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After the Gavel Falls: An Introduction to the Department of Defense Clemency and Parole Process

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*173 I refer to those actions which work out the good of the agent to courage, and those which work out the good of others to nobility. Therefore temperance, sobriety and presence of mind in danger, etc. are species of courage; but modesty, clemency, etc. are species of nobility. — Benedict de Spinoza¹

The President's power to grant clemency to a military prisoner derives from Article II, section 2, of the Constitution, which gives the President the power to “grant Reprieves and Pardons for Offenses against the United States ...” Military authorities have had the power to grant clemency—reduction of a court-martial sentence in whole or in part—to servicemembers since the Revolutionary War.² That authority was used extensively by commanders who had the authority to convene courts during World War II, primarily as a way to return men to battle.³ In addition, the military service Secretaries are authorized by federal statute to “provide a system of parole” for their servicemembers confined in military correctional facilities (MCFs).⁴ Service clemency and parole boards are an evolution of the Army Clemency Boards created in 1945 under the guidance of a former U.S. Supreme Court justice, Owen J. Roberts, then serving as a clemency advisor to the Army.⁵

Department of Defense (DoD) clemency and parole programs are administered by the services (Air Force, Army, and Navy-Marine Corps). The Air Force Clemency and Parole Board assists the Secretary of the Air Force in executing clemency, parole, transfer to the Federal Bureau of Prisons, return to duty authorities, and mandatory supervised release (MSR) authorities established by law. These authorities are outlined by federal statute,⁶ and DoD, and service-specific regulations.⁷ The clemency and parole boards' clemency authority is separate from a commander's posttrial power to modify the findings and/or sentence of a court-martial. With the recent changes to the Uniform Code of Military Justice limiting the commander's posttrial clemency authority, the clemency and parole boards have broader clemency powers than commanders.

Air Force Clemency and Parole Board (the Board) members are appointed by the Assistant Secretary of the Air Force for Manpower and Reserve Affairs. It is composed of five voting members with extensive experience in military corrections and

military justice. Currently, two of the board members are former military trial and appellate court judges. In general, the Board meets twice a month to review, discuss, and vote on cases of Air Force inmates, primarily housed at the five major MCFs,⁸ who are eligible for clemency, parole, and MSR. The Board also reviews and acts on cases where supervisees, either on parole or MSR, violate one or more conditions of their supervision.

Some basic information on the demographics of the MCF population provides important background and context for the military clemency and parole process. Although some military members are convicted of very serious crimes, a majority of those court-martialed are first-time offenders, not career criminals. Also, all military members have at least a high school education, and many have college degrees. The DoD inmate population is therefore much different demographically than the civilian (state or federal) prison population.

I. Clemency

Those convicted at Air Force courts-martial can seek clemency through a variety of avenues. The Air Force Clemency and Parole Board is one. Clemency is different than granting discretionary parole release, as discussed below. The Board's sentence reducing clemency powers include the ability to remit or suspend part or all of the unexecuted portion of a court-martial sentence (for example, the unserved part of a sentence to confinement, or adjudged, but not executed punitive discharge).⁹ The Board's authority does not extend to a pardon. Only the President of the United States can pardon a court-martialed military member. Clemency can be given, based upon the Board's judgment and experience, to adjust disparities in sentences or affect uniformity for similar offenses and similar offenders. Clemency can also be exercised for reasons of mercy or leniency consistent with good order and discipline and in the best interest of the service, society, and the inmate. Inmates have no right to clemency, but are reviewed regularly for it unless they waive consideration.

To be eligible for clemency, an inmate must have an adjudged sentence to confinement of twelve months or more. Initial review for those inmates whose sentence is at least twelve months and less than ten years occurs when the inmate has served nine months of the sentence. After initial consideration, an inmate is considered annually thereafter. For sentences of confinement of ten years or more, initial clemency review is concurrent with the inmate's initial *174 parole consideration (discussed below).¹⁰ For those with sentences of life without eligibility for parole (LWOP), clemency review starts at twenty years and occurs every three years thereafter. The service boards can deny a clemency request for these inmates, but only the Secretary personally may grant clemency and only after the prisoner has served twenty years. Sentences to LWOP are very rare in the military. The Secretary of the Air Force has not received a request for clemency from an Air Force inmate serving a sentence to LWOP in recent memory.

The table below presents the number of cases considered and clemency given at the Air Force Clemency and Parole Board from 2011 through 2014. During that time period, approximately 650 Air Force members were incarcerated.

	Clemency Cases	Approval Rate
2011	175	2.9%
2012	183	3.8%
2013	157	3.2%
2014	164	3%

Other service clemency and parole boards have approved a slightly lower percentage of clemency requests. The Army Clemency and Parole Board granted 3 percent of clemency requests in 2011, 2 percent in 2012, 2 percent in 2013, and 1 percent in 2014. During the same time period, the Navy and Marine Corps Clemency and Parole Board had an average 3 percent approval rate.

II. MSR

Mandatory supervised release, or MSR, is “forced supervision” at the inmate's release date. If ordered by the Board, MSR begins at an inmate's minimum release date. MSR is different than discretionary early release on parole that, if granted, would occur before the minimum release date. The minimum release date is determined by deducting “good conduct time” credit from the adjudged confinement. DoD inmates accrue good-time credit at the rate of five days per month, with the opportunity to earn up to eight additional days per month for participation in work, education, and rehabilitation programs.¹¹ Like those on parole, those released on MSR must adhere to conditions of release and are under the supervision of a federal parole officer. MSR is used to facilitate an inmate's transition back into society in the event they are not granted discretionary early release on parole, particularly those convicted of violent or sex offenses, especially if they either did not participate in offense-specific treatment or did not receive a sentence to confinement long enough to do so. If the clemency and parole board does not grant discretionary parole or order MSR, then the inmate is released without supervision on the minimum release date.¹²

III. Parole

Discretionary parole release is alive and well as an alternative to incarceration in military corrections, having been excepted from legislation abolishing it for the rest of the federal prison system. It is not, however, a matter of right; parole eligibility does not mean automatic release. If an inmate desires parole, that disposition is not taken lightly, and is made only after the Board concludes that release on parole will not present a substantial risk to the civilian community. It is Air Force policy that its inmates should be released from confinement at the times and under the terms and conditions most likely to ensure their assumption of responsibilities as productive, law-abiding citizens, consistent with the needs of justice, society, the rights and interests of victims, and rehabilitation of the inmate. Unlike some civilian correctional facilities, parole release in the DoD is not used to manage inmate population.

The objectives of parole in the DoD system are to: (1) assist the inmate through supervision and guidance in making the transition from confinement to life in the community; (2) make a focal point available through which community services may contribute to the inmate's positive social adjustment; and (3) protect the community and the inmate from the stresses associated with unsupervised release. To be considered for parole, an inmate must have an approved discharge. Those who do not receive a punitive discharge at trial are not eligible for parole.¹³ With a sentence of a year or more, an inmate with a punitive discharge approved by the commander who convened the court normally becomes first eligible for parole after serving one-third of their adjudged sentence, exclusive of earned good-conduct time, and at least six months in confinement. For those with sentences of thirty years or more, up to life, initial consideration for parole is at the ten-year point. Those with death sentences or life without eligibility for parole are, obviously, not considered for discretionary parole release.

An inmate can waive parole consideration, but like clemency, few do. An inmate who desires parole must submit a supervision plan and agree in writing to abide by that plan. At a minimum, an acceptable supervision plan must include where and with whom the inmate will live, written acknowledgment from that person that the inmate can live with them, and either guaranteed employment, an offer for employment assistance, or acceptance in a valid educational or vocational program. There are some “catches,” particularly with the residence portion of the plan. For example, a child sex offender will not be approved for parole if their proposed residence includes children.¹⁴ Also, working in a family member's household is normally not considered acceptable employment. If approved, the Board establishes, and has the authority to modify, the conditions for release it considers appropriate.¹⁵ An inmate approved for parole is supervised for their full sentence to confinement (i.e., until their maximum release date) because an inmate must agree to waive all of their earned good-conduct time to be considered for parole.

If an inmate *175 is not granted parole, they will “minimum out” (be released at their minimum release date without any supervision) unless the Board orders MSR. Approved parolees are supervised by probation officers from the U.S. Probation Office of the U.S. District Court nearest the parolee's approved residence.

Since clemency is relatively rare, parole is the primary vehicle for early release from confinement in the Air Force. The table below reflects the number of Air Force parole cases considered and approved from 2011 through 2014.

	Parole Cases	Parole Approval Rate
2011	94	34%
2012	103	29%
2013	94	16%
2014	119	45%

Other service clemency and parole boards maintain a lower parole approval rate. The Army Clemency and Parole Board had a 16 percent parole approval rate in 2011, 13 percent in 2012, 16 percent in 2013, and 12 percent in 2014. The Navy and Marine Corps Clemency and Parole Board had an average 18 percent parole approval rate over the same time period.

Parole approval rates have dropped as a result of the implementation of MSR, in 2006. Since the Board can now direct prisoners to supervised release at their minimum release date, the Boards have proven to be more conservative with requests for early release on parole.

IV. How Does It All Work?

With the help of the fictitious case of Airman West, we'll look at how a case would make its way through the clemency and parole process. Airman West was convicted by court-martial of burglary and larceny for breaking and entering the dorm room of a fellow Airman and stealing his friend's iPhone, video games, an Xbox game system, and \$1000 in cash, which his friend had been saving for a down payment on a car. Airman West pled guilty to the offenses and was sentenced to a bad-conduct discharge, two years confinement, and reduction to the lowest enlisted grade. Airman West is twenty years old and serving his first four-year enlistment in the Air Force. He is a member of the security forces and deployed once in support of U.S. combat operations overseas. He is from a small town in Iowa where he grew up with his younger sister. He has never been in trouble before, but experienced some financial problems after joining the Air Force. His family is close-knit, and is ready to welcome him home upon his release from confinement. Airman West desires both clemency and parole.

Since he was sentenced to two years in confinement, he is eligible for his first, and probably only, look for clemency at nine months.¹⁶ He requests that his sentence to confinement be reduced by five months so he can go home as soon as possible to help take care of his ailing mother. He is eligible for his first (and likely only) opportunity for parole at eight months (one-third of his sentence), which he has now served. Since he is eligible for parole and almost eligible (at nine months) for clemency, he is ready to start the Board process.

Before Airman West meets the Air Force Clemency and Parole Board, a disposition board at the MCF reviews his case. It is composed of three military corrections officers. Ideally, the disposition board meets about a month before an inmate's clemency and/or parole eligibility date. The disposition board evaluates the proposed release plan, if parole is requested, and the facts and circumstances of the offenses. MCF mental health and cell block corrections officers provide input regarding Airman West's participation in rehabilitation and work programs, behavior while in confinement, and whether or not he has accepted responsibility for his confining offenses and expresses remorse for them. Acceptance of responsibility is not a requirement for

clemency or parole eligibility purposes. However, if an inmate denies responsibility for their offenses, the chances of receiving clemency or parole are enormously reduced.

Since Airman West would like to be paroled, a member of the MCF's parole office will verify his proposed supervision plan. MCF staff also recommends specific conditions for parole (e.g., participation in community-based behavior, health, or substance abuse programs, urinalysis testing, etc.). Airman West has the right to make a personal appearance at the disposition board, but he is not entitled to be represented by counsel. The victim and any witnesses are also given the opportunity to provide input on his request by submitting in writing anything they would like the board to consider.¹⁷ After the disposition board meets, it makes a recommendation on Airman West's request to the service clemency and parole board through the MCF commander, who also provides a recommendation.

The MCF mental health and cell block teams report that Airman West has accepted responsibility for his crimes, has completed all the treatment programs offered to him while in confinement, is a hard worker at the Brig laundry, and has maintained a relatively clean confinement record, having recorded only a few minor infractions of the Brig's rules. Airman West appeared at the disposition board and expressed his continuing regret for stealing from his friend. His proposed parole plan is to live with his parents in Mason City, Iowa. His parents have both signed a letter stating he can live with them and his fifteen-year-old sister. Airman West submitted a letter of acceptance from North Iowa Area Community College, an accredited institution in Mason City, and a restitution plan to repay his friend. The victim was notified that Airman West was going to be considered for clemency and parole, and did not submit any statements to be considered, either for or against clemency and parole. The MCF disposition board recommended against clemency and for parole for Airman West. The MCF Commander concurred.

***176** The Air Force Clemency and Parole Board is not bound by any of the recommendations made during the disposition board process. The Board could grant clemency or parole even if there are no favorable recommendations made at the MCF. The five Clemency and Parole Board members review Airman West's case prior to the meeting. They then meet in person or by telephone conference to discuss it. When considering Airman West for clemency and parole, the Board considers many factors, including: the nature and circumstances of the offenses; Airman West's military and civilian history, including a combat and overseas record; his confinement record, including participation in offense-specific rehabilitation programs; his personal characteristics; victim impact; the protection and welfare of society; the need for good order and discipline and deterrence; his acceptance of responsibility for the offenses; and the feasibility of his proposed parole plan.

Air Force Clemency and Parole Board proceedings are not open to the public. Nor are they adversarial in nature. However, victims and witnesses, and others acting on their behalf, can appear in person to present victim impact information regarding the case. If they elect not to make a personal appearance, victims and witnesses and their representatives can also send information to the Board for consideration. Victim and witness statements, whether made in person or in writing, are not disclosed to inmates. Inmates do not have a right to make a personal appearance, as that happens at the disposition board. They can submit written, audio, or video material. Friends, family, and attorneys of the inmate can appear in person on behalf of the inmate. Board members may ask questions of those making personal appearances, but otherwise no government representatives are present. In a closed session, the Board thoroughly discusses all of the considerations above and votes on each request for clemency and parole. A majority of the members carries the vote. The Board's decision is communicated to the inmate in writing, but the vote tally is not. If a decision unfavorable to the inmate is reached, the inmate is given the reasons for the decision. There is no formal method for publicly announcing the Board results. An inmate can appeal an adverse decision to the Director of the Air Force Review Boards Agency.¹⁸ A denial of an appeal is final.

So, what is the likely outcome of Airman West's request for clemency and parole? Clemency? Probably not. Sentence clemency is relatively rare. There are no exceptional circumstances to indicate that a reduction of the unexecuted sentence would be consistent with good order and discipline or in the best interest of the service or society. Airman West is, however, a good candidate for discretionary parole release. He accepts responsibility for his offenses, completed all the rehabilitation treatment available to him, and has a good confinement record. He deployed while on active duty, and aside from his court-martial, had a good military personnel record. His parole plan is solid, includes a restitution plan, and he has a supportive family. The victim

did not submit anything indicating he objected to Airman West being paroled. By paroling Airman West, the Air Force will be able to monitor him to ensure his smooth transition back to civilian life until he serves the remainder of his two-year sentence.

V. Supervision Violations

Like most DoD inmates who are placed on parole, Airman West completed his sentence to confinement while on parole without incident. However, to bring the discussion full circle, I will briefly discuss the DoD supervision violation process. The good news is that the vast, vast majority of military parolees successfully complete their sentence. As I mentioned earlier, the demographics of the MCF population are much different from the state or federal prison population. As such, comparatively speaking, those DoD inmates who are released on discretionary parole are, more often than not, good risks for early release under supervision.

Those who do get in trouble while under supervision are primarily “technical” violators of their terms as opposed to reoffenders. For example, people who don’t maintain employment or a stable residence are considered technical violators and are subject to the supervision violation process. The supervision violation rate is consistently below 5 percent. Less than 1 percent of those on supervision commit violations serious enough to warrant return to custody.

Service clemency and parole boards coordinate directly with each supervising U.S. Probation Office regarding conditions of supervision and violations. When a service clemency and parole board receives credible information that a supervisee may have violated a condition of supervision, the Board may suspend the supervision in order to conduct an inquiry to determine whether a violation in fact occurred. Clemency and parole boards may also order the supervisee’s return to military custody pending resolution of the alleged violation if the supervisee is a flight risk or presents a “substantial risk” to public safety. When supervision is suspended, the Board must determine whether probable cause exists to believe a condition was violated. This determination is accomplished through a preliminary interview. The individual conducting the interview¹⁹ recommends to the Board whether probable cause exists to proceed to a supervision violation hearing. In certain circumstances, the Board can find probable cause without a preliminary interview (e.g., when the supervisee absconds supervision or is convicted of an offense punishable by imprisonment). A supervision violation hearing must be conducted, or waived, before the Board can revoke parole.²⁰ The Board can revoke parole based on the preponderance of the evidence that the parolee violated a condition of parole and that the violation warrants revocation.²¹ If parole is revoked, the Board determines what, if any, credit the supervisee receives (“street time”) toward service of their adjudged sentence to confinement. The Board can also take administrative action short of revocation to address the violations (e.g., a letter of warning).

*177 VI. Conclusion

Any system of criminal justice must not only be fair, it must be perceived as fair. The DoD clemency and parole programs recognize that a viable clemency process and the ability for those who take their rehabilitation seriously to be afforded an opportunity for parole goes a long way toward fostering a perception of fairness in the military justice process. The goal of the DoD clemency and parole programs is the evaluation of each prisoner with a primary view toward successfully returning them, through treatment and rehabilitation, to civilian life. As the statistics above make clear, the opportunity for clemency or parole is not illusory. A healthy percentage of inmates who abide by the rules, accept responsibility for their offenses, work hard, and strive to overcome and correct the things that drove them to committing crimes in the first place stand a decent chance of getting out of jail in a way and at a time that satisfies the retributive and deterrent portion of a sentence, and also rehabilitates the offender.

Footnotes

- a1 Paula McCarron is a member of the Air Force Clemency and Parole Board, and a former military judge in the United States Air Force Reserve. The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, the Department of Defense, or the United States Government.
- 1 Benedict De Spinoza, *Ethics* 59 (Everyman Edition, 1934) (1677).
- 2 See Lieutenant Michael J. Marinello, *Convening Authority Clemency: Is It Really an Accused's Best Chance of Relief?*, 54 *Naval L. Rev.* 169, 173-74 (2007).
- 3 *Id.*
- 4 10 USC§ 952. Those military members serving their sentences to confinement at the Federal Bureau of Prisons are not eligible for parole through service clemency and parole boards.
- 5 L. Rice Edwards, *Air Force Clemency and Rehabilitation*, 8 *A.F. L. REV.* 38, 41 (1966).
- 6 10 U.S.C. §§874, 875, 951-54.
- 7 Department of Defense Instruction 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, March 11, 2013; Air Force Instruction 31-205, *Air Force Corrections System*, April 7, 2004 (This is currently being rewritten. The superseding instruction will be AFI 31-105); Army Regulation 15-130, *Army Clemency and Parole Board*, October 23, 1998; SECNAV Instruction 5815.3 J, *Department of the Navy Clemency and Parole Systems*, June 12, 2003.
- 8 The five MCFs house a majority of servicemembers serving a sentence to confinement: the Navy Brigs at Charleston, South Carolina; Miramar, California; and Chesapeake, Virginia; and the Army's Regional Corrections Facility and the United States Disciplinary Barracks, both located at Ft. Leavenworth, Kansas. All five facilities house members from all military branches.
- 9 The board can remit a more serious punitive discharge to a less serious one (e.g., remit a dishonorable discharge to a bad-conduct discharge).
- 10 The inmate, MCF commander, or service clemency and parole board can request and/or direct earlier clemency consideration for "extraordinary reasons," for example, an inmate who saves another's life and would like earlier consideration. Such requests are not routinely made, but the board has broad discretion to grant them.
- 11 Those in the military corrections system earn good conduct time according to DoD Instruction 1325.07, *supra* note 7.
- 12 DoD policy is normally not to impose MSR if the approved sentence to confinement is less than three years.
- 13 They could become eligible for parole later if they are, subsequent to their court-martial, administratively discharged or are approved for retirement.
- 14 Supervision plans are also subject to the approval of the supervising probation officer. The probation officer will investigate the proposed residence to ensure compliance with any applicable state laws, especially regarding sex offenders.
- 15 For example, movement is prescribed by the supervising probation officer, offense-specific treatment and polygraphs are ordered, and depending on the nature of the offense, computer access is prohibited or limited. For those convicted of drug-related offenses, urinalysis testing is also required.
- 16 A sentence to two years' confinement, assuming an inmate does not have any significant misbehavior, will likely mean that the first look will be the only opportunity for clemency or parole, given good conduct time credit.
- 17 Victim and witness notification are accomplished in accordance with DoD Directive 1030.1, *Victim and Witness Assistance*, November 23, 1994, and DoD Instruction 1030.2, *Victim and Witness Assistance Procedures*, December 23, 1994.

- 18 The Air Force Review Boards Agency adjudicates military and civilian personnel matters through a number of statutory and secretarial boards. The Air Force Clemency and Parole Board is one.
- 19 The preliminary interview, or Gagnon hearing, as it is called in the civilian world, is conducted by a neutral and detached person (usually another USPO) after providing the supervisee written notice of the interview and the evidence of the alleged violation(s). The supervisee is given an opportunity to be heard and call witnesses on their behalf. They are entitled to civilian representation at their expense, or if requested, a military attorney will be appointed free of charge.
- 20 Unless the supervisee has been returned to custody, the supervision violation hearing is usually conducted at the offices of the supervising USPO. The Board appoints a hearing officer to conduct the hearing. In the Air Force, this is normally a military judge, but that is not a requirement. The supervisee is given written notice of the hearing, the violations and evidence, and their rights at the hearing. The hearing officer can call witnesses and receive documentary evidence. The supervisee can also call witnesses, present evidence, and cross-examine adverse witnesses. As with a preliminary interview, the supervisee is entitled to civilian counsel at their own expense, or can request appointment of a military attorney free of charge.
- 21 In determining whether a violation warrants revocation, the Board considers the same factors used to determine whether parole was warranted at the outset, as well as the impact the revocation creates on the parolee and their family.

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