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MACDL Weighs in on the Most Consequential Pardon Case in 125 Years

JaneAnne Murray
University of Minnesota Law School, murrayj@umn.edu

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One hundred and twenty-five years ago, the Minnesota electorate voted to modify the Governor's then plenary pardon power to require that it be exercised "in conjunction with" a Board of Pardons, composed of the Governor, the Attorney General and the Chief Justice of the Minnesota Supreme Court. Today, pardon applicant Amreya Shefa awaits the outcome of a case before the Supreme of Court of Minnesota that will decide what these apparently collegial and modest words "in conjunction with" mean. Do they mandate, as the Minnesota legislature decided in 1897, one year after the constitutional amendment, that the governor's pardon power be subject to a unanimous vote from the three-member Board of Pardons, or do they require something less stringent – at the very least no more than a majority vote of the three Pardon Board members? The issue has profound ramifications for Ms. Shefa, whose pardon application garnered a 2-1 vote and who believes that she faces almost certain death if not granted a pardon that will save her from deportation. But it also impacts the thousands of pardon and commutation applicants in this state for whom the Governor's clemency power is the only meaningful opportunity for relief from disproportionately long sentences or who suffer life-limiting collateral consequences because of their prior conviction.

Background

In December 2013, Amreya Shefa had been raped and abused by her husband one time too much. She stabbed him 30 times, causing his death. She was charged with murder, and after a bench trial, a judge in Hennepin County convicted her of manslaughter. While acknowledging that Ms. Shefa was the victim of abuse, the court reasoned that Ms. Shefa had "exceed[ed] the degree of force required to defend herself."[2] Ms. Shefa was sentenced to seven years in prison. She served her sentence in full. Upon completion of her sentence and because of her manslaughter conviction, Ms. Shefa was held by immigration authorities to be deported to her home country where she feared her husband's family – which had vowed a blood revenge – would kill her.

The Binger Center for New Americans at the University of Minnesota Law School (the "BCNA") assumed Ms. Shefa's representation in immigration court. Seeing few paths to Ms. Shefa's freedom, the BCNA filed for clemency for Ms. Shefa on the grounds that hers, if ever one existed, was a case of "unfortunate guilt"[3] that should be mitigated through a pardon. A pardon would save her from deportation.

On June 12, 2020, the Minnesota Board of Pardons voted

[1] JaneAnne Murray is a member of the MACDL board, and director of the Clemency Project at the University of Minnesota Law School. In connection with the drafting of the MACDL amicus, MACDL acknowledges the invaluable research and analysis of Scott Dewey, J.D., Ph.D., a historian at the Law School's library, Ingrid Hofeldt, a J.D. Candidate at the Law School, and Margaret Colgate Love, Executive Director of the Collateral Consequences Resource Center.

[2] 1/23/2015 Decision of Hon. Judge Elizabeth Cutter at 18, ¶ 12.

[3] The Federalist No. 74 (Alexander Hamilton).

2-1 in favor of granting the pardon (with Governor Walz and Attorney General Ellison in favor of the pardon and Chief Justice Lorie Gildea opposed). Because the statutes implementing the constitutional pardon power provided that the Board of Pardons, alone, exercised the power, and also required a unanimous vote of board members, Ms. Shefa's pardon application was denied.[4] She then proceeded to challenge the constitutionality of this unanimity requirement in district court in Ramsey County.

Judge Laura Nelson's Decision

Judge Laura Nelson ruled on Ms. Shefa's motion on April 20, 2020. The court concluded, "[t]he plain language of art. V, § 7 names the Governor separate and apart from the Board of Pardons, of which he is a member. Based on this plain language, and applying the canon against surplusage, the Governor has some pardon power or duty separate or apart from the Board of Pardons."[5] Accordingly, the district court ruled that the challenged statutes—"which give pardon power to the 'Board of Pardons' alone"—are unconstitutional.[6] The district court declined to "address the argument that the correct interpretation of [the pardon provision of the Minnesota Constitution] would require that a pardon be effective if the Governor and one other member of the Board . . . voted yes."[7]

Supreme Court Grants Request for Accelerated Review

Chief Justice Gildea and Attorney General Ellison appealed Judge Nelson's decision and Justice Gildea sought accelerated review, a motion that was granted by the Supreme Court on July 20, 2021. As Ms. Shefa's potential deportation looms, briefing was ordered to occur within a seven-week window and argument is scheduled for September 15, 2021.

MACDL's Amicus Brief

The scope of the pardon power is an issue with unique resonance for MACDL. As criminal defense lawyers, we are painfully familiar with the harshness and injustice endemic in our criminal legal system, its pervasive racial and economic disparities, and the limited availability of judicial "second look" mechanisms after a conviction is final. Clemency, even if exercised sporadically, is a powerful statement against cruel laws and prosecution practices, and a reaffirmation of the humanity principle that those in the crosshairs of the criminal legal system are capable (and, in the right circumstances, deserving) of redemption.

MACDL also has a more specific interest. We recently inaugurated a clemency project in collaboration with ("in conjunction with," if you will) NACDL to recruit and train volunteer lawyers to represent applicants for state clemency in Minnesota. Given that this process has been shamefully parsimonious in this state over the last several decades (only two commutations in 30 years, and a pardon rate that is overshadowed by many other states), MACDL has a direct interest in seeing an invigoration of the clemency process in Minnesota.

Mindful of the Supreme Court's admonition for amici not to duplicate arguments in this case, MACDL's amicus brief focused on a discrete issue: the meaning of the word "board" in the amendment presented to the 1896 electorate. Whereas previously the Governor had unfettered pardon discretion in cases that did not involve impeachment, the proposed constitutional amendment required them to work in conjunction with a "board." But nothing in the text of the amendment or indeed in its legislative history put the electorate on notice that in implementing legislation to be enacted the next year, this singular and personal act of executive empathy would be subject to a *unanimous* vote of all Pardon Board members – and thus a potential veto by one member.

We opened our amicus brief by highlighting the uniquely personal nature of an act of clemency – it is an act of empathy by an individual leader towards a human being deserving of mercy. This quality was preserved by the 1896 electorate when it chose to continue to enumerate the pardon power as one of the *governor's* constitutional powers. We then analyzed the nature of "boards" in early American life, and the electorate's likely understanding of the term as one founded on the republican principle of one-person-one-vote and majority rule. We concluded with an analysis of all other nine constitutional pardon boards established in other states by 1896 – none of which required unanimity of all members of the board before a pardon could issue, and in fact eight of which explicitly permitted a vote on a majority basis. In short, the available evidence from the historical record indicates that the 1896 electorate would have interpreted the "in conjunction with [a board]" language to mean something Minnesotans today understand well: a collegial process where the discursive obligation encourages compromise, but if the parties cannot agree, a majority vote prevails and no one person has a veto power.

1. The 1896 Electorate Privileged the Governor

Minnesota's constitutional pardon provision, as amended by the Minnesota electorate in 1896, squarely grants the pardon power to the Governor. As the language of the amendment presented to the electorate back then stated:

> . . . *he [the governor] shall have power*, in conjunction with the board of pardons, of which the governor shall be ex officio a member, and the other members of which shall consist of the attorney general of the State of Minnesota and the chief justice of the supreme court of the State of Minnesota, and whose powers and duties shall be defined and regulated by law, *to grant reprieves and pardons after conviction for offenses against the State, except in cases of impeachment.*

See Minn. Const. Art. V § 4 (as amended in 1896) (enumerating the powers of the governor) (emphasis added).[8] While this power is exercised "in conjunction with" the Board of Pardons, it remains a power that the Governor exercises in their individual capacity. This was in keeping both with the practice at the time in almost all of the states and with the humanity principles underlying the power itself.

As Alexander Hamilton observed in opposing an "advice and consent" procedure for its counterpart in the federal constitution (and upon which the Minnesota constitutional provision was based), "one [person] appears to be a more eligible dispenser of the mercy of government, than a body of [people]."[9] Hamilton's views were echoed in those of federalist and future Supreme Court Justice James Iredell, who similarly advocated that the power to be merciful be reposed in one individual: "and where could it be more properly vested, than in a man who had received such strong proofs of his possessing the highest confidence of the people?"[10]

The Supreme Court later acknowledged in interpreting the federal constitutional pardon provision, that the pardon power was "the 'private . . . act' of the executive magistrate;"[11] in other words, the pardon provision, while "a part of the Constitutional scheme,"[12] was specifically designed to be a *human* decision with limited restraints.

[4] *See* Minn. Stat. §§ 638.01; 638.02.

[5] Decision of the Hon. Laura E. Nelson, entered in this case at the district court level on April 20, 2021, at 11.

[6] *Id.*

[7] *Id.*

[8] Although the pardon power was later moved to its own dedicated section (Art. V. § 7), this was done for clarity purposes and had no legal effect. *See City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 159 (Minn. 2017).

[9] The Federalist No. 74 (Alexander Hamilton).

[10] *See Address by James Iredell, North Carolina Ratifying Convention* (July 28, 1788) reprinted in 4 The Founders Constitution 17-18 (P. Kurland & R. Lerner ed. 1987) (emphasis added).

[11] *Burdick v. United States*, 236 U.S. 79, 90 (1915) (emphasis added).

[12] *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (Holmes, J.).

II. Nothing in the 1896 Amendment Required Unanimity

While the Minnesota electorate chose in 1896 to amend the Governor's previous plenary pardon power with a requirement that it be exercised "in conjunction with" the new Board of Pardons, nothing in the proposed amendment put the electorate on notice that this change might subject the Governor's power to a unanimity requirement. To the contrary, boards were ubiquitous in early America in all walks of life – religious, educational, governmental and business – and early Americans were fully familiar with their traditional mode of operation, in keeping with prevailing republican norms: one person, one vote and majority rule.

A. Boards in Early America Operated by Majority Rule

Relying on invaluable research and analysis from Scott Dewey, J.D., Ph.D, a historian at the University of Minnesota Law School, MACDL argued that the Minnesota electorate understood the word "board" in the phrase "board of pardons" to mean a group of individuals who operated on a majority-vote basis – underscored by a study of how boards – whether corporate, school, church, municipal – operated at the turn of the 20th Century.

The post-Revolutionary United States inherited English law and legal culture and generally remained close to them, including with regard to public and private corporations and similar institutions. Thus, the First Bank of the United States, established in 1791, was patterned after the Bank of England and similarly borrowed the term "director;" whereas the latter institution had 24 directors on its board, the former added a twenty-fifth member as a potential tie-breaker in votes.[13]

Towering figures of early American law reaffirmed the general default rule that corporate and other boards governed by majority rule. Chancellor Kent in his *Commentaries* discussed majority rule in the context of corporations as follows:

> The same principle prevails in these incorporated societies as in the community at large, and the acts of the majority, in cases within the charter powers, bind the whole. *The majority here means the major part of those who are present at a regular corporate meeting.* There is a distinction taken between a corporate act, to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act; but in the former a majority of the definite body must be present, and then a majority of the quorum may decide.[14]

Chief Justice Lemuel Shaw in a Massachusetts Supreme Court opinion, in the context of considering the validity of a transaction made by directors of an insolvent manufacturing corporation, noted:

> In ordinary cases, when there is no other express provision, a majority of the whole number of an aggregate body who may act together constitute a quorum, and a majority of those present may decide any question upon which they can act.[15]

The republican roots of board voting and decision-making deepened further in the United States throughout the nineteenth century. Already from an early date, New York State established by law the general default rule of majority rule on boards in its Revised Statutes: "that when any power or duty is confided by law to three or more persons, it may be performed by a majority of such persons, upon a meeting of all, unless special provision is otherwise made."[16] New York's revised 1890 Corporation Law similarly established majority rule by quorum as a general default: "When the corporate powers of any corporation are to be exercised by any particular body or number of persons, a majority of such body or persons, if it be not otherwise provided by law, shall be a quorum; and every decision of a majority of such persons duly assembled as a board, shall be valid as a corporate act."[17]

In the same vein, the Rhode Island Supreme Court reiterated the principle of majority vote in the context of commissioners appointed to partition an estate:

> We do not think the report of the commissioners was invalid merely because it was not unanimous. *We think the true rule is, that where three or more persons are charged with a judicial or quasi judicial function under an authority derived*, not from the parties in interest merely, but *from a law or statute of the state*, though all must hear and deliberate together, *a majority may decide, unless it is otherwise provided*. The counsel for the defendants admit that this is a rule when the power to be exercised is of a public nature[.]"[18]

A leading treatise throughout the nineteenth century on American corporation law similarly emphasized, "Corporations are subject to the emphatically republican principle (supposing that charter to be silent), that the whole are bound by the acts of the majority, when those acts are conformable to the articles of the constitution."[19]

As a result, already by the early 1800s if not even sooner in America, it was generally understood regarding corporations that "[t]he board would usually have the authority, by majority rule, to write the corporation's bylaws, and generally run the firm."[20] From back then through the present, "American corporation statutes [have] provide[d], ... that a corporation shall be managed by or under the direction of its board of directors," which has become a "universal norm in American corporate law" as well as the "prevailing model of corporate governance around the world."[21] "The second concept underlying th[is] board-centered model of corporate governance is that a group composed of peers acting together makes the decisions"[22] – by one person, one vote majority rule unless otherwise clearly specified.

B. No State Board of Pardons in 1896 Required Unanimity

With invaluable research and analysis from Margaret Colgate Love, former U.S. Pardon Attorney and the nation's leading expert on pardons, MACDL's brief next pointed out that no state board of pardons in 1896 required unanimity.

Critically, the majority-rule requirement was included explicitly in eight of the nine constitutional pardon boards created by other states prior to Minnesota's amendment of Article V of its Constitution in 1896; only one other state's constitution, South Dakota's, was silent on this point. Like Minnesota, all nine of these state constitutional pardon boards were composed of high-level government officials. And while the operation and structure of these boards differed from the Minnesota one, in no state was the vote

[13] Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 Hofstra L. Rev. 89, 110 (2004).

[14] Eden Francis Thompson, An Abridgment of Kent's Commentaries on American Law 134-135 (1886) (emphasis added).

[15] *Sargent v. Webster,* 13 Mass. 497 (Mass. Sup. Jud. Ct., 1847) (emphasis added).

[16] *In re Fourth Avenue*, 11 Abb.Pr. 189 (NYS Sup. Ct. Gen'l Term, 1854) (adding further, "This was a familiar principle of law, known to those who framed the present Constitution, and long before adopted, as it was found necessary and beneficial in practice, and it had never been complained of. It cannot be supposed that the framers of the Constitution intended to repeal it in this case, by a covert means[.]"); *see also, e.g., People ex rel. Hawes v. Walker*, 2 Abb.Pr. 421, 23 Barb. 304 (NYS Sup. Ct., 1856); *People ex rel. Andrews v. Fitch*, 9 A.D. 439, 441; 41 N.Y.S. 349, 351 (N.Y.S. Sup. Ct., App. Div., 1896); *People ex rel. Crawford v. Lothrop*, 3 Colo. 428, 453 (Colo. Sup. Ct., 1877) ("In the case of a corporation, if a corporate act is to be done, by a definite body, as by a board of directors or trustees, where the charter and by-laws are silent, a majority, at least, must be present to constitute a quorum, but a majority of that quorum may do the act."); *Schofield v. Village of Hudson*, 56 Ill. App. 191, 193 (Ill. App. Ct. 1894).

[17] New York State General Corporation Law, L. 1890, p. 1063, c. 563, § 17 (effective May 1, 1891).

[18] Townsend v. Hazard, 9 R.I. 436, 442 (R.I. Sup. Ct., 1870) (emphasis added).

[19] Joseph K. Angell & Samuel Ames, Treatise on the Law of Private Corporations Aggregate 534, Chap. XIV, § 499 (1882); see also *id.* at 537, § 501.

[20] Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 J. Econ. Hist. 645, 652 (Sept. 2008).

[21] Gevurtz, *Historical and Political Origins of the Corporate Board of Directors,* at 92.

[22] *Id.* at 94.

of one member alone permitted to veto a pardon grant of the governor.[23] These were the models before the people of Minnesota when it adopted its pardon board in 1896.

Nevada Florida, Idaho and Utah, followed a model first established by New Jersey before the Civil War: removing the pardon power from the governor and vesting it in a pardon board, of which the governor was one member. In these state constitutions, governors had no power to pardon apart from their membership on the pardon board.

In all five of these state boards, cases were decided by majority vote, and in four state boards the governor had to be part of the majority.[24] Importantly, while a pardon could only be granted by majority vote, a pardon could not be denied by the negative vote of a single board member (unless that negative vote was the governor's).

The other four states with constitutional pardon boards – Pennsylvania, Louisiana, Montana and South Dakota – established what have been called "gatekeeper" boards:[25] the governor alone remained responsible for granting pardons, but controls were imposed on the governor's actions through a separate board. These boards, which were usually composed of high officials but did not include the governor, had to approve a pardon before it could be granted by the governor. In three of the boards, a majority vote was explicitly specified. In one, South Dakota, the voting procedure was not specified, but a leading treatise on the operation of state pardon boards published in 1922 indicates that South Dakota did not operate on a unanimity basis.[26] Thus, even under this gatekeeper model, the negative vote of a single member of the board was not sufficient to veto a governor's pardon decision.

In short, explicitly in eight of the nine states that had established constitutional pardon boards before the Minnesota amendment of 1896; and implicitly in the ninth state, South Dakota, a pardon could issue only if authorized by a pardon board majority. In none of them, however, could a single member of the board other than the governor (if on the board), or a board minority, stop a pardon from being issued.

These were all the models of constitutional pardon boards available for consideration by constitutional reformers in Minnesota in the late 1800s and the Minnesota electorate when it voted in 1896 to add a pardon board to the provision situating responsibility for pardoning in the governor personally. At that time, Americans knew well how boards and majority voting worked. The establishment of boards and the utilization of majority voting were both in keeping with America's culture of republican institutions and practices that had evolved since the American Revolution, and, indeed, even before, during colonial times. One-person-one vote and majority voting had become ingrained in the whole culture.

The adoption the following year in 1897 of the statute conditioning the governor's power to pardon on the agreement of the other two board members imported hard legal limits on the governor's power into a constitutional scheme that by its terms did not provide any. Significantly, the unanimity rule imposed stricter limits on the governor's power to approve a pardon than those applicable to his counterparts in any of the nine other board states, where majority rule governed the board's operations. That is, in eight of the other nine board states whose examples were before the Minnesota legislature in 1897 (and, again, implicitly in the ninth), a governor could never be held hostage by the refusal of a single board member to approve a pardon. Not only was Minnesota's statutory unanimity unauthorized by the constitutional language, it resulted in giving Minnesota's governor less authority to pardon than the governor in any of the other board states.

It was also, as noted above, antithetical to the republican foundations of American civic and business life. And it was antithetical to the spirit animating the concept of executive pardon power in general: to give effect to feelings of empathy and mercy towards a fellow "human creature."[27]

Conclusion

Clemency was designed to be the "fail safe" of our criminal legal system.[28] But in 1897, when the Minnesota legislature enacted legislation to implement the 1896 constitutional amendment, its decision to grant a veto power to any one member of the Board of Pardons engaged in an unconstitutional usurpation of the governor's clemency power. The result of this power grab has been decades of parsimonious use of an important check on unduly punitive criminal laws and practices. MACDL's amicus brief urges the Supreme Court to restore the Governor's constitutional clemency power to one that reflects the humanity principles underlying the decision of early Minnesotans to continue to repose it individually in their governor, supported by a Board of Pardons created in the republican tradition. ■

[23] In the eight states that expressly established majority rule on their pardon boards, this was explicit; in South Dakota, this relationship arguably was implicit, in light of the long-established American tradition of majority rule on boards and commissions described in section 2, *supra*. *See also* Christen Jensen, The Pardoning Power in the United States 16 (Chicago University Press 1922) ("Pardoning Power") (listing Minnesota and two states that formed pardon boards after Minnesota, North Dakota and Connecticut, as the only ones requiring unanimous action, and thus, implicitly that South Dakota only required at most a majority vote).

[24] The one state that did not require the governor to be part of the approving majority was Idaho. Note that while a pardon might be granted in Idaho without the governor's approval, a pardon supported by the governor could not be denied by the vote of a single board member, as would be the case with a valid unanimity requirement.

[25] *See* Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. St. Thomas L.J. 730, 746 (2012).

[26] *See* Pardoning Power at 16 (listing Minnesota and two states that formed pardon boards after Minnesota, North Dakota and Connecticut, as the ones requiring unanimous action, and not including South Dakota in this list).

[27] *See* Federalist No. 74.

[28] *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (clemency is the "fail safe" of our system).