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## Pardon Me

How Executive Clemency Works in  
Tennessee (and How It Doesn't)

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# Pardon Me

By Benjamin K. Raybin

## How Executive Clemency Works in Tennessee (and How It Doesn't)

*Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.*

— Alexander Hamilton, *The Federalist Papers* No. 74

### “How can I get a pardon?”

is one of the most common questions I am asked as a criminal defense attorney. In many situations the conviction at issue was the person's only legal transgression, resulted in no one getting hurt, and is decades old. Nonetheless, my answer always begins with a piece of advice: circle January 2019 on your calendar, because that is the soonest you can reasonably hope for any chance of relief.

Since taking office in 2011, Gov. Bill Haslam has not granted a single pardon. Thus far he is following the path of his predecessor, Phil Bredesen, who issued all 22 of his pardons in the final days of his

second term. Withholding clemency until the end of a governor's term is the trend nationwide.<sup>1</sup>

Given the reelection success of Tennessee's last five governors, this pattern means a person with a troubled past can expect to time their hopes for redemption in eight year increments.

To provide potential clients with more insight into the pardon process, I attempted to find data on the number of people in Tennessee who apply for clemency and how likely they are to receive it. I learned that these statistics are not tracked by the state and that the facts of each case are not publically available unless relief is granted.

## Legal Background

Although the Tennessee Constitution gives the governor exclusive authority to issue "reprieves and pardons,"<sup>2</sup> the Tennessee Board of Parole is statutorily delegated the duty to review clemency requests and make recommendations at the request of the governor.<sup>3</sup> The Board of Parole is now an independent agency, but until 1979 it was part of the Tennessee Department of Corrections and named the "Tennessee Board of Pardons and Paroles."<sup>4</sup>

Executive clemency comes in three main categories:

- **Pardons** grant "forgiveness" for prior convictions and, in some situations, expungement of the conviction and restoration of rights.
- **Commutations** reduce a sentence currently in effect, such as incarceration to parole or a death sentence to life in prison.
- **Exonerations** are adjudications that a person is actually innocent of a convicted offense. Required before person can be compensated for wrongful imprisonment.

As a matter of practice the Board of Parole receives all clemency applications,<sup>5</sup> which are available on its website.<sup>6</sup> Staff members within the "Executive Clemency Unit" of the board's "Operations Division" perform an initial screening to see if an application meets

*About 150 people apply for some form of executive relief each year. Of those, only 3 to 4 per year are granted hearings. This means that about 98 percent of applications are summarily denied by the board .*

threshold procedural standards, such as completeness.<sup>7</sup> Applicants are advised if required information is lacking.<sup>8</sup>

Pardon applications considered complete are forwarded to the seven board members, who decide by majority vote whether to grant a "formal hearing." There is no limit for how long the board has to consider an application before making a decision. If a hearing is denied, the application is rejected without ever being seen by the governor. As will be discussed later, this practice may violate the board's statutory "duty ... to make nonbinding recommendations concerning all requests for pardons."<sup>9</sup>

If the board conducts a clemency hearing, the recommendation for either approval or denial is sent to the governor.<sup>10</sup> The governor's subsequent decision is provided to the board, which notifies the applicant.<sup>11</sup>

Public information regarding clemency requests is extremely limited. The board publishes an annual report, which provides the number of applications received and the number that met "the initial screening requirements and were reviewed by the board."<sup>12</sup> But how many requests are actually granted or at least referred to the governor?

Since the Board of Parole is the gatekeeper for clemency requests, I contacted the board for more information. I learned that the board does not actually keep track of this information. Since the Public Records Act requires disclosure of only existing documents, the only way I could obtain such data was by paying the board to compile it (which it graciously agreed to do for me). I ended up paying \$280 for an annual breakdown of numbers since 2000.

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## Clemency Data

Here are the highlights of Tennessee’s clemency statistics since 2000.<sup>13</sup> On

Haslam has yet to exercise his authority. Thus, aside from a pair of exonerations issued by Gov. Bredesen mid-term, clemency has only been granted on a single day since 2003. Of the 692 applications submitted since Gov. Haslam

	Bredesen (2003-11)	Haslam (2011-Nov. 2015)
<b>Total Reviewed by Board</b>	<b>1,411</b>	<b>692</b>
Pardons	322	351
Commutations	1,068	327
Exonerations	21	14
<b>Total Files Sent to Governor</b>	<b>29</b>	<b>14</b>
Pardons	19	10
Commutations	7	4
Exonerations	4	0
<b>Total Granted Relief</b>	<b>29</b>	<b>0</b>
Pardons	22	0
Commutations	5	0
Exonerations	2	0

average, about 150 people apply for some form of executive relief each year. Of those, only 3 to 4 per year are granted hearings (about 2 percent). This means that about 98 percent of applications are summarily denied by the board without a hearing or review by the governor. Most of the few which receive hearings are ultimately granted relief by the governor.

Commutations (a reduction in the sentence) are the most requested form of clemency but the least granted. Of the 1,086 requests during Gov. Bredesen’s administration, only seven were given hearings and five granted (a total success rate of less than half a percent). Of 322 pardon requests, 22 (6.8 percent) were granted by the governor. Exoneration requests were rarer: of 21 applications, 4 were given hearings and only 2 were granted.

The data I received also reflects the timing of relief. Gov. Bredesen issued all of his pardons and commutations just four days before he left office,<sup>14</sup> and Gov.

took office, 14 have been referred to the governor by the board and are awaiting decision, including eight from 2012.<sup>15</sup>

## Clemency Criteria

Who is fortunate enough to make it past the Board of Parole? The Governor’s Office denied my Public Records request for documents on pending recommendations, explaining that the board has promulgated rules making its recommendations confidential.<sup>16</sup> Thus, there is essentially no way to evaluate or oversee clemency determinations by the board or the governor, absent looking at granted requests or tracking down applicants.

The Board of Parole does give some guidance on its website. Pardon applicants are told the governor will give them “serious consideration” when

- (1) they have not been convicted or confined within five years since the completion of the sentence from which they seek a pardon,
- (2) they have demonstrated “good citizenship” and

- (3) they can verify a “specific and compelling need for a pardon.”<sup>17</sup>

Commutation applicants must demonstrate “exceptional strides in self-development and self-improvement” and that either

- (1) they are suffering from a serious illness,
- (2) they are the only person able to care for a close family member with such illness or
- (3) they have been rehabilitated and are no longer a threat to society.<sup>18</sup>

To be considered for exoneration, the applicant must show clear and convincing evidence that they did not commit the crime and they have exhausted all possible state judicial remedies.<sup>19</sup> In other words, they must affirmatively prove their innocence; an absence of proof is not enough.

The opaque process and vague guidelines makes it difficult to advise clients about their chances for clemency. For example, how does someone demonstrate “a specific and compelling need” for a pardon?<sup>20</sup>

In general, a pardon “forgives” an offense but does not necessarily “forget” it.<sup>21</sup> Pardons automatically restore civil rights,<sup>22</sup> except for firearm rights,<sup>23</sup> but the same is true for a civil restoration of rights that can be sought in circuit court.<sup>24</sup> Pardons can trigger expungement and reclamation of firearm rights, but only if the offense was “non-violent” and there are no other disqualifying convictions.<sup>25</sup> However, it may be possible to get the same relief even without a pardon.<sup>26</sup> Thus, demonstrating a “specific and compelling need” can become a rather complex legal question that may exclude many deserving candidates.

Many of the potential clients with whom I have spoken care very much about either the intangible redemptive nature of a pardon or the more practical ability to possess a firearm to defend their homes or go hunting with their families. Whether Gov. Haslam (and perhaps more importantly, the Board of Parole) considers such intentions sufficiently

“compelling” cannot be known without more information than is publically available. Moreover, such determinations are susceptible to unpredictable variance between gubernatorial administrations.

## Commentary

No discussion on Tennessee executive clemency is complete without mention of the Ray Blanton pardon scandal.<sup>27</sup> In the late 1970s, members of the Blanton administration were arrested for selling pardons. The ensuing furor led to a bipartisan coup to expedite his ouster from office resulting in a lasting stain on our state.<sup>28</sup>

While the manner of Blanton’s pardoning was certainly remarkable, his exercise of gubernatorial clemency power was not. Gov. Malcolm Patterson (1907-11) issued more than 1,400 pardons in four years, compared to less than half that amount granted by Blanton in (almost) as much time.<sup>29</sup> Gov. Patterson’s most famous pardon was of

Duncan Cooper for the murder of Senator Edward Carmack as the Tennessee Supreme Court was announcing its affirmance of Cooper’s conviction.<sup>30</sup>

At the national level, presidents have also issued hundreds of pardons and commutations each year until relatively recently.<sup>31</sup> Most of President Obama’s clemency grants have come in the form of mass commutations to non-violent drug offenders,<sup>32</sup> along with a handful of pardons every year or so.<sup>33</sup>

Until the early 1920s, clemency served as the primary temper on often harsh sentences and injustices within the judicial system, where many crimes were capital offenses. Indeed, Tennessee’s historical reliance on clemency is demonstrated by the still-existing but disused statutory procedure for judicial recommendations for a pardon or commutation.<sup>34</sup> Once indeterminate sentencing, the parole system, and greater access to appellate review grew

stronger, clemency took a back seat.<sup>35</sup>

Nonetheless, our courts still defer to executive clemency in the pursuit of justice. The United States Supreme Court has held — in denying the availability of federal habeas corpus relief on the ground of actual innocence — that clemency is the “fail safe” in our criminal justice system, which “is the historic remedy for preventing miscarriages of justice.”<sup>36</sup>

Thus, a combination of systematic transformations and political pressures have combined to fundamentally change how many and how frequently clemency grants are issued.

Nonetheless, clemency remains just and appropriate for many Tennesseans with very old convictions who have otherwise contributed to society. The reduced access to clemency for these people is unfortunate.

## Suggestions

There are several options available to

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strike a better balance. First and most basically, the process could be more clear and transparent. On the front end, applicants could be given better direction about the standard they are to meet. For example, what constitutes a “specific and compelling need for a pardon,” and how does someone demonstrate this?

The application forms could be updated to allow people to better make their case. The instructions on the Pardon form explain that applicants have “the obligation to provide written verification of good citizenship and of compelling and specific need,” described as letters of support.<sup>37</sup> Yet nowhere is the applicant directed to provide any direct statement to the board other than a narrative about the offense. By contrast, Georgia’s application form includes a full page for the applicant to explain his or her reasons for seeking a pardon.<sup>38</sup>

It is imperative for the state to publicize better data. Potential applicants should know that their request has a very small chance of getting approved only once every eight years, if that is to be the practice. Armed with this infor-

*Pardon “forgives” an offense but does not necessarily “forget” it.*

mation, attorneys handling such cases would also be better able to represent current clients and advise potential ones. The public has the right — and the responsibility — to know how constitutional powers are being exercised (or not exercised). The Board of Parole itself is benefited by better monitoring and tracking its clemency caseload.

The data currently available —

containing only the number of applications received and the amount meeting the “screening requirements” — is not particularly useful. By contrast, Georgia publishes the number of applications received and a detailed breakdown of the types of pardons granted that year.<sup>39</sup> Tennessee citizens should not have to pay to have such data compiled.

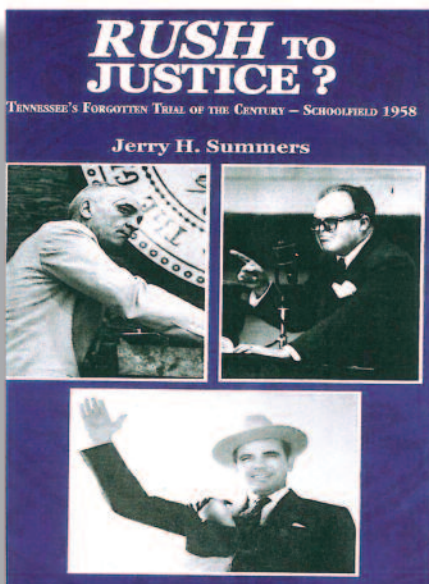
Perhaps more staff and resources should be allocated for clemency requests. The bulk of the board’s work is conducting parole hearings to consider whether inmates should be released. Last year the seven-member board oversaw a whopping 16,881 hearings. However, actual board members conducted only 5 percent of those hearings for the most serious cases. The vast majority were instead conducted by a “hearing officer” who then made a recommendation to the board members for a vote.<sup>40</sup>

By contrast, clemency applications are apparently sent directly to board members after processing.<sup>41</sup> A substantive pre-screening process by subordinate officers may assist busy Board Members in reviewing the dozens of annual clemency applications. Currently, staff members only compile additional information if a hearing has already been granted.<sup>42</sup>

Timing guidelines would facilitate prompt consideration of applications. The data I received does not indicate how quickly the board makes decisions to deny an application or to conduct a hearing. However, in one recently-publicized case, two state lawmakers promoting a lingering exoneration request were reportedly “boiling mad and tired of getting the runaround from both the Tennessee Board of Parole and the office of Gov. Bill Haslam.”<sup>43</sup>

There may also be legal problems with the way Tennessee reviews clemency requests. While the governor is given sole authority to grant relief, the Board of Parole is statutorily delegated the “duty ... to advise with and make recommendations to the governor” with respect to clemency requests.<sup>44</sup> Pursuant to those laws Gov. Haslam has

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asked the board “to consider and to make non-binding recommendations.”<sup>45</sup>

However, the board has sent just 2 percent of applications to the governor’s office for review since 2000. This means that the board has unilaterally denied 98 percent of all applications without the governors even having the opportunity to see them.<sup>46</sup>

This practice would appear to conflict with our constitution’s assignment of clemency power solely to the governor.<sup>47</sup> While the governor could perhaps delegate the denial of pardons to the board, our current executive has not done so. Thus, apparently all applications should be sent to the governor, even if most have unfavorable recommendations.

An interested public or media could put more pressure on our governors to grant clemency more often throughout their time in office. While we sometimes see stories and petitions shortly before a scheduled execution, interest is virtually nonexistent for less-urgent pardon requests. There is simply no practical reason for clemency to be issued primarily (or entirely) at the end of a governor’s term, other than immunization from political fallback. Thus, by removing accountability on clemency decisions, Tennessee’s current practice makes it more likely that we will experience the abuses of power that still echo from the Blanton administration.

A more drastic remedy would be to eliminate the governor from the clemency process altogether, thereby divorcing what perhaps should be an apolitical process from our chief politician. Just as the Board of Parole makes recommendations on applications as they are received, so could the board grant them without waiting on an artificial eight-year cycle.

Several states have implemented such changes. In Georgia, there were “serious questions raised about the handling of pardons by some governors’ offices,” resulting in a 1943 constitutional amendment to reassign clemency power from the governor to an independent board, whose members are appointed by

the governor following confirmation by the senate.<sup>48</sup> In recent years, the Georgia Board of Pardons and Paroles has granted relief in a steady stream rather than sporadic spurts.

While such modification in Tennessee would also require a constitutional amendment, this question is worthy of discussion.

## Conclusion

An improved judicial system may have reduced the historical justifications of clemency to second-guess the determinations of guilt and an appropriate sentence upon conviction. But our courts do not have a mechanism to decide whether a punishment remains just and appropriate years later.

By providing relief otherwise unavailable through the judiciary, clemency remains an important and essential part of our justice system and the constitutional framework of checks and balances. We should reevaluate how clemency is granted in Tennessee to ensure that it is continuing to satisfy these purposes. <sup>49</sup>



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Raybin would like to acknowledge the Tennessee Board of Parole for agreeing to compile the clemency data central to this article.

## Notes

1. Cathleen Burnett, “The Failed Failsafe: The Politics of Executive Clemency,” 8 *Tex. J. on C.L. & C.R.* 191, 192-93 (2003).

2. Tenn. Const. Art. III, Sec. 6. This power is codified at *Tenn. Code Ann.* § 40-27-101, et sec.

3. *Tenn. Code Ann.* §§ 40-28-104(a)(10), 40-28-126(a).

4. 1979 Tenn. Pub. Acts 853, 868;

Tennessee Board of Parole, Historical Timeline, <http://www.tn.gov/bop/article/historical-timeline>.

5. Sheila Burke, “Lawmakers Demand State Pay Man for Wrongful Imprisonment,” Associated Press, June 16, 2016, <http://bigstory.ap.org/article/3dde4397a2024283b6106ec7b151b83b/lawmakers-demand-state-pay-man-wrongful-imprisonment> (Haslam spokesperson stating: “It is the administration’s policy to consider executive clemency requests after receiving a recommendation from the Board of Probation and Parole.”). Data from Gov. Bredesen’s tenure reflects that he considered at least a few requests that had not been submitted to the board.

6. <https://www.tn.gov/bop/article/bop-executive-clemency-unit>.

7. Tenn. Comp. R. & Regs. 1100-01-01-.16(1)(a).

8. Tenn. Comp. R. & Regs. 1100-01-01-.16(1)(b).

9. *Tenn. Code Ann.* § 40-28-104(a)(10).

10. A written list of the names of applicants receiving hearings is also sent to standing committees of the General Assembly as well as the District Attorney General in the district of conviction. Tenn. Comp. R. & Regs. 1100-01-01-.16(f), (g).

11. [https://www.tn.gov/assets/entities/bop/attachments/BOP\\_Executive\\_Clemency\\_Information.pdf](https://www.tn.gov/assets/entities/bop/attachments/BOP_Executive_Clemency_Information.pdf).

12. Board of Parole, Annual Report 2014-15, p. 13, [https://www.tn.gov/assets/entities/bop/attachments/2014-15\\_BOP\\_Annual\\_Report.pdf](https://www.tn.gov/assets/entities/bop/attachments/2014-15_BOP_Annual_Report.pdf).

13. I received the data in November 2015, so it is current only though that time. Although I expect more applications have been received and referred to the governor between that time and publication of this article, I have found no evidence of any grants by the governor.

14. Jeff Woods, “Bredesen commutes death sentence, pardons 22,” *Nashville City Paper*, Jan. 11, 2011, <http://nashvillecitypaper.com/content/city-news/bredesen-commutes-death-sentence-convicted-murderer>.

15. It appears Gov. Sundquist did not follow this practice. My request of data beginning in the year 2000 included the final three years of his governorship, which reflected one grant of clemency in 2000-01, four in 2001-02, and six in 2002-03. I have not discussed his clemency practices further in this article because I do not

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have data from earlier in his term.

16. The State's Public Records request denial letter, which cited *Tenn. Code Ann.* § 40-28-119(c) and Rule 11-1-1-.15(1)(a)(6), is on file with the author.

17. [https://www.tn.gov/assets/entities/bop/attachments/BOP\\_Pardon\\_Application-BP\\_0245.pdf](https://www.tn.gov/assets/entities/bop/attachments/BOP_Pardon_Application-BP_0245.pdf).

18. [http://www.tn.gov/assets/entities/bop/attachments/BOP\\_Commution\\_Application-BP\\_0044.pdf](http://www.tn.gov/assets/entities/bop/attachments/BOP_Commution_Application-BP_0044.pdf).

19. [http://www.tn.gov/assets/entities/bop/attachments/BOP\\_Exoneration\\_Application-BP\\_0247.pdf](http://www.tn.gov/assets/entities/bop/attachments/BOP_Exoneration_Application-BP_0247.pdf). My office handled three exoneration hearings during the Bredesen administration.

20. The pardon application form provides: "Generally, the need for a pardon will not be found compelling when other provisions of the law provide appropriate relief for the petitioner."

21. *State v. Blanchard*, 100 S.W.3d 226, 231 (Tenn. Crim. App. 2002).

22. *Id.*

23. *Blackwell v. Haslam*, No. M2012-01991-COA-R3CV, 2013 WL 3379364, \*11 (Tenn. Ct. App. June 28, 2013).

24. *Tenn. Code Ann.* § 40-29-101 et sec.

25. *Tenn. Code Ann.* § 40-32-101(h).

26. *Tenn. Code Ann.* § 40-32-101(g).

27. The Nashville Bar Association will conduct a three-hour CLE on Gov. Blanton and his administration on Nov. 10, 2016.

28. See Keel Hunt, *Coup: The Day the Democrats Ousted Their Governor, Put Republican Lamar Alexander in Office Early, and Stopped a Pardon Scandal* (Vanderbilt Univ. Press, 2013).

29. Donald F. Paine, Sex, Murder and UT Football: The Trials of Lawyer James E. Fulton for Murdering Lawyer Sam Parker, *Tenn. B.J.*, December 2003, at 37 n.2.

30. "Cooper Pardoned by Gov. Patterson," *N.Y. Times*, April 14, 1910.

31. Margaret Colgate Love, "Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful," 27 *Fordham Urb. L.J.* 1483, 1488 (2000).

32. Department of Justice, Commutations Granted by President Barack Obama, <https://www.justice.gov/pardon/obama-commutations>.

[www.justice.gov/pardon/obama-commutations](https://www.justice.gov/pardon/obama-commutations).

33. Department of Justice, Pardons Granted by President Barack Obama, <https://www.justice.gov/pardon/obama-commutations> <https://www.justice.gov/pardon/obama-pardons>.

34. The judge may stay "execution of the sentence for the amount of time as may be necessary to make application to the executive for a pardon or commutation of punishment." *Tenn. Code Ann.* § 40-22-101. See also *Tenn. Code Ann.* § 40-22-102.

35. Love, 27 *Fordham Urb. L.J.* at 1491.

36. *Herrera v. Collins*, 506 U.S. 390, 412, 415 (1993).

37. [https://www.tn.gov/assets/entities/bop/attachments/BOP\\_Pardon\\_Application-BP\\_0245.pdf](https://www.tn.gov/assets/entities/bop/attachments/BOP_Pardon_Application-BP_0245.pdf).

38. <https://pap.georgia.gov/sites/pap.georgia.gov/files/ParoleConsideration/Pardon%20Application%20Revised%20July%202015%20%281%29%20%281%29.pdf>.

39. Georgia State Board of Pardons and Paroles, Annual Report 2015, p. 20-22, <https://www.joomag.com/magazine/ga-parole-fy2015-annual-report/0499652001427221953?short>. The data indicates Georgia is far more generous, granting 481 of 1,982 applications in 2015 alone.

40. Board of Parole, Annual Report 2014-15, p. 6, [https://www.tn.gov/assets/entities/bop/attachments/2014-15\\_BOP\\_Annual\\_Report.pdf](https://www.tn.gov/assets/entities/bop/attachments/2014-15_BOP_Annual_Report.pdf).

41. [https://www.tn.gov/assets/entities/bop/attachments/BOP\\_Executive\\_Clemency\\_Information.pdf](https://www.tn.gov/assets/entities/bop/attachments/BOP_Executive_Clemency_Information.pdf).

42. *Tenn. Comp. R. & Regs.* 1100-01-01-.16 (d)(3).

43. Burke, *supra* note 5.

44. *Tenn. Code Ann.* §§ 40-28-104(a)(10) and 40-28-126(a).

45. [https://www.tn.gov/assets/entities/bop/attachments/BOP\\_Executive\\_Clemency\\_Information.pdf](https://www.tn.gov/assets/entities/bop/attachments/BOP_Executive_Clemency_Information.pdf).

46. Since inmates are summarily denied review if they are within two years of parole consideration, inmates who are denied parole by the board and given new hearings within that time would never have the opportunity to be heard by the governor under the current policy.

47. *Tenn. Const. Art. III, Sec. 6.*

48. Georgia State Board of Pardons and Paroles, About, <http://pap.georgia.gov/about>.

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