

WHERE PARDONS ARE CONCERNED, SECOND BEST MAY
NOT BE SO BAD AFTER ALL: A RESPONSE TO CHAD
FLANDERS

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In his article, *Pardons and the Theory of the "Second Best,"* Professor Flanders asserts that pardons are "second best" in two ways.¹ First, they tend to be granted when the criminal justice system has failed in some way.² Second, pardons "en masse" can reflect racial bias, favoritism, and arbitrariness, all of which undermine the integrity of our criminal justice system.³ The heart of his article theorizes how pardons should be granted in order to avoid such undermining outcomes.⁴ Specifically, Flanders contends that pardons cannot be examined exclusively at the individual level; rather, executives should consider the patterns that emerge when looking at pardons as a whole.⁵ Using the examples of Governor Barbour's end of term pardons and the pardons of George W. Bush's second administration, Flanders maintains that "[a]ctors within the criminal justice system need to be mindful not only of how they act in a single case, but of what legal virtues they display over time and across many cases."⁶

Professor Flanders makes an important contribution to the literature on executive clemency by making one point very clear: process matters. Process, of course, matters with respect to all aspects of our criminal justice system, but it matters in a particular way for pardons. An executive's pardon power, unlike most of our criminal justice system, is usually unchecked by pre-determined process. In fact, in many instances, the lack of process is by design. On one hand, unbridled executive clemency enables agility and swift action. On the other hand, such lack of process and regulation can court arbitrariness and blatant unfairness. It is the latter outcome that concerns Professor Flanders, and he offers some initial thoughts on how executives might constrain their pardon power so as to minimize unfair outcomes at the wholesale level.

In asserting that process matters, Professor Flanders introduces, perhaps unwittingly, an important question that relates to the timing of pardons. Many executive actors, like Governor Barbour, whose pardons are core to Flanders's thesis, grant pardons at the end of their term. But

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1. Chad Flanders, *Pardons and the Theory of the "Second-Best,"* 65 FLA. L. REV. 1559, 1586 (2013).

2. *Id.* at 1574.

3. *Id.* at 1585.

4. *See id.* at 1566, 1586, 1591–92 (suggesting ways that pardons should be applied to avoid racial bias, favoritism, and arbitrariness).

5. *Id.* at 1594.

6. *Id.* at 1594–95.

not all executive actors do. In fact, President George W. Bush, whose pardons are also featured in Flanders's article, granted 189 pardons over a six-year period.⁷ Maryland's Governor Robert J. Ehrlich Jr., whose commitment to executive clemency continues today despite his no longer being an elected official, regularly exercised his clemency authority while in office.⁸ In general, regular clemency grants—as opposed to end of term grants en masse—are a good thing. Routine exercise of the pardon power theoretically should normalize the process for the public, which may be otherwise wary of it, and rationalizing its operation should enhance fairness. Yet, if Professor Flanders is correct that “sometimes a pardon is wrong only when compared to other instances of pardons granted or not granted,”⁹ regular exercise of the pardon power is very problematic. How could or would a Governor, for example, anticipate the pardon applications that may be coming in the future and their relative merits? I do not think Professor Flanders is suggesting that end-of-term pardons are a necessary condition to a fair pardon process, but his argument that pardons have to be considered as a whole raises the question of how executive actors can do such a holistic analysis prospectively. This question would be a worthwhile inquiry in future scholarship, but Flanders's primary point that executives should consider pardons in the aggregate is an important one.

Flanders states that his account of the pardon power “tries to be unobjectionable,”¹⁰ and that his Article “does not mean to court controversy,”¹¹ and yet I think there are at least two ways in which it does. First, it is not clear why he chose to apply his thesis to the pardons of Governor Barbour and those from the second Bush administration. Governor Barbour's 2012 end of term pardons certainly generated a great deal of media attention—and even an unsuccessful legal challenge—but, as I have argued elsewhere, Governor Barbour's pardons are really an example of what not to do in granting clemency.¹² They lacked transparency; they afforded little to no notice to victims' family members; and they occurred at the very end of the Governor's term without advance explanation to the public. It may be that Professor Flanders wanted to use Governor Barbour as a case study precisely because his pardons were granted en masse and at the end of his term,

7. Margaret Colgate Love, *Final Report Card on Pardoning by George W. Bush*, PARDON LAW 1 (March 13, 2009), <http://www.pardonlaw.com/materials/FinalReportCard.3.13.09.pdf>.

8. Matthew Mosk, *Ehrlich Prolific in Granting Clemency*, WASH. POST (Aug. 25, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/24/AR2006082401851.html>.

9. Flanders, *supra* note 1 at 1585.

10. *Id.* at 1564–65.

11. *Id.* at 1565.

12. Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1149–50 (2012).

and thus they are more amenable to consideration as a whole. However, the same is not true of those pardons granted during the second Bush administration—or for that matter, the entire administration of George W. Bush. I wish that Flanders had defended these two examples as valid case studies for his thesis. At the very least, his pairing of these two examples resurrects my earlier question: how would an executive who regularly grants clemency examine such grants at the wholesale level? And if there is such a way to do so, does this mean we need a different theory for pardons depending on the timing of the process?

The second way in which Flanders may court controversy is by indirectly suggesting that executives should scale back their use of the pardon power. Now, to be clear, Flanders is not directly advocating this, and in fact, he recognizes that others have called for an expansion in pardons, and he calls himself a defender of pardons.¹³ Yet, there are two problems. Grants of clemency, especially at the state level, are at an historic low.¹⁴ To suggest that executive actors in such a climate need to be cautious and vet not just each clemency application but clemency grants en masse seems to argue with a straw man. Moreover, if executive actors are already worried about the potential fallout associated with any particular pardon, and they are, Flanders offers them additional reasons to not grant clemency—the fear that, taken as a whole, their pardons will appear to reflect discrimination, favoritism or arbitrariness.

Based on his article, I suppose that Flanders would respond that executive actors need not fear such reprisal so long as they employ the anti-discrimination and other norms he proposes. But that only takes the discussion so far; we still need to wrestle with how those norms can operate prospectively for an executive who wants to regularly exercise clemency. And my bigger concern is that executive actors who already have little to gain, and much to lose, from pardons will simply decide it is not worth it.

Flanders's central point is of paramount importance: process matters, both for optics and for fairness. I hope that in future works Flanders develops this thesis in greater detail, with a particular focus on how to operationalize the norms he proposes.

13. Flanders, *supra* note 1 at 1563.

14. Drinan, *supra* note 12 at 1129.