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# Quality of mercy in commutations: The history behind clemency powers

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Any day now, Gov. George Ryan will decide whether to commute more than 140 death sentences to life imprisonment, making an unprecedented statement in the national debate on capital punishment.

These sentences were imposed under a system that is widely acknowledged to be riddled with defects, including incompetent legal counsel, coerced confessions and the absence of DNA testing. Since 1977, more people in Illinois have been released from Death Row for mistaken convictions than have actually been executed (13 freed; 12 executed), prompting a group of state and federal judges to take the unusual step of urging Ryan to commute the death sentences. Yet the possibility that Ryan would consider a comprehensive grant of clemency has sparked great controversy and objections to the proposed commutations are twofold. First, some consider almost any use of the clemency power, except to remedy the most glaring injustices, to be impermissible "second guessing" of the courts. Second, it is argued that even if commutations are warranted in a few cases, Ryan cannot invalidate all pending death sentences issued under the broken system. Neither of these arguments holds up in light of the historic role clemency has filled in American systems of justice.

The view that clemency is a quasi-legitimate power that rarely should be used is one that was not shared by the founders of our country, past governors and former presidents. The purpose of clemency is to provide a meaningful check on courts and legislatures.

The framers of the Constitution were so convinced of the need for unfettered executive clemency authority that they overwhelmingly rejected a proposal requiring the president to share the power with the Senate, and dismissed other limitations as well. Indeed, Alexander Hamilton asserted that "humanity and good policy" dictate that the clemency power "should be as little as possible fettered or embarrassed." If "ready access" to clemency were not available, Hamilton cautioned, justice would "wear a countenance too sanguinary and cruel."

And for most of our history, presidents and state governors have granted pardons and commutations substantially more often than they do currently, especially in capital cases. Thus, Ryan is acting squarely within traditional legal norms when he considers exercising the power in all cases where he entertains serious doubts.

The more difficult issue pertains to the manner in which the power ought to be exercised: May Gov. Ryan legitimately commute the sentences of nearly everyone on Death Row? Many refer to what is being considered as a "blanket clemency," but this is a misnomer. The Illinois Prisoner Review Board has individually reviewed each case, listening to the painful victim testimony and taking into account the unique facts of every request before making a confidential recommendation to Ryan. This sort of individualized review is the standard procedure followed by many states in capital clemency proceedings.

What seems to be fueling the controversy surrounding Ryan's method is the fear that, because of his outspoken criticism of the pervasive problems in Illinois' system of capital punishment, he may improperly grant many or all of the requests for clemency.

Comprehensive remissions of punishment to remedy systemic flaws are, however, sometimes required. It is not unusual for courts to make constitutional rulings that have the effect of invalidating convictions across the board. The U.S. Supreme Court's 1972 decision in *Furman vs. Georgia*, effectively invalidated every death sentence then pending nationwide.

And other executives have found it necessary to use clemency to correct problems common to an entire class. Thomas Jefferson, shortly after becoming president, discharged every person being punished under the Alien and Sedition Act, which he considered an unconstitutional law. In a letter to Abigail Adams, he explained that he did this "in every instance, without asking what the offenders had done, or against whom they had offended, but whether the pains they were suffering were inflicted under the [invalid] law." President Andrew Johnson following the Civil War, and Presidents Gerald Ford and Jimmy Carter after the Vietnam conflict, granted amnesty to broad classes of individuals who had broken wartime laws.

What makes the Illinois situation unique is that previous broad grants of clemency have not involved death sentences based on murder convictions. Yet the irrevocable nature of the punishment involved actually strengthens the case for clemency. Given the array of terrible mistakes that Gov. Ryan has encountered in administering the death penalty, he could reasonably conclude that the system's fundamental inadequacies have infected nearly every case.

Under such circumstances, like Jefferson, he could well decide that his principal consideration must be whether each prisoner was sentenced under the same deficient system. We give broad clemency authority to our executives precisely so that such difficult questions can be asked, and answered.

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