from being taken into account. In fact, I hoped the consultation with Mr. Holder by the White House would help me make my case for Mr. Rich because I believed Mr. Holder was familiar with the charges and with our arguments as to the flaws in the indictment. And more importantly, at a minimum I knew that he realized we were at an impasse because the U.S. Attorney's office would not discuss the matter or consider our arguments.

On December 11, I delivered a two-inch-thick pardon application, right here, to the White House, more than 5 weeks before the pardon was granted on January 20. While the application was under consideration, I wrote to Mr. Holder on January 10 and asked him to weigh in at the White House with his views. I sent that letter to him hoping for his support, having been informed that his views would be considered important.

I had that letter sent by messenger to the Department of Justice while I was out of town, though I now understand there were problems with its arrival at Justice and that it was routed to and received by the Pardon Attorney on January 18. The point here, though, is that I wanted the Department of Justice and Mr. Holder involved because I understood their views would be considered important.

Still later, as you know, I called Mr. Holder on the evening of January 19 and I told him that Mr. Rich's pardon was receiving serious consideration at the White House, and that I understood he would, in fact, be contacted before a decision was made.

It is now my understanding from Mr. Holder himself, from then White House Counsel Beth Nolan, and from former President Clinton that Mr. Holder was indeed consulted and that he expressed a view. I am further told by Ms. Nolan that the position he expressed was important to the ultimate decision to grant the pardon.

This was not the first pardon granted upon application directly to the White House rather than through the Pardon Attorney, and it most certainly did not exclude the Department of Justice. In filing the petition, I included the views of the prosecutors in the form of the responses I and other counsel had received from the Southern District for a meeting, and most particularly in the form of the original indictment of Mr. Rich itself. Again, I encouraged the White House Counsel's office on, I believe, more than one occasion to seek the views of Mr. Holder and the Department.

The pardon petition was filed directly with the White House because I knew from personal experience as a former White House Counsel that that is not an uncommon practice, and I knew that

this application did not fit within the four corners of the regulations you have discussed earlier governing how the Pardon Attorney handles pardon applications.

As the Washington Post has reported, previous administrations in their closing days have considered pardons directly at the White House that have not gone through the customary Justice Department screening process. In fact, the Los Angeles Times reported last week that 46 other pardon petitions were submitted directly to the White House in a similar fashion this very year.

I see the light is on, Senator. Do you want me to refrain from the last section?

Senator SPECTER. No. You may finish your statement, Mr. Quinn.

Mr. QUINN. Thank you, Senator.

Lastly, let me address the involvement of Denise Rich and Beth Dozoretz. Yes, both were involved. Their involvement was emphatically not, in my view, determinative or even central to my efforts. I based my efforts on the legal case I made, as well as on the support of the Government of Israel, not on the false presumption that any personal or political relationship with President Clinton would result in a favorable outcome.

Denise Rich is the ex-wife of my client and she wanted President Clinton to grant her ex-husband and the father of her children this pardon. I encouraged her and her daughters to write letters to President Clinton because, as in any pardon application, it was appropriate that the President hear from family members.

I know that she urged the President to consider this case carefully on two or more occasions, but I want to emphasize I never suggested that she talk to the President about anything extraneous to the pardon itself. Indeed, I did not know at the time about the reported contributions or pledges that she has made to the Clinton library, nor did I know at the time about the extent of her fundraising activity for the Democratic Party, nor did I know that she may have given personal gifts to the former President.

As for the involvement of Beth Dozoretz, Beth has been a good friend of mine for several years. She is also a close friend of Denise Rich and she is a good friend of President Clinton. I knew that she speaks with the former President with some frequency, and so I was sure she would know of my efforts and no doubt inquire about the status of our application.

That was not unwelcome to me. I believed she might provide me with a sense of our progress or lack of progress. As a lawyer, I wanted information from as many sources as I could get about where my petition stood at the White House so that, if necessary, I could refocus my efforts and my arguments to achieve the desired result for my client.

So I spoke to Ms. Dozoretz over the Thanksgiving weekend and told her that I would be filing a pardon petition on behalf of Marc Rich. I encouraged her to help me be sure that the President himself was aware of the fact that the application had been filed with the White House Counsel's office. She did just that and reported back to me at some point, in essence, that President Clinton had said I should make my case to Bruce Lindsey and other counsel in the White House Counsel's office.

Weeks later, Ms. Dozoretz talked to the President again. What I understand her to have reported then is that the President was impressed with the legal arguments I had made, but was doing due diligence with lawyers in the White House so that he understood all of the arguments for and against the pardon.

Again, I would like to emphasize this point. The notion that the President was going to be convinced to grant this pardon because of support for it from Beth Dozoretz or Denise Rich rather than because of the case we made on the law and the important support of world leaders like Prime Minister Ehud Barak of Israel is, in my view, just untrue.

I want to add that, as with Ms. Rich, I never asked Ms. Dozoretz to talk to the President about this matter in a fundraising capacity. On the contrary, from my very first conversation, I emphasized to Ms. Dozoretz that this case could and must be made on the merits. She did not have to be convinced of that.

As far as I am concerned, the most conclusive evidence that the President granted this pardon on the merits was the telephone conversation I had with him on the night of Friday, January 19. In that conversation, I could tell that President Clinton had obviously read and studied the pardon petition. He grasped the essence of my argument about this case being one that should have been handled civilly, not criminally, and he discussed with me whether the passage of time would permit statute of limitations defenses in such a civil proceeding. I told him that I would happily give him a letter waiving those defenses, and he insisted that I provided one to him within an hour.

These comments, I believe, reflect the state of mind of a President who was searching to make a decision based on fairness and equity. You may disagree with him and with me. You may believe he made a terrible mistake, but I tell you today that nothing, absolutely nothing, in my conversations with him remotely suggested to me that he was thinking about or motivated by his friendships, his politics, or his library. Everything I saw in my dealings with the President suggested to me that President Clinton based his decision on his judgment of the merits and, I believe, on the strong support for the pardon from Prime Minister Barak.

Thank you, Senator.

[The prepared statement of Mr. Quinn follows:]

[Additional material is being retained in the Committee files.]

STATEMENT OF JACK QUINN, ESQ., ATTORNEY, QUINN AND GILLESPIE, WASHINGTON, D.C.

Chairman Specter. Senator Leahy, distinguished Members of the Committee, thank you for this opportunity to provide information about the pardon of Mare Rich.

I am well aware that most if not all of you already have expressed your disapproval of this pardon. Nonetheless, I welcome the opportunity to sit before you and answer your questions about the case I made and the process I followed in making it.

I am here today as a lawyer who believes in the merits of the case I made. I do not expect today to turn back the tidal wave of opposition to the Rich pardon, but before today's hearing is adjourned. I hope that all of you will know that I acted as a lawyer who pursued my client's interests vigorously and ethically and that this pardon was based on the case I made.

I joined the Marc Rich legal team in the spring of 1999 while I was an attorney at Arnold & Porter. The Rich defense team over the years included attorneys of un-

usual skill and unquestionable integrity, from law firms of stellar reputation, including Len Garment, who served as President Nixon's White House Counsel; Larry Urgenson, who held a senior position in the Reagan Justice Department; Lewis "Scooter" Libby, who now serves as Vice President Cheney's Chief of Staff, and other distinguished attorneys (App. A).

My principal mission, upon being retained, was to help bring resolution to the outstanding indictment against Mr. Rich at the Justice Department.

During an intensive period of review that lasted for several months, I learned that the indictment grew out of a patchwork of energy regulations enacted in the Carter Administration that were later repealed on President Reagan's first day in office. Those regulations attempted to limit the price of oil but, as in any complicated regulatory regime, there were many exceptions.

The Carter regulations caused price discrepancies that, in turn, created a powerful incentive for major U.S. oil companies to try to avoid the regulatory regime. One way to do so involved "liking" price controlled domestic oil transactions with non-price controlled foreign transactions in dealings with international oil resellers. Specifically, U.S. oil producers structured transactions that provided additional profits on foreign transactions to compensate them for their inability to maximize profits on regulated domestic transaction. This resulted in complex linked transactions between the major oil companies and resellers around the world. These transactions are central to Mr. Rich's indictment in which he, a colleague, and two associated companies were charged with a variety of crimes. And, for reasons I will explain, it is critical that you keep in mind the linked nature of these transactions, because the failure to see the linkage is what leads to the mistaken view of the tax and energy consequences of the transactions that the indictment represents.

The indictment that had stood against Mr. Rich for almost twenty years was unique for *two* very important reasons:

- First and foremost, prosecutors used the Racketeer Influenced and Corrupt Organizations Act (RICO) when they indicted Mr. Rich—one of the *first* times they had done so in a case not involving organized crime. In 1983, prosecutors used the RICO sledgehammer—a weapon originally designed to combat mob basses like John Gotti—to attach Mr. Rich for what his lawyers believed amounted to no more than a regulatory dispute about price controls and taxes.

In 1989, the Justice Department changed their guidelines for the use of RICO statutes—essentially prohibiting its use in tax cases like this one. As you will no doubt recall there had been widespread condemnation of RICO abuse by New York prosecutors. Writing in his *New York Times* column in 1989, William Safire referred to the then-unrestricted use of RICO as a "legal monstrosity" adding that "politically ambitious prosecutors in New York, Chicago and elsewhere" had "been making themselves famous by misapplying RICO to targets who have nothing to do with organized crime" using "nuclear artillery" when only "elephant guns would do."

In the same vein, the *Wall Street Journal* has long recognized that the US Attorney's office in New York misused RICO and that the Marc Rich case was a prominent example of that abuse. In 1989, Yale-trained layer and weekly columnist Gordon Crovitz wrote: "It is worth taking a second look at Mr. Giuliani's first big RICO case. This was the much-celebrated 1984 case against Marc Rich, the wealthy oil trade. A close reading of the allegations shows that these also effectively reduce to tax charges. The core of the case is that Mr. Rich wrongly attributed domestic income to a foreign subsidiary. Again, this sounds like a standard civil tax case, not RICO."

Months later, the same paper's editorial board said: "[The Department of Justice] should launch a complete review of all US Attorney RICO cases—from Mr. Giuliani's first RICO-expanding case against Marc Rich in 1984 through current allegations against Chicago pit traders and Michael Milken."

In fact, just days ago two *Wall Street Journal* reporters recognized that: "The indictment against Mr. Rich that was invalidated by Bill Clinton's pardon was based in part on aggressive prosecution tactics later reined in by the Supreme Court and the Justice Department."

Unfortunately, by the time the Department of Justice had finally reined in their tactics, the Southern District prosecutors has misused RICO and its asset forfeiture provisions to coerce Mr. Rich's companies into a $200 million guilty plea just to survive, and Mr. Rich had been labeled a racketeer and fugitive for not returning from his headquarters in Switzerland to be subjected to what he believed would be an unfair and prejudicial racketeering trial. Indeed, once his companies had been forced to plead guilty by the misuse of the RICO statute, Mr. Rich believed that he stood virtually defenseless as an individual to similar criminal charges.

- The misuse of RICO was not the only unique aspect of this case. The second unique factor was that although prosecutors were still trying to subject Mr. Rich to *criminal* penalties, the major US oil companies that had structured the very transactions at issue in the indictment had themselves been pursued only *civilly*. In fact when the United States Department of Energy (DOE) independently examined transactions involving one of Mr. Rich's major trading partners, ARCO, it concluded that ARCO had *improperly failed to account*for the liked transactions and thereby had violated the excess pricing/profits regulations; yet, DOE pursued ARCO only on a *Civil* basis for violations of the regulations. The Southern District of New York never indicted any of the U.S. oil companies that structured these types of transactions.

I want to emphasize: the same Department of Energy recognized that the Marc Rich companies *had correctly taken into account* the liked nature of the transactions on their books. But, despite DOE's recognition that Mr. Rich's companies had *properly linked* the transactions for accounting purposes, while ARCO had not, the prosecutors attacked these same transactions in their indictment against Mr. Rich. They took the position, directly contrary to the DOE regulators, that the domestic and foreign transactions should *not* be considered linked for U.S. tax and energy purposes. This inconsistent treatment of DOE and the Southern District goes to the heart of the U.S. government's case against Mr. Rich. DOE used the administrative process to collect hundreds of millions of dollars in *civil* penalties from ARCO, while the Southern District criminalized the conduct of Mr. Rich based on a exactly contradictory analysis of the same facts.

This was not just my conclusion and that of the reputable attorneys I joined on Rich's defense team. Two of the most preeminent tax authorities in the nation, Professors Bernard Wolfman of Harvard Law School and Martin Ginsburg of Georgetown University Law Center, had analyzed the transactions at issue and concluded that the Marc Rich subsidiary "correctly reported its income from those transactions and that a court, if called upon to decide the issue, would agree." Contrary to statements that have been made about the Ginsburg/Wolfman analysis, both lawyers were fully aware of the prosecutors' evidence against Mr. Rich, including the allegedly "sham" transactions and the record-keeping from the "pots."

Put simply, the indictment against Mr. Rich was flawed—not just in my view, but also in the views later expressed by two departments of the United States Government. The case was built on a perception of the transactions later directly contradicted by the Department of Energy, and it was inappropriately ratcheted up into a RICO case in a manner the Department of Justice later acknowledged was inappropriate. The U.S. Government itself has undermined the Rich indictment, not just me or other lawyers for Mr. Rich.

Knowing all of this, I found it difficult to believe that Mr. Rich's lawyers had been unsuccessful for more than a decade in trying to convince the Southern District of New York to re-examine the charges against him. So, in October '1999, I turned to a man with whom I had worked in the past and for whom I have immense respect—then Deputy Attorney General Eric Holder.

I first met with Mr. Holder about the Rich case in late October 1999. The purpose of the meeting was to provide Mr. Holder with an overview of the flaws in the outstanding indictment against Mr. Rich. This conversation and other contacts with Mr. Holder are reflected in the documents I have provided to the Committee (App B). According to my notes of a November 8, 1999 telephone conversation with Mr. Holder several weeks after our meeting, he told me that he and some senior DOJ officials thought that the refusal of the Southern District to meet with Mr. Rich's attorneys was will considered and in fact "ridiculous." Subsequently, he told me that some officials at DOJ came to believe that on this matter, "the equities were on our side," at least with respect too our request for a meeting.

At Mr. Holder's suggestion, I wrote to Mary Jo White, the US Attorney for the Southern District of New York, on December 1, 1999, asking that her office re-examine the charges against Mr. Rich so that we might bring the matter to some resolution. But like the long list of distinguished lawyers before me, I, too, was denied even a meeting.

I have searched in vain for a written Justice Department policy that directs U.S. Attorneys never to discuss case merits with attorneys for alleged fugitives or other absent persons. No such policy exists. Indeed, there are many instances in which Justice Department prosecutors have engaged in discussions about case merits with indicted defendants residing abroad.

Regardless of this absence of a firm government policy, even main Justice was unwilling to talk to us about the merits of the case, because Mr. Holder believed he

must defer to the Southern District and not overrule his subordinates. This left us at an intractable impasse.

Now, as a general rule, I agree that pardons should not be granted to alleged fugitives but there must be exceptions for unique circumstances. Mr. Rich is not the first person who has been pardoned despite he alleged fugitivity. Presidents Wilson and Carter pardoned all of the draft evaders of their eras. Mr. Holder himself advocated a pardon granted to a fugitive who had received prejudicial treatment because of this race. I viewed my case, though dissimilar, as another reasonable exception because I thought our legal arguments were compelling and because the government's now admitted misuse of RICO had created the very situation—my client's absence—that the government cited in refusing to discuss the merits of the case.

Accordingly, we decided in October 2000 to seek a presidential pardon. I believed that the President, as the chief law enforcement officer for the nation, essentially serves as our country's top prosecutor. I believed a pardon petition would provide the president with the opportunity—if we could convince him of the merits—to reduce this case to its proper proportions: a civil regulatory dispute.

I personally notified Mr. Holder in his office on November 21, 2000, that I would be sending a pardon application directly to the White House. I told him then that I hoped to encourage the White House to seek his views. He said I should do so. At no time did I attempt to circumvent the Justice Department or prevent its views from being taken into account. In fact, I hoped that consultation with Mr. Holder by the White House would help me make my case for Mr. Rich, because I believed Mr. Holder was familiar with the charges and with our arguments as to their flaws. Most importantly, I knew that he realized we were at an impasse because the U.S. Attorney's Office would not discuss the matter or consider our arguments.

On December 11, 2000, I delivered a two-inch thick pardon application to the White House—more than five weeks before the pardon was granted on January 20, 2001. While the application was under consideration, I wrote Mr. Holder on January 10, 2001 and asked him to weight in at the White House with his views. I sent that letter to him hoping for his support, having been informed that this views would be important. I have that letter sent by messenger tot he DOJ, through I now understand there were problems with its arrival and that it was routed to and received by the pardon attorney on January 18.

Still later, I called Mr. Holder the night of January 19, 2001, and told him that Mr. Rich's pardon was receiving serious consideration at the White House, and that I understood he would be contacted before a decision would be made at the White Hour. It is now my understanding from Mr. Holder, from then-White House Counsel Beth Nolan and from former President Clinton, that Mr. Holder was indeed consulted and that he expressed a view. I was told that his view was important to President Clinton's ultimate decision.

I want to emphasize that the process I followed in filing the pardon petition was one of transparency at both the Department of Justice and the White House. It was not the first pardon granted this way and it most certainly involved the Justice Department. In filing the pardon petition, I included the views of the prosecutors—in the form of the responses I and other counsel had received from the Southern District for a meeting and, most particularly, in the form of the original indictment of Mr. Rich.

Furthermore the process this pardon followed gave the president the opportunity to weight his decision carefully. For over five weeks the White House had time to consider the views of the White House attorneys the Justice Department and anyone else with whom it chose to discuss the matter to make a judgment on the merits.

The pardon petition was field directly with the White House because I knew from personal experience as a former White House Counsel that it was not an uncommon practice. As the *Washington Post* has reported, "previous Administrations in their closing days" have considered pardons directly at the White House that have not going "through the customary Justice Department screening process." In fact, the *Los Angeles Times* reported last week that 46 other pardon petitions were submitted directly to the White House in a similar fashion.

Lastly, let me address the involvement of Denise Rich and Beth Dozoretz. Yes, both were involved. But I never believed their views would be the dispositive consideration for the President. I based my efforts on the legal case, as well as the support of the Government of Israel, not on the false presumption that any relationship with President Clinton would result in a favorable outcome.

Denise Rich is the ex-wife of my client, and she wanted President Clinton to grant her ex-husband and the father of her children this pardon. I encourage her and her daughters to write letters to President Clinton. As in any pardon application, it was appropriate that the President hear from family members. I also encouraged Ms.

Rich to follow up when she had the opportunity to see President Clinton at a White House holiday party—simply by making sure he had seen her letter. I know that she urged the President to consider this case carefully on that and perhaps another occasion. but I never suggested that she talk to the president about anything extraneous to the pardon itself. Indeed, I did not know at the time that she had made contributions in the past to the Clinton Library, nor did I know at the time the extent of her past fund raising for the Democratic Party.

As for the involvement of Beth Dozoretz, Beth has been a good friend of mine for several years. She is also a close friend of Denise Rich, and she is a good friend of President Clinton. I knew that she talked to the President with some frequency.

I expected that Ms. Dozoretz would inquire about the status of our application. And I believed she might provide me with a sense of our progress or lack there of. As a lawyer, I wanted information from as many sources as I could get about where my petition stood in the White House, so I could refocus my efforts and my arguments to achieve the desired result for my client.

I talked to Ms. Dozoretz over the Thanksgiving weekend and told her I would be filing a pardon petition on behalf of Marc Rich, the ex-husband of her close friend, Denise Rich. I encouraged her to help me be sure that the President himself was aware that we had filed the petition. She did just that and later reported back to me that President Clinton had said I should make my case to Bruce Lindsey and others in the White House Counsel's office.

On another occasion, Ms. Dozoretz talked to the President again. I wanted to hear from Ms. Dozoretz any information she might glean from the President as to where my petition stood with him. What I understand her to have reported is that the President was impressed with my arguments but was doing due diligence with lawyers in the White House so that he understood all the arguments—for and against the pardon.

Let me be clear on this point: the notion that the President was going to be convinced to grant this pardon because of support for it from Beth Dozoretz or Denise Rich, rather than because of the case we made and the support of leaders like Ehud Barak, the Prime Minister of Israel, is, in my view, untrue. Yes, I was eager to hear any reports about what the President was thinking. Yes, I was eager to hear any reports about what the President was thinking. Yes, Ms. Dozoretz had been a political supporter of the President. But she was no longer the Finance Director for the DNC. She had left that job in October 1999. At this time, she was a fried of the President. And let me be clear about this as well: I never asked Ms. Dozoretz to talk to the President about this in a fund raising capacity; on the contrary, I emphasized to Ms. Dozoretz that this case could and must be made on the merits. She did not have to be convinced of that.

As fare as I am concerned, the most conclusive evidence that the President granted this pardon on the merits was the twenty-minute telephone conversation I had with him on the night of Friday, January 19th. In that conversation, I could tell that President Clinton had obviously read and studies the pardon petition. He grasped the essence of my argument about this case being a case that should have been handled civilly, not criminally, and discussed whether the passage of time would permit statute of limitation defenses. I told him that I would waive those defenses. President Clinton then requested a letter to that effect within an hour.

These comments reflect the state of mind of a President who was searching for a decision based on fairness and equity and his understanding of a regulatory system long ago repealed by the United States. you may disagree with him and me. You my believe he made a bid mistake. But I tell you that nothing—nothing—in my conversations with him remotely suggested to me that he was thinking about his friendships, his politics, or his Library.

In this case as in others, when the press dissects a policy decision made by any elected official in Washington, it more times than not may find that people were involved or were nearby who at one time or another have raised money for political campaigns. That's why I don't disagree with Senator John McCain, who said about this matter: "The President may have had the purest of motives, but the appearance is bad." The appearance is bad, as it often is in Washington when money has been raised by those who are close to elected officials. But I believe that President Clinton based his decision on his judgment of the merits, and I see no evidence to the contrary.

As we sit here today and discuss the pardon process and any changes that might be made to improve on it, it is useful to remember that the Constitution grants the pardon authority only to the President. The Justice Department has a Pardon Attorney, who reports to the Deputy Attorney General, and one of the major functions of the Deputy Attorney General is to serve as the departmental liaison with the White House staff and the Executive Office of the President, including specifically

with respect to pardons. I informed the Deputy Attorney General of may petition. I encouraged the White House Counsel to seek his views. I did this over a period of two months, having briefed him about the case for more than a year before that.

The only man to serve both as president and Chief Justice of the Supreme Court, William Howard Taft, wrote that the reason the U.S. Constitution vests and absolute pardon power in the President is that it is "essential" that some authority "*other than the courts*" have the power to ameliorate or avoid the outcome of particular cases. The pardon power has never been limited to being granted only after a person has stood trail. As a 1995 Justice Department memorandum attests: "Throughout this nation's history, Presidents have asserted the power to issue pardons prior to conviction." Effects of a Presidential Pardon, 1995 WL 861618 (June 19, 1995). The Iran Contra pardons by President Bush are just one recent example.

In short, as then-Chief Justice Taft wrote for the Supreme Court in 1925: "Executive clemency exists to afford relief from undue harshness or evident mistakes in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt."[*Ex parte Grossman*, 267 U.S. 87, 120–21 (1925)]

President Clinton properly gave serious consideration to Mr. Rich's pardon application. He demanded that Mr. Rich's lawyers waiver all procedural defenses related to the transactions in question so that Mr. Rich would be po0tentially subject to civil penalties, such as those faced by others who were involved in similar transactions. In short, I believe our nation's top prosecutor handled this case in a way that it should have been handled years ago.

In conclusion, Mr. Chairman, while you may disagree with President Clinton's decision, I believe the facts establish that I represented my client's interest fairly, vigorously and ethically. And I carried out this representation keeping both the Department of Justice and the White House informed.

Thank you for this opportunity to testify.

Senator SPECTER. Mr. Quinn, we are looking to the future, and the merits look very thin to me, but the appearance of impropriety is overwhelming. What could be done when you have someone in your position, former White House Counsel, very close to the President?

You have a conversation with him on January 19, the day before he is to leave office, which was very rare time, considering what he had to do. To call that special access would be a vast understatement. Then you consult with Ms. Beth Dozoretz for, as you say, the purpose of finding out what had happened. But it is an obvious inference that there is an interest in having her weigh in as an official of the Democratic National Committee.

Then the Pardon Attorney is not consulted. The pardon falls outside the parameters of the Department of Justice regulations which the President ignores and has a constitutional right to ignore. On an inquiry from the Pardon Attorney a few hours before the President is to leave office, about 11 hours before he is to leave office, the Pardon Attorney is told that Mr. Rich and Mr. Green are living abroad. That creates quite a murmur from people who were listening to that.

Now, looking beyond Marc Rich, what can be done to see to it that the very powerful who have the President's ear, like Jack Quinn and Beth Dozoretz, are counterbalanced at least by having somebody in the White House know something more than Marc Rich is living abroad, so that you have the opportunity for a just decision, to say nothing about the opportunity for the appearance of propriety at the highest level of our Government?

Mr. QUINN. There was an awful lot embedded in that question and I would like to try to deal with—

Senator SPECTER. Well, not nearly as much as in your testimony, Mr. Quinn.

Mr. QUINN.—to deal with as much of it as I can. As I have said, Senator, I do believe the pardon was granted on the merits. I don't disagree with you that one of the unfortunate aspects of this is that this and other decisions were not gotten around to until very, very late, to say the least.

Senator SPECTER. Mr. Quinn, I understand that you believe it was granted on the merits. You are the attorney for the petitioner. You have also said you think it was the right decision. Whether it was granted on the merits is in the mind of President Clinton.

When you say it was the right decision, you are about the only person who thinks so. It is hard to find a Senator from the other side of the aisle—I don't think it is hard, pardon me—it is not possible to find a Senator from the Democratic side of the aisle, and headlines are that the Democrats are deserting the President over it. Then you have the appearance question. So what I would like you to direct your attention to in the few minutes we have is what can we do for the future.

Mr. QUINN. Well, I do have a thought about that, Senator. In retrospect, I suppose if I had to make a recommendation for you as to how this should be handled in the future, I think that the current and future Presidents should adopt by executive order some process that would be sufficiently transparent and ensure the input of as many people as possible and appropriate that their decisions on matters like this would not be subject to criticism because of the appearances that you discussed.

Senator SPECTER. If the President adopts an executive order, is he bound to follow it? Executive orders are fine for the whole Government. The President is the executive. He can impose an order that people have to follow, but does the President have to follow an executive order or can he technically rescind an executive order and do as he pleases? In one act of violating the executive order, both may be implied.

Mr. QUINN. Yes, you are quite right. A President could theoretically at least repeal the executive order that governed this process and then choose to ignore the process. But the reason I suggest that as the appropriate vehicle for doing it is that I think there are serious constitutional problems with the notion of doing it legislatively through statute.

Senator SPECTER. What is wrong with former Senator Mondale's idea, Mr. Quinn?

Mr. QUINN. As a former White House Counsel, I spent an awful lot of time defending the prerogatives and the powers of the presidency and the office of the presidency. I would worry that this process would become imbued with politics and that the cure—

Senator SPECTER. And the current process is not imbued with politics?

Mr. QUINN. Well, I think in general it is not, and I—

Senator SPECTER. How about here?

Mr. QUINN. Sorry?

Senator SPECTER. How about this case? In general, it is not. How about this case?

Mr. QUINN. I don't disagree with you that there have been appearance problems here that require people like myself to offer an explanation as to—

Senator SPECTER. My red light just went on, but you may finish your answer, Mr. Quinn.

Mr. QUINN.—as to the case we made. But it is certainly not my impression that the pardon process is inherently or even occasionally a political process.

Senator SPECTER. Senator Feinstein?

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

Mr. Quinn, you are obviously a very smart man, a very good lawyer.

Mr. QUINN. Thank you, Senator.

Senator FEINSTEIN. I listened to your opening statement and you made a couple of points. First, about you communications with Justice. I looked back to your Exhibit B and counted at least eight different occasions where you had made contact with Justice. So that is one point.

The second point was when you went over the merits of the case. Let me read what I think happened, and you correct me as I go along, interrupt me where this is wrong.

At the time, Federal law limited the price a seller of crude oil could charge, and this amount varied depending on how the oil was classified. The oil classifications vaned according to the history or the level of production of the well from which the oil came.

One way to make illegal profits at the time was to buy crude oil at a classification that had a low maximum price, illegally alter that classification, and then sell it at a higher maximum price. To avoid getting caught, a buyer would often arrange for the oil to be repeatedly bought and sold through a series of oil resellers, called a daisy chain, thus effectively disguising the change in classifications through a blizzard of paperwork.

Now, as I understand it, the prosecutors allege that Rich and Green and their companies engaged in a number of daisy chain oil transactions, reaping illegal profits on millions of barrels of crude oil. In carrying out this scheme, they allegedly prepared numerous false invoices and other documents as well as more than one set of books. Ultimately, the scheme netted Rich and Green over $100 million in illegal profits.

The prosecutors allege, then, that the scheme violated both the Federal energy law and the RICO statute. Once Rich and Green had made their illegal profits, they moved this money offshore to hide it from the IRS. Not surprisingly, they filed false tax returns, omitting this income. Hence, the tax evasion charges.

Finally, while Americans were being held hostage in Tehran, Rich and Green illegal bought millions of barrels of crude oil from Iran. They then took a number of steps to disguise these purchases, including using a secret code. In 1984, as I understand it, their companies pled guilty to those charges, However, Rich and Green fled the country, ending up in Switzerland, where prosecutors attempted to extradite them. Switzerland, of course, refused to hand them over.

Now, does this accurately set forth the charges?

Mr. QUINN. It accurately reflects the allegations that were made, but there are answers at each point. And, frankly, the attachments to our pardon application, including the arguments we made to the Southern District in my letter in 1999, as well as the presentation

made by Mr. Urgenson several years earlier, address each and every one of those allegations.

The tier trading or Daisy Chains, as you call them, were not themselves illegal. What, in essence, was going on here was that companies like ARCO structured transactions that would enable them to take, by way of example, a barrel of domestic oil for which they could only charge $10, move it to a reseller who, as you say, in turn would transfer it, and in the course of doing that end up getting $30 for that barrel of oil. That set of transactions was permissible under these complex regulations.

But if you think about this, what is going on is that ARCO has allowed somebody to take a barrel oil that they could only get $10 for and end up getting $30 for it. Well, ARCO and the other major oil companies didn't want to do that. So Rich helped them—

Senator FEINSTEIN. Are you saying this was common practice at the time for major oil companies?

Mr. QUINN. I am saying that ARCO and other major oil companies engaged in these activities with the effect of ending up getting more for a foreign barrel of oil than it was worth. And when you average the two, instead of getting $10 for that barrel of oil, they were, in effect, getting $27.50.

The Department of Energy went after ARCO for doing that and said, you are misleading us about these domestic transactions in your failure to link them to the foreign transactions. The Department of Energy went after ARCO for hundreds of millions of dollars and won, and in the course doing that concluded that Rich, in his accounting, has properly linked the foreign and domestic transactions and that ARCO had not.

Now, by the way, I alluded very quickly to the analysis undertaken by Professors Wolfman and Ginsburg, and all of the allegations that you recited were before the tax professors when they did their analysis.

Senator FEINSTEIN. I am told there are two sets of books and that those professors were only given one set of the books. Is that correct?

Mr. QUINN. I do not believe that is the case. I believe the tax professors knew that the Southern District claimed there was a duplicate or second set of phony books. But our response is that there was not a second set of books. There was a ledger by which Rich and people like ARCO were keeping track of the money they needed to get back for making these under-priced domestic trades.

Senator FEINSTEIN. Are you saying that Mr. Rich essentially did the same thing that ARCO did, except ARCO got away with it at the time and he did not and so his companies pled guilty?

Mr. QUINN. Senator, I am not only saying they did the same thing. The transactions, as I understand it, were structured by the oil companies, not by Rich. Rich facilitated them.

The guilty plea—frankly, you are familiar with the draconian asset forfeiture provisions of RICO. What Marc Rich would say to you is that they entered into that corporate guilty plea as the only thing they could do to keep the company because had they not done that, under the forfeiture provisions they could have lost the entire company and all of its assets.

Senator FEINSTEIN. Let me ask this question. You have asserted that as part of your deal with President Clinton, Rich waived all statute of limitations defenses. In theory, the Government then could still pursue Rich in civil court. The President has also offered this argument in defense of the pardon.

However, my understanding is that since Rich's companies paid all the back taxes, Rich may owe nothing and the statute of limitations waiver becomes irrelevant. Do you agree that this waiver is irrelevant?

Mr. QUINN. No, I do not, Senator, and I think frankly that that analysis mixes up the tax and the energy regulatory regimes that could apply here.

Senator SPECTER. Do you have many more questions, Senator Feinstein?

Mr. QUINN. Can I just give the Senator—

Senator FEINSTEIN. I didn't realize my light went on. I apologize, Mr. Chairman. I am sorry.

Mr. QUINN. What I would like to do, Senator, is just cite to you a section of the U.S. Code, 15 U.S.C. 754, sub (3(a)(4), and I am happy to provide you with a copy of it today, which I believe would provide the basis for at least an argument by the Department of Energy that Messrs. Rich and Green could be held to account civilly for the transactions that you and I discussed a few minutes ago. I hasten to add that they would, of course, defend themselves on the merits in any such civil action, but they have agreed to subject themselves to such a proceeding.

Senator FEINSTEIN. Thank you. Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Feinstein.

Senator DeWine?

Senator DEWINE. Thank you, Mr. Chairman.

Mr. Quinn, you are obviously a good lawyer, a strong advocate doing what you should be doing as far as presenting your case today. Let me look at some of your written testimony and then ask you a question about it.

You say, "Put simply, the indictment against Mr. Rich was flawed, not just in my view but also in the views later expressed by two departments of the U.S. Government. The case was built on a perception of the transaction later directly contradicted by the Department of Energy. It was inappropriately ratcheted up into a RICO case in a manner that the Department of Justice later acknowledged was inappropriate."

Now, unfortunately we don't have the prosecutor here. We don't have the Justice Department here. We don't have anybody to give the counter-argument for that today. But you are not inferring or stating that the Justice Department today thinks this was a bad case or that they shouldn't have brought the case or that they think it is a flawed case. I mean, that is not their position, is it?

Mr. QUINN. Senator, if the prosecutors were here, they would tell you I am full of beans. They feel very different about this than I feel about it. They feel differently than the reputable and good attorneys who I joined on this defense team feel about it.

I, as you indicated, made a case as an advocate on the merits. I think it was a solid case. I think that each element of the indictment can be attacked. I do believe that if one considers that RICO

really was, at least in the minds of Rich and Green, kind of the straw that broke the camel's back here—and, look, we can disagree with whether or not that justified the actions they engaged in. And, of course, as you know, I was not their attorney at the time that they chose not to return to the United States, and I hope I can honestly say to you that I would have encouraged them to do so at that time and stand trial.

But RICO really was a sledgehammer here, and it was subject to the kind of criticism I recited from opinion pages in any number of good publications, like the Wall Street Journal and the New York Times, and it was what they thought would prevent them from getting a fair trial. And the Department of Justice itself, then, in 1989 acknowledged that RICO shouldn't be used in cases like this.

On the second point, I think it really is pretty remarkable that you had the prosecutors in the Southern District arguing a tax case on the basis of an analysis of the transactions that was 180 degrees different from the analysis of the same transactions by the very regulatory department charged with enforcing these price control regulations. So I don't think it is unfair to say that the Government was really of two minds here, and that has to call in question some of the core charges that were laid down here.

Senator DEWINE. Mr. Quinn, thank you. Mr. Chairman, thank you.

Senator SPECTER. Thank you very much, Senator DeWine.

Senator Sessions?

Senator SESSIONS. Thank you very much.

You indicated that the goal was to bring resolution to the indictment, Mr. Quinn, and I think that wasn't the goal. The goal was to get the charges dismissed. The way you normally bring a resolution to an indictment is to come forward and face the charges.

Mr. Rich was indeed of that very rich, billionaire-level wealth. He was obviously arrogant, and he determined he was going to try to buy his way out of this deal, it seems to me, and not face the music like every other poor person who gets hauled before a court.

Would you comment on that?

Mr. QUINN. Yes, Senator. Certainly, when I undertook this representation and communicated with Main Justice and with the Southern District, it was my hope and my aim to persuade them to drop the charges.

Senator SESSIONS. Let me pursue that a minute. Was there a predecessor counsel to you on this matter?

Mr. QUINN. Yes, sir.

Senator SESSIONS. And they had been negotiating with the United States Attorney's office in the Southern District of New York for quite a number of years, had they not, off and on?

Mr. QUINN. No, sir. In point of fact—

Senator SESSIONS. There had been no discussions about Mr. Rich appearing and answering the charges?

Mr. QUINN. I want to be careful here because I am under oath. It is my impression that since at least the mid–1980's, the U.S. Attorney's office in New York would not sit down and discuss the merits of the case, the merits of the case.

There was a conversation when now Judge Obermeier was in the U.S. Attorney's office, but as I understand it, he indicated in the course of that conversation that he would not agree to devote the resources of the office to review the merits of the case without preconditions that the clients thought were impossible to agree to.

But at least since the late 1980's or 1990, and in particular, Senator, since the analysis by the tax professors, it has been the view of the attorneys who preceded me on this matter that the U.S. attorney's office would not give anything approaching a thoroughgoing review of that tax opinion.

Senator SESSIONS. They were taking the view, I think, that most United States attorneys' offices take that you don't negotiate with a fugitive.

Mr. QUINN. You are quite right.

Senator SESSIONS. They have to submit themselves to the authority of the court before you enter into a negotiation.

Mr. QUINN. You are quite right, Senator, and may I just address that?

Senator SESSIONS. You mentioned that these were tax charges, but the RICO had to have been founded on false claims or false statements or mail fraud. Was it mail fraud charges or wire fraud that formed the basis for the RICO case?

Mr. QUINN. Yes, sir, and can I address that and can I also just back one—

Senator SESSIONS. I know what you are saying. You are saying it was fraud that involved tax. But it also had to be fraud or they couldn't have charged it as a mail fraud, isn't that right?

Mr. QUINN. The Supreme Court in the McNally case, the later McNally case, in effect, disallowed the fraud charge that was the RICO predicate. You are quite right—

Senator SESSIONS. So you think under McNally that these charges would have been invalid?

Mr. QUINN. Yes, sir.

Senator SESSIONS. Then you were home free. Why didn't you come in and move to dismiss?

Mr. QUINN. Well, they couldn't come in and make a motion to dismiss because they weren't within the jurisdiction of the court, so they were in this catch–22. And with respect to—

Senator SESSIONS. They had a decision to make, either come in, submit themselves to the court and file a motion to dismiss the RICO charges.

Mr. QUINN. Right, right.

Senator SESSIONS. Wouldn't that have been the proper thing for them to do?

Mr. QUINN. It certainly would have been an alternative, but they were unwilling to come back and they were—

Senator SESSIONS. That is right. They were unwilling.

Mr. QUINN. Yes.

Senator SESSIONS. They didn't want to do what everybody else has to do. They wanted to beat the system another way.

Mr. QUINN. Correct. Now, may I add one other point about this fugitivity because you are quite right that the Southern District took the position that it would not have discussions with fugitives or absent persons? And I would be happy to send to you a docu-

ment that was prepared for me and for Mr. Libby which reports on a series of plea bargains with domestic and international fugitives by various U.S. attorneys' offices.

Senator SESSIONS. Well, I know you could do that.

Mr. QUINN. I am to submit it.

Senator SESSIONS. They took the position they didn't want to do that.

Could you have approached the Chief of the Criminal Division and asked for an independent review of the RICO charges and gotten a high official in the Department of Justice that wasn't a part of the prosecution team?

Mr. QUINN. Well, as a matter of fact—

Senator SESSIONS. Did you ever think about asking for that?

Mr. QUINN. I think, in effect, we did, sir.

Senator SESSIONS. Did you formally ask for that and did you have a review by anyone in the Department of Justice occur?

Mr. QUINN. Yes, I think we did. When I communicated with Mr. Holder in 1999, I provided to him materials that outlined all the arguments we made against the indictment, and we copied Mr. Robinson in the Criminal Division and the head of the Tax Division on those arguments. After the Southern District—

Senator SESSIONS. Did you ask them to overrule the opinion of the United States attorney in Manhattan?

Mr. QUINN. In effect, I sure did.

Senator SESSIONS. Did they do so?

Mr. QUINN. No, they did not.

Senator SESSIONS. So that would have been a proper avenue, I think, if you were unhappy with the charge of the United States attorney. And isn't it true that the Attorney General could, in fact, remove the United States attorney if they failed to comply with a decision of the Attorney General?

Mr. QUINN. Of course, but all I am saying to you, Senator, is that I believe we availed ourselves of that avenue with no success.

Senator SESSIONS. But this is President Clinton's Department of Justice.

Mr. QUINN. I understand that.

Senator SESSIONS. They work for him. So you are saying that President Clinton couldn't get the Department of Justice to even review the case for criminal appropriateness, and so he is going to grant a pardon about a complex matter, of which I submit he knew very little law. He may have known the politics, but he didn't know the law.

Why wouldn't that have been the appropriate action for the President, if he was troubled by a prosecution to say I want the Chief of the Criminal Division—

Senator SPECTER. Do you have many more questions, Senator Sessions?

Senator SESSIONS. Yes, but my time is out.

Senator SPECTER. Well, finish this one.

Senator SESSIONS. So why wouldn't that have been the appropriate thing rather than just ripping out the legitimacy of the pardon?

Mr. QUINN. Senator, it would have been an alternative, but it is not one I asked him to take.

Senator SESSIONS. I would suggest that had that happened, you wouldn't have received the opinion you wished.

Senator SPECTER. Thank you, Senator Sessions.

Professor Gormley, you say that the pardon of President Nixon didn't look too good in 1974, but it looks pretty good 27 years later. Do you think the pardon of Marc Rich will look pretty good in 2028?

Mr. GORMLEY. I don't, Senator Specter, and my point is that I think the danger in tinkering with the Constitution isn't the Marc Rich cases that I think are always going to be, as I referred to, the bad pennies. One can question them. There are a number of instances in history.

Lincoln was accused of favoring his friends from Kentucky. Thomas Jefferson pardoned members of the anti-Federalists who were supporters of his. There are always those instances, and I think that would actually be the good part of having something like the Mondale amendment, that you could get at those questionable pardons.

Senator SPECTER. Do you think there is a good part to the Mondale amendment?

Mr. GORMLEY. Yes, that is the good part. The bad part, just to make clear, is I am concerned with the more difficult ones like the Ford pardon of Richard Nixon, like perhaps President Buchanan's pardoning of the Mormon settlers during a very difficult time of insurrection, like perhaps President Bush's pardoning of the Iran-contra defendants, very controversial at the time.

There has to be a way to put closure to some of these things, and I think if you put them up to a vote at the time they would be vetoed, and that is my concern, Senator Specter. It is not that you wouldn't occasionally find some that legitimately you might want to go in and overturn.

Senator SPECTER. But as you characterize a veto, if two-thirds of the House and two-thirds of the Senate say no, it is true it is contemporaneous. It may take a long time for the Mondale amendment to succeed. The ERA still hasn't succeeded. But you can't override a Presidential veto very easily on legislation and my instinct is it would be a fairly tough vote to get two-thirds in the Congress.

Mr. GORMLEY. I think it would be tough, but again picture the Ford pardon of Nixon. You would have some Members of Congress naturally who would vote along party lines in a situation like that, and then you would have a number of Members of the House and of the Senate who would have this enormous pressure on them from their constituents who are outraged by this who end up buckling under to that pressure. That would be my concern.

Senator SPECTER. So you think a national outrage is really something that ought to be ignored, a cooling-off period, 27 years, and then have the vote?

Mr. GORMLEY. Well, no, but the point is that if we put a thumbs-up or thumbs-down system on many of these sensitive pardons and we just let the public input take over, we would make some bad decisions, I think.

Senator SPECTER. But when you talk about public input and you talk about two-thirds, the public reaction is not exactly an

irrelevancy. When you deal with some of the historical precedents, maybe yes, maybe no. You have a fair size core of independents in the Congress.

Let me turn to Professor Schroeder for a question. Professor Schroeder, you say, and I agree with this, that we ought to pursue remedies which are non-constitutional means, and you cite the statute. What do you think from that statute or other non-constitutional means would be effective to deal with this issue? I incorporate by reference, Professor Schroeder, my question to Mr. Quinn.

Mr. SCHROEDER. Senator Specter, I think at the end of the day if the President wants to grant a pardon which is highly unpopular or quite controversial or contentious, under the current constitutional regime he or she is going to be able to do that. The Constitution gives them that power.

That said, I am somewhat conflicted here because I, like Mr. Quinn, spent some time defending executive power when I worked at the Justice Department in the Office of Legal Counsel. But then I have also spent some time working for this committee, so I respect the power of the Congress as well.

You could set up by statute, in my opinion, that would set out a list of procedures, requirements, for a pardon application that went into the system—

Senator SPECTER. Statutory?

Mr. SCHROEDER. Yes, that would have to be complied with by the Pardon Attorney, not a restraint on the President, but by the Pardon Attorney. You could then, I think, in that same enactment encourage the President—and that is all you could do—to utilize that system in all except the very rarest of circumstances.

And if you wanted to go further, I believe under the Constitution using your power of the pursue you could set up a system whereby if the President wanted to do something extraordinary, you could withhold the expenditure of Federal funds in the Justice Department to assist in that regard. So you would put tremendous pressure on the President.

He could do his own investigation. He could talk to his own advisers, he could talk to the Attorney General. But you couldn't have anybody in the Justice Department or the Pardon Attorney picking up the phone and making a long-distance phone call on the Government's nickel or sending the FBI out to do investigations.

So you would have a kind of two-tiered system when you were in the system. You have got this transparent process, but you couldn't stop the President from going outside the system. But then you simply declare that if you are outside the system, you are on your own, Mr. President.

Senator SPECTER. When you talk about withholding funding, somebody has suggested that if you take a look at this President and seek to reach him in a specified way, it would be a bill of attainder. Now, of course, a bill of attainder is a criminal reference, but could you constitutionally really direct a rifle shot at a President by withholding funding on a collateral matter, or taking away his pension—there is some talk about that—or taking away his Secret Service guard or making him have an office on the tenth floor?

Mr. SCHROEDER. No, Mr. Chairman, I don't think at this juncture the Congress can or should do any of those things. I was talking about looking forward. You could set up a regime not to attack the President's salary, but simply to withhold from him the normal availability of Federal employees to vet and work on extraordinary pardons, if you wanted to do that, so that if he wanted to do something behind closed doors—

Senator SPECTER. Well, that would cutting off your nose to spite your face if you cutoff the funding for people to vet extraordinary pardons. We want more people to vet them on the off chance that if he finds about them, he will do the right thing.

Mr. SCHROEDER. Well, that would be the point of the first part of having a system of transparent vetting that the Justice Department had to employ whenever a pardon application came in the door or whenever the President referred one. But as long as you have got to deal with the fact that the President can act autonomously if he or she wants to, it seems to me if you placed those autonomous pardons outside the system, you would really be raising the stakes of justification of a President.

Why, Mr. President, did you choose to go outside the system and not avail yourself of the normal apparatus, would become, I think, a quite salient question that might be very difficult for a President to answer unless he had a very good reason, in which case you would want him to do it.

Senator SPECTER. Professor Becker, I have ignored the red light because there is only one other person who can follow my lead, and that is Senator Sessions, and he is welcome to do so when I finish.

Senator SESSIONS. Go ahead. I am very interested in your questions.

Senator SPECTER. I was intrigued by our conversation last week where you described your representation of President Ford, counsel to him on the Nixon pardon, and how that played through and how you made the suggestion as to your consulting with President Nixon and raised the issue that even with a pardon, there was still technically an opportunity for impeachment.

Would you recount that for the record?

Mr. BECKER. Yes, sir. In August 1974, when President Nixon resigned and President Ford was elevated to the presidency, approximately 3 days later, after Mr. Nixon had arrived in California, he called the Ford White House and spoke to Alexander Haig, the Chief of Staff, and directed Mr. Haig to send to Mr. Nixon in California all the records, papers and tapes that had accumulated during the 5 years of the Nixon presidency.

Those records, papers and tapes, particularly with reference to the tapes, had rather important significance to ongoing litigation and history. There were many people in the White House who felt that President Ford should comply immediately and send all of those documents and tapes to Mr. Nixon. There were a few people who felt to the contrary and I was one of those.

President Ford asked the Justice Department to give him an opinion on the ownership issue of who owned those records, papers and tapes accumulated by a President who is no longer in office. And the Department of Justice ultimately gave President Ford an

opinion that said they belonged to Richard Nixon; they are Richard Nixon's personal property.

That gave rise to even greater pressure on the President of the United States, who had been President 2 weeks, two-and-a-half weeks, from everyone in the White House, virtually, the Nixon staff inherited by President Ford, urging him and urging him to send those documents and tapes to San Clemente.

To his great, great credit and political courage, President Ford refused to do so and insisted that those records would not leave the possession of the Government of the United States. I was asked to try to negotiate some disposition of those records, papers and tapes with Mr. Nixon and his counsel, Jack Miller.

Those conversations led into conversations respecting the possibility of the issuance of a pardon to Mr. Nixon. I reviewed the precedents on pardon for President Ford, advising him of the scope of his Presidential power. One of the matters that we were concerned with was the obvious question, Senator, of pardon pre-indictment, pardon pre-conviction, and/or the question of whether or not, even if a pardon were issued, if the Senate chose to proceed with an impeachment trial of President Nixon with a House vote—what effect would a pardon have on the impeachment proceeding.

The impeachment proceeding, even though of a resigned President, was technically possible. The impeachment of an executive involves three things from a constitutional standpoint—the loss of the office, which had already occurred by virtue of the resignation; the loss of the emoluments, which had not occurred by virtue of the resignation; and the loss of the right to hold high office in the future, which had clearly not occurred. So the Senate had a string of jurisdiction if they wanted to retain back in 1974 the question of an impeachment trial. Obviously, they did not do so.

Ultimately, as you know, Senator, a series of lengthy negotiations occurred between myself and Mr. Nixon's counsel and Mr. Nixon in California that resulted in Mr. Nixon turning over the records, papers and tapes to the Government of the United States which were later modified and codified by an act of Congress.

Senator SPECTER. Did you discuss with President Nixon or his counsel the technical possibility of an impeachment even after the President left office by way of resignation?

Mr. BECKER. I believe I discussed it with Jack Miller at one time. In my conversation with President Nixon, we did not discuss impeachment. We discussed other matters.

Senator SPECTER. Was Jack Miller surprised to hear that that was a possibility?

Mr. BECKER. My recollection was that Jack adopted my view that it was a mere technical possibility and not likely in the present atmosphere.

Senator SPECTER. Well, when you called my attention to it last week, it surprised me that that was an option. Somebody has said that the most effective remedy that we are talking about is hitting the ex-president where it hurts, on his legacy. I am not sure that that is incorrect, but I am not sure that that has a whole lot of impact either.

One final question, Professor Becker, or maybe two final questions, or maybe more. Did you play any role in President Ford's de-

cision to voluntarily testify before the House of Representatives Judiciary Committee?

Mr. BECKER. I am so happy you brought that up. There has been so much conversation about—

Senator SPECTER. Professor Becker, I am glad someone is finally happy about something.

Mr. BECKER. I really want this record to be very clear that following the grant of the pardon in September 1964 to President Nixon by President Ford, there was a similar public reaction that we are witnessing today and a similar congressional reaction, in that the House of Representatives Judiciary Committee met to investigate the pardon of Richard Nixon by Gerald Ford.

The distinctions, I think, Senator, end there because back in 1974, as soon as that committee was formed, President Ford voluntarily appeared before that committee, sat in a chair like I am sitting now before Members of the House of Representatives and said, my name is Gerald Ford, I am President of the United States, and I am here to answer any questions you have and I will stay as long as you have questions.

Senator SPECTER. And he got some pretty pointed questions, too, didn't he?

Mr. BECKER. He did, sir, he did, and he answered every single one of them.

Senator SPECTER. Do you think President Ford's decision to testify voluntarily has any relevance to today, to what former President Clinton ought to do?

Mr. BECKER. I don't want to give advice to President Clinton on what to do or what not to do, but I think President Clinton ought to take note of President Ford's openness and candor and frankness with the Congress and the American people back in 1974.

Senator SPECTER. Senator Sessions, you have the final word.

Senator SESSIONS. I suppose President Ford felt that he owed it to the American people that they understand fully why he did what he did so that they could properly evaluate his performance.

Mr. BECKER. Senator Sessions, that is indeed accurate, but even before President Ford appeared before the committee, he had lengthy press conferences on the question of a grant of a pardon. So the answer is absolutely yes.

Senator SESSIONS. Well, that was an act of a courage, rightly or wrongly. He did what he thought was right and was willing to answer to the American people and explain it. I haven't seen that kind of reaction in former President Clinton. Thank you, Mr. Chairman, for your leadership. I think it has been important. Giving someone a pass for a criminal charge is not to be treated lightly and we should consider these matters in-depth.

Senator SPECTER. Well, that concludes our hearings. Thank you very much, Professor Schroeder, Professor Gormley, Professor Becker, and Mr. Quinn.

[Whereupon, at 1:28 p.m., the committee was adjourned.]

[Questions and Answers and Submissions for the Record follow:]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE ASSISTANT ATTORNEY GENERAL
Washington, D.C. 20530
April 10, 2001

The Hon. Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This is to provide information responsive to Senator Feinstein's questions at the Committee's hearing on February 14, 2001 regarding clemency granted by President Clinton on January 20, 2001. We request that this information, which pertains to the role of victims in the clemency review process, be included in the hearing record.

The impact on victims of the crime for which the applicant seeks executive clemency has long been a significant factor for the Office of the Pardon Attorney in its investigation of clemency petitions and in its preparation of the Department's advice to the President concerning whether a pardon or commutation should be granted. Since 1997, the portion of the United States Attorneys Manual that deals with the role of the United States Attorney in clemency matters (Section 1–2.111, USAM) has expressly noted the importance of providing information to the Pardon Attorney regarding victim impact in clemency cases. The practice of victim consultation in clemency cases has now been standardized by a regulation (28 CFR § 1.6(b)) which applies to clemency petitions filed on or after September 28, 2000, but this reflects more of a continuation of past practice than the commencement of a new procedure.

In response to Senator Feinstein's request, we examined pardons and commutations granted between December 1, 1999, and December 31, 2000. Of the ten commutations granted in this period, none involved an individual victim who suffered either physical or financial harm. Of the 147 pardons granted during this period, only two involved physical harm to persons or property. The victims were not consulted in these two cases. In both instances, the defendant/pardon applicant had been charged with a regulatory type offense, not an assault or property destruction offense. In one case, restitution had been fully paid many years ago, and the defendant had taken great pains not to hurt any persons and to do only damage to the personal property of an individual with whom he was having a personal feud. The other case involved merely bad judgment that resulted in an accident, and neither drugs nor alcohol were involved.

I hope that this information is helpful. Please do not hesitate to contact me if you would like additional assistance regarding this matter.

Sincerely,

SHERYL L. WALTER
Acting Assistant Attorney General

DUQUESNE UNIVERSITY
Pittsburgh, PA 15282
1March 2, 2001

Hon. Patrick Leahy
Senate Judiciary Committee
Dirksen Building Room 224
Washington, D.C. 20510

Dear Senator Leahy,

Thank you for the thoughtful question posed as a follow-up to the Senate Judiciary Committee hearings held on February 14, 2001, relating to the Presidential pardon power. Your question is: "Short of a constitutional amendment, what steps if any could Congress take to reduce the potential for Presidential abuse of the pardon power?"

This, in my view, hits at the heart of the issue initially posed by Senator Specter in convening the hearings; namely, what can be done to remedy actual or perceived

abuses of the pardon power if we focus not on the specific controversy involving former President Clinton, but instead upon the broader goal of avoiding pardon-related problems in the future? I have taken the liberty of discussing your question with colleagues around the country, most of whom specialize in Constitutional law. The following are my thoughts, with advance apologies for not having more time to flush them out more thoroughly.

Let me begin by saying that, in speaking with Constitutional scholars of all backgrounds—conservative, liberal, Republican and Democrat—I found very few who were enthused about the concept of amending the Constitution to limit the admittedly broad pardon powers that the Framers reposed in the President. My previous testimony before the Judiciary Committee, I believe, fairly summarizes the reasons that Constitutional scholars are wary about any such amendment. Within the existing Constitutional framework, however, Congress (as your question suggests) can take certain steps to reduce the chance of abuse and/or controversy with respect to future Presidential pardons. I will set forth several possibilities that are within the realm of Constitutional possibility.

A. Congressional Report

First, and least controversially, Congress can publish a comprehensive Report at the conclusion of its hearings, setting forth specific recommendations directed to the Justice Department (including the Pardon Attorney's office) and the President, with respect to patching obvious holes in the pardon process. A detailed Congressional Report, to the extent that it identifies specific break-downs in the process with respect the President Clinton's end-of-term pardons (as well as problematic pardons granted by previous Presidents), can play a vital role in shaping internal DOJ reforms. As well, an objective and compelling Report will put future Presidents on notice that Congress and the American public are watching attentively. Although Presidential pardons have historically been subject only to perfunctory scrutiny during prior political eras, modern 21th century research and communication technology permits a much more swift, searching and intelligent inquiry of such Presidential action. The present Congressional hearings, if they culminate in a neutral yet frank assessment of potential weak-spots in the pardon mechanism, will provide a useful starting point for healthy internal DOJ and White House reforms.

B. Reporting Procedures

Second, Congress might consider enacting legislation (or promulgating a non-binding resolution) that established certain non-intrusive reporting requirements, by which the Department of Justice would collect and publish certain information with respect to pardons granted and denied. Procedures could be established both at the intake phase, and at the concluding phase of the process after the President has granted or denied each pardon or commutation.

It should first be made clear that any time Congress seeks to impose restrictions or conditions directly on the President with respect to the exercise of his or her pardon power, this raises serious separation of powers problems. However, minimally intrusive procedures could probably be constructed *vis-a-vis* the Department of Justice—informational in nature—ensuring that Congress and the public are kept apprised of pardons sought and granted.

Atthe intake stage, Congress might provide that any one interested in applying for clemency should file a document with the Department of Justice, accompanied by certain specific information. This basic information might include the name of the individual seeking a pardon or commutation; the crime(s) for which clemency is sought; current location and status of the individual seeking the pardon etc. The legislation or resolution might also provide that DOJ should provide a periodic report to Congress with respect to all pardon applications filed, thus causing the intake information to be transmitted to Congress for informational purposes. A standing Committee could be established in Congress to keep abreast of such data.

It should be stressed that, whatever procedures are set forth by Congress, a President cannot be force to adhere to them. Indeed, the President's pardon power is virtually absolute; he or she can pardon an individual whether or not that person follows the procedures or applies to DOJ at all. However, one would expect that—except in unusual circumstances—a President would be inclined to channel pardon applications through the requested intake procedure. Likewise, one would expect that the Department of Justice would not take offense at this minimally intrusive process, designed to provide Congress with periodic information concerning the flow of pardon applications and dispositions. Indeed, the above-described intake procedures could simply be layered atop the existing, more extensive DOJ regulations that already govern pardon applications. The Congressional intake process—with its con-

comitant reporting feature—would guaranty a regular flow of non-privileged information to the legislative branch. This would put Congress in a better position to carry out its lawmaking powers (as discussed below). It would also place Congress in a better position to offer its own input to the President with respect to requested pardons, and to exert political pressure upon the executive branch if a specific pardon was deemed objectionable. The President, of course, would be free to bypass the Congressionally-created application process, if sensitive national security concerns or other exigencies required that the potential pardon remain confidential. However, the President would remain politically accountable for that decision.

Procedures could also be established to govern the exit phase of the process. Congress might provide that, after clemency requests were acted upon, the Department of Justice would supply Congress with certain non-privileged information concerning those pardons that were actually granted or denied. The information requested at this stage would have to be carefully circumscribed, so that it did not intrude upon the confidential relationship between the Attorney General and the President, or the core functions of the executive branch. Thus, if it wished to accomplish this goal in the least intrusive manner, Congress might set forth a list of certain basic procedures that it deemed desirable for the Department of Justice anal the President to follow with respect to evaluating and acting upon pardon requests. Such procedures might include: following the initial DOJ intake process (described above); conducting an FBI check upon each individual requesting a pardon; consulting with the office of the prosecuting attorney in the jurisdiction(s) in which the individual was investigated and/or convicted; providing a confidential written recommendation to the President with respect to whether clemency is appropriate; etc. After setting forth this checklist of desire procedures, Congress might then provide that the Department of Justice should publish a list of each pardon granted or denied, within a specified time period after Presidential action was taken, indicating whether the procedures had been followed. The Justice Department would simply designate whether the pardon fell within Category A (i.e. those pardons that followed the Congressionally recommended processes) or Category B (those pardons that did not follow such processes). In this fashion, both Congress and the American public could remain informed with respect to the basic procedures (or lack thereof) that were followed in applying for and receiving Presidential pardons.

It should be emphasized that any attempt by Congress to require the Department of Justice or the President divulge their specific reasons for granting or denying a pardon, or their recommendations with respect to the same, would likely constitute an encroachment upon the domain of the executive branch. Any legislation or resolution should limit itself to seeking basic, non-privileged information concerning the pardon process. Any legislation that directly or indirectly forced the President or Justice Department to reveal the motivations or thought-processes underlying specific pardon decisions, would most likely damn itself to unconstitutionality.

C. Registration Requirement

Several other steps could be taken to eliminate potential abuse with respect to the existing pardon process. First, Congress might require that any non-lawyer agent or other person representing an individual seeking a pardon or commutation, who receives remuneration or any thing of value for such services, register with the Department of Justice, much like a lobbyist. Actual remuneration received would, in turn, have to be disclosed to the Internal Revenue Service. The pardon power, because it is absolute, carries with it uniquely grave possibilities for abuse. The most obvious of these is outright bribery. In order to prevent abuses that may remain shielded even from the eyes of the Justice Department and/or the President, Congress could require non-lawyer agents, and other individuals representing clients in pardon cases, to register and make public their representation. This would throw open the process to the light of public scrutiny, rather than fostering the appearance of secretive deal-making. (With respect to lawyers representing clients in pardon requests, this situation poses unique issues due to the attorney-client privilege and the applicable Canons of Ethics. Congress might wish to avoid this treacherous terrain.)

On the flip side, any individual seeking a pardon could be required to disclose actual payments (or promises of payment) made to non-lawyer agents or other persons for services rendered. Likewise, individuals seeking a pardon could be required to disclose any contributions made within a specified period to the President, his or her political party, and/or any other entity that might directly or indirectly benefit the President and/or Attorney General who are acting upon the pardon request.

Finally, Congress might be able to require the President himself to disclose, within a specified time period after granting a pardon, any contributions received by a

person receiving a pardon, or any financial stake in any entity associated with such person. This would be no different than the disclosures routinely required of Supreme Court Justices and federal judges with respect to financial stakes in entities appearing before them. Admittedly, this option raises unique problems because it4 applies directly to the President, who possesses plenary power in issuing pardons. Yet requiring; disclosure of actual or potential conflicts of interest may be within acceptable Constitutional boundaries, consistent with the Framers' general intent. They never meant to countenance abuse of the pardon power. In general, no public official is permitted to act based upon self-interest without disclosing the existence of such an interest. Although it is true that nothing in the Constitution would empower Congress to *prohibit* Presidential pardons, even where based upon a conflict of interest (short of actual bribery, which is a crime), Congress may be permitted to require that the existence of an actual or potential conflict be disclosed, so that the public and Congress can assess it on its merits. This minor intrusion upon the President's sweeping pardon power may flow naturally, just as it flows naturally that the granting of pardons must be made part of the public record (ratbar than being kept secretive).

Congress might derive its power to enact the above sorts of non-intrusive measures from several sources within the Constitution. First, Congress is empowered to enact federal criminal laws. It must continuously assess existing federal criminal statutes, and adapt them to changing times. A simple reporting requirement channeling regular information to Congress concerning Presidential pardons (particularly those clemency requests that are granted) would assist the legislature in evaluating intelligently the efficacy of its criminal statutes. Many pardons, throughout American history, have been granted to soften the impact of criminal laws which Presidents deem unduly harsh. If Congress is to be able to process this information, and amend its laws intelligently to respond to flaws and gaps in the existing federal criminal laws, allowing some modest appraisal of the ebb and flow of Presidential pardon activity would assist that goal. Moreover, it seems relatively non-intrusive.

A second basis for Congress's ability to take non-invasive action in this area might flow from its impeachment power. The Constitution vests sole power to impeach in the House of Representatives. Sole power to try impeachments resides in the Senate. It is clear from the debates concerning the Presidential pardon power, at the time of the Constitution's ratification, that the Framers envisioned impeachment as the only real deterrent to the improper exercise of the pardon power. Pardons may be dispensed at any time throughout a President's tenure. One powerful disincentive for inappropriate or irregular pardons, in the Framers' minds, was that Congress would be in a position to impeach a President in the case of an egregious abuse of that power. Thus, allowing non-privileged information concerning Presidential pardons to be channeled to Congress, would allow the legislative branch to stay alert for potential abuses that might trigger the initiation of an impeachment inquiry, in rare cases.

D. Eliminating Emoluments of Office

There is a final step that Congress might take with respect to deterring inappropriate Presidential pardons. I have personal concerns about the wisdom of this option, yet I set it forth in the interest of open discussion. Congress would have the power to enact legislation, I believe, which provided for the stripping of the President's emoluments of office—pension, etc.—after he or she left office. This could be triggered where the President was convicted of certain specified crimes, one of which might be bribery flowing from the abuse of the pardon power.

I recognize that some scholars—including Professor Benton Becker who also testified at the Senate Judiciary Committee hearings—believe that there is some hypothetical possibility of impeaching a President *after* he or she leaves office. This, in effect, would strip the President of the emoluments of office without the need for additional legislation. However, I find the "impeachment after leaving office" argument to be unconvincing.

First, the text of the Constitution (Article I, Section 3, clause 7) specifically refers to the consequence of impeachment as "removal from office." This language strongly implies that impeachment is an option only while the President occupies office. Second, many scholars today (including myself) concur that a President cannot be subjected to indictment or criminal prosecution while in office. Rather, impeachment is the only remedy for a Chief Executive still serving his or her term. Criminal prosecution must await removal from, or vacating of, the Oval Office. This strongly ironies, conversely, that criminal prosecution is the only recourse against a President *afer* he or she leaves office. Impeachment and criminal prosecution seem to be mutually exclusive.

So the "impeachment after leaving office" approach, I believe, provides no basis for stripping a President of benefits. Yet I do not see any impediment to Congress enacting a statute that provides that a former President (or any other federal official) shall forfeit his or her pension and other emoluments of office after he or she leaves service, if convicted of certain specifically-enumerated crimes. Of course, I assume that Congress would not wish to include speeding tickets or minor misdemeanors on this list. But Congress might choose to include bribery among the specified offenses, whether that crime was committed during the President's term in office (he cannot be tried and convicted until after he leaves office) or after he has returned to civilian life. In either a statute that took away the President's benefits based upon criminal conduct, I believe, would rest safely within the bounds of the Constitution.

I hasten to add, however, that such a law would not be legitimate if applied retroactively. It could not, for instance, be applied to strip President Clinton of the emoluments of his office. Rather, such a statute could only apply to future Presidents to avoid constituting an *ex post facto* law.

Of all of the options set forth in this correspondence, the last proposal troubles me the most. I can foresee the potential for abuse if certain political factions undertook a unified effort to hound a former President after he or she left office, in order to gain a criminal conviction and leave him or here effectively ruined and impecunious. Moreover, would we strip a former President of Secret Service protection, because he or she had committed a crime? This might only invite attempts on the life of the former President and create security nightmares. I see numerous drawbacks lurking beneath the surface of such potential legislation. Nonetheless, I mention this option because it is the only valid approach (in my view) that would allow Congress to strip a former President of the emoluments of office, based upon an abuse of the pardon power.

In the end, most of the proposals that I have set forth in this letter require voluntary compliance by the Department of Justice and/or the President. Given the strong powers of the President in the area of granting pardons, any effort by Congress to gain information or establish procedures—if pushed to the mat—would probably fail if the executive branch chose to defy the legislation or resolution. Yet in this twilight area of criminal justice, were Congress shares some power with the executive branch to act responsibly, the Constitution may leave room for interplay and cooperation between the two branches of government (much like the War Powers Resolution—which is observed more as a voluntary request than as a mandate). In the large run of situations, reasonable Congressional requests in this twilight zone would probably be honored.

I do not take a position, one way or another, with respect to any of the specific proposals that I have outline above. Rather, I am seeking to respond objectively to your question, by setting forth those options that are within the realm of Constitutional possibility, should Congress seek to examine alternatives short of amending the Constitutional possibility, should Congress seek to examine alternatives short of amending the Constitutional pardon power. Although I feel rather strongly that a Constitutional amendment of the Presidential pardon power is inadvisable, I feel less opposed to the notion that Congress might take some reasonable, non-intrusive step to make the pardon process work more smoothly. This would be in the best interests of all three branches of government, it seems. Ultimately, it would help restore public trust in the process.

Those are my views, in response to your excellent question. If I can be of any further assistance to this Committee, please do not hesitate to let me know.

Warm regards,

KEN GORMLEY
Professor of Law

SUBMISSIONS FOR THE RECORD

STATEMENT OF MARGARET COLGATE LOVE, ATTORNEY, WASHINGTON, D.C.

My name is Margaret Love, and I am a lawyer in private practice in Washington. From 1990 to 1997 I served as Pardon Attorney in the Department of Justice, and in that capacity I had primary responsibility for investigating and making recommendations to the President on petitions for pardon and commutation of sentence. For two years prior to that time I served on the personal staff of the Deputy Attorney General, where I oversaw the operation of the Office of the Pardon Attorney. I therefore had firsthand experience with the administration of the pardon

power during the administrations of Presidents Bush and Clinton, and I am also familiar with pardoning practices in previous administrations. Finally, I have studied and written about the origins and rationale of the pardon power, and its evolving function in the federal criminal justice system. I described the recent atrophy of the pardon power in an article published last spring. See "Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to Be Merciful," 27 Fordham Urban L. Rev. 1483 (2000).

I do not intend to speak to the merits of any particular clemency cases decided by President Clinton in his final weeks in office, nor will I speculate about the way in which particular decisions were reached. Rather, I will comment generally on the way President Clinton's pardoning practices differed from the practices of his predecessors, and offer some suggestions about how the administration of the President's pardon power can in the future be reformed so that it can once again play the role envisioned for it by the Framers of the Constitution.

HISTORICAL BACKGROUND

The Attorney General has been responsible for advising the President on all applications for executive clemency since the middle of the 19" century. The Attorney General's central role in administering the constitutional pardon power reflects and reinforces the link that has historically existed between clemency and the day-to-day operation of the federal criminal justice system. Until quite recently, pardon could be counted on to assure a fair result in individual cases, to signal the President's law enforcement priorities, and to underscore the value of rehabilitation as a goal of the justice system.

In 1898 the first clemency rules promulgated by President McKinley directed all applicants for executive clemency to submit their petitions to the Attorney General, and specified how such applications would be processed within the Justice Department. Over the next hundred years these clemency regulations would be reissued on several occasions, but they remained remarkably similar in each new iteration, providing perhaps our most venerable and consistent framework for governmental decisionmaking.

Prior to President Clinton's final grants, the number of situations in which pardon was granted without a prior Attorney General investigation and recommendation pursuant to these regulations could be counted on the fingers of one hand. (Notable exceptions are President Ford's 1975 pardon of Richard Nixon, President Reagan's 1981 pardon of two FBI officials being prosecuted for authorized illegal searches, and President Bush's 1992 pardon of six Iran-Contra defendants.)

This is not to say that the President has always followed the advice of his Attorney General, though the records of the Pardon Attorney and my own experience indicate this was usually the case. But the practice gave the President full access to the facts of a case, to the law enforcement perspective on its merits, and to the counsel of a key member of his Cabinet. And, because the Attorney General never divulged the nature of his recommendation, the President could deflect at least some criticism resulting from a particular grant by referring to his reliance on the Attorney General's advice. Until recently, most pardon warrants signed by the President contained a phrase alluding to the Attorney General's recommendation.

This system worked efficiently and for the most part quietly, resulting in over a hundred grants of pardon and commutation almost every year between 1900 and 1980, most of them to ordinary individuals convicted of garden variety crimes. Pardon warrants were issued four or five times a year, and there was no particular increase in grants at the end of an administration. While there was an occasional controversial grant, the only pardon-related scandals during the 20' century involved the rare situation that was handled outside of the normal process (Nixon and Iran-Contra).

Within the White House, the business of reviewing and deciding clemency cases forwarded from the Justice Department became, along with judicial selection, part of the routine housekeeping business of the White House Counsel's office. Until the Clinton administration, this formal and regular process was scrupulously observed by the White House, even after the instance of pardoning began to decline during the administration of President Reagan.

PARDONING PRACTICES DURING THE CLINTON ADMINISTRATION

Early in President Clinton's first term there were signs that he might depart from the consistent practice of his predecessors of relying on the Attorney General's advice in clemency matters. For example, the White House undertook to respond itself to inquiries about pardon matters, and many of its written responses included a phrase suggesting that the President considered the Justice Department only one

of many potential sources of advice. Also, in contrast to past administrations, the Clinton White House did not act on clemency cases in a regular and timely fashion: no grants at all were issued in four of President Clinton's first five years in office, and only a relative handful of pardons were granted in later years, usually at Christmas. The total number of cases decided did not keep pace with the unprecedented number of new applications each year, so that the case backlog reported by the Pardon Attorney grew steadily larger. When President Clinton departed Washington on January 20, he left behind him well over 3000 pending clemency cases, all of which are now of course the responsibility of the Bush Administration.

The FALN grants in the summer of 1999 demonstrated President Clinton's willingness to have the White House staff play a role in pardon matters entirely independent of the Justice Department. The Department had recommended against clemency for the FALN defendants in December of 1996, while I was still in charge of the pardon program. Later, after my departure, the Department apparently provided the President some less definitive information about the cases. In the end, the President decided to rely upon an investigation undertaken by his White House Counsel in making those controversial grants. This evidently deprived him not only of a full picture of the law enforcement implications of the grants and the likely public reaction to them, it also precluded his being able to allow a political appointee with Cabinet status to take some responsibility for the situation.

Several months before the end of President Clinton's second term, reports began to circulate that there would be a large number of grants at the end of his term. This by itself would be unusual, for pardoning had in the past taken place regularly and consistently throughout the President's term and was not reserved until its end. Even more unusual, some pardon applicants and their lawyers were reportedly given to understand, by Justice Department officials and others, that the White House might be receptive to applications filed there directly, given the short time period remaining before the end of the administration.[1] It was said that President Clinton did not want to leave office having pardoned less generously than any President in history, and only three weeks before leaving office he himself remarked publicly on his frustration with the existing system of Justice Department review.[2]

While one might expect some slippage in the ordinary pardon process at the end of an administration, it was clear to anyone familiar with that process that something unprecedented was about to take place. Even with this advance warning, however, I was surprised at how pardon decisions were reportedly made in the final hours of his tenure, and even more surprised at some of the grants.

CONGRESSIONAL OVERSIGHT OF THE PARDON POWER

I do not believe that a constitutional amendment is necessary to ensure responsible use of the pardon power, or to provide for appropriate congressional oversight of its administration. Nor is it desirable to restrict the President's discretion if pardon is to continue to play the operational role in the justice system that it has throughout our history. Future misuse of the power can best be avoided if the President commits himself to the serious and regular exercise of the power, and to reliance on a system for administering the power that inspires public confidence.

A direct congressional role in granting pardons was rejected by the Framers precisely on grounds that this would not be conducive to accountability, consistency or efficiency. I leave it to others to explain in more detail why the Framers thought that the President alone should have the power and duty to bestow public mercy, and why of all his powers they chose to make this one entirely independent of the other branches. I would simply note that giving Congress a role in approving or disapproving pardons is hardly likely to result in more or better ones, and will do little to remove the power from the influence of politics. Indeed, it is likely to exacerbate the situation.

At the same time, I believe that it is entirely appropriate for Congress to take an interest both in particular pardon grants, and in the President's pardoning practices. This is particularly important at a time when the justice system is in transition, as ours now evidently is with an escalating prison population and serious questions being raised about the fairness of the federal sentencing guidelines system. It

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[1] See, e.g., Kurt Eichenwald and Michael Moss, "Rising Number Sought Pardons in Last 2 Years," New York Times, January 29, 2001, at A1.

[2] See President Clinton's remarks on the occasion of the appointment of Roger Gregory to the Court of Appeals for the Fourth Circuit, December 27, 2000. President Clinton noted that many of those to whom he had granted pardon just before Christmas "were not people with money or power or influence. And I wish I could do some more of them—I'm going to try. I'm trying to get it out of the system that exists, that existed before I got here, and I'm doing the best I can."

is important for Congress to heed the messages pardons send, for a justice system whose fairness depends upon the frequent exercise of the pardon power is probably in need of legislative reform. If few pardons are being issued, this may also suggest the desirability of congressional inquiry, for it may portend (as recently evidenced) postponement of the inevitable.

Moreover, congressional oversight can help the President assess how efficiently his power is being administered, and whether it is serving appropriate policy goals. For if the recent episode has taught us anything, it is that the pardon power is a public trust, in whose fair and regular exercise all citizens have an important stake.

I hope that the instant congressional inquiry will reveal that the Justice Department's role in administering the pardon power has been instrumental in keeping the power from being misused or otherwise brought into disrepute, and that the President would be well-advised to mend it, not end it. Many of the concerns raised in connection with the final Clinton pardons are directly attributable to the President's decision not to seek the advice of his Attorney General in connection with making a decision on a number of those grants. More generally, the irregularity and infrequency with which President Clinton acted on pardon applications throughout his two terms 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 the longstanding regular system of Justice Department review led directly to the reported free-for-all at the end of his term, and at best an appearance of cronyism and impropriety.

President Clinton's pardoning practices not only resulted in embarrassing grants, they also left the process by which the pardon power has historically been administered in disrepute. President Bush has his work cut out for him in deciding what to do now. If he wishes to restore public confidence in the pardoning process, it will not do for him simply to retool the existing bureaucracy. His more fundamental and important task is to consider what role pardon should play in the federal justice system, and then decide how best this can be accomplished. Hopefully, the otherwise unfortunate circumstances of the final Clinton pardons will offer President Bush an early opportunity to do both.

REEXAMINATION OF THE ROLE OF PARDON IN THE JUSTICE SYSTEM

The critical first question is what official role (if any) forgiveness should play in the federal criminal justice system. Historically, the pardon power has been used to override the law to achieve a just result in individual cases, and also to symbolize official forgiveness. A majority of President Clinton's final grants fall into this category under traditional Justice Department criteria. Given President Bush's stated interested in rehabilitation and redemption, pardon should find a welcome place in his panoply of powers.

Pardon has also been used as a policy tool, to suggest the desirability of particular changes in the law. For example, among the last-minute beneficiaries of Clinton's pardons were 20 men and women convicted of violating the federal drug laws, who walked out of prison by executive fiat on the day Clinton left office. Each of the twenty had served at least six years of sentences ranging from 10 to 85 years, and each had been only peripherally involved in the drug conspiracies for which they had been held accountable. Several of those released had been teenage couriers for crack gangs, and several had been victims of domestic abuse. In some of the cases the sentencing judge and prosecutor had recommended in favor of clemency, the only means of mid-term sentence reduction currently available in the federal justice system. These 20 lucky drug offenders were in many respects typical of the hundreds of inmates serving long mandatory sentences for whom executive clemency holds out the only hope of early release. It would be a shame if the message in these 20 grants were lost in the uproar over the more controversial and irregular grants.

As another example of the way pardons deliver a powerful message to the justice system, many of the beneficiaries of the January 20 grants were seeking restoration of basic legal rights of citizenship that they had lost as a consequence of their conviction. Most had long since served their sentences and were genuinely remorseful, and had patiently waited many years for an official indication that they had paid their debt to society. Few had lawyers, and even fewer had influential friends. Many had encountered legal obstacles to their rehabilitation such as denial of employment and benefits and basic civil rights. There is a legitimate question whether presidential action should be necessary to give relief from these civil disabilities, or whether Congress should not review the laws that so impede an offender's reentry into the community.

SHORING UP THE ADMINISTRATION OF THE PARDON POWER

Assuming the desirability of a role for pardon in the justice system, it remains to be decided how the President's pardon power can best be administered to ensure its freedom from suspicion and manipulation. As previously described, the President has historically relied on the advice of his Attorney General in exercising the power, which has for the most part kept it free from political interference and public suspicion, allowing it to play a constructive operational and symbolic role.

Recently, in the absence of guidance from the President, the pardon program has lost its independence and integrity within the Department of Justice. Over the past twenty years it has gradually come to reflect the unforgiving culture of federal prosecutors, and now serves primarily as a conduit for their views. This too seems to have contributed to the January 20 debacle, for it appears that the President may have been dissatisfied with the general approach to clemency cases being taken by his own Justice Department, and in the end simply worked around it using his own White House staff.

In addition, the rising number of federal criminal convictions, the severity of the consequences of conviction, and the absence of alternative relief mechanisms, have combined to create an overwhelming demand for pardon and a crushing workload for the small staff in the Justice Department that is responsible for administering the pardon program. The unprecedented increase in case filings during President Clinton's two terms, coupled with uncertainty about standards for making decisions, has evidently made it impossible for the Department of Justice to maintain even the semblance of fairness and regularity in handling pardon cases. (Whether responsible Justice officials could have played a more helpful role in coordinating and facilitating the pardon process is one of the yet-unsolved mysteries of Clinton's final days.)

The basic structure and staffing of the Department's pardon program has not changed very much in almost a century. If the role of the pardon power is to be reassessed, so too should the system by which it is administered. If I had just one recommendation to make to President Bush, it would be that he direct his Attorney General to resume a personal responsibility for providing advice in pardon matters. As a corollary, I would suggest that the President appoint someone to assist the Attorney General in clemency matters whose courage and compassion are unquestioned, whose independence within the Department is assured, and who can be held politically accountable.

If I could make a second recommendation, I would urge the President not to make it so hard for people to obtain his mercy. Post-sentence pardons should be available to all who are truly remorseful, and who have made a genuine effort to pay their debt to society. As to commutation cases, some fair and systematic way should be found to identify and give relief to individuals serving prison sentences whose length is simply disproportionate to the crime.

LOOKING AHEAD

The message to our new President from the final Clinton pardon grants should be clear: it is time for a thorough-going rethinking of the role of pardon in the federal justice system.

This will provide an occasion to review current laws and policies on the consequences of conviction, to determine what reforms may be necessary to lessen the operational need for pardon, and to spell out how compassionate conservatism will work in this most logical venue. This review should involve members of Congress and the judiciary, for their role in the making and interpretation of the law has important implications for the exercise of the pardon power. It should also involve representatives of the media, who have a central role in controlling pardon's exercise.

The message to Congress should also be clear: Rather than seek to restrict and control the President's pardon power, through a constitutional amendment or otherwise, Congress should encourage its generous exercise as a discretionary complement to the legal system, and work to ensure that the laws do not have to depend for their fair operation upon a device that by rights should serve only as a "fail safe."

I predict that we will look back on Bill Clinton's final pardons as his single most important contribution to the federal criminal justice system. For thirty years politicians and bureaucrats alike have been for more interested in feeding the front end of the justice system through enacting more laws, hiring more prosecutors, and building more prisons, than in helping people avoid becoming enmeshed in the system in the first place, creating opportunities for them to earn their way to freedom, or finding ways to encourage their reintegration in to the community. My hope is that, with Bill Clinton's pardons in mind, President Bush and Congress together will be willing to reorder these priorities.

OFFICE OF THE DISTRICT ATTORNEY
Anniston, Alabama 36201
February 9, 2001

Honorable Jeff Sessions
United States Senate
495 Russell Senate Building
Washington, DC 20510

Dear Senator Sessions

On his last day in office. President Clinton commuted the death sentence of David Ronald Chandler who had been convicted in United States District Court for the Northern District of Alabama in 1991 for murder in the furtherance of a continuing criminal enterprise. The Supreme Court of the United States was soon due to consider this case further when the commutation was granted. I implored the President not to intervene. While Chandler's attorneys and supporters, many in the media, have viciously attacked the integrity of those investigators and prosecutors who diligently pursued Chandler. the truth is that the President commuted a death sentence that was appropriate and fair under the circumstances of the case. My understanding is that the former Attorney General concurred. at least tacitly, in the President's actions. It is disheartening that both of these officials saw fit to turn their backs on their line personnel who had done nothing except vigorously enforce the law as written.

The evidence at trial showed that Chandler was the controlling partner in a large marijuana, rowing, transporting and trafficking operation between 1987 and 1990. He and his partners cultivated and harvested thousands of marijuana plants in eastern Alabama and western Georgia, and bought and sold large quantities of marijuana for distribution. Testimony showed Chandler had attempted to use deadly physical force against a Georgia Bureau of Investigation officer upon a previous arrest, and that Chandler had said that "if he got set up again, he'd have to kill somebody."

Persons with intimate knowledge of Chandler's operation testified that Chandler had solicited them to kill an informant and the local police chief who had been instrumental in bringing Chandler's activities to the knowledge of state and federal law enforcement officials. According to these witnesses, Chandler offered money to secure these deaths, even providing a weapon for such use Martin Shuler, the deceased victim of Chandler's crime, informed local law enforcement in March, 1990 that Chandler was having marijuana distributed from the home of Shulei s ex-wife, Donna Shuler. A search warrant revealed Shuler's allegations true and Ms Shuler was arrested for her possession of one kilogram of marijuana. The evidence at trial indicated Chandler learned of Martin Shuler's informant activities during the legal proceedings concerning Ms Shuler's arrest. Chandler, according to one witness, solicited him to kill Shuler and the local police chief because of their intruding into his marijuana distribution process.

Charles Ray Jarrell, Chandler's brother-in-law who worked with Chandler in the growing and distribution of the marijuana, testified Chandler offered him money on several occasions to "take care" of Martin Shuler. Jarrell further testified that on the day or Shuler's death, Chandler told him Shuler was "going to cause us a lot of trouble" and that Jarrell "better go on and get rid of him." Chandler told him he still had the money available to pay Jarrell if he would do as lie was asked. Jarrell testified that, using a gun given to him by Chandler, he shot Shuler while they visited a local lake, that he and Chandler buried the body in a remote mountain area, and hid Shuler's car. Jarrell later led authorities to the gravesite. An autopsy was performed that revealed Shuler died from a gunshot wound to the back of the head.

Later, in August and September, 1990, Chandler made threats with respect to two other individuals who, according to testimony, he believed were stealing his marijuana from where it was being grown or stored. Neither of those individuals have been seen after early September 1990. Their families have never been allowed to bury their loved ones, yet Chandler has been able to sway the President of the United States that his life should be spared.

Chandler's attorneys have painted their client as a "Robin Hood" type character and his prosecutors has suborners of perjury and liars themselves. They offer Jarrell's recantation of his trial testimony as incontrovertible evidence of Chandler's innocence when, in actuality, it is only one brother-in-law doing his best to have another removed from a death row cell he helped build After 23 years of prosecuting

criminals, I know there are no winners or losers in cases such as these. Only justice should win. In this case, justice is mysteriously absent.

Sincerely,

JOSEPH D. HUBBARD
District Attorney

PHOTOGRAPHIE EN MARS 1982
PHOTOGRAPHED IN MARCH 1982
FOTOGRAFIADO EN MARZO DE 1982
صور في آذار / مارس ١٩٨٢

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5031/87
N° de Contrôle / Control No
N° de Control / رقم المراقبة
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IDENTITE EXACTE - NATIONALITE AMERICAINE EXACTE. Né le 18 décembre 1934 à ANVERS (Belgique), fils de RICH David et de WANG Paula. PROFESSION : homme d'affaires (Société Marc Rich and Co International Ltd). SIGNALEMENT : corpulence moyenne, taille 177 cm, cheveux noirs, clairsemés, yeux marron. Parle anglais. MOTIF DE LA DIFFUSION : Fait l'objet du mandat d'arrêt N° W 321531799 délivré le 19 septembre 1983 par les autorités judiciaires de NEW YORK (Etats-Unis) pour escroquerie commise au moyen du télégraphe, escroquerie commise au moyen de la poste, fraude fiscale, extorsion de fonds et association de malfaiteurs. L'EXTRADITION SERA DEMANDEE EN CAS D'ARRESTATION EN TOUT PAYS AYANT UN TRAITE D'EXTRADITION AVEC LES ETATS-UNIS POUR DES INFRACTIONS DONNANT INDUBITABLEMENT LIEU A EXTRADITION. Dans les pays où l'extradition est demandée, procéder à son arrestation préventive. Dans les autres pays, surveiller seulement ses déplacements et ses activités. Dans tous les cas, aviser immédiatement *

*IDENTITY VERIFIED - NATIONALITY: U.S. CITIZEN (VERIFIED). Born on 18th December 1934 in Antwerp, Belgium; son of RICH David and Paula nee WANG. OCCUPATION: businessman - Marc Rich and Co. International Ltd. DESCRIPTION: Height 177 cm., medium build, thinning black hair, brown eyes. Speaks English. REASON FOR NOTICE: Wanted on arrest warrant No. W 321531799, issued on 19th September 1983 by the judicial authorities in New York, United States, for wire fraud, mail fraud, income tax evasion, racketeering and conspiracy. EXTRADITION WILL BE REQUESTED IF ARRESTED IN ANY COUNTRY WHICH HAS AN EXTRADITION TREATY WITH THE UNITED STATES FOR CRIMES THAT ARE CLEARLY EXTRADITABLE. If found in a country from which extradition will be requested, please detain; if found elsewhere, please keep a watch on his movements and activities. In either case, immediately inform**

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IDENTIDAD COMPROBADA - NACIONALIDAD ESTADOUNIDENSE COMPROBADA.- Nacido el 18 de diciembre de 1934 en AMBERES (Bélgica); hijo de David y de WANG Paula. PROFESION: Hombre de negocios - "Marc Rich and Co. International Ltd". SEÑAS DE IDENTIDAD: complexión mediana, talla 177 cm., cabello negro, calvo, ojos castaños. Habla inglés. MOTIVO DE LA DIFUSION: es objeto de la orden de detención Nº W 321531799 expedida el 19 de septiembre de 1983 por las autoridades judiciales de NUEVA YORK (EEUU) por estafa por telégrafo, estafa por vía postal, evasión de impuestos, extorsión de fondos y asociación de delincuentes. DE SER DETENIDO SE SOLICITARA LA EXTRADICION A TODOS LOS PAISES QUE TENGAN TRATADO DE EXTRADICION CON LOS EEUU PARA DELITOS EN LOS QUE ESTA NO OFREZCA DUDAS. Caso de encontrarle en alguno de los países a los que se solicita la extradición, procédase a su detención preventiva. En los demás países, vigílense solamente sus desplazamientos y actividades. En todos los casos, avísese inmediatamente a: *

النوعية مؤكدة - الجنسية أمريكية مؤكدة - تاريخ الولادة : ١٨/١٢/١٩٣٤ في أنفرس / بلجيكا ؛ اسم الأب RICH David واسم الأم Paula WANG (اسمها العائلي قبل الزواج) ؛ المهنة : رجل أعمال شركة (Marc Rich & Co. International Ltd.). الأوصاف : متوسط السمنة ، الطول ١٧٧ سم ، الشعر أسود خفيف ، لون العينين كستنائي ، يتكلم الانكليزية ؛ سبب إصدار النشرة : صدرت بحقه مذكرة توقيف رقمها W 321531799 وتاريخها ١٩٨٣/٩/١٩ عن السلطات القضائية في نيويورك / الولايات المتحدة الامريكية لأعمال احتيال بواسطة البرق واحتيال بواسطة البريد ، وتهرب من دفع ضريبة الدخل وابتزاز وتآمر ؛ سيكلف تسليمه من أي بلد يقبض عليه فيه من البلدان التي تربطها بالولايات المتحدة الامريكية معاهدة لتسليم المجرمين المجرائم التي لا نزاع في جواز تسليم مرتكبيها ، في البلدان التي سيطلب منها تسليمه ، يرجى توخيه توقيفا احتياطيا ، وعن أنشطته ونشاطاته في البلدان الأخرى ، وفي الحالتين المبادرة الى اعلام ،

* U.S. National Central Bureau, Shoreham Building, Room 800, U.S. Department of Justice, WASHINGTON, D.C. 20530

de la société International Ltd, provenant pour la plupart d'infractions commises par RICH et par cette société au Règlement fédéral américain sur l'énergie. Cette escroquerie a permis à la société International Ltd de soustraire au fisc plus de 48 millions de dollars d'impôts pendant les années fiscales 1980 et 1981. Afin de mener à bien cette escroquerie, plus de 71 millions de dollars US de bénéfices réalisés aux Etats-Unis ont été virés télégraphiquement sur des comptes bancaires ouverts à l'étranger par des filiales de sociétés appartenant entièrement à des sociétés tierces.
Complice : GREEN, prénom Pincus, né le 11 mars 1934, qui fait l'objet de la notice internationale rouge N° 5027/87 A-146/4-1987.

RENSEIGNEMENTS COMPLEMENTAIRES : Passeport américain N° Z 3045402 délivré le 3.3.1982 à LISBONNE (Portugal). Permis de conduire délivré par l'Etat de NEW YORK N° RU9099 91045 347921-34, ayant expiré le 31.12.1982. Assurance médicale Blue Cross/Blue Shield N° 496343075. N° de code de Carte Visa : 10602.

Pourrait se rendre en Afrique du Sud, en Suisse ou en Allemagne.

BACKGROUND TO REQUEST FOR NOTICE: UNITED STATES, New York, 1980 - 1981: RICH, in conspiracy with others devised a scheme to defraud the United States of income taxes by concealing in excess of $100 million in taxable income generated by the firm International Ltd., most of which was generated by the firm's and RICH's violations of Federal Energy Laws and Regulations. The scheme enabled International Ltd., to evade in excess of $48 million in taxes for the years 1980 and 1981. To carry out the scheme, $71 million in domestic profits of International Ltd. were diverted by wire transfers to the foreign bank accounts of wholly-owned subsidiaries of third party companies. Accomplice: GREEN Pincus, born on 11th March 1934, subject of red notice No. 5027/87 A-146/4-1987.

ADDITIONAL INFORMATION: U.S. passport No. Z 3045402, issued on 3.3.1982 in Lisbon, Portugal. New York State driver's licence No. RU9099 91045 347921-34, which expired on 31.12.1982. Medical insurance: Blue Cross/Blue Shield No. 496343075. Visa Card Key No. 10602.

May travel to South Africa, Switzerland, Germany.

EXPOSICION DE LOS HECHOS: NUEVA YORK (EEUU): 1980 y 1981, GREEN urdió, junto con otros cómplices, una estafa destinada a defraudar a la Hacienda de los EEUU más de 100 millones de dólares de ingresos imponibles de la sociedad International Ltd., que en su mayor parte provenían de infracciones perpetradas por el sujeto y por la mencionada sociedad contra la legislación federal estadounidense sobre la energía. Gracias a dicha estafa la empresa International Ltd. pudo defraudar al fisco estadounidense más de 48 millones de dólares de impuestos en 1980 y 1981. A fin de poder realizar la estafa, los interesados giraron telegráficamente más de 71 millones de dólares de beneficios realizados en los EEUU a cuentas bancarias abiertas en el extranjero por filiales de empresas que pertenecían totalmente a terceras empresas.

Cómplice: GREEN Pincus, nacido el 11 de marzo de 193- (objeto de la difusión internacional roja Nº 5027/87 A-146/4-1987).

DATOS COMPLEMENTARIOS: pasaporte estadounidense Nº Z 3045402 expedido el 3.3.1982 en LISBOA (Portugal). Permiso de conducir del Estado de NUEVA YORK Nº RU9099 91045 34-7921-34, caducado el 31.12.1982. Seguro médico: Blue Cross/Blue Shield Nº 496343075. Nº de código secreto de tarjeta Visa: 10602.

Pudiera desplazarse a Africa del Sur, Suiza o Alemania.

الوقائع : نيويورك / الولايات المتحدة ، ١٩٨٠ - ١٩٨١ : وضع RICH خطة بالتآمر مع آخرين ، للاحتيال على ادارة الولايات المتحدة للمرسة الدخل ، اذ أخفى ما يزيد على ١٠٠ مليون دولار من الدخل الخاضع للمرسة الموظفة على شركة "International Ltd." ، وكان هذا المبلغ قد نتج عن خروق منجذة لقانون الطاقة الفدرالي . ومكّنت هذه الخطة شركة International Ltd. من التهرّب من دفع ما يزيد على ٤٨ مليون دولار من المرسة عن السنين ١٩٨٠ و ١٩٨١ . ولتنفيذ هذا المخطط ، حُرّت مبلغ ٧١ مليون دولار من الأرباح المحققة محليًا من عمليات مرفقة الى حسابات مصرفية أجنبية تعود لفروع شركات أخرى .

مرتكب الجرم : GREEN Pincus المولود في ١١ آذار ١٩٣٤ ، والذي صدرت بحقه مذكرة التحري الحمراء 5027/87 A-146/4-1987 .

معلومات اضافية :

جواز السفر الأمريكي Z 3045402 الصادر في لشبونة / البرتغال ، في ٣ آذار ١٩٨٢ ، ورخصة القيادة الصادرة عن ولاية نيويورك المرسمة RU9099 91045 34921-34 التي انتهت مفعولها في ٣١ كانون الأول ١٩٨٢ ، ورقم بطاقة التأمين Blue Cross/Blue Shield 496343075 ورقم الرمز السري لبطاقة الائتمان "Visa Card" 10602 .

قد يسافر الى جنوب افريقيا وسويسرا والمانيا .

5-147/4-1987

STATEMENT OF JOHN R. STANISH, HAMMOND, IN

I am happy to be invited to testify before the Senate Judiciary Committee on the matter of presidential pardons.

PERSONAL BACKGROUND

I have practiced law in Hammond, IN for the past 30 years, except for the period from 1977 through 1980 when I served as Pardon Attorney in the administration of President Jimmy Carter. During that time I served under the two Carter Attorneys General, Griffin Bell and Benjamin Civiletti. Since leaving office, I have from time to time represented clients in presidential clemency matters.

BACKGROUND ON THE PARDON PROCESS

Article two, section two, clause one of the Constitution provides in part:

"The President . . .shall have the power to grant reprieves and pardons for offenses against the United States. . ."

This language has uniformly been interpreted to grant the President unlimited power in matters of clemency. The reason for this interpretation is that the Constitution grants very few specific powers to the President. Although, we would all agree that the presidency has awesome and broad powers, almost all of these powers come from implied and not specific grants of power in the Constitution. The few examples of specific grants of power, including the clemency power, are therefore generally interpreted to be very broad in nature. I emphasize this because the President's clemency powers cannot be restricted by anyone, including Congress.

Historically, Presidents have looked to the Attorney General for advice concerning clemency. This process was formalized when a Pardon Clerk and then a Pardon Attorney was provided for in the Department of Justice. The Pardon Attorney, on the staff of the Attorney General, assists in clemency requests and prepares letters or reports from the Attorney General to the President on proposed clemency.

Under President Carter, the Justice Department was reorganized in to two broad operating areas, criminal and non-criminal, and an Associate Attorney General position was created as the third ranking Justice Department official. Since then, the Associate Attorney General oversees either the criminal or non-criminal functions and the second highest official, the Deputy Attorney General, oversees the other area. The Pardon Attorney reports to the official overseeing the criminal area and recommendations for or against clemency are prepared for the signature of the Deputy Attorney General or the Associate Attorney General, whichever is appropriate. The Attorney General is now out of the direct clemency process, although he or she can and does get involved at his or her discretion. In the Clinton presidency, the Deputy Attorney General supervised the Pardon Attorney.

I believe that either during the Franklin Roosevelt or Harry Truman presidencies, formal rules were adopted jointly by the President and the Attorney General concerning clemency. These rules, subject to changes from time to time, are still in effect under 26 CFR 1.1 et seq. The rules are considered advisory only and create no right in any person to clemency nor are they construed so as to create procedural rights in pardon applicants as to how clemency is considered. The rules do not limit the President in any manner. In other words, any President can ignore these rules and consider clemency outside of the process contemplated by the rules. This is certainly what appears to have happened with the approximately two dozen grants of clemency at the end of President Clinton's tenure.

USUAL CLEMENCY PROCESS

In the normal course of things, anyone seeking clemency follows the procedures established at 26 CFR 1.1 et seq. by applying for clemency with the Pardon Attorney. If the request is for commutation of sentence, the Pardon Attorney would direct the Bureau of Prisons to furnish prison records, which should include the pre-sentence report and other details of the offense. If those records and the clemency petition appear to have any merit, the views of the current U. S. Attorney for the district of conviction, the sentencing judge and the Director of Prisons are solicited. If the matter involved drugs, weapons, taxes, etc., the views of the head of the DEA, ATF, IRS, etc. would also be sought. If after all of these have been reviewed the Pardon Attorney continues to believe that clemency should be granted, he would prepare a Letter of Advice to the President detailing the matter and suggesting the form of commutation to be granted. This letter would be signed by the Deputy Attorney General (or the Associate Attorney General if that official is overseeing criminal matters) and forwarded on to the White House Counsel. If the Pardon Attorney feels that clemency should not be granted, he would prepare a Report of Denial suggesting that clemency should not be given. This report is also prepared for the signature of the Deputy or Associate Attorney General and forwarded on to the White House Counsel. During my tenure as President Carter's Pardon Attorney, I sought to have authority given to the Pardon Attorney to simply issue denial reports without bothering higher officials if the case were clearly unmeritorious. This procedure may or may not still be in effect today.

If the request were one for pardon, the application should also be filed with the Pardon Attorney, who would make a preliminary decision as to whether the case may have merit. If it is determined positively, normal procedures require that he secure a copy of the pre-sentence report from the sentencing district (because this provides excellent background on the case). After that is received and assuming the case may still appear to have merit, the Pardon Attorney would direct the FBI to

conduct a full-field background investigation of the applicant. This investigation is handled by the same unit within the FBI that conducts background investigations for presidential appointees. The investigation is quite thorough. The FBI looks into credit history for the possible financial irresponsibility, contacts all present and most past employers or business associates, checks into all neighborhoods of current and past residence, checks on the possibility of current or past other criminal activity, drug or alcohol abuse, attitudes regarding racial, sexual or religious bias, interviews character references suggested by the pardon applicant, and generally is free to delve into anything the bureau feels is appropriate. The character references, past and present neighbors, and past and present employers and business associates are also asked to furnish names of other persons familiar with the pardon applicant. This whole process is lengthy and designed to elicit adverse information, if any exists. My experience with the FBI background process is that it is very effective in ferreting out negative matters if any are present.

Assuming the FBI background investigation comes back free of any adverse matters, sufficient time has passed since the conviction or release from imprisonment, and the case otherwise looks meritorious, the Pardon Attorney solicits the views of the sentencing judge, the current United States Attorney of the district of conviction, and other relevant officials such as the head of the DEA, ATF, IRS, etc. After all of these officials respond, the Pardon Attorney decides whether the pardon should be granted or denied and prepares a Letter of Advice or Report of Denial as set out above in the paragraph on commutations. The matter goes to the Deputy or Associate Attorney General for signature. The White House Counsel receives the communication on behalf of the President and reviews it. If the Counsel agrees with the Department's recommendation, the Pardon Attorney is so advised. If clemency is to be granted, the individual petitioner is included in the next master grant of clemency. (A master grant is nothing more than a grouping of favorable clemency cases so that the President signs his name once rather than many individual times.) If clemency is to be denied, the Pardon Attorney notifies the petitioner of the adverse action.

It should be noted that in almost all cases the recommendation of the Pardon Attorney is accepted by the Deputy or Associate Attorney General. Also, in almost all cases, the recommendation of the Department of Justice is agreed to by the White House Counsel. In a few cases these higher officials will disagree with the proposed decision. In the Carter administration, if the Justice superior disagreed with the Pardon Attorney, he would advise the Pardon Attorney of his reasons and invite the Pardon Attorney to rewrite the recommendation to the President or argue the matter further until an agreement was reached. From my personal experience, I can say that if the Pardon Attorney believed strongly in a proposed outcome, he could prevail on his superior at the Justice Department. Rarely, would the Pardon Attorney be ordered to change his recommendation. I can think of maybe two instances, each involving genuine differences of opinion, where I was simply told to change the Department's recommendation to the President.

On the occasions when the White House Counsel disagreed with the Letter of Advice or Report of Denial from the Justice Department, I never saw an instance where the Department's recommendation was simply disregarded. Instead, on those few occasions, the White House Counsel set out its views and asked the Department to consider them. Some times the Department changed its recommendation after considering the Counsel's position and on others, the Department stayed with its original recommendation, which became dispositive of the case. I never experienced a situation of where the White House Counsel simply overruled the recommendation of the Department of Justice.

ALTERNATIVE CLEMENCY PROCESS

In coming here today, I was asked to discuss the "alternative clemency process," meaning one where the request bypassed the Justice Department. In my opinion, there is no "alternative clemency process." During the Carter presidency, I can think of one instance of a clemency request going to the White House rather than the Department of Justice. President Carter received a personal letter from the President of the Sudan. In that case, President Carter put a "buck slip" on the letter and forwarded it to the Attorney General for proper handling. The matter was passed along to me, reviewed as if it were a petition for clemency, and denied. The Pardon Attorney prepared a letter for the President's signature to the Sudanese President advising of the disposition of the matter.

On rare occasions, Presidents will grant clemency without a petition to the Pardon Attorney. In recent decades, the only other instances that come to mind are: the Clinton clemencies of on or about January 20, 2001;

the senior Bush pardon of the Iran-Contra officials at the end of his presidency;
the Reagan pardon of senior FBI officials in 1981;
several clemency proclamations by Presidents Carter and Ford for military or draft offenses relating to the Vietnam War;
and the Ford pardon of President Nixon.

Other than the Clinton clemencies, the others could easily be argued to be of great personal interest to the President for very proper political reasons such as bringing closure to the country after the Vietnam War or the Watergate era or believing that it was in the best interest of the nation to not see high government officials prosecuted.

CLINTON CLEMENCIES

The grants of clemency given by President Clinton on or about his last day in office included about two dozen cases, which I understand were never considered by the Justice Department. For the most part, these cases were not of the nature described in the previous paragraph and should not be considered to have been given for highly principled, legitimate political reasons. (Although, I can see how President Clinton could have granted clemency to Susan McDougal on the basis that he had strong feelings that the various investigations against him were politically motivated and caused great and unfair harm to someone who happened to be his associate. Therefore, it could be argued that Ms. McDougal should be forgiven so as to put this whole matter behind her and the country, particularly in light of the fact that the President had concluded his problems with the Independent Counsel.)

While I can see no good reason for bypassing the Justice Department on these cases, the President acted legally and within the power granted him in the Constitution. I cannot see how any of the pardons can be set aside or otherwise challenged.

The granting of this group of pardons is highly unusual and unprecedented in recent times. I know of no group of pardons granted by recent presidents that were similarly granted. I am struck by one question and that is " Why did the White House Counsel's office allow these pardons to proceed?" As I understand the role of the Counsel's office it is, among other things, to protect the President from doing things that are illegal or embarrassing. Here, the Counsel's office had to be aware of the efforts to get these pardons granted. It should have advised the President that established procedures would be violated if the pardons were granted and place him at great risk of embarrassment or mistake. If the Counsel did so advise the President and this advice were ignored, then I believe the Counsel may be without fault. If it did not, then the President suffered from a complete failure in the Counsel's office.

If you were to look at specific cases of the Rich and Braswell pardons, both would have been stopped by the Pardon Attorney if he had been aware of them. In the Rich case, I can assure you that the Pardon Attorney would have summarily rejected the request on the basis that clemency is never considered for a fugitive. The reason should be obvious If you consider clemency for a fugitive you undermine the authority of law enforcement agencies, prosecutors and the courts. If Braswell had been considered by the Pardon Attorney, it would have been referred to the FBI, which would have processed Mr. Braswell through its system. That would have shown the pending criminal investigation and resulted in the case being rejected. I know of no other pardons granted to a fugitive or to someone under an active Federal criminal investigation.

THE FUTURE OF THE PARDON POWER

Unless a Constitutional amendment is adopted, there is little that can be done to prevent the President from exercising clemency in any manner he sees fit. If I may engage in hyperbole, the President could literally sign a document today that would pardon every Federal inmate and I cannot see how such an act could be set aside. The question becomes whether the nation wants to go through the effort of amending the Constitution. If an amendment is the decided route, I would take the opportunity to consider how clemency has been handled in the various states, none of which vests the same broad power in a governor as is vested in the President. The best of the states' procedures could be written into the Constitutional amendment.

I have substantial doubts that Congress can do much by legislation to restrain the President's pardon power.

I want to thank the Committee for inviting me to express my views on these matters.

JOHN R. STANISH
Attorney at Law

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman:

I am pleased that we are holding this hearing today to review pardons issued by President Clinton in the closing hours of his presidency.

The pardon that is the most controversial and hardest to understand is for Marc Rich. In 1983, Mr. Rich was charged in what at the time was the largest tax fraud case in U.S. history. He was indicted for violating the Iranian oil embargo and for evading $48 million in taxes. He then fled the country and renounced his citizenship. He has lived as a fugitive from justice ever since.

In the case of Mr. Rich there was no need to consider leniency. There had not even been a conviction. Instead, he fled the country to avoid having to answer the charges. Giving a pardon to a fugitive sets a terrible example. Fugitives are already a serious problem in our country, and this action will encourage others to evade the law.

This pardon request did not follow the normal procedures through the Justice Department. Moreover, the President did not even consult with the prosecutors who brought the charges and fought diligently to try to bring Mr. Rich and his associate to justice. No good explanation has been given for this pardon, and it is appropriate for the Congress to try to find out why it was done.

As a result of this outrageous action by the President, some have called for constitutional amendments to try to prevent this from happening again. We should always be very reluctant to amend the Constitution, and this area is no exception. I am strongly opposed to President Clinton's actions, but I think we should consider this matter very carefully before we act to limit the power of future Presidents based on President Clinton's conduct. There have been many controversial pardons in American history, but the President's very broad pardon authority under Article II has never changed.

The pardon power is an important component of the powers reserved to the Executive in the Constitution. When used sparingly, it is an appropriate control on the criminal justice system.

Last year, many of us on the Committee proposed statutory reforms for the pardon process, which were directed at the Pardon Attorney's recommendations to the President. This was done in response to an earlier unwise decision by President Clinton to grant clemency to members of a terrorist organization called the F.A.L.N. The final pardons by President Clinton should create new interest in statutory reforms.

The pardon power is a high responsibility that should not be abused. I hope that future Presidents will show greater respect for their constitutional authority.