

COMMON SENSE FOR OREGON WHITE PAPER ON CLEMENCY POWERS

Executive Clemency in Oregon

Clemency power granted to the President under the US Constitution is derived from the King's power to grant mercy or forgiveness under early English law.¹ In Oregon, the Governor's executive clemency power is derived from the Oregon Constitution, Article V, Section 14, which grants broad clemency power to the Governor; however, despite its royal roots, Oregon clemency powers are limited by the state constitution, by statutes, and by administrative processes that demand transparency, communication, and accountability.

Limitations to Clemency in Oregon

There are three types of limitations on the Governor's executive power in Oregon. The Governor's clemency actions are limited by: (1) the Oregon Constitution; (2) regulations as prescribed by Oregon law; and (3) the administrative process required of inmate applicants and the Governor.

I. Constitutional Limitations

A. Clemency power is subject to regulations as may be provided by law. The Oregon Constitution, Article V, Section 14, bestows upon the Governor the "power to grant reprieves, commutations, and pardons, after conviction, for all offences except treason, *subject to such regulations as may be provided by law.*"²

A pardon represents full forgiveness by the state of the convicted person's crime. It absolves the convicted person of all legal consequences of the crime committed, and "wipes the

¹ William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475, 476–77 (1977).

² Or. Const. art. V, § 14

slate clean” by nullifying the very existence of the conviction.³ A commutation replaces the original sentence with a lesser one (for example, by reducing the number of years of incarceration the convicted person must serve).⁴ A reprieve provides a temporary hiatus in the execution of a criminal sentence; it does not eliminate or reduce any portion of a sentence or its consequences, it merely places the sentence on hold for the length of the reprieve.⁵

Several provisions in the Oregon Constitution limit the clemency powers of the Governor. Article I, Section 44 of the Oregon Constitution, adopted by the voters in 1999, provides that a term of imprisonment imposed by a judge may not be set aside, or otherwise not carried out, except as authorized by the sentencing court or through appellate relief or the subsequent exercise of the Governor’s clemency powers.⁶ The Governor’s clemency power is subject to regulations as may be provided by law.⁷ Article I, Section 10 of the Oregon Constitution provides that in the administration of justice, “No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.”⁸ This reiterates the necessity for transparency, communication, and accountability.

2. Oregon laws shall be founded on the principles of Protection of Society, Personal Responsibility, Accountability for one’s actions, and Reformation. The Oregon Constitution, Article I, Section 15, provides that, “Laws for the punishment of crime shall be founded on these

³ *Ex parte Wells*, 59 U.S. 307, 310 (1855); ORS 144.653, effective in 2019, states that a pardon seals the record of conviction in Oregon. This statute requires governor to inform courts when a pardon is granted so the court may seal the record; governor must inform courts of pardons granted in previous five years to enable them to seal, and authorizes individuals convicted before that time to apply to the court for sealing of the record.

⁴ *Biddle v. Perovich*, 274 U.S. 480, 486–87 (1927)

⁵ *Haugen*, 306 P.3d at 598.

⁶ Or. Const. art I, §44(1)(a)

⁷ Or. Const. art. V, § 14

⁸ Or. Const. art. I, § 10

principles: protection of society, personal responsibility, accountability for one’s actions and reformation.” The language is clear and there is no exception. Clemency laws, which are part of the body of laws for the punishment of crime, must be founded on these four principles.

3. Oregon law requires victims’ rights and entitlements shall be honored and must be balanced with those of their criminal offenders. The Oregon Constitution grants the victim of a crime rights entitling him or her to information about the future release from physical custody of the perpetrators.⁹ The Oregon Constitution also requires that every victim shall have remedy by due course of law for violation of one of these established rights.¹⁰ Further, a victim may assert a claim for a right established in Section 42 in a pending case, by a mandamus proceeding if no case is pending or as otherwise provided by law.¹¹ The Legislative Assembly may provide by law for further effectuation of the provisions of this subsection, including authorization for expedited and interlocutory consideration of claims for relief and the establishment of reasonable limitations on the time allowed for bringing such claims.¹²

4. Oregon law requires inmates to work as hard as the taxpayers who provide for their upkeep. Thirteen paragraphs in Article 1, section 41, of our Constitution are devoted to the clear statement of purpose, intent and management of Oregon’s work and training programs for inmates in our corrections institutions.¹³ Article 1, section 41, in pertinent part, provides:

(1) Whereas the people of the state of Oregon find and declare that inmates who are confined in corrections institutions should work as hard as the taxpayers who provide for their upkeep; and whereas the people also find and declare that inmates confined within corrections institutions must be fully engaged in productive activity if they are to successfully re-enter society with practical skills and a viable work ethic; now, therefore, the people declare:

⁹ Or. Const. art. I, § 42 (1)(b)

¹⁰ Or. Const. art. I, § 42 (3)(a)

¹¹ Or. Const. art. I, § 42(3)(b)

¹² Or. Const. art. I, § 42(3)(c)

¹³ Or. Const. art. I, § 41(1)-(13)

(2) All inmates . . . *shall* be actively engaged full-time in work or on-the-job training

. . . .

(5) The intent of the people is that taxpayer-supported institutions and programs *shall* be free to benefit from inmate work. Prison work programs *shall* be designed and carried out so as to achieve savings in government operations, so as to achieve a net profit in private sector activities or so as to benefit the community.

. . . .

(11) Inmate work *shall* be used as much as possible to help operate the corrections institutions themselves, to support other government operations and to support community charitable organizations. This work includes, but is not limited to, . . . agricultural and forestry work, especially in parks and public forest lands; and environmental clean-up projects. (emphasis supplied).

There is no reference in the constitution to any corrections institution work programs serving the purpose of a reward system for inmates that provide an opportunity for a reduced sentence in exchange for work performed.

II. Statutory Limitations

In Oregon, the legislative regulation of executive clemency powers demands process and transparency.¹⁴ These regulations provide the statutory requirements for the Governor to report (to the legislature) all pardons, commutations and reprieves granted during a specified time

¹⁴ Or. Rev. Stat. § 144.660 states in full:

The Governor shall report to the Legislative Assembly in the manner provided in ORS 192.245 (Form of report to legislature) each reprieve, commutation or pardon granted since the previous report to the Legislative Assembly required by this section. The report shall include, but not be limited to the reason for granting the reprieve, commutation or pardon, the name of the applicant, the crime of which the applicant was convicted, the sentence and its date, statements by the victim of the crime or any member of the victim's immediate family, as defined in ORS 163.730 (Definitions for ORS 30.866 and 163.730 to 163.750), a statement by the district attorney where the conviction was had, photos of the victim, the autopsy report, if applicable, and the date of the commutation, pardon or reprieve. The Governor shall communicate a like statement of particulars in relation to each case of remission of a penalty or forfeiture, with the amount remitted.

period.¹⁵ ORS 144.660 requires the Governor to report, at a minimum, the reason for granting clemency; the crime for which the applicant was convicted; the sentence and its date; statements by the victim of the crime or any member of the victim's immediate family; a statement by the district attorney where the conviction was had, photos of the victim, and the date of the commutation, pardon, or reprieve. Also, under ORS 144.670, the Governor must release to the public all documents he or she received pertaining to any clemency application within 10 days of granting a commutation, pardon, or reprieve or remitting a fine or forfeiture.¹⁶ ORS 144.670 specifically requires that all documents filed with the clemency application shall be kept as public record, open to public inspection.¹⁷ This provision, coupled with the requirement to report to the legislature, makes clear there are statutory requirements for transparency, communication, and accountability in the clemency process.

III. Administrative Limitations

Historically, inmates in Oregon and across the nation *apply* for executive consideration and clemency action. Convicted criminals seek forgiveness and state their case by demonstrating remorse, rehabilitation, and a desire to responsibly re-enter society. Clemency is rarely granted unless all other avenues of appeal have been exhausted.¹⁸ While no specific form is required for

¹⁵ ORS 144.660 was modified in 1995 to require the Governor to include additional information in the clemency report to the legislature that focuses on information about and from the victim.

¹⁶ Or. Rev. Stat. § 144.670 states in full:

When the Governor grants a reprieve, commutation or pardon or remits a fine or forfeiture, the Governor shall within 10 days thereafter file all the papers presented to the Governor in relation thereto, including any documents provided under ORS 144.650 (Notice of intention to apply for pardon, commutation or remission) (3) or (4), in the office of the Secretary of State, by whom they shall be kept as public records, open to public inspection.

¹⁷ *Id.*

¹⁸ *Information on Applications for Executive Clemency*, State of Oregon Governor's Office, sent by email from Governor's Office staff on August 13, 2021.

a clemency application, a standardized application and affidavit has been created by the Governor's staff and is available upon written request.¹⁹

Convicts must meet rigorous application standards. The applicant convict must file a signed and notarized application and affidavit with the Governor's office, with copies served upon the district attorney of the county where convicted or confined, the State Board of Parole and Post-Prison Supervision, and the Director of the Department of Corrections.²⁰ The Governor may not act on any commutation or pardon request for 30 days after receipt.²¹

Per the Governor's instructions from the Information on Applications for Executive Clemency provided by the State of Oregon Governor's office, an applicant who drafts his or her own application for an executive clemency action in Oregon, is encouraged to include the following information:

- Full name, address, date of birth, and social security number, and citizenship status
- The identifying number and state the institutions and dates of incarceration.
- The crimes for which the applicant was convicted, the date of the crimes committed, the county in which convicted, the court case numbers, and the date of conviction.
- A description of the applicant's family situation and responsibilities, indicating whether the applicant is single, married, or divorced, and whether the applicant has dependent children or other people for whom the applicant is financially responsible.
- A description of the applicant's employment before and after conviction and any plans for future employment.

¹⁹ *Id.*

²⁰ Or. Rev. Stat. § 144.650(1)

²¹ Or. Rev. Stat. § 144.650(5)

- A description of the applicant’s involvement with any church, public service, or community activities along with any special accomplishments
- A description of past criminal record, if any.
- A list of any debts owed with an explanation of how the applicant plans to pay debts back.
- Three or four character references.
- An explanation of the reason(s) for the application and why the applicant believes the Governor should use his or her power to grant a commutation, pardon, or reprieve of sentence.²²

Recent Releases by Governor Brown

Multiple provisions in the Oregon Constitution were ignored when the Governor exercised her clemency powers in 2020 and 2021. Although the Governor has broad clemency power, that power is subject to regulations as provided by law.²³ The Governor must follow the procedural process as laid out in the various sections of ORS 144, yet she did not.²⁴ The Governor did not include in her report to the legislature the criteria set out by statute. In fact, she did not examine these specific criteria in her selection process. Rather, the Governor delegated that power to the Department of Corrections.

Article I, Section 10 of the Oregon Constitution provides that, in the administration of justice, “No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.”²⁵ The manner in which Governor Brown released

²² *Id.*

²³ Or. Const. art. V, § 14

²⁴ Or. Rev. Stat. § 144.650; Or. Rev. Stat. § 144.660; Or. Rev. Stat. § 144.670

²⁵ Or. Const. art. I, § 10

hundreds of convicted felons before the completion of their sentences was not transparent, defied accountability to the people, and undermined the work of our judicial and law enforcement system.

The Governor's clemency actions in 2020-2021 are not "open," as she disregarded the procedural steps required by the constitution and statutes, leaving the legislature and law abiding citizens in the dark regarding which convicts were released and when. The Governor's actions do not support the dictates nor the spirit and intent of the Oregon Constitution. In fact, her actions undermine the administration of justice by placing the interests of duly convicted felons above the safety of society, principles of personal accountability, and responsibility.

The actions of the Governor are not consistent with the law requiring that victims be afforded a meaningful role in the criminal justice system to ensure that "a fair balance is struck between the rights of crime victims and the rights of criminal defendants"²⁶

A misapplication of the Governor's clemency power especially pertains to the 41 felons granted one-year commutations for the stated reason that the Governor recognizes "the extraordinary efforts made by adults in custody who were deployed to fight the historic wildfires that ravaged the state around Labor Day 2020." This is a dangerous precedent. Article 1, section 41, of our Constitution makes abundantly clear the purpose, intent and management of Oregon's work and training programs for inmates in our corrections institutions.²⁷ It does not include reduced-sentence rewards.

To reframe our corrections institutions' work programs into a reward system for inmates that will reduce a duly established criminal sentence, is an abuse of the Governor's clemency power. In the case of the firefighting releases, the felons did not request clemency consideration,

²⁶ Or. Const. art. I, § 42(1)

²⁷ Or. Const. art. I, § 41(1)-(13)

as is customarily required and described above. In addition, the Governor’s sole reason stated in an en mass Clemency Order dated June 23, 2021, was the firefighter work performed.

As to other cases, the Governor ordered the Oregon Department of Corrections (ODOC) to identify individuals meeting certain “Commutation Criteria” that she dictated, and are substantially less rigorous than her own previously required clemency application criteria set out above.²⁸

The en mass release of 567 inmates listed at Exhibit A of the Governor’s letter to the Legislature dated June 25, 2021, does not comply with the law. These are releases that took place after June 12, 2020, when the Governor requested the ODOC perform a case-by-case analysis using certain criteria set by her ‘in light of the state of emergency’ and in contemplation of the ‘public health and safety of all Oregonians.’ Notably, when Governor Brown issued her first executive clemency order in 2016 pardoning three individuals, Governor Brown was quoted as acknowledging that “Although clemency is appropriate only in rare cases, these applicants have distinguished themselves by learning from past mistakes and committing themselves to serving their communities.”²⁹

Governor Brown skipped the entire application process for hundreds of convicted felons she released from 2020 to present. In fact, she ordered ODOC to “make the case” for these convicts while the inmates did nothing to effectuate their early release. How many more early releases will Governor Brown initiate?

²⁸ The Governor ordered ODOC to identify individuals who met the following criteria: (1) For the duration of their deployment during the 2020 wildfire season, met the criteria for fire crew participation, (2) Have a record of good conduct for the last 12 months; (3) Have a suitable housing plan prior to the date set for their early release, if applicable; (4) Have their out-of-custody health care needs assessed and adequately addressed prior to the date set for their release, if applicable; and, (5) Not present an unacceptable safety, security, or compliance risk to the community (collectively the “Commutation Criteria)

²⁹ Conrad Wilson, *Oregon Gov. Brown Makes 1st Executive Pardons of Her Tenure*, OPB (August 16, 2021), <https://www.opb.org/news/article/oregon-gov-kate-brown-pardons-clemency/>

Summary

In the exercise of her clemency powers, Governor Brown failed to follow the procedures that clearly dictate the criteria, process and reporting methods for releasing individuals granted pardons, commutations, remissions, and reprieves.

Clemency actions must remain reserved for the rare exercise of executive power for unique circumstances and must be transparent and open to the legislature and the public.