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Pardons In Virginia

PARDONS IN VIRGINIA*

An element of administrative discretion is operative at five levels of the criminal process. Initially, the policeman must decide whether or not to arrest the suspect; the commonwealth's attorney must determine whether to prosecute the suspect; the trial judge decides whether to modify or to suspend the jury's determination of punishment; the appellate court must decide whether to grant a writ of error. Finally, at the terminal release stage, the parole board decides whether to parole the prisoner and the governor decides whether to grant a pardon. While granting of a parole is controlled in part by statute,[1] the power to pardon is a wholly discretionary function which vests in the governor.

A parole is the conditional release of a prisoner by the Virginia Probation and Parole Board after the serving of a statutorily prescribed portion of his sentence. A prisoner may not be considered for parole until he has served one-fourth or twelve years of his sentence, whichever is shorter, except for prisoners serving life sentences, who become eligible for parole after fifteen years.[2] Prisoners serving life sentences by reason of commutation of death sentences are not eligible for parole.[3] Thus the Probation and Parole Board may exercise its discretionary authority only after a prescribed period of time.

The Supreme Court of Appeals of Virginia has defined pardon as a remission of guilt.[4] It has subsequently noted that "[a] pardon is granted on the theory that the convict has seen the error of his ways, that society will gain nothing by his further confinement, and that he will conduct himself in the future as an upright, law-abiding

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[1]VA. CODE ANN. §§ 53-230 to -264 (Repl. Vol. 1967). For distinctions between parole and pardon, see S. RUBIN, H. WEIHOFEN, G. EDWARDS & S. ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 546-47 (1963) [hereinafter cited as RUBIN]. For an exhaustive study of pardons in the United States, see 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES (1939).

[2]VA. CODE ANN. § 53-251 (Repl. Vol. 1967).

[3][1961-1962] VA. OP. ATT'Y GEN., at 80.

[4]Edwards v. Commonwealth, 78 Va. 39, 41 (1883).

citizen."[5] Therefore a pardon serves to release the petitioner "from the punishment or penalty which the State might have exacted of him...."[6]

The power to grant a pardon is vested exclusively in the governor by the Constitution of Virginia[7] and may be exercised by him for any offense at any time after conviction,[8] except when the prosecution has been carried on in the House of Delegates. The vesting of the broad pardon prerogative in Virginia's chief executive may be contrasted with the constitutional requirements of at least twenty states which either vest the pardon power in a board of pardons or require that the governor have the recommendation of an administrative or judicial body before granting a pardon.[9] In Virginia the General Assembly has the power to establish the Board of Pardons and Reprieves[10] but otherwise the governor's power to pardon may be altered

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[5]Wilborn v. Saunders, 170 Va. 153, 162, 195 S.E. 723, 727 (1938).

[6]Prichard v. Battle, 178 Va. 455, 465, 17 S.E.2d 393, 397 (1941).

[7]He shall have power to remit fines and penalties under such rules and regulations as may be prescribed by law; and, except when the prosecution has been carried on by the House of Delegates, to grant reprieves and pardons after conviction; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution, and to commute capital punishment.

He shall communicate to the General Assembly, at each session, particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting or commuting the same.

The General Assembly may, however, provide for a board, not exceeding three in number, to be appointed by the Governor, and to serve during his pleasure. Such board may be vested with any one or more or all of the following powers, which when so conferred shall be exclusive: (a) to commute capital punishment; (b) to grant reprieves or pardons in misdemeanor cases; or (c) to grant reprieves or pardons in felony cases.

VA. CONST. § 73.

[8]Blair v. Commonwealth 66 Va. (25 Gratt.) 850 (1874) (governor may grant pardon after conviction but before sentence has been passed); VA. CODE ANN. § 19.1-297 (Repl. Vol. 1960).

[9]CAL. CONST. art. 5, § 8; DEL. CONST. art. 7, §§ 1-3; FLA. CONST. art. 4, § 11; GA. CONST. § 2-3011; IDAHO CONST. art. 4, § 7; IOWA CONST. art. 4, § 16; ME. CONST. art. V, pt. 1, § 11; MASS. CONST. § 64; MINN. CONST. art. 5, § 4; MONT. CONST. art. VII, § 9; NEB. CONST. art. 4, § 13; NEV. CONST. art. 5, § 14; N.H. CONST. art. 52; N.D. CONST. § 76; OKLA. CONST. art. 6, § 10; PA. CONST. art. 4, § 9; R.I. CONST. amend. II; S.C. CONST. art. 4, § 11; TEX. CONST. art. 4, § 11; UTAH CONST. art. VII, § 11.

[10]A previous experience with the Board of Pardons and Reprieves was apparently unsatisfactory. It was terminated in 1948 after three years of existence. VA. CODE ANN. § 53-228 (Repl. Vol. 1967). The proposed revision of the Constitution recommends only one change with regard to the governor's clemency power—the provision authorizing the Board of Pardons and Reprieves is to be deleted. REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 175-76 (1969).

only by an amendment to the constitution. Other state constitutions subject executive clemency to regulation by the legislature.[11] Virginia only goes so far as to make it the statutory duty of the Probation and Parole Board to investigate and report on petitions for executive clemency *when requested to do so by the governor.*[12]

The governor's pardoning power operates in conjunction with the other forms of executive clemency authorized by the Virginia Constitution:[13] remission of fines and penalities,[14] the granting of reprieves, commutation of capital punishment and removal of political disabilities consequent upon conviction of a felony. While the constitution does not limit commutation of capital punishment to a life term, in practice, commutees have been granted only life sentences from which there is no possibility of parole.[15] Political disabilities including withdrawal of the right to vote,[16] to hold public office[17] and to act as a juror,[18] are not removed by the satisfactory completion of the entire sentence.[19] Removal of political disabilities is generally granted as a matter of course after several years of good conduct in the community upon the recommendation of three reputable citizens, preferably state or local officials.[20]

TYPES OF PARDONS AND THEIR LEGAL EFFECTS

Since there is no statutory definition of a pardon and the few cases, only three of which were decided in this century, speak in general terms, there is apparently some confusion in Virginia as to the

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[11]*E.g.*, ORE. CONST. art. V, § 14.

[12]VA. CODE ANN. § 53-229 (Supp. 1968).

[13]VA. CONST. § 73.

[14]This power is subject to statutory regulations. VA. CODE ANN. §§ 19.1-351 to -357 (Repl. Vol. 1960).

[15][1961-1962] VA. OP. ATT'Y GEN., at 80. On occasion the pardon power has been used for commutation of a sentence for a term of years. A prisoner was convicted and sentenced to 5 years each on 27 counts of grand larceny in June, 1947 with the sentences to run consecutively. In 1958 he was granted an absolute pardon for indictments 7-27, which reduced his term to 30 years. Therefore, the pardon made him eligible for parole but did not release him. Absolute pardon to D. A. Powell in LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, VA. S. DOC. No. 2, at 5 (1960).

[16]VA. CONST. § 23.

[17]VA. CONST. § 32.

[18]VA. CODE ANN. § 8-175(2) (Repl. Vol. 1957).

[19]*Cf.* VA. CONST. §§ 23, 32; VA. CODE ANN. § 8-175(2) (Repl. Vol. 1957).

[20]Interview with Miss Martha Bell Conway, Secretary of the Commonwealth, in Richmond, Virginia, Feb. 20, 1969 (hereinafter cited as Conway Interview). Interview with Mr. Carter O. Lowance, Commissioner of Administration, in Richmond, Virginia, Feb. 21, 1969 (hereinafter cited as Lowance Interview).

types of pardons and their legal effects. This confusion may be evidenced by the fact that although pardons in Virginia are understood by the Secretary of the Commonwealth to fall within three general categories—absolute, simple without conditions and conditional—Governor Lindsay Almond's 1962 Report included four types by subdividing "simple without conditions" into simple pardons and pardons without conditions.[21] Traditionally the Virginia cases have been consistent in their terminology and understanding of conditional pardons. However, when referring to pardons which are not conditional these cases have used the terms "full" and "full and complete"[22] rather than making the differentiation currently followed by Virginia governors.

While an absolute pardon supposedly wipes the record clean,[23] there is an inconsistency of application in the Virginia authority as to whether this pardon reaches the fact of conviction. For purposes of considering a prior conviction for increased punishment in recidivist proceedings,[24] Virginia follows the minority view that a pardon blots out the fact of conviction.[25] However, *Prichard v. Battle*[26] followed the majority view[27] that the fact of conviction was not reached by this pardon for the purpose of restoring an operator's license revoked upon conviction of leaving the scene of an accident. The distinction was made that while increased punishment is directly consequent upon the prior conviction, the revocation of one's privilege to drive is not such punishment relieved by a pardon.[28] Similarly, the costs of prosecution assessed against the convicted defendant must still be paid by the pardonee.[29]

The granting of an absolute pardon is generally predicated upon grounds of innocence.[30] However, other reasons, such as to avoid deportation of an alien as a result of conviction[31] and to afford the

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[21]LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, VA. S. DOC. NO. 2 (1962).

[22]*See* Prichard v. Battle, 178 Va. 455, 17 S.E.2d 393 (1941); Edwards v. Commonwealth 78 Va. 39 (1883).

[23]Conway Interview.

[24]VA. CODE ANN. § 53-296 (Repl. Vol. 1967).

[25]Edwards v. Commonwealth, 78 Va. 39 (1883). *See* RUBIN 607-08. *See also Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867) which stated, "in the eye of the law the offender is as innocent as if he had never committed the offence...."

[26]178 Va. 455, 17 S.E.2d 393 (1941).

[27]RUBIN 608-09.

[28]Prichard v. Battle, 178 Va. 455, 465, 17 S.E.2d 393, 397 (1941).

[29]Anglea v. Commonwealth, 51 Va. (10 Gratt.) 696 (1853).

[30]Conway Interview.

[31]Absolute pardon to Emilio Batres in LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, VA. S. DOC. NO. 2, at 5 (1960).

petitioner an opportunity to enter the Armed Forces,[32] have been advanced. It seems inconsistent that a pardon granted upon grounds of innocence would not remove political disabilities, but it is the understanding of the current Secretary of the Commonwealth that such removal is a separate action. It seems reasonable that Virginia should follow the majority rule that an absolute pardon does restore one's civil rights,[33] especially if there is to be any difference in the legal effect between an absolute and a simple pardon.[34]

A simple pardon without conditions, as understood by the Secretary of the Commonwealth, serves to relieve the recipient of the punishment imposed by the sentencing court but does not serve to remove political disabilities. It is more than likely that this pardon, like an absolute pardon, removes the fact of conviction for recidivist purposes. In light of the failure of the Virginia cases to distinguish between these pardons which are not conditional, no distinction between an absolute and a simple pardon with respect to recidivist proceedings would probably be attempted.

The failure to differentiate between these two types of pardons seems to be the result of two factors. Historically there were various types of pardons which could be granted,[35] but today most states grant only absolute and conditional pardons.[36] Secondly, Virginia is one of the few states to specifically mention in its constitution the power of the governor to restore one's civil rights.[37] Apparently, most states implicitly include the power to restore civil rights as part of the pardon power.[38] Understandably then the granting of pardons and the removal of political disabilities have been thought of as separate and distinct actions by the governors.

While a 1785 Virginia case[39] cast doubt on the authority of the governor to grant conditional pardons, it is well established that he may grant a pardon upon any condition attached except those which are illegal, immoral, or impossible of performance.[40] The governor

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[32]*E.g.*, Absolute pardon to William A. Bowie in LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, VA. S. DOC. NO. 2, at 5 (1966).

[33]Knote v. United States, 95 U.S. 149, 153 (1877); *see* RUBIN 582.

[34]The Secretary of the Commonwealth states that she knows of no difference in legal effect between an absolute and a simple pardon. Conway Interview.

[35]*Ex parte* Wells, 59 U.S. (18 How.) 307, 310 (1855).

[36]*See* RUBIN 582.

[37]ALA. CONST. amend. XXXVIII; GA. CONST. § 2-3011.

[38]*E.g.*, CAL. CONST. art. 5, § 8.

[39]Commonwealth v. Fowler, 8 Va. (4 Call) 35 (1785) (a condition that the pardonee work for three years on public buildings was held void and the pardon absolute).

[40]Wilborn v. Saunders, 170 Va. 153, 159, 195 S.E. 723, 725 (1938).

may wish to grant a conditional pardon because he believes the prisoner is ready to go back into society but also wishes to maintain some control over him to discourage reversion to undesirable activities. This desire for retention of control is apparent from the fact that more than 76 per cent of all pardons granted are conditional.[41] Common conditions imposed are: supervision under the Probation and Parole Board for a stated period of time,[42] exclusion from the county of conviction[43] or even the state,[44] and refraining from committing the same offense, not violating any penal laws, or desisting from certain selected activities, such as the drinking of alcohol.[45] Whether satisfaction of all conditions of a conditional pardon would negate a conviction for recidivist purposes is unsettled in Virginia. However, there is non-Virginia authority that upon fulfillment of the imposed conditions, a conditional pardon has the same effect as a full and absolute pardon.[46]

Under common law a pardon which was not conditional could not be revoked after delivery, but it might be possible to void the pardon by a proceeding in equity if it had been procured by fraud.[47] With respect to conditional pardons, Virginia follows the common law that such a pardon may be revoked after a breach of condition which voids the pardon.[48] However, to actually revoke the pardon, affirmative action must be taken by the governor or a court to determine whether a breach of a condition has occurred. The revocation may be for a breach of a specified condition or for the breach of the general condition against the violation of state penal laws.

The governor may reserve by stipulation in the decree of pardon the right to declare, after a hearing, a breach of the pardon conditions. The governor's hearing may be informal and need only allow the pardonee an opportunity to be heard.[49] In the absence of such a reservation by the governor, the Supreme Court of Appeals of Virginia has

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[41]*See* Appendix I.

[42]Such periods of supervision generally last from 2-5 years. Conway Interview.

[43]*E.g.*, Conditional pardon to Clarence Williams in LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, VA. S. DOC. NO. 2 at 6 (1968).

[44]*E.g.*, Conditional pardon to Curtis Adams in LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, VA. S. DOC. NO. 2, at 6 (1966).

[45]Conway Interview.

[46]*Ex parte* Alvarez, 50 Fla. 24, 39 So. 481, 484 (1905).

[47]*E.g.*, Rathbun v. Baumel, 196 Iowa 1233, 191 N.W. 297 (1922). The problem apparently has not arisen in Virginia.

[48]Wilborn v. Saunders, 170 Va. 153, 159-60, 195 S.E. 723, 725-26 (1938).

[49]Fleenor v. Hammond, 116 F.2d 982, 986 (6th Cir. 1941).

held that the common law practice for revocation of a conditional pardon governs.[50]

Under the common law, the trial court, after hearing of a possible breach of condition, issues an order reciting the original judgment, the pardon with conditions and the alleged violation, with a command to the sheriff to arrest the convict and bring him before the court to show cause why the original sentence, or the portion not served at the time of release, should not be executed.[51] The breach of any condition voids the pardon and the finding of a breach authorizes commitment to prison.[52] If the pardonee is returned to prison as a result of a conviction for a crime constituting a breach of the pardon conditions, the Probation and Parole Board automaticaly submits a report to the governor on the circumstances of the case.[53] Conviction of a crime not constituting a violation of the pardon conditions is not a breach and would not be grounds for revocation. The pardon is necessarily voided by the breach of conditions, however, it lies within the governor's discretion as to whether the pardon should be revoked.

PROCEDURE

Virginia does not have statutory procedures for informing prisoners of the availability of pardons. Therefore information concerning application for pardons is disseminated on an informal basis and is probably common knowledge within penal institutions.

Unlike many jurisdictions Virginia does not have a requirement of notice on an application for pardon. Other states often do require either the applicant[54] or the governor's representative[55] to file notice of the application or hearing upon an application with the trial judge and prosecuting attorney[56] or in a newspaper of the county in which the applicant was convicted.[57]

While the governor may grant a pardon on his own initiative, the current Virginia policy is to require a written application by either

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[50]Hudson v. Youell, 178 Va. 525, 537-38, 17 S.E.2d 403, 408 (1941), *modified*, 179 Va. 442, 19 S.E.2d 705, *cert. denied*, 317 U.S. 630 (1942).

[51]Wilborn v. Saunders, 170 Va. 153, 160, 195 S.E. 723, 725-26 (1938).

[52]*Id.* Apparently a breach of condition is not an offense against the Commonwealth. *But see In re* Conditional Discharge of Convicts, 73 Vt. 414, 51 A. 10 (1901).

[53] Interview with Mr. Pleasant C. Shields, Member, Virginia Board of Probation and Parole, in Richmond, Virginia, Feb. 21, 1969.

[54]*E.g.*, ORE. REV. STAT. § 153.040 (Repl. Part 1965).

[55]*E.g.*, MD. CONST. art. II, § 20.

[56]WYO. STAT. ANN. § 7-383 (1957).

[57]WIS. STAT. ANN. § 57-09 (Supp. 1968).

the prisoner, his counsel, a member of his family, or by any interested person. No more than a simple letter is required, but the application must state facts and circumstances indicating reasons for the governor to consider a pardon. The superintendent of a penal institution[58] would not initiate a pardon application, but he might suggest the possibility of pardon to a prisoner who had spent many years in prison and was either not eligible for parole or had given up attempts to obtain one.[59] In certain unusual circumstances the Probation and Parole Board will initiate a pardon recommendation for a prisoner. This may be done if the prisoner either is not eligible for parole or some factor, such as adverse public opinion, militates against favorable parole consideration.[60]

As a matter of administrative procedure, applications for pardons are referred to the Secretary of the Commonwealth for processing. While the governor could assign this task to another office or administrative assistant, in practice it has remained with the Secretary for a considerable period of time. To avoid the consideration of frivolous and repetitious appeals for pardons, the governor instructs the Secretary to process pardon applications to determine whether certain minimal qualifications have been met. These qualifications may be altered or disregarded by succeeding governors.

If the application is initially accepted for pardon consideration, the governor generally requests the Probation and Parole Board to conduct an investigation of all aspects of the prisoner's personal history, criminal record, prison adjustment and the environment to which he would return upon release from prison.[61] In view of the relatively large number of pardon petitions reaching the governor's office[62] and the Board's accessibility to the petitioner's records, it would seem that the Board is in a better position than other state agencies to handle these investigations.

In making its investigations the Board has at its disposal various sources of information. Its principal source of information is the prisoner's personal file as maintained by the Department of Corrections. This file contains all information available concerning the prisoner, such as his history and environment, criminal record and

[58]Penal institutions herein as referred to include: prisons, road camps, jails, reformatories, or other places of confinement.

[59]Standard periodic reports on each prisoner's behavior and habits keep the superintendent informed as to the status of the inmates.

[60]Interview with Mr. Charles P. Chew, Chairman, Virginia Board of Probation and Parole, in Richmond, Virginia, Feb. 21, 1969.

[61]*See* Appendix III.

[62]Each year the number of pardon applications exceeds 500. Conway Interview.

personal habits in the penal institution. An essential part of this file is the Field Report, which attempts to describe the prisoner's background and home life. The Field Report includes a pre-sentence report,[63] if available, and further investigations by local parole officers[64] on the individual's reputation and the environment in which he was raised. Other information from the prisoner's personal file, such as letters from the trial judge and prosecuting attorney giving their observations of the prisoner, may be forwarded to the governor.[65] According to Mr. Pleasant C. Shields of the Virginia Board of Probation and Parole, the report to the governor is likely to devote more consideration to the nature of the crime than would normally be used by the Board in consideration of parole. The Board may consult with the superintendent of the penal institution or conduct a personal interview with the prisoner himself. However, due to the wealth of information contained in the file, such consultations and interviews are generally not conducted.

Upon receipt of the Board's report and a determination that the petitioner's application is meritorious, the governor usually requests the opinions of the trial judge and the commonwealth's attorney, who were directly involved with the petitioner's trial. If these individuals are not available, the governor is likely to request the opinion of the current judge and the commonwealth's attorney of the jurisdiction of conviction.[66] He may also request the trial record.

These procedures have evolved as a result of the volume of pardon petitions. The governor is free to either fully utilize or totally disregard any or all of them. If the governor possesses personal knowledge of the case, where for example, the petitioner is from the same area of the state as the governor, there would appear to be a diminution of reliance on a Board investigation in reaching a determination. In addition, members of the General Assembly or the public may be questioned as to the level of local feeling. The opinion of the superintendent of the penal institution may be requested. If the prisoner has

[63]The pre-sentence report covers "the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed." VA. CODE ANN. § 53-278.1 (Repl. Vol. 1967).

[64]The Commonwealth is divided into parole districts. Local Probation and Parole Officers are appointed by the court and serve to aid the courts as well as being part of the state parole system. VA. CODE ANN. §§ 53-242 to -250 (Repl. Vol. 1967). Often petitions signed by local citizens will accompany the pardon application. Local parole officers will investigate the merit of these petitions.

[65]It is routine procedure for the Board to send letters to these individuals requesting comments after the prisoner enters the penal institution.

[66]*See* Appendix IV.

formally attacked alleged procedural errors in a habeas corpus petition, the governor may request the Assistant Attorney General who represented the Commonwealth in the case to give his observations.[67]

Factors Influencing Determination

The Secretary of the Commonwealth, under the governor's supervision and direction, processes every application for certain minimal requirements for initial acceptance for pardon consideration. As a matter of policy, and of practical necessity, something more than a mere desire of release from confinement must be demonstrated. In the absence of an extraordinary showing, those applications submitted by prisoners shortly after entering prison are not to be accepted for consideration. To do otherwise would have the effect of being in direct contravention of the trial court's decision and result in an undermining of its judgment. Those petitioners who have recently received pardon consideration and whose applications do not reveal any new facts will not likely receive further consideration. Primarily as a matter of policy, prisoners serving life sentences, in the absence of something very unusual, will not be considered for pardon unless eight or nine years of imprisonment have been served.[68] Again this would seem to be an attempt to give proper weight to the determination of the trial court.

The Secretary of the Commonwealth noted that if the prisoner is close to his parole eligibility date, the governor is likely to allow the Probation and Parole Board to settle the matter in due course rather than making further inquiry. This seems to result from a desire for harmony between the parole and pardon proceedings, coupled with the governor's awareness that should a prisoner's conditional pardon be revoked, in certain cases the amount of time already served would not be taken into account for subsequent parole eligibility.[69]

Apparently it is the general practice for the governor to request the recommendation of the Board as to the advisability of granting a pardon.[70] It the Board is unable to make a recommendation, it may decline to do so. For any decision which is ultimately reached, Board members state that they closely scrutinize the Field Report to try to determine the personality of the individual, and review the periodic correctional reports to judge his adjustment to the penal system.

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[67]Interview with Mr. Reno S. Harp, III, Assistant Attorney General in Richmond, Virginia, Feb. 21, 1969.

[68]Lowance Interview; Conway Interview.

[69]*See* note 72 *infra*.

[70]Conway Interview.

Rehabilitation, general attitude and the sincere desire of the prisoner to make a contribution to society upon release are key factors comprising a favorable recommendation. Accomplishments inside prison, such as completion of educational opportunities or the rendering of unusual services[71] have been considered to be important factors.

The Board will attempt to determine what is most advantageous from the prisoner's viewpoint. They will examine "the maximum efficiency of confinement," that stage at which the prisoner has received the greatest benefit of imprisonment. Mr. C. C. Peyton as well as Mr. Pleasant C. Shields, of the Virginia Board of Probation and Parole, feel that a psychological deterioration often results from incarceration after this stage is reached in that the prisoner begins to lose all hope of release. The surroundings to which the individual will return and the opportunities for him there have always been considered important factors.

The prisoner's eligibility for parole is a major concern in a Board recommendation. For example, a life term prisoner must serve fifteen consecutive years to be eligible for parole[72] and a break in confinement would negate previous time spent for parole purposes. If such a person were granted a conditional pardon shortly before parole eligibility and then breached a condition of the pardon with resultant revocation, he would have to serve an additional fifteen years to become eligible for parole. Such a situation would certainly be called to the governor's attention.

Board members have also considered public sentiment in arriving at their recommendations. The effect of a pardon on the public's respect for law enforcement is considered in cases of notoriety where the public may have a belief as to the appropriate length of punishment for particular prisoners. Those persons who are in prison as a result of violations of public trust are generally not considered to be good prospects for pardon.

The prime function of the Board in the pardon procedure is the assembling of information which is sufficient to enable the governor to reach a well reasoned decision. Consequently, the number of reports submitted to the governor significantly outnumbers the number of pardons granted.[73] Although the governors seldom cite the recom-

[71]*E.g.*, Conditional pardon to James Eastep in LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, VA. S. DOC. NO. 2, at 4 (1958) (granted pardon apparently for informing authorities of incipient riot or escape).

[72]VA. CODE ANN. § 53-251 (Repl. Vol. 1967). By the terms of this statute prisoners serving under a term of years are eligible for parole after serving one-fourth of the sentence or twelve *consecutive* years, whichever is shorter.

[73]*See* Appendix II.

mendation of the Board as a basis for granting a pardon,[74] the Board's recommendation has had a heavy influence upon the governor's decisions.[75] This result stems from the proximity of the Board to information about the prisoner and a general belief that in the best interests of penal administration the powers of parole and pardon should be exercised harmoniously rather than at cross-purposes. The harmony between the two systems may be exemplified by the fact that a significant number of conditional pardons were granted to prisoners who were not eligible for parole, while those eligible for parole or not in prison received absolute and simple pardons.[76] Consequently those prisoners with long term sentences for murder, rape and robbery have received a majority of all pardons[77] and of conditional pardons as well because they are eligible for parole only after an extended period of time.

In the Governor's Report to the General Assembly, the governor is required to cite the pertinent factors which he considered in granting a pardon.[78] Of course the governor may not refer to all of his reasons for granting a particular pardon. From these reports the most often cited reason was the prisoner's good record while incarcerated. Five other factors were often cited: the circumstances of the case, the length of time served, the prisoner's prior good record, the favorable environment to which the prisoner would be returning and the prisoner's having received the maximum benefits of imprisonment.[79] The governor frequently includes the opinions of individuals or agencies such as the Probation and Parole Board, the commonwealth's attorney, the trial judge, the superintendent of the prison, the Director of Corrections and interested citizens who have made recommendations on the pardon. It is interesting to note that the trial judges and commonwealth's attorneys prefer to voice no objection to the pardon rather than making favorable recommendations.[80]

The most important factor which enters into consideration is the governor's personal sense of justice. Individuals who have been close

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[74]*See* Appendix IV.

[75]Lowance Interview.

[76]*See* Appendix I.

[77]For all pardons granted over the period from 1956-1968, 43.7 per cent were granted to murderers, 14.7 per cent to rapists, and 18.6 per cent to robbers. There is some repetition in the figures because several prisoners were convicted of multiple crimes. *See* Governors' Biennial LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, VA. S. DOC. NO. 2 (1958-1968).

[78]VA. CONST. § 73.

[79]*See* Appendix III.

[80]*See* Appendix IV.

to a number of governors, such as Miss Martha Bell Conway, Secretary of the Commonwealth, and Mr. Carter O. Lowance, Commissioner of Administration, agree that Virginia's governors have viewed the power of pardon as one of their most serious and personal responsibilities. While the governor must often depend upon the information gathered by the Board, the ultimate decision rests solely with him. Each governor is likely to have a different view as to the extent as well as to the conditions under which the pardon power should be exercised. One governor generally refused even to consider overturning a jury's determination of sentence.[81] Former Governor and now Justice Albertis S. Harrison, Jr. related that he regarded with special interest those cases where co-defendants received different sentences because one was tried by a judge while the other chose to be tried by a jury.[82] It was his opinion that such disparity of sentence resulted in a particularly disruptive influence in the penal system.

Prisoners who are serving under commuted death sentences are likely to receive special consideration since pardon is their only hope of release. General public opinion as well as local feeling cannot help but be factors weighing on the governor, an elected political official. Governors have therefore been more inclined to grant pardons in controversial cases at the very end of their term in office.[83] Thus, he may take into account any consideration necessary in order to reach a well reasoned decision. This flexibility results from the fact that the power to pardon is a purely discretionary prerogative of the governor.

CONCLUSION

The slight restrictions placed upon Virginia governors in the excercise of the pardon power seem in keeping with its traditional discretionary nature. As a result of the increasing burdens being placed upon today's state chief executives there appears to be a growing trend in other states that a permanent board should be employed to

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[81]Lowance Interview.

[82]Interview with Mr. Justice Albertis S. Harrison, Jr., Supreme Court of Appeals, in Richmond, Virginia, Feb. 21, 1969.

Governor La Follette of Wisconsin was interested in using his pardon power to equalize disproportionate sentences imposed for the same statutory crime in different parts of the state. Gillin, *Executive Clemency in Wisconsin,* 42 J. CRIM. L.C. & P.S. 755 (1952). Former Governor Albertis S. Harrison, Jr., however, discounted this idea and took the position that each crime was different.

[83]*E.g.,* Conditional pardon to Lee Scott in LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, VA. S. DOC. NO. 2, at 11 (1966).

administer the pardoning power.[84] However, those persons having a part in the operation of Virginia's present system and interviewed for this study did not feel that way. They expressed a general satisfaction with present procedures. Noticeable was the strong feeling that the responsibility of granting pardons should be exercised by an individual rather than a board. Of course the system may now operate satisfactorily, but its continued success depends solely upon the responsiveness of the governor charged with making the pardon determination. As a practical matter, the effect of an unresponsive or unreasonable governor is limited by the fact that Virginia's chief executive changes every four years.

Probably the major concern of the public is that a governor may be too liberal in exercising his pardon prerogative.[85] Virginia governors have apparently followed a reasonable path with an average of nineteen pardons a year granted during the period 1956-1968. This average seems especially reasonable in view of the generous parole eligibility requirements.

Perhaps the greatest weakness in the system is the lack of clarity as to the legal consequences of granting various types of pardons. As long as the governor's discretion and full authority to grant pardons are not disturbed, there would appear to be no constitutional objection for the legislature to bring needed clarification into this area.

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[84]*See* RUBIN 592.

[85]During the years 1915-1917 Texas Governor James E. Ferguson granted 1,774 pardons and 479 conditional pardons. *See* interpretive commentary accompanying TEX. CONST. art. 4, § 11. The Texas Constitution was subsequently amended to require the governor to have the written recommendation of a Board of Pardons and Paroles. TEX. CONST. art. 4, § 11.

APPENDIX I

TYPES OF PARDONS GRANTED AND PAROLE ELIGIBILITY

Year of Report[a]	*Type Granted*	*Total Granted*	*Not Eligible for Parole*	*Eligible for Parole*	*Not in Prison at Time of Granting*[b]
1968	Absolute	1	..	..	1
	Simple	8	1	1	6
	Conditional	9	8	1	..
1966	Absolute	9	..	4	5
	Simple	4	..	2	2
	Conditional	40	27	11	2
1964	Absolute	3	..	..	3
	Simple	4	2	1	1
	Conditional	16	11	5	..
1962	Absolute	8	..	..	8
	Simple and Pardon Without Conditions	8	5	1	2
	Conditional	41	31	10	..
1960	Absolute	6	3	..	3
	Simple	3	2	..	1
	Conditional	36	32	4	..
1958	Absolute	1	..	1	..
	Simple	..	..	..	..
	Conditional	34	33	1	..

[a]Each report is presented by the Governor in January and includes all pardons granted during the previous two years.

[b]The pardonees not in prison include those already released, escapees, or those under suspended sentences.

APPENDIX II

VIRGINIA PROBATION AND PAROLE BOARD REPORTS TO THE GOVERNOR AND PARDONS GRANTED FOR EACH PERIOD

July 1-June 30	*Full report Submitted*	*Pardons Granted*
1966-1967	84	12
1965-1966	101	28
1964-1965	67	15
1963-1964	88	18
1962-1963	96	18
1961-1962	66	30
1960-1961	72	19
1959-1960	not-available	21
1958-1959	21	27

APPENDIX III

REASONS GIVEN BY GOVERNOR FOR GRANTING PARDONS

Year of Report	*Total Granted*	*Good Record While in Prison*[a]	*Circumstances Surrounding the Case*[b]	*Length of Time Served*	*Maximum Benefit of Confinement*	*Influential Home Environment*	*Prior Good Record*
1968	18	10	2	5	5	..	5
1966	53	35	13	13	2	6	7
1964	23	11	6	4	4	..	2
1962	57	33	11	3	4	3	6
1960	45	17	22	5	1	4	7
1958	35	30	..	30	1	9	..

[a]A good record in prison was cited for almost all those applicants in prison at the time of the pardon and not eligible for parole. See Appendix I.

[b]The circumstances include facts of the trial and incidents of the crime itself.

APPENDIX IV

RECOMMENDATIONS CITED FOR CONDITIONAL PARDONS[a]

Year of Report	*Total Conditional Pardons Granted*	*Parole Board*		*Trial Judge*[b]		*Commonwealth Attorney*	
		Favorable	*Not Objecting*	*Favorable*	*Not Objecting*	*Favorable*	*Not Objecting*
1968	9	1	..	..	4	2	3
1966	40	7	..	6	8	5	8
1964	16	3	..	..	8	..	7
1962	41	1	..	2	20	4	21
1960	36	4	..	3	21	3	20
1958	34	6	..	4	21	2	22

[a]There may be duplications on recommendations as different authorities may make recommendations on the same applicant. In isolated instances the Superintendent of the penal institution housing the applicant, the Director of Corrections, and various interested citizens have made favorable recommendations to the governor.

[b]No differentiation is made between the current judge or Commonwealth's attorney and the individuals participating in the case as the pardon citations often do not differentiate between them.