

An Extraordinary Pardon

by Derek P. Langhauser

INTRODUCTION

When Janet T. Mills first began serving as governor of Maine in 2019, her Board on Executive Clemency received an unusual petition for a pardon. The brother of a tribal advocate who died in 2014 requested a posthumous pardon for a conviction for a seemingly insignificant crime that his brother received in 1969. A like petition filed with the preceding governor was denied without a hearing.

To Governor Mills and her Clemency Board, the petition raised several provocative questions. Why seek redemption posthumously after 50 years? What happened in the offender's life during all that time? Why was his modest offense met with such severe consequences back then? Why was a seemingly minor case pursued by the state's highest law enforcement officials?

To answer these questions, the board granted a hearing. Thereafter, the governor asked me, as her chief legal counsel, to look into the matter more closely. What the governor concluded in the end is set forth and explained in this commentary. The fact that the governor has her own extensive prosecutorial experience, including serving as the state's attorney general, made her conclusions all the more interesting.

More broadly, this pardon raised the profile of the little-noticed clemency powers. Even though the clemency power dates back to the original version of the Maine State Constitution and is among the most discretionary powers that a governor has, there has been little

caselaw, scholarship, or commentary on its use.¹ Unlike legislation, which is inherently conceptual, a pardon is highly personal. A pardon is not the making of a law, it is an act that judges the prior application of the law. Because it is highly personal, it is therefore much more connective, especially when granted as a matter of principle to rectify a wrong with an impact still resonating after the passage of 50 years. Pardons such as these have the ability to fuel policy discussion and progress. Indeed, since this pardon was issued the governor and legislature have enacted no fewer than five statutes to address a variety of issues that affect tribal/state relations.

The purpose of this commentary is threefold. First, it describes the theory, origin, purpose, and process of the pardon power generally. Second, it discusses the story behind this particular pardon. Third, it explains how this pardon helped advance subsequent policy actions.

THE PARDON POWER

The Maine Constitution confers upon the governor the authority to "remit after conviction all forfeitures and penalties, and to grant reprieves, commutations and pardons, except in cases of impeachment, upon such conditions, and with such restrictions and limitations as may be deemed proper."²

These four powers—remit, reprieve, commute, and pardon—are collectively known as the clemency powers. Pardons are by far the most commonly used

of these powers. Details about the pardon power and process are generally not well known. While very little Maine caselaw interprets this power, a meaningful number of federal cases interpret the analogous federal power of the president.³ Indeed, in the first case to be decided concerning the federal pardoning power, Chief Justice Marshall, speaking for the Supreme Court of the United States, said, "[T]his power had been exercised from time immemorial [as] 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."⁴

In perhaps its most basic terms, a pardon is a formal expression of forgiveness.⁵ A pardon typically says that the positive things that a person has done since the time of their conviction deserve recognition from the government that convicted them. As a matter of law, a pardon relieves a person of any legal penalties or restrictions that are attached to or flow from the conviction. For example, in many states, certain criminal convictions can restrict a person's ability to vote, hold office, serve on a jury, testify in court, hold certain jobs, or possess a firearm.⁶ Pardons help people clear these and related obstacles to adoption, housing, school admissions, immigration status, volunteering, and occupational licenses.

Pardons apply only to criminal, not civil, offenses. They apply to misdemeanor, felony, adult, and juvenile offenses alike. State pardons only apply to state, not federal, offenses; a state pardon does not immunize (but may help) a person facing a federal proceeding (such as deportation). Pardons can only be given once the acts constituting the crime have been committed. They

cannot be given proactively before the commission of such acts because that would constitute an exemption from or dispensation of the laws in violation of a separate constitutional provision expressly prohibiting such suspension by the executive.⁷

That said, a pardon can be issued any time after the criminal act is committed, but the effect of a pardon depends upon when thereafter it is issued. If a pardon is issued before the person is arrested, the pardon preempts any arrest and charges. If it is after an arrest, it frees the person if they are held. If it is after charges are filed, it effectively dismisses the charges. If it is otherwise given before conviction, it ends the prosecution. If it is after conviction, the pardon eliminates the penalties, such as fines, forfeitures, probation, or incarceration. Finally, pardons can be absolute or contain conditions (precedent or subsequent), or other restrictions and limitations, so the recipient may still be bound to comply with any of the above or other restrictions that the governor preserves.⁸

Judicial interpretation of the legal significance of pardons has shifted over time, shaping the contours of the law in interesting and unexpected ways. For example, a pardon does not expunge a record of a conviction, cancel the underlying finding of guilt, eradicate any moral turpitude involved in such guilt, or create any factual fiction that conviction did not occur. It does not wipe out the lack of honesty or irresponsibility inherent in the factual predicates that supported the conviction. A pardon does not prevent the pardoned offense from being counted as a prior offense in future charges or sentences. After a pardon, the fact of conviction cannot be taken into account in subsequent proceedings, but the fact that the crime was committed may still be considered. A pardon does not imply that a person was

wrongfully convicted by the justice system or otherwise proclaim their innocence. On the contrary, acceptance of a pardon is regarded as a confession of guilt, or at least acceptance of the existence of facts from which a judgment of guilt would follow.⁹

One interesting and recurring question where opinions divide is the effect of a pardon on a person's answer to the question, typically on an employment application, of whether the person has ever been convicted of a crime. As a matter of law, the answer is "no" because the pardon vitiates the conviction. But morally, which is how, for example, a prospective employer may be judging it, the better answer might be "yes," continuing with "I was convicted but pardoned because of how insignificant my crime was and/or how many great things I have done since."

The power to pardon is currently delegated exclusively to the governor. The original 1820 version shared the power "with the advice and consent of the (Governor's) council," but that requirement was eliminated in 1977 when the governor's council was eliminated.¹⁰ Maine is among the minority of states (joined by two other states and the District of Columbia) that align with the United States in having no statutorily required advisory process such that the locus of the power to pardon rests exclusively with the executive. Twenty-two states share power between the governor and a board, nineteen require a consulting relationship, and six states have an independent board.¹¹

Because the power in Maine is now exclusive to the executive, the doctrine of separation of powers prevents the legislature and judiciary from taking any action that effectively usurps the power by limiting, conditioning, or blocking its use. For this same reason, there is very little room for judicial review of the pardon process or its decisions.¹²

Accordingly, a governor's discretion in deciding whether or not to pardon has few recognized limits. One limit is that a conditional pardon cannot impose a condition that is "illegal, immoral or impossible to perform."¹³ As second limit may be that a governor cannot pardon him or herself (for other than impeachment, which is already expressly excluded by the Constitution). Such self-dealing may violate the governor's duty to faithfully execute the laws because the very concept of faithfulness includes a fiduciary duty that by definition excludes tolerance for self-dealing.

Other than that, executive discretion of whether and, if so, how to issue a pardon is very broad. As a practical matter, pardons are relatively infrequent and the standard of persuasion is high. A governor typically must be persuaded to a degree of meaningful certainty that the offense was modest enough to be forgivable and that the individual has the maturity, character, and discipline to behave well indefinitely so that the decision will reflect well on society, the individual, and the governor alike. For these reasons, pardons are typically not given for violent, sexual, abusive, OUI, or other egregious or dangerous offenses, and they are typically not given if a desired purpose is to restore the right to possess a firearm.

Decisions therefore typically focus on the demonstrated character of the person as weighed against the age and severity of their offense. Pardons are most often given as recognition of rehabilitation for good deeds done since conviction. They are also given for mercy, to clear criminal records and restore the pardoned individual's good name, for favor to political or personal associates, or for citizen or governmental healing, as with President Ford's pardon of Richard Nixon. A pardon is ultimately a determination that the public welfare will be better served by

inflicting less than what the conviction originally fixed.¹⁴

It is common for certain types of presidential or gubernatorial pardons to trigger related policy debates and changes in related law. Grants, and perhaps more aptly, denials of pardons often trigger policy discussions about the proper balance of the roles of punishment, deterrence, and rehabilitation in criminal justice system, particularly sentencing. This is to be expected. The concepts of grace, favor, forgiveness, reformation, and mercy as part of the criminal justice ambit have deep historical roots that date back to Mosaic, Greek, and Roman laws. Indeed, it was English law that adopted and refined these ancient concepts and applied them to the American colonies before the Revolutionary War in 1776. In 1791, the Framers of the US Constitution then incorporated for the president a clemency clause based largely on this English model.¹⁵

There was little debate at the federal Constitutional Convention of the pardon power. The Framers primarily discussed three issues: whether to share the executive's power with the legislative branch, and whether to exclude treason and impeachment as pardonable offenses. For the reasons explained by Alexander Hamilton in *Federalist No. 74*, the power was given solely to the executive, treason was included, and impeachment was excluded.¹⁶ While Maine followed these leads as well as other principles of the English tradition, the Framers of the Maine Constitution were not, as Maine's leading state constitutional scholar observed, "mere copyists" (Tinkle 2013), so they chose a clemency clause that was more explicit and detailed than its federal counterparts.¹⁷

The process for requesting and considering pardons in Maine is established by statute, executive order, and agency

procedures.¹⁸ It starts with a person submitting a petition form to the Department of Corrections (Maine GBEC 2019). Approximately four times per year, the Governor's Board on Executive Clemency reviews these petitions along with the department's personal and professional background reports, selects cases for hearings, holds hearings, and makes recommendations to the governor. Granted pardons are memorialized on a warrant that is filed with various governmental and law enforcement agencies around the state. The whole process typically takes about a year, and persons denied a pardon must wait one year before reapplying. Over the last 20 years, annual clemency petition rates have varied from a low of about 60 to a high of over 200, with the boards commonly granting hearings to approximately 10 petitions per meeting. Despite these fluctuations, recent Maine governors have been relatively consistent in how often they grant pardons, as their grant rates do not vary appreciably.¹⁹

PARDON OF DONALD GELLERS

In 2019, a family attorney filed a pardon petition for Donald C. Gellers, also known as Tuvia Ben-Shmul Yosef, for his 1969 conviction for the constructive possession of six marijuana cigarettes (Office of the Governor 2020). The case was extraordinary for several reasons. First, it was a posthumous pardon; Mr. Gellers passed away in 2014 at age 78. It was clear that the governor had the authority to issue a posthumous pardon, but it did not appear that a posthumous pardon had ever been issued in Maine before. Second, it had been over 50 years since Mr. Gellers was convicted, a much longer time than that for which pardons are typically granted. Finally, because so much time had passed, the file consisted of hundreds of pages of court documents, court opinions,

news accounts, letters, and statutes for review.

In 1963 after being honorably discharged from the New York National Guard, Mr. Gellers came to Maine to live and practice law. He settled in Eastport where he opened his law office. He soon came to represent the Native American tribal leaders and tribal members who "could not find counsel elsewhere during a time of great prejudice and discrimination; a time when few if any others were willing to help the tribal members with their legal problems" (Office of Governor 2020). During his eight years in Eastport, Mr. Gellers worked tirelessly for the Native American people, often for little or no pay.

In 1968, Mr. Gellers filed what was the beginning of the momentous land claims suit on behalf of the Passamaquoddy tribe. By 1975, the subject matter of this claim would be decided in a landmark opinion by the federal appeals court in Boston in a related case that led to an \$81.5 million settlement codified by Congress in 1980.²⁰ Before that would come to pass, between 1968 and 1971, Mr. Gellers worked on local tribal matters of all kinds. He represented peaceful protesters, helped rehome native children from non-native homes, and challenged state jurisdiction of minor offenses committed on a reservation. He advocated for state officials to repair leaking sewage systems and implored Princeton barbers to cut tribal members' hair. He lobbied to repeal laws prohibiting tribal members from hunting on their own land and advocated for the state to create a new Indian Affairs Department. He also helped prompt an investigation of an "unscrupulous state official who had effective powers of life and death over tribal members through his control of access to food, medical care, and fuel" (Office of Governor 2020).²¹

In 1969, Mr. Gellers was convicted and subsequently disbarred from practicing law in Maine for unlawful constructive possession of six marijuana cigarettes that were found in his home. Thereafter, he emigrated to Israel where he was admitted without reservation to practicing law after a personal review of the circumstances surrounding his Maine conviction by the Principal Legal Assistant to the Attorney General of Israel. Mr. Gellers also studied to become a rabbi and later moved back to New York. In 1989, after disclosing all the circumstances of his Maine conviction, the United States Court of Appeals for the First Circuit issued him a certificate of good standing. By then, though, his work had moved from attorney to rabbi, and up until his death in 2014, Mr. Gellers used his faith to continue to help “people without means; people without ready access to help; people seeking the solace of faith from the burdens of their lives” (Office of the Governor 2020).

It was in part for all these “tireless efforts to help others the whole of his life—both for his eight years in Maine and in the 35 years since his conviction” that Governor Mills pardoned Mr. Gellers (Office of the Governor 2020). But there was also another reason, and the governor spoke directly to it:

Many have long claimed that a motivation to arrest Mr. Gellers was not just to enforce the state’s criminal laws, but also to thwart his outspoken political and legal advocacy. After reviewing the historic record of this case, I find that there is merit to this claim.

Mr. Gellers and his houseguest, Alfred Cox, were arrested immediately after Mr. Gellers filed the original land claims lawsuit on behalf of the Passamaquoddy Tribe. The charge was unlawful constructive possession of six marijuana cigarettes that were found in Mr. Gellers’ home. Mr. Gellers was convicted on only one of his three counts, sentenced to two to four years imprisonment and, because

he now had a felony conviction, he was disbarred from practicing law in Maine.

Even the chief of the State Police in public comments at the time recognized that a felony charge for small personal possession was “so severe” that it was “difficult to get proper adjudication[s].” This is why, even before Mr. Gellers’ trial started, the legislature was working on a bill to downgrade the offense to a misdemeanor. This new law, PL 1969, c. 443, took effect *two years before* [emphasis added] Mr. Gellers’ appeal was decided and *three years before* [emphasis added] his disbarment was ordered. It is not clear why this significant and timely change in the law did not temper the state’s discretion in prosecuting and disbarring Mr. Gellers.

Three additional facts inform our observations in this case. First, Mr. Gellers’ arrest, trial and appellate oral argument were all handled by the State’s top officials; a unique level of attention to a small personal possession case.

Second, although the State consistently defended at both trial and on appeal its decision to charge Mr. Gellers as a felon, it did not in the end insist that he serve his two to four-year felony sentence. Mr. Gellers instead left the country without the State either trying to stop or extradite him back. It would have been only the felony conviction, regardless of time served, that was needed, and was in fact used, to disbar Mr. Gellers and thereby end his advocacy in Maine.

Finally, the penalty for the co-defendant, Mr. Cox, was only to forfeit the \$500 bail that had been posted for him. So, in the end, Mr. Cox simply forfeited that minimal bail while Mr. Gellers was deprived of his entire livelihood. This is true even though Mr. Cox was the one who was in actual possession of the six marijuana cigarettes. But Mr. Cox was also not the legal and social advocate that Mr. Gellers was. (Office of the Governor 2020)

Legal professionals no less prominent than the US Court of Appeals for the First Circuit and the principal legal assistant to a national attorney general

could agree in seeing that Mr. Gellers’ Maine offense was insignificant and not worthy of any profound permanent punishment as felony conviction and ongoing disbarment. Mindful of this and all of the above, the governor came to this principled conclusion:

While this pardon cannot undo the many adverse consequences that this conviction had upon Mr. Gellers’ life, it can bestow formal forgiveness for his violation of law and remove the stigma of that conviction. Let it also remind us of these guiding truths: That, when enforcing the law, proportionality is an essential component of fundamental fairness, and that fundamental fairness is the essential moral and legal promise that a thoughtful government makes to its people. And that history will long judge whether and how that promise is kept. (Office of the Governor 2020)

POLICY DEVELOPMENTS SINCE THE GELLERS’ PARDON

Presidential and gubernatorial pardons often trigger related policy debates and changes in policy or law. For example, federal pardons for offenses by draftees have often been regarded as policy statements on the war the draftees were conscripted to support.²² State pardons for immigrants have recently been viewed as statements on federal enforcement actions at the border. Federal pardons of offenses related to highly charged political times have been viewed as salves for old wounds. State pardons of juvenile offenses may be regarded as bellwethers for larger policy issues regarding juvenile justice. And pardons for many types of offenses, or more aptly denial of such pardons, often trigger policy debates about the proper balance of the roles of punishment, deterrence, and rehabilitation in criminal sentencing.

The Gellers’ pardon was issued in January 2020, just before the pandemic started. In Governor Mills’ first

legislative session in 2019, two tribal-related measures became law with her active support: an act banning Native American mascots in schools and an act governing water quality standards to protect sustenance fishing (“Sustenance Fishing Act”). The Sustenance Fishing Act was highly substantive, an accomplishment of national significance that was the product of months of intense negotiations. Then, in her second session in 2020 when the Gellers’ pardon was being issued, the governor drew on her deep criminal law expertise to draft legislation extending jurisdiction of tribal courts to prosecutions of domestic violence offenders.²³

The pandemic in 2020 brought a prompt end to the regular process of lawmaking. It was in this space that perhaps the Gellers’ pardon helped continue the momentum of the previous sessions. Unlike legislation, which is inherently conceptual, a pardon is highly personal and therefore much more connective, especially when granted as a matter of principle to rectify a wrong with an impact still resonating after the passage of 50 years.

The first regular session of 130th Maine State Legislature in January 2022 marked the legislature’s return to more regular lawmaking activities. In that session, the governor, legislature, and tribes worked to enact an important law that addressed drinking water issues on the Pleasant Point Reservation. They also collaborated to enact a law that gave certain tax benefits to tribal communities and an opportunity to benefit from online sports wagering and other benefits.²⁴ This legislation was lengthy and the result of extended negotiation. It provided the four tribes exclusive rights to operate online sports wagering in Maine and established a nationally unique tribal-state collaboration process that requires state agencies to collaborate with the tribes on issues in which

the tribes have a unique and substantial interest. Maine is now the only state in the country that has codified such a process beyond mere policy.

In the following session in 2023, the governor, legislature, and tribes again worked together. Although agreement was not reached on one bill,²⁵ three other measures did become law. The first improved the functioning of the Maine Indian Tribal-State Commission. A second extended to the Mi’kmaq Nation the same rights and benefits enjoyed by other Wabanaki Nations in Maine. This too was substantial legislation that also applied to the Houlton Band of Maliseet Indians. Those tribes had limited jurisdictional authority previously, and this bill put them on equal footing with the Penobscot Nation and Passamaquoddy Tribe. Finally, a third enactor, the Maine Indian Child Welfare Act, preserved the rights of Indian families during custody and child welfare proceedings involving Indian children.²⁶

In the 2024 legislative session, collaborative work on other issues continued. The First Annual State and Tribal Summit on November 17, 2023, hosted by the governor at the Blaine House helped continue the dialogue between the state and the tribes. And at the time this article was printed, the Tribes, Governor, and Judiciary Committee agreed to recommend to the House and Senate a measure that would authorize tribal courts to prosecute certain crimes committed on tribal land involving, in most cases, at least one member of a federally recognized tribe.²⁷ Work on matters with complex legal consequences is always iterative, but the clear progress since 2019 continues.

CONCLUSION

Unlike legislation, which is inherently conceptual, a pardon is highly personal and therefore often

much more connective, especially when granted as a matter of principle to rectify a wrong with an impact still resonating after the passage of 50 years. The governor’s posthumous pardon in 2020 for the 1969 offense involving tribal advocate Donald Gellers was an important statement of principles that were both personal to Mr. Gellers and broader to tribal/state relations. Since then, the governor, the tribes, and the legislature have in relatively short order enacted at least five noteworthy tribal/state measures. Perhaps it was that pardon, a historical act of principle and grace, that contributed to the worthy progress in tribal/state relations.

ACKNOWLEDGMENTS

The author acknowledges the excellent research by Nancy Rabasca of Cleaves Law Library and thoughtful reviews by attorney Holly Peterson in contributing to this article. +

NOTES

- 1 There is still reason to agree with the conclusion of a 1939 report by the US Attorney General that there has “never been an adequate treatment of the subject of pardon. [It] has been a neglected orphan, allowed to grow without benefit of careful grooming which has been accorded other branches of law” (Ruckman 1995: 2).
- 2 Me. Const. art. V, pt. 1, §11.
- 3 To *remit* means to cancel or refrain from exacting or inflicting a debt or other punishment. These requests are rare. To *reprieve* means to cancel or postpone a punishment. This power was designed primarily for application to death penalty sentences, which Maine authorized when the Constitution was adopted in 1820. This provision was effectively mooted when the death penalty was finally abolished (after a preceding repeal and restoration) in 1887. Only the remaining two are active today. A *commutation* is a reduction of a judicial sentence to one less severe. These requests are relatively few, and a grant is very rare. *Pardons* represent the vast majority of petitions.

U.S. Const. art. II, § 2 provides that the president “shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”

- 4 *U.S. v. Wilson*, 32 U.S. 150, 160 (1833).
- 5 The related concept of amnesty is essentially identical to pardon in ultimate effect. The principal distinction is that amnesty typically is extended to classes of persons instead of single individuals (*Brown v. Walker*, 161 U.S. 591, 601–02 [1896]; *Knote v. United States*, 95 U.S. 149, 152–53 [1877]).
- 6 The only of these restrictions that Maine has is firearm dispossession (15 MRS § 393).
- 7 Sources for this paragraph are (in order of appearance) found in *Angle v. Chicago, St. P., M. & O. Ry. Co.*, 151 U.S. 1, 19 (1894) (“An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong, or relieve the wrongdoer from civil liability to the individual he has wronged.”); *In re Bocchiario*, 49 F. Supp. 37, 38 (W.D.N.Y. 1943); *Ex parte Garland*, 71 U.S. 333, 380 (1866); and Me. Const. art. I, § 13.
- 8 The Maine Constitution expressly limits remissions to “after conviction,” but that limitation does not appear to apply to pardons (art. V, pt. 1, § 11). The express authority to issue conditional pardons was added by constitutional Amendment XV in 1876 (*Accord U.S. v. Wilson*, 32 U.S. 150, 161 [1833]; *Kavalin v. White*, 44 F.2d 49, 51 [10th Cir. 1930]). Note that a person who objects to a condition can reject the pardon (*Hoffa v. Saxbe*, 378 F. Supp. 1221, 1241–42 [D.D.C. 1974]).
- 9 Sources for this paragraph are (in order of appearance) found in *Pardoning Power*, 11 Op. Atty. Gen. 228 (1865); *Hirschberg v. Commodity Futures Trading*, 414 F.3d 679, 682 (7th Cir. 2006) (denying a commodity futures trading license for that reason); *Carlesi v. New York*, 233 U.S. 51, 59 (1914) (pardoned offense could still be considered as an aggravating circumstance under a state habitual-offender law); *Grossgold v. Supreme Court of Illinois*, 557 F.2d 122 (7th Cir. 1977) (denying a law license for that reason). See also *United States v. Flynn*, 507 F. Supp. 3d 116, 136 (D.D.C. 2020).
- 10 Me. Const. amend. CXXIX. A related provision requiring the governor to provide the legislature with certain information about acts of clemency was eliminated by Amendment XC in 1964.
- 11 See Restoration of Rights Project, “50-State Comparison: Pardon Policy & Practice.” <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-characteristics-of-pardon-authorities-2/>.
- 12 The Maine Constitution expressly provides that the legislature can only regulate the manner of applying for a pardon (Me. Const. art. V, pt. 1, § 11). To that end, the legislature has enacted 15 MRS §§ 2161–67. Otherwise, because the power flows from the Constitution, it can only be altered by constitutional amendment (*Schick v. Reed*, 419 U.S. 256, 266 [1974]). For case examples of usurpations regarding the related commutation power, see *Bossie v. State*, 488 A.2d 477 (Me. 1985); *Baston v. Robbins*, 153 Me. 128 (1957) (intrusion by the legislature); *State v. Hunter*, 447 Me. 797 (1982) (intrusion by the legislature and the courts); *State v. Sturgis*, 110 Me. 96 (1912) (intrusion by the courts); *Austin v. State*, 663 A.2d 62 (Me. 1995) (intrusion by the parole board); *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950) (judicial review).
- 13 See Tinkle (2013) and *Accord, Conditional Pardons*, 1 Op. Atty. Gen. 482 (1821).
- 14 For example, Governor LePage reportedly granted late pardons—without public hearings—to his late mentor’s grandson and a former friendly lawmaker (Villeneuve 2019a).

In declining to overturn President Ford’s pardon of former President Nixon, a federal judge made this observation:

In view of fact that public clamor over former President’s alleged misdeeds in office had not immediately subsided on his resignation and that at the same time the country was in grips of apparently uncontrollable inflationary spiral and an energy crisis of unprecedented proportions, it was not unreasonable for the successor to the office to conclude that the public interest required that positive steps be taken to end the division caused by the scandal and to shift the focus of attention to the more pressing social and economic problems [by] taking steps to restore the tranquility of the commonwealth by a well-timed offer of pardon (*Murphy v. Ford*, 390 F. Supp. 1372, 1374 [W.D. Mich. 1975]).

Biddle v. Perovich, 274 U.S. 480, 486 (1927).
- 15 For an excellent if not seminal historical account of the development of clemency powers, see US DOJ (1939). See also, U.S. Const. art. II, § 2. For federal clemency procedural rules, see 28 C.F.R. pt. 1, §§ 1.1–1.11.
- 16 *Federalist No. 74*. As regards which branch should have the power, those against giving the legislature a role in the pardon process argued that a body “governed too much by the passions of the moment” was “utterly unfit for the purpose” and that such individualized determinations would be inconsistent with the legislative role (Farrand 1911: 626). Executive-held power was desirable because such a power “should be as little as possible fettered or embarrassed” to ensure “easy access to exceptions in favour of unfortunate guilt,” that a single person would be “a more eligible dispenser of the mercy of the government than a body of men” who “might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency” (Farrand 1911: 626).
- 17 *State v. Hunter*, 447 Me. 797, 802–03 (1982) (English tradition). Tinkle (2013: 9) also noted Thomas Jefferson’s praise of the Maine Constitution for its tight language and “wisdom in every point.”
- 18 See 15 MRS §§ 2161–67, Me. Exec. Order No. 6 FY 19/20 (Mar. 6, 2019); <https://www.maine.gov/corrections/pardonboard>.
- 19 Maine governors have a long tradition of using advisory panels to review and make recommendations on petitions for pardon or clemency. The current board consists of five persons appointed by the governor who are “Maine citizens who have knowledge of the criminal justice system and the interests served by conferring clemency in appropriate cases” (Me. Exec. Order No. 6 FY 19/20). The petitions selected for hearing, the hearing, and the warrant for any pardons granted by a governor are public records and meetings. The other petitions, board deliberations and recommendations, the governor’s deliberations, and all other related records are confidential by law (Me. Exec. Order No. 6 FY 19/20; 1 MRS § 402(2)(F) and (3)(J) and § 403(6)). This approach is designed to respect the legitimate privacy interests of the petitioners. For example, during their respective eight years, Republican Governor LePage issued at least 240 pardons to 112 people. Democratic Governor Baldacci issued approximately 218 pardons to 141 people. Independent Governor King issued 154 pardons to 100 people. See Villeneuve (2019b).
- 20 Litigated in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) and codified by Congress in 25 U.S.C. §§ 1721–25.
- 21 Of these experiences Mr. Gellers wrote to friends:

I was dealing with a people [who] had known so many defeats that hope, itself, was a victory.... Before I came, Indians died of malnutrition, and burned up in their shacks. Getting arrested for anything meant getting convicted. Living meant begging the Welfare

Indian Agent for groceries and clothes, having children taken from parents and placed for adoption in non-Indian homes, not voting for the Legislature or serving on juries, and [only] occasionally talking about treaty rights no one ever respected. I [helped stop] all that, and [I did] it peacefully (Office of Governor 2020).

- 22 For example, general war-related amnesties were issued by Presidents Washington, Adams, Madison, Lincoln, Andrew Johnson, and Theodore Roosevelt.
- 23 PL 2019 Ch. 123 (mascots); PL 2019, Ch. 463 (fishing); PL 2020, Ch. 621 (tribal court jurisdiction).
- 24 PL 2022, Ch. 650 (drinking water); PL 2022, Ch. 681 (sports betting).
- 25 LD 2004 (proposing a variety of complex measures); objections stated in Governor Mills's veto letter and in her radio address: https://www.maine.gov/governor/mills/news/radio_address/why-i-vetoed-ld-2004-2023-07-07; the legislature sustained the objections.
- 26 PL 2023, Ch. 370 (Maine Indian Tribal-State Commission); PL 2023, Ch. 369 (Mi'kmaq Nation); PL 2023, Ch. 359 (child custody).
- 27 Committee Amendment (Majority Ought to Pass as Amended Report in 2024) to LD 2007 (carried over from 2023).

REFERENCES

- Farrand, Max, ed. 1911. *The Records of the Federal Convention of 1787*. New Haven, CT: Yale University Press.
- Maine GBEC (Governor's Board on Executive Clemency). 2019. "General Information Regarding Executive Clemency." Augusta: Maine Department of Corrections. <https://www.maine.gov/corrections/pardonboard>.
- Office of Governor Janet T. Mills. 2020. "Governor Mills Issues Posthumous Pardon for Former Passamaquoddy Advocate Donald Gellers." News release, January 7, 2020. <https://www.maine.gov/governor/mills/news/governor-mills-issues-posthumous-pardon-former-passamaquoddy-advocate-donald-gellers-2020-01>.
- Ruckman, P.S. 1995. *Federal Executive Clemency in United States, 1789–1995: A Preliminary Report*. <https://ssrn.com/abstract=2214593>.
- Tinkle, Marshal J. 2013. *The Maine State Constitution*, 2nd edition. New York: Oxford University Press.
- US DOJ (Department of Justice). 1939. *Attorney General's Survey of Release Procedures, Vol. 3: Pardon*. Washington, DC: Government Printing Office.
- Villeneuve, Marina. 2019a. "LePage Granted Late Pardons without Traditional Public Hearing." *Portland Press Herald*, April 14, 2019.

Villeneuve, Marina. 2019b. "LePage Pardoned His Late Mentor's Grandson, 111 Others for Range of Crimes." *Portland Press Herald*, March 27, 2019.

Derek Langhauser is a Maine attorney who has been chief legal counsel to Maine Governors Mills and McKernan, special counsel to a US Senator, and law clerk to two state Supreme Court Justices. He teaches constitutional law, is a member of the Council of the American Law Institute, a Fellow of American Bar Foundation, and a Fellow of the National Association of College and University Attorneys.