

HEINONLINE

Citation: 82 U. Chi. L. Rev. 1 2015

Provided by:

The University of Chicago D'Angelo Law Library



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue Feb 2 13:10:30 2016

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0041-9494](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0041-9494)

The University of Chicago Law Review

Volume 82

Winter 2015

Number 1

© 2015 by The University of Chicago

SYMPOSIUM

Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal

Rachel E. Barkow† & Mark Osler††

The use of the pardon power is a necessary element in a fully functioning system of criminal law. Recent presidents, however, have largely ignored this powerful tool, even as many have sought to expand the power of the office in other ways. This Essay seeks both to describe the costs of this trend and to propose important structural reforms to reverse it. Specifically, we advocate for the creation of a clemency commission with a standing, diverse membership. While this commission should have representation from the DOJ and take the views of prosecutors seriously, the commission itself should exist outside the Justice Department, and its recommendations should go directly to the White House. This new model of clemency should also pay attention to data, both to create uniform standards and to focus the use of the pardon power as a management tool. An emphasis on data will also help the new pardon commission make evidence-based decisions about risk and reentry. This is the time to create a better machine of mercy that will serve the Constitution's mandate no matter who holds the presidency.

† Segal Family Professor of Regulatory Law and Policy and Faculty Director, Center on the Administration of Criminal Law, New York University School of Law.

†† Professor of Law, University of St. Thomas School of Law.

Thanks to Aimee Carlisle, Kadeem Cooper, Heather Gregorio, Steve Marcus, Neal Perlman, and Sam Zeitlin for excellent research assistance. We acknowledge with gratitude the financial support of the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund at NYU.

INTRODUCTION

The morning of March 30, 2010, presented a remarkable moment. The US Supreme Court was hearing argument in *Dillon v United States*.¹ The case concerned whether Percy Dillon, a convicted crack dealer, could receive a reduction in his sentence based on postconviction rehabilitation.² It was going poorly for Dillon: the Court seemed disinclined to consider the relief that he sought. Then things took a dramatic turn. As then-solicitor general Elena Kagan looked on in surprise from the counsel table, Justice Anthony Kennedy pointedly raised an unexpected issue in the following exchange with Assistant Solicitor General Leandra Kruger:

JUSTICE KENNEDY: The Petitioner's brief opens with a statement about his rehabilitation. We don't know if that has been contested. You don't respond to it. But let's assume that's all true. He established schools, and he helped young people and so forth. Does the Justice Department ever make recommendations that prisoners like this have their sentence commuted?

MS. KRUGER: I am not aware of the answer to that, Justice Kennedy. It is certainly true that evidence of that type of rehabilitation factored into the government's recommendation in this case that Petitioner—

JUSTICE KENNEDY: And isn't the population of prisoners in the Federal prisons about 185,000 right now?

MS. KRUGER: I think—

JUSTICE KENNEDY: I think it is. And were there—how many commutations last year? None. How many commutations the year before? Five. Does that show that something is not working in the system? 185,000 prisoners? I think that's the number.

MS. KRUGER: I—I'm not prepared to speak to that question today, Justice Kennedy.³

This unusual exchange reflects a state of crisis in an often-hidden corner of criminal law: the use of the pardon power as a necessary element in a fully functioning criminal-justice system.

¹ 560 US 817 (2010).

² *Id.* at 822–23. Dillon sought this reduction based on a retroactive reduction in the Sentencing Guidelines relating to crack offenses. *Id.* at 823.

³ Transcript of Oral Argument, *Dillon v United States*, No 09-6338, *40–41 (US Mar 30, 2010), archived at <http://perma.cc/E57X-PDNG> (paragraph breaks omitted).

The Framers took the pardon power seriously, creating it as a virtually unchecked power of the presidency.⁴ Recent presidents, however, have largely ignored this powerful tool, even as some have sought to expand the power of the office in other ways.⁵

This Essay seeks both to describe the costs of this trend and to propose important structural reforms to reverse it. Presidents may have different substantive standards for when the use of clemency is appropriate, and clemency rates may therefore rise and fall according to who holds the presidency.⁶ However, the current administrative process for reviewing clemency petitions stands in the way of just about any vision that a president may have about invoking this authority. Recent presidents across the political spectrum—from President Bill Clinton to President George W. Bush—have been unable to systemically grant clemency even when they have wanted to do so.⁷ If the wisdom of the Framers is to be respected, each gear in the machine of the government that they created must be kept in good order—clemency is no exception simply because the power itself is so sweeping. Indeed, clemency stands as a case study in how poor administrative design can foil even broad substantive powers.

Taking clemency reform seriously is particularly important now. After a first term in which he granted fewer clemency petitions than any modern president, President Obama has signaled that he intends to take a more vigorous approach to clemency in his second term. In the first several months of 2014, that meant replacing the pardon attorney,⁸ actively soliciting more petitions that meet the president's announced criteria,⁹ encouraging US Attorneys to support clemency in some cases,¹⁰ and temporarily

⁴ See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv L Rev 1332, 1345–46 (2008). See also Part I.E.

⁵ For example, President Barack Obama and some of his predecessors have sought to enlarge the president's war powers. See Curtis A. Bradley and Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum L Rev 1097, 1099–1100 (2013); Michael D. Ramsey, *Meet the New Boss: Continuity in Presidential War Powers?*, 35 Harv J L & Pub Pol 863, 863–64 (2012).

⁶ See Jeffrey Crouch, *The President's Power to Commute: Is It Still Relevant?*, 9 U St Thomas L J 681, 685–86 (2012) (discussing variation in clemency rate by president).

⁷ See Part I.C.

⁸ US Department of Justice, Press Release, *Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants* (Apr 23, 2014), archived at <http://perma.cc/S93G-AKAU>.

⁹ Id.

¹⁰ Id (noting that “Deputy Attorney General Cole sent a letter to all of the 93 U.S. attorneys asking for their assistance in identifying meritorious candidates”). At the NYU Center on the Administration of Criminal Law's annual conference in 2014, Kathryn

assigning more lawyers to the Office of the Pardon Attorney to process clemency petitions.¹¹ These initiatives will likely assist President Obama in achieving his stated goals for clemency, which are focused on granting commutations to individuals who would be sentenced differently today based on changes in the law.¹² It is not a model of structural reform but a plan to work within the existing framework to find and process more cases in which to grant commutations based on factors outlined specifically by the president.¹³

While we applaud the president's efforts, we believe that lasting, meaningful clemency reform requires more. Specifically, the clemency process should be restructured to achieve its constitutional functions not only for this president, but for all presidents. Future presidents may not want to limit commutations to only those situations in which a change in the law would dictate a change in sentence. They may wish to have pardon attorneys look for injustices in individual cases based on the specific facts of those cases, even if the underlying law has not changed. They may wish to use clemency as a means for policing federal prosecutors who exercise their discretion in a way that does not correspond to the president's and attorney general's policies. They may also seek more insulation from political criticism and a process that is based as much as possible on what we know about the relationship between recidivism, length of sentence, collateral consequences, and rehabilitation. None of these goals can be achieved under the announced Obama reforms. These goals require more than a shift in resources and personnel. They require wholesale structural change.

Part I of this Essay sets the stage for the discussion by considering the fading of the pardon power and the rusting out of the clemency process. It then explores the costs of this development. First, and perhaps most obviously, a decline in clemency exacerbates the problem of overincarceration in the federal system, as very few prisoners receive commutations of their sentences.¹⁴ Compared to other factors, such as lengthy mandatory

Ruemmler, counsel to Obama, noted that the president had recently conveyed his interest in clemency to US Attorneys.

¹¹ DOJ, Press Release, *Announcing New Clemency Initiative* (cited in note 8).

¹² See *id.*

¹³ See *id.*

¹⁴ See Terry Carter, *Prison Break: Budget Crises Drive Reform, but Private Jails Press On*, 98 ABA J 44, 51 (Oct 2012).

minimum sentences,¹⁵ the absence of a vigorous commutation policy may not seem significant, but it nonetheless contributes to the problem of overincarceration. Second, the falling away of the pardon power risks atrophying the process mechanism. It seems that exactly this has happened, based on reports of how the Office of the Pardon Attorney has functioned in recent years.¹⁶ Third, if commutation is functionally unavailable, it puts pressure on other mechanisms available to prisoners, such as habeas corpus, coram nobis, and other appeals to courts.¹⁷ Finally, if the pardon power goes unused, the system becomes unbalanced. The Framers intended clemency to serve as a check on overreach in punishing criminals. If clemency is abandoned by the executive branch, the structure as a whole is strained.

Considering the costs of not using clemency obviously highlights the benefits of reinvigorating it: a renewed commitment to clemency can help address the problem of mass incarceration, improve the process mechanism, reduce pressures on other early release mechanisms, and bring new balance to the system. But there are other possible benefits to a robust clemency system, particularly if it is reconstructed. Part II will suggest reforms that yield additional benefits.

The key is the abandonment of the current bureaucracy in favor of a new institutional structure. Embedding a single official (the pardon attorney) deep within the DOJ has proven to be a failure.¹⁸ Instead, review of clemency petitions should be entrusted to a commission that has a diverse, standing membership that includes key conservative representatives who are particularly sensitive to victim interests and public-safety concerns. Having these voices on the commission will ensure that these interests are given significant weight and will also provide the president with political cover when he opts to grant clemency because he will have the backing of a bipartisan group that cannot be accused of being soft on crime or insensitive to public safety. And while this commission should have representation from the DOJ and take the views of prosecutors seriously, the

¹⁵ See *Mandatory Minimum Penalties in the Federal Criminal Justice System* *83 (US Sentencing Commission, Oct 2011), archived at <http://perma.cc/LAD3-LGFM>.

¹⁶ See Part I.C.

¹⁷ See Part I.D.

¹⁸ See Part I.C (arguing that the institutional placement of the Office of the Pardon Attorney has not only yielded a lower number of grants but has also atrophied the clemency process as a whole).

commission itself should exist outside the Justice Department and its recommendations should go directly to the White House.

This institutional shift will help alleviate the prosecutorial bias in decisionmaking that exists within the Justice Department and that handicaps the ability of the Office of the Pardon Attorney to police prosecutorial abuses.¹⁹ It will allow clemency to serve as a check on the exercise of prosecutorial discretion, promoting uniformity. Clemency, seen in this light, can help bring uniformity to prosecutorial decisionmaking in much the same way that the creation of the independent Sentencing Commission helped bring uniformity to the exercise of judicial discretion in sentencing.²⁰

Just as the success of the Sentencing Commission rests on data collection, the success of this new model of clemency should also pay attention to data. This would both create uniform standards and employ the pardon power as a management tool that allows the president to properly use clemency as a check on enforcement policies that have proven themselves to be too harsh and on the unwise use of prosecutorial discretion even under existing policies. An emphasis on data will also help the new pardon commission make evidence-based decisions about risk and reentry.

Over the past three decades, the pardon power has too often been ignored or used to create calamities rather than cure them.²¹ Presidents seem to realize that the system is not working only at the end of their time in office, when they feel safe in giving grants but become aware of the fact that the system does not produce many recommendations for doing so, even when asked. There is thus a last-minute scramble to find cases to avoid a charge of being unmerciful or perhaps to fill what is

¹⁹ See Part I.C (discussing prosecutorial bias in the Office of the Pardon Attorney). For further discussion of prosecutorial bias in the DOJ, see Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 Va L Rev 271, 312–19 (2013).

²⁰ A 2004 Sentencing Commission study found that the Guidelines have been largely successful in eliminating interjudge and regional disparities for most types of crimes. See *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* *140–43 (US Sentencing Commission, Nov 2004), archived at <http://perma.cc/8K5H-236D>.

²¹ The pardon of Marc Rich and the commutation of Scooter Libby's sentence by Bill Clinton and George W. Bush, respectively, are examples of public scandals that damaged the public perception of the pardon power. See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J Crim L & Crimin 1169, 1195–1204 (2010).

finally recognized as a duty of the office.²² But clemency deserves to be more than an afterthought. It is time to view clemency reform as a priority for the office of the presidency no matter who holds the position. This is the time to create a better machine of mercy.

I. THE COSTS OF A LATENT PARDON POWER

A. The Fading of the Principled Pardon Power

Within the course of about one month, two thoughtful documents emerged from the conservative Heritage Foundation and the progressive American Constitution Society (ACS). What was striking was their broad agreement. Writing in a Heritage Foundation Legal Memorandum, Paul Rosenzweig concluded that, “[d]espite its prominence throughout the history of the American Republic, the pardon power is seldom used today.”²³ He called for an institutional solution with a new review structure.²⁴ Just weeks later, former US pardon attorney Margaret Colgate Love wrote a comprehensive piece for ACS, similarly lamenting that “[f]or the past thirty years presidents have been increasingly reluctant to use their constitutional power to pardon,”²⁵ and calling for the consideration of new processes.²⁶

When writers for the Heritage Foundation and ACS agree on a problem’s importance (and its remedy), something noteworthy is going on. Indeed, the fading of the pardon power as a regular, expected task of the president is both real and unmistakable. The numbers tell the story.

Until relatively recently, use of the pardon power (which includes both the shortening of sentences through commutation and traditional pardons) has been a regular part of a president’s duties. In just his first two years in office, President Abraham

²² See Part I.C. Clinton, for example, ended his presidency in exactly this way: as the end of his term approached, he expressed regret over his anemic exercise of the pardon power and announced 177 new grants on his final day in office. See Love, 100 J Crim L & Crimin at 1195–1200 (cited in note 21).

²³ Paul Rosenzweig, *A Federalist Conception of the Pardon Power* *1 (Heritage Foundation Legal Memorandum No 89, Dec 4, 2012), archived at <http://perma.cc/LWY3-2236>.

²⁴ See *id.* at *7–8.

²⁵ Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States* *3 (American Constitution Society, Jan 2013), archived at <http://perma.cc/GH4K-RF9R>.

²⁶ See *id.* at *18–21.

Lincoln granted clemency to several hundred soldiers and over two hundred civilians.²⁷ Looking at statistics for the first terms of later presidents, the numbers consistently reflect a vital clemency power even well after World War II. Considering just commutations,²⁸ President Franklin D. Roosevelt granted 309 sentence reductions in his first term, while Presidents John F. Kennedy and Lyndon B. Johnson commuted 100 and 226, respectively, during their presidencies; even President Richard Nixon granted 48 commutations in his first term.²⁹ In contrast, President Obama granted precisely one commutation petition during his first term.³⁰

The 1970s, and particularly the tenures of Presidents Gerald Ford and Jimmy Carter, represented a turning point. Ford used the pardon power in two very different and remarkable ways. As history well remembers, he pardoned his predecessor, Nixon, for crimes that Nixon may have committed in office.³¹ The Nixon pardon rocked the nation on September 8, 1974.³² Less well remembered is a program that Ford had announced just three weeks prior. In an August 19, 1974, address to a Veterans of Foreign Wars convention (whose members were aghast), he set out a program to pardon large numbers of convicted draft evaders and army deserters.³³ Though they were controversial, both these initiatives can be described as principled actions aimed at national healing after traumatic events.

After Ford, Carter echoed his predecessor's work in issuing an amnesty for draft evaders who had not been convicted, some

²⁷ Love, 100 J Crim L & Crimin at 1170 (cited in note 21). For year-by-year statistics, see US Department of Justice, *Clemency Statistics*, archived at <http://perma.cc/W22H-KWT4>.

²⁸ Our thesis mainly addresses commutations, so we focus on them here. Presidents nearly always grant far more pardons than commutations.

²⁹ DOJ, *Clemency Statistics* (cited in note 27).

³⁰ *Id.*

³¹ For the text of Ford's proclamation and his accompanying remarks, see Gerald R. Ford, *President Gerald Ford's Pardon of Richard Nixon*, 13 Fed Sent Rptr (Vera) 207 (2001). Ford's proclamation of the pardon claimed that the action was necessary to avoid a "prolonged and divisive debate." *Id.* at 208.

³² Ford may have picked the date in a failed attempt to hide the news behind another (even more bizarre) national event: Evel Knievel's attempt to jump the Snake River Canyon on that same day. See Laura Kalman, *Gerald Ford, the Nixon Pardon, and the Rise of the Right*, 58 Cleve St L Rev 349, 360 (2010).

³³ See *id.* at 353 & n 48.

of whom had fled abroad.³⁴ And, with that, the era of presidents using the pardon power for a broad and principled purpose seemed to come to a close. Presidents Ronald Reagan, Bill Clinton, George H.W. Bush, and George W. Bush seemed content to use the pardon power sporadically and inconsistently and certainly did not use it to promote policy initiatives.³⁵ Especially telling was the declining rate of petitions granted during this period: Kennedy granted 40.9 percent of all clemency petitions ruled on or closed (for both pardon and commutation), and the presidents between Kennedy and Reagan granted over 21 percent of all petitions. Then the decline began: Reagan granted 12.6 percent of all petitions, George H.W. Bush 4.5 percent, Clinton 9.2 percent, and George W. Bush 1.65 percent (and only 11 of 9,732 commutation petitions).³⁶

Obama's record has been strikingly inconsistent, with a first term nearly devoid of clemency grants (only 0.06 percent of petitions ruled on or closed).³⁷ At the time of this writing, Obama's second term is witnessing the creation of an unusual, extraordinary, and (importantly) temporary clemency process that appears poised to grant hundreds, if not thousands, of petitions of individuals seeking sentencing reductions in situations in which they are serving long sentences that would not be issued under current law and for which they did not commit acts of violence.³⁸

The remarkable slowdown in clemency through the regular process coincided with a larger event that compounded its effect—the elimination of parole in the federal system through the

³⁴ Carter wasted no time, issuing the amnesty proclamation on his first full day in office. See Allen Pusey, *Jan. 21, 1977: Carter Pardons Vietnam-Era Draft Dodgers* (ABA Journal, Jan 1, 2014), archived at <http://perma.cc/FG2X-EMWZ>.

³⁵ See Love, 100 J Crim L & Crimin at 1194–95 (cited in note 21) (detailing how, from the 1980s onward, prosecutorial control over pardon recommendations created a situation in which “pardon practice served primarily to ratify the results achieved by prosecutors, not to provide any real possibility of revising them”). See also Part I.B (providing examples of the Bill Clinton and George W. Bush administrations’ failures to use the pardon power in support of stated policy aims). Importantly, Ronald Reagan’s “amnesty” for undocumented immigrants was accomplished through legislation, not via the pardon power. See Immigration Reform and Control Act of 1986 (IRCA), Pub L No 99-603, 100 Stat 3359, codified as amended in various sections of Title 8.

³⁶ DOJ, *Clemency Statistics* (cited in note 27).

³⁷ *Id.* (indicating that, through 2012, Obama pardoned just twenty-two people and commuted only one sentence).

³⁸ See James M. Cole, *Remarks as Prepared for Delivery at the Press Conference Announcing the Clemency Initiative* (Apr 23, 2014), archived at <http://perma.cc/4CR7-SJBH>; Stephanie Condon, *Obama to Consider More Clemency Requests from Nonviolent Drug Offenders* (CBS News, Apr 21, 2014), archived at <http://perma.cc/7A53-ENZN>.

Sentencing Reform Act of 1984.³⁹ Thus, the two principal features of second-look sentencing in the federal system shut down simultaneously, one through legislative action and one through executive disinterest. Clemency is the more remarkable of the two, however, because unlike parole, the pardon power exists as a creation of the Framers. The remainder of this Part will catalogue some of the costs of this systemic failure of what the Supreme Court has called the “fail safe” mechanism of our criminal-justice system.⁴⁰

B. Overincarceration and the Desuetude of Clemency

Certainly, the falling away of clemency has not been a primary cause of what many perceive to be a wave of overincarceration in the federal system. Even under those presidents who most frequently utilized their pardon power, the number of people offered commutations was only a fraction of the inmates held at that time.⁴¹ A telling example is the only attempt, prior to Obama’s, to release prisoners sentenced to long terms for narcotics-related violations because those sentences were viewed as too harsh. That program was initiated by Kennedy and led to the release of more than three hundred inmates perceived to have been oversentenced under the Narcotics Control Act of 1956.⁴² While this effort was historic (if quiet),⁴³ it affected only a tiny part of the federal inmate population.⁴⁴ That small reduction was more than nothing, of course—particularly if you happen to be one of the people released from prison.

A regular, conscientious clemency program will probably never act broadly enough to substantially affect prison numbers directly. However, we should not dismiss indirect effects too

³⁹ Pub L No 98-473, 98 Stat 1987, codified as amended at 18 USC §§ 3551–3742 and 28 USC §§ 991–98.

⁴⁰ *Herrera v Collins*, 506 US 390, 415 (1993) (quotation marks omitted).

⁴¹ See DOJ, *Clemency Statistics* (cited in note 27).

⁴² Pub L No 84-728, 70 Stat 567 (1954), codified at 26 US § 7237. See also Love, 100 J Crim L & Crimin at 1191 n 89 (cited in note 21); Charles Shanor and Marc Miller, *Pardon Us: Systemic Presidential Pardons*, 13 Fed Sent Rptr (Vera) 139, 142–43 (2001).

⁴³ See Shanor and Miller, 13 Fed Sent Rptr (Vera) at 142 (cited in note 42) (noting that this pattern of systematic clemency can be discerned only from a close reading of the annual reports of the attorney general issued during the first few years of the Johnson administration).

⁴⁴ These roughly 300 commutations affected only approximately 1 percent of the federal prison population, which in 1960 stood at 23,218. See Patrick A. Langan, et al, *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925–86* *1, 10 (US Department of Justice, May 1988), archived at <http://perma.cc/CH8L-BN8H>.

quickly. Clemency has always played a role in signaling policy goals in the continuing dialogue between the three branches of government and within the executive branch itself. For example, President Thomas Jefferson believed the Alien and Sedition Acts⁴⁵ to be unconstitutional as a matter of law.⁴⁶ As president, though, he was limited in the actions that he could take. He could not unilaterally strike down the law; as the Supreme Court shortly made quite clear, it was the prerogative of the judicial branch to rule on the Acts' constitutionality.⁴⁷ Nor could he repeal the law, as that was within the power of Congress. Instead, the tool that he had was the pardon power, and he exercised that power to free those held under the Acts.⁴⁸

Kennedy's actions, too, signaled his recognition of a problem with the onerous Narcotics Control Act.⁴⁹ The signal was eventually heeded, and the most objectionable provisions of that law were repealed in 1970.⁵⁰

Bill Clinton and George W. Bush, significantly, passed over a similar chance to signal their objections to the 100-to-1 ratio between powder cocaine and crack cocaine that was embedded in the federal Sentencing Guidelines and the statutory minimums from 1986 to 2010.⁵¹ Though both presidents publicly voiced their objections to this disparity,⁵² neither backed this up with the use of the tool in their hands—commutation. Either could have signaled the need for reform by strategically commuting the sentences of a significant number of crack defendants. But instead they squandered this power on clemency for Marc Rich and Scooter Libby, signaling something less

⁴⁵ Act of June 18, 1798 ("The Naturalization Act"), 1 Stat 566, repealed by Act of Apr 14, 1802 ("Naturalization Law of 1802") § 5, 2 Stat 153, 155; Act of June 25, 1798 ("The Alien Act"), 1 Stat 570 (expired 1800); Act of July 6, 1798 ("The Alien Enemies Act"), 1 Stat 577, codified as amended at 50 USC §§ 21–24; Act of July 14, 1798 ("The Sedition Act"), 1 Stat 596 (expired 1801).

⁴⁶ See Shanor and Miller, 13 Fed Sent Rptr at 143 (cited in note 42).

⁴⁷ See *Marbury v Madison*, 5 US 137, 177–78 (1803).

⁴⁸ See Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo Wash L Rev 521, 541 (2005).

⁴⁹ See Shanor and Miller, 13 Fed Sent Rptr at 143 (cited in note 42).

⁵⁰ See *id.* at 142.

⁵¹ The 100-to-1 ratio was adopted by the Anti-Drug Abuse Act of 1986, Pub L No 99-570, 100 Stat 3207, codified at 21 USC § 801 et seq, and it "treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Kimbrough v United States*, 552 US 85, 96 (2007). Thus, the Act would have imposed equivalent sentences on a defendant possessing 5 grams of crack cocaine and a defendant possessing 500 grams of powder cocaine. *Id.*

⁵² See Shanor and Miller, 13 Fed Sent Rptr at 143–44 (cited in note 42).

principled. Professor Jeffrey Crouch was blunt in concluding that Clinton and Bush “succumbed to the temptation to use clemency for their own personal reasons.”⁵³

The importance of this signaling function is not limited to the lines of communication between the president and the legislature. It also serves as a notice of presidential priorities, which is communicated directly to the people who make real-time charging and plea decisions—the Assistant US Attorneys across the country. Several layers of bureaucracy lie between the chief executive and these key actors—the attorney general, the deputy attorney general, a US Attorney, the criminal chief of that office, and a unit supervisor—and priorities are easily diluted as they are communicated down this long line. Clemency sends a clear message to those line prosecutors about what matters to the president.⁵⁴

Clemency, then, has both a direct and indirect role to play in controlling prison populations—particularly in the absence of a parole mechanism—and disuse has a cost. We may now be seeing one of those costs, even as Obama has signaled that he will use the clemency power to address the effects of overcharging and oversentencing narcotics offenses in federal courts.⁵⁵ The need to commute the sentences of large numbers of people through a special process is created in part by the fact that the regular, systemic process has not worked. In other words, instead of releasing steam regularly, the system has burst. That herky-jerky reaction does not reflect a healthy, ongoing mechanism. It would be far better to have released 125 people every year over 8 years in office, carefully examining each petition and thereby signaling when prosecutorial discretion to charge has gone too far, rather than push through 1,000 pardons during the last year in office.

⁵³ Jeffrey Crouch, *The Presidential Pardon Power* 101 (Kansas 2009).

⁵⁴ For an argument that clemency is a critical structural mechanism for the president to control executive branch prosecutors, see Rachel E. Barkow, *Clemency and the Unitary Executive*, 90 NYU L Rev *49 (forthcoming 2015), archived at <http://perma.cc/4KMK-G9XH>.

⁵⁵ See US Department of Justice, Press Release, *President Obama Grants Commutations and Pardons* (Dec 19, 2013), archived at <http://perma.cc/5TAG-ZWKT> (granting eight commutations and thirteen pardons for individuals convicted of narcotics offenses); DOJ, Press Release, *Announcing New Clemency Initiative* (cited in note 8).

C. The Atrophy of the Clemency Process

By declining to conscientiously employ the pardon power, recent presidents have not only failed to signal important policy ideas. They have also affirmatively signaled something else: that clemency itself is unimportant. That signal leads inexorably to a certain lethargy in the process mechanism, and the evidence of that lethargy within the current system is unmistakable.

When we come to expect nothing from the pardon power, little attention is given to the process itself. The process of evaluation becomes a process of denial, fulfilling low expectations regarding outcomes. A president can, of course, demand that more petitions be advanced with positive recommendations, but for some three decades this apparently did not happen (with the exception of last-minute requests by Clinton and George W. Bush).⁵⁶ Largely forgotten, during this period the Office of the Pardon Attorney met the low expectations embodied in the executive's disinterest. This dynamic was magnified by the placement of the evaluation process within the DOJ itself—after all, the consideration of mercy takes place within a building largely devoted to prosecution and punishment.⁵⁷

This idea about atrophy is not hypothetical; it is the reality that developed within the Office of the Pardon Attorney through the George W. Bush administration and the first years of the Obama administration. A remarkable window into this period was offered in a brief op-ed in the *Los Angeles Times*, published on November 6, 2010, titled “A No-Pardon Justice Department.”⁵⁸ The author was Samuel Morison, who had worked in the Office of the Pardon Attorney for ten years, well into George W. Bush's presidency. What Morison described was alarming and sad:

[T]here is a strong presumption within the pardon office that the number of favorable recommendations should be kept to an absolute minimum, regardless of the equitable

⁵⁶ At the end of both the Bill Clinton and George W. Bush presidencies, the White House began bypassing the DOJ and accepting petitions directly. See Love, 100 J Crim L & Crimin at 1195–1203 (cited in note 21).

⁵⁷ See Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J Crim L & Crimin 593, 606 & n 80 (2012) (“All but a handful of the individuals officially responsible for approving Justice Department clemency recommendations since 1983 have been former federal prosecutors.”). See also Part II.

⁵⁸ Samuel T. Morison, *A No-Pardon Justice Department* (LA Times, Nov 6, 2010), archived at <http://perma.cc/9GAE-TDWN>.

merits of any individual petition. . . . [T]he bureaucratic managers of the Justice Department's clemency program continue to churn out a steady stream of almost uniformly negative advice, in a politically calculated attempt to restrain (rather than inform) the president's exercise of discretion.⁵⁹

This cycle of disfavor and disuse is difficult to break without concerted action: The pardon attorney, embedded among prosecutors, protects the work of those prosecutors above all else. The president, in turn, fails to use the pardon power. Clemency falls out of the public eye, and the failure to use the pardon power only affirms the continuing negativity of the pardon attorney.

An incident regarding a particular case reveals this dynamic with even more precision. Dafna Linzer of ProPublica pursued a series of stories regarding clemency and the federal pardon attorney in 2012 and 2013.⁶⁰ Several involved Clarence Aaron, who was serving a life sentence for his involvement in a drug conspiracy. As Linzer reported, an inspector general report blasted Pardon Attorney Ron Rodgers for specific and troubling failures:

Aaron had won crucial support for a commutation from the U.S. attorney in Mobile, Ala[bama], and the sentencing judge there. But Rodgers, who opposed Aaron's release, failed to accurately convey those views to the White House. Acting on Rodgers's advice, President George W. Bush denied Aaron's request for commutation in the final weeks of his presidency.⁶¹

Within the realm of clemency, support from the prosecutor and judge is both rare and important. The failure to report this information shows a striking devotion to consistent denials.⁶²

Morison and Linzer describe a flawed system. It is not coincidental that this level of dysfunction was reached after decades of presidential disinterest in clemency. Had a president demanded more, the outcome may have been better. But because presidents expected less, those expectations were fulfilled. Now

⁵⁹ *Id.*

⁶⁰ See *Presidential Pardons: Shades of Mercy* (ProPublica), archived at <http://perma.cc/VC4W-KGW5> (containing Linzer's full series).

⁶¹ Dafna Linzer, *Head of Pardons Office Withheld Facts from White House in Key Case* (ProPublica, Dec 18, 2012), archived at <http://perma.cc/H2A6-MX7E>.

⁶² See *id.* Aaron later had his sentence commuted by Obama. See Cora Currier, *President Obama Tells Clarence Aaron He Can Finally Go Home* (ProPublica, Dec 19, 2013), archived at <http://perma.cc/L7EE-MYYJ>.

the system built on those low expectations no longer functions. The fact that Obama has had to resort to an extraordinary work-around of the pardon attorney—by soliciting petitions and having the deputy attorney general announce the criteria for evaluating those petitions—does not undermine this fact; rather, it confirms it.

In addition, the more unusual clemency becomes, the more each grant becomes newsworthy in itself and subjected to scrutiny. Given the politics of crime, presidents may be reluctant to grant clemency because doing so has limited political upside and each grant carries the risk of a political attack should the recipient of clemency commit an act of violence. If clemency is routine and based on a defensible vetting process and the consistent use of principled standards, the president has greater insulation from such attacks.

D. The Erosion of Clemency Stresses Other Early Release Mechanisms

As clemency becomes less relevant to criminal law due to presidential inaction, it gives up its function as a fail-safe within the criminal law system as a whole. This puts more pressure on other pathways to second-chance review, such as the ancient writs of habeas corpus, *coram nobis*, and *audita querela*.

Habeas corpus within the federal system, having suffered the manhandling of the Antiterrorism and Effective Death Penalty Act of 1996⁶³ (AEDPA), is limited to correcting the grossest of abuses raised by the most vigilant of prisoners.⁶⁴ It is an ill-fitting vehicle for the majority of worthwhile clemency petitioners, whose bedrock claim is simply that their sentence no longer fits the person who they have become or the current standards for a proportionate sentence. Pushing those whose claims should rest on an appeal to mercy through a system of habeas that rarely considers even the most worthwhile legal claims is a recipe for failure at multiple levels. It simply clogs the system with petitions that are destined to fail.

The writs of *coram nobis* and *audita querela* present a different dilemma. To see this at work, one need only look to the

⁶³ Pub L No 104-132, 110 Stat 1214, codified at 28 USC § 2254(d).

⁶⁴ See *Greene v Fisher*, 132 S Ct 38, 43 (2011) (“[T]he purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction.”) (quotation marks omitted).

work of Harlan Protass, an innovative criminal-defense lawyer in New York City. Protass, having taken stock of the federal clemency drought, concluded that “pardon/commutation is a broken system that provides so minuscule a chance at relief that making an application borders on a waste of time.”⁶⁵ He saw better prospects in other forms of second-chance relief.

Specifically, Protass found success in pressing federal cases through the use of FRCP 60. On its face, that Rule expressly abolishes the writs of *coram nobis* and *audita querela*,⁶⁶ but Protass found ways to finesse that point, convincing courts that the writs were eliminated only in civil cases.⁶⁷ *Coram nobis* traditionally was issued by a court to correct a previous error of the most fundamental character in order to achieve justice when there are “extraordinary circumstances” and no other remedy is available.⁶⁸ *Audita querela* was also a British common-law writ that allowed the consideration of new law or evidence.⁶⁹

Even when it is successful, this use of an obscure civil procedure rule (which expressly bars the writs sought) is unstable over time. It is likely that courts will try to push *coram nobis* and *audita querela* into known pathways by construing them as motions under 28 USC § 2255 that are subject to severe restrictions or by limiting their relevance to areas not covered by 28 USC § 2255. Already, courts of appeals have moved in this direction.⁷⁰ More simply, a flood of cases under this rule might push the Supreme Court (or a majority of courts of appeals) to simply hold that Rule 60(e) means what the government will urge that it does—namely, that these writs have been abolished in both civil and criminal actions.⁷¹

⁶⁵ E-mail from Harlan Protass to Mark Osler (Apr 7, 2014) (on file with authors).

⁶⁶ FRCP 60(e).

⁶⁷ Harlan Protass, *The Mercy Project: Legal Primer* *7–10 (NYU Center on Administration of Criminal Law Sept 2013), archived at <http://perma.cc/R8QH-J89K>.

⁶⁸ *Nicks v United States*, 955 F2d 161, 166–67 (2d Cir 1992).

⁶⁹ See *United States v LaPlante*, 57 F3d 252, 253 (2d Cir 1995). See also *United States v Holder*, 936 F2d 1, 3–4 (1st Cir 1991). For a helpful discussion of the distinction between the writs of *audita querela* and *coram nobis*, see *United States v Torres*, 282 F3d 1241, 1245 n 6 (10th Cir 2002).

⁷⁰ See, for example, *Cherys v United States*, 552 Fed Appx 162, 166–67 (3d Cir 2014) (concluding that *coram nobis* is generally not available to those who are “in custody” and asserting a claim under § 2255); *United States v London*, 523 Fed Appx 510, 511 (10th Cir 2013) (holding that the petitioner was “not entitled to a writ of *audita querela* because he [was] in custody”).

⁷¹ To get to this conclusion, though, the Court would have to deal with the language of *United States v Morgan*, 346 US 502 (1954), which allowed a *coram nobis* petition and

The reason that this matters is tied to the hopes and expectations of prisoners. If an ancient writ offers hope, the word spreads fast within prison.⁷² If all that prisoners have is a dream of freedom, that dream will be tied to whatever balloon floats by. Unfortunately, these ancient writs rest on very unstable legal ground. Once courts come to a consensus, it is likely that these balloons will have been popped, and those writs will be reduced to less than a wisp in the law. The disadvantage of these writs is that they do not even exist in statute (other than a declaration of their abolition), meaning that courts can easily dispose of them. In contrast, the pardon power, however maligned and ignored, still rests squarely within the words of the Constitution.⁷³ The pardon power will revive as a systemic fail-safe when and if the will is there. It may not be ideal in implementation, but it will, at the least, continue to *be*.

E. Clemency and the Balance of Power

It is clear that the Framers intended the pardon power not only to be a vehicle for the ancient value of mercy but also to play a role in the balance between the branches of government. The importance of this role was significant enough to overcome even the resistance of those who were generally suspicious of a strong executive.⁷⁴

With striking foresight, the Framers identified the specific problem that could be countermanded through the pardon power: the inevitable instinct of legislators, propelled by political impulse, to create harsh sentences against unpopular criminals that would prove disproportionate in particular cases. As Alexander Hamilton put it in *Federalist 74*:

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

concluded that “[n]owhere in the history of Section 2255 do we find any purpose to impinge upon prisoners’ rights of collateral attack upon their convictions.” *Id.* at 510–11.

⁷² See David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 *Harv L Rev* 321, 322 (1973).

⁷³ See US Const Art II, § 2, cl 1 (giving the president the “Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment”).

⁷⁴ See Crouch, *The Presidential Pardon Power* at 14–15 (cited in note 53).

easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.⁷⁵

This argument, made some twenty-two decades ago, concisely describes the imbalance that has plagued our federal system of justice over the past three decades. Politicians reacted to public and media alarms about drugs with the passage of harsh sentencing laws without much attention to data and empirical evidence. In time, we have come to realize that these laws were sanguinary and cruel, at least as to some of those affected. The tool for restoring balance—the pardon power—has sat latent as the injustice has become clearer.

The pardon power is not sufficient (on its own) to reduce the federal prison population.⁷⁶ The legislature must do its job by revising the laws and allowing retroactivity when appropriate. Yet the clemency power of the executive has a role in keeping the whole in balance and sending signals to prosecutors about how those laws should be charged. When that power goes unused, or when it is used without principle, the carefully balanced process of criminal justice is subtly undone. The structure for clemency must be rebuilt so that its intended function can be restored.

II. THE PATH FORWARD: REDESIGNING CLEMENCY

Reinvigorating clemency will help to minimize the costs discussed in Part I. But a renewed commitment to clemency can bring even more benefits, particularly if there is a shift in its institutional design and decisionmaking focus.

One of the reasons that clemency has fallen by the wayside is its institutional placement within the DOJ. There is an inherent conflict of interest when the same department that prosecutes cases is asked to second-guess those decisions at the clemency phase.⁷⁷ This conflict became increasingly pronounced in the late 1970s and early 1980s when the Justice Department shifted responsibility over pardons to the deputy attorney general—whose principal responsibility is to oversee federal prosecutions—and when a focus on tough-on-crime politics made the Justice Department's law-enforcement efforts a key, high-profile

⁷⁵ Federalist 74 (Hamilton), in *The Federalist* 500, 500–01 (Wesleyan 1961) (Jacob E. Cooke, ed).

⁷⁶ See Part I.B.

⁷⁷ For a lengthier treatment of this intrinsic tension, see Barkow, 99 Va L Rev at 286–91, 312–19 (cited in note 19).

aspect of presidential administration.⁷⁸ Given this conflict, it is not surprising that the Office of the Pardon Attorney fails to recommend grants, thereby frustrating presidents who want to use the power.⁷⁹ President George W. Bush, after failing to receive positive recommendations for clemency from the Office of the Pardon Attorney even after his White House counsel requested them, remarked that the process “is broken” and “doesn’t make any sense.”⁸⁰

It is hard to disagree with Bush’s assessment. While it is critical to get the views of the prosecutor who brought the case initially and any other input from the Justice Department on the merits of a grant, that information can be gathered by another body that does not have the same conflict of interest in weighing that assessment against other factors and information.⁸¹ Whereas pardon attorneys in the Justice Department will be prone to defer to the Department—not out of bad faith, but because of a natural sense of confidence in the judgment of Department prosecutors and in deference to the deputy attorney general, who both supervises federal prosecutions and is in charge of the pardon office—an actor outside that framework can bring a fresh perspective when she evaluates the Justice Department’s position alongside other evidence as well as the president’s criminal justice policies.

A. Creation of an Independent Clemency Board

The key to strengthening clemency and maximizing its utility is to change this institutional structure by removing clemency from the supervision of the Justice Department—an

⁷⁸ See *id.* at 288–89 (noting that the Reagan Justice Department explicitly sought to “polarize the debate” on drugs and prisons to “further [its] agenda,” and describing the 1978 shift in control over pardons).

⁷⁹ President Clinton, for example, expressed “dissatisfaction with the general approach to clemency cases being taken by his own Justice Department,” which led him to turn to his lawyers in the White House to serve those functions. *Presidential Pardon Power, Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives*, 107th Cong., 1st Sess 25 (2001) (statement of Margaret Colgate Love).

⁸⁰ Peter Baker, *Don’t Go Away Mad: The Final, Heartfelt Conflict That Ended the Bush–Cheney Partnership*, *NY Times Magazine* 28, 32 (Oct 10, 2013).

⁸¹ See Rachel E. Barkow, *Criminal Law as Regulation*, 8 *NYU J L & Liberty* 316, 337–38 (2014); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan L Rev* 869, 883 (2009); Keith A. Findley, *Tunnel Vision*, in Brian L. Cutler, ed., *Conviction of the Innocent: Lessons from Psychological Research* 303, 303–04 (American Psychological Association 2012).

institutional setup in which the prosecutorial perspective dominates and the president does not receive an independent assessment that insulates his decision from partisan decisionmaking. President Obama's first White House counsel, Greg Craig, reached this conclusion and argued in favor of an "independent commission of former judges, prosecutors, defense attorneys and representatives of faith-based groups."⁸²

While there is room for reasonable disagreement about where it should be institutionally placed and who should be on such a board, we believe that it is possible to outline certain minimal requirements of such a body. First, it should be an executive branch institution because the pardon power is a core executive function. Its membership should not be subject to confirmation by the legislative branch or subject to any other limitations by the other branches.⁸³ We thus envision a commission that would serve solely at the pleasure of the president. While it could be a freestanding agency within the executive branch or placed within the White House counsel's office or elsewhere in the Executive Office of the President,⁸⁴ it should not be subject to supervision by the DOJ because of the conflict created by

⁸² Dafna Linzer and Jennifer LaFleur, *A Racial Gap for Criminals Seeking Mercy*, Wash Post A1, A21 (Dec 4, 2011). Craig was not the first to advocate for placing clemency outside the Justice Department. See, for example, Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J Crim L & Crimin 1131, 1167–68 (2010) (advocating for the placement of the Office of the Pardon Attorney within the Executive Office of the President with reporting obligations to the White House counsel); Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse?*, 13 Fed Sent Rptr (Vera) 177, 178 (2001) (arguing for shifting the pardon authority from the DOJ to the White House). See also Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 Cap U L Rev 219, 231 (2003) (arguing that "an administrative body, properly constituted, can improve the dispensing of clemency" and "better decisions could well be forthcoming from a body that was truly representative and comprised of individuals with expertise in the retribution and culpability issues surrounding clemency (psychologists, criminologists, lawyers, parole officers, clergy, etc.)").

⁸³ Thus, although a body like the Sentencing Commission has the staff and capabilities for the kind of data analysis that we propose, see Part II.C, its placement in the judicial branch and the fact that its members are subject to Senate confirmation would restrict the president's constitutional clemency power to too great an extent should the Sentencing Commission have a role in clemency. In addition, the Sentencing Commission's membership lacks the kind of diversity that we believe is necessary for clemency determinations. The Commission's most recent slate of seven voting members consisted of five federal judges, a law professor, and a former White House counsel and US Attorney. US Sentencing Commission, *About the Commissioners* (June 2013), archived at <http://perma.cc/LGR3-S6BJ>.

⁸⁴ See Barkow, 99 Va L Rev at 330–41 (cited in note 19) (discussing the advantages and disadvantages of various institutional placements).

putting those responsible for prosecution in charge of second-guessing those same prosecutorial decisions.

Although the number of pardons has fallen in jurisdictions throughout the United States (and not just at the federal level), some states have better-functioning clemency systems. Love's important study of state practices found that the use of an independent board was a critical factor in those nine states where pardons continue to be granted on a regular basis.⁸⁵ This is not sufficient, of course, as there are a number of states with independent boards that rarely grant clemency.⁸⁶ But the use of an independent board does seem to be a necessary precondition to improvement because it creates a layer of independence in the decisionmaking process from law-enforcement biases and tough-on-crime political concerns that may not represent smart-on-crime decisions.

B. Composition of the Clemency Board

A second crucial aspect of a clemency advisory board is its membership. Any advisory body on clemency should include representatives from the range of interests that play a role in the criminal justice process to ensure that all those interests are represented and to increase the likelihood that the judgment of the board is substantively sound as judged from the perspective of that range of interests. We believe that the board should include the following: a former federal prosecutor; a former federal public defender; someone with prior experience working in corrections; someone who was formerly incarcerated; a former federal judge; a former probation officer; a former police officer; an individual with private-defense experience; someone who has worked with victims of crime or was a victim of crime and works on those issues; and individuals from academia with expertise in risk assessment and criminal justice policy, so at least one criminologist, one psychologist, and someone who studies criminal law and policy. Having former political officials could also be beneficial, perhaps including former governors who had previously made clemency decisions.

The specifics of the membership criteria are less important than the general goals. The central aim should be to create a

⁸⁵ See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* xi (Hein 2006).

⁸⁶ See *id.* at 23–26.

group of individuals who bring all the relevant perspectives to bear on the issues posed by criminal conduct and the need for clemency and who will view their job on the board as apolitical. The body should be politically balanced along the lines of the Sentencing Commission and other independent agencies, with Democrats and Republicans among its members. The goal should be the creation of a bipartisan body that is not tilted in a particular political direction or biased toward a certain viewpoint.

Because of the politics of clemency, it is critical that the group include validators for any president who wishes to exercise this power more robustly. Thus, having former law-enforcement officials and politicians who cannot be attacked as soft on crime is beneficial for the success of this body. In the model of President Nixon going to China, this body needs people on it who can signal to the general public that a decision for clemency is reasonable across a range of viewpoints.⁸⁷ Indeed, it is critical that the commission have individuals with unassailable credentials on public safety and a concern for victim interests.

C. Reliance on Data

The body itself should ground its decisions, as much as possible, in data. Currently, clemency decisions are viewed in isolation, with each application assessed on its own merit and without a systematic approach to how a case fits into a larger frame of decisionmaking. Unfortunately, the ad hoc nature of this current process has produced racially disparate outcomes and a system that favors those few individuals with members of Congress backing their application.⁸⁸ A new model of clemency should pay close attention to racial and other disparities to ensure that the process is not biased. Such a change requires thorough data collection.

A focus on data could bring additional benefits by using this decision point as an opportunity to check exercises of prosecutorial discretion that can produce disparities in the system.⁸⁹ Love

⁸⁷ The most successful sentencing commissions follow this model of a diverse membership with commissioners who have influence with other political actors. See Rachel E. Barkow, *Administering Crime*, 52 *UCLA L Rev* 715, 800–04 (2005).

⁸⁸ See Linzer and LaFleur, *Wash Post* at A1, A20 (cited in note 82).

⁸⁹ See Barkow, 90 *NYU L Rev* at *48–50 (cited in note 54) (discussing clemency as a tool for promoting uniformity in law enforcement).

has observed that clemency can become a “useful policy and management tool” for the president by giving him a “birds-eye view of how the federal justice system is being administered, revealing where particular laws or enforcement policies are overly harsh, and where prosecutorial discretion is being unwisely exercised.”⁹⁰

There is currently no body in the federal system that keeps track of prosecutorial decisions across the ninety-three offices of the US Attorneys, other than whatever metrics are kept by prosecutors themselves in the DOJ and the information from the DOJ and the courts that gets reported to the Sentencing Commission.⁹¹ We know from existing data that there is a great deal of disparity in how prosecutors charge cases and the sentences that they pursue. For instance, there is wide variation in the charging of crimes that carry mandatory minimum sentences. One GAO study found that prosecutors in the Southern District of Florida almost always filed mandatory minimum charges, while prosecutors in the Eastern District of New York declined to file the mandatory minimum over seventy times.⁹² In the Eastern District of New York and the Southern District of California, prosecutors dropped or reduced mandatory minimum charges regularly,⁹³ while prosecutors in other districts, such as the Central District of California, rarely dropped or reduced charges after filing them.⁹⁴

Recent data also indicate wide variation in charging repeat offenders under the mandatory-minimum-sentencing provisions of 21 USC § 851. “For example, in six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty as an enhancement. In contrast, in eight

⁹⁰ Love, 100 J Crim L & Crimin at 1206 (cited in note 21).

⁹¹ See Brian D. Johnson, *The Missing Link: Examining Prosecutorial Decision-Making across Federal District Courts* *86 (National Institute of Justice, 2010), archived at <http://perma.cc/CF4E-AWR5>.

⁹² A 1993 study by the GAO revealed large disparities between districts in their treatment of defendants whose offenses had the potential for mandatory minimum sentences. See *Mandatory Minimum Sentences: Are They Being Imposed and Who Is Receiving Them?* *19–21 (GAO/GGD-94-13, Nov 1993), archived at <http://perma.cc/84QK-B243>.

⁹³ In the Eastern District of New York, prosecutors dropped or reduced the charges for 53 out of 125 defendants. *Id.* at *19. In the Southern District of California, prosecutors dropped or reduced charges for 55 out of 66 defendants. *Id.*

⁹⁴ *Id.*

districts, none of the eligible drug offenders received the enhanced penalty.”⁹⁵

Moreover, available data strongly indicate that there are large disparities among the offices of the US Attorneys in their willingness to file motions on behalf of defendants who offer substantial assistance to prosecutors. For example, prosecutors in the Southern District of Alabama were more than twice as likely to file such motions than prosecutors in the Eastern District of Arkansas; prosecutors in the Central District of Illinois were over three times as likely to file such motions as prosecutors in the Southern District of Illinois.⁹⁶ Undoubtedly there are other charging and sentencing practices that differ among US Attorneys’ Offices, and the clemency board would be well suited to track those variations.

Data-driven clemency would be a way to systematically evaluate and smooth out those differences in line with the president’s enforcement policies. Because clemency works in only one direction—to reduce sentences—the board itself would serve as a check on only those offices that are charging too aggressively. But nothing would stop other actors, such as the president or attorney general, from using the data to reformulate department policy should the Justice Department decide that some districts have been charging too leniently. And Congress could use the information to assess whether statutory changes are needed because of how those statutes are being applied. The point of the clemency board would be to provide these data in a useable format, in the same way that the Sentencing Commission does with respect to its data on judicial decisionmaking. Those data are useful tools to a range of actors, and similar data on prosecutorial practices are just as vital.

Data collection on federal prosecutors could also help identify the areas in which those prosecutors may be prone to error. If, for example, clemency is necessary when an individual

⁹⁵ Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System* at *255 (cited in note 15). See also *United States v Young*, 960 F Supp 2d 881, 882 (ND Iowa 2013) (discussing the “the stunningly arbitrary application by the Department of Justice . . . of § 851 drug sentencing enhancements”).

⁹⁶ *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* 124 (Human Rights Watch 2013). The Sentencing Commission notes, “There appears to be no nationwide Department of Justice practice concerning the extent of the reduction that should be recommended for any particular type of cooperation.” Sentencing Commission, *Mandatory Minimum Sentences in the Federal Criminal Justice System* at *110–11 (cited in note 15).

demonstrates innocence or identifies prosecutorial misconduct, that should have a bearing on an individual's ultimate sentence and may also signal something wrong in how particular types of cases are handled. In this respect, the clemency board can operate like a conviction-integrity unit, which have been established in state prosecutors' offices to look for errors in cases and establish mechanisms to avoid error in the future based on common mistakes that are identified through that retrospective review.⁹⁷

Finally, the clemency board could provide yet another useful benefit through its collection of data on individuals who receive clemency. Currently, the public receives information on individuals granted some form of clemency only when the media highlights a case in which an individual reoffends after having been given a break—what might be called the “Willie Horton bias.” What we lack is a systemic look at what happens in those cases in which clemency produces a successful outcome. Under what circumstances are grants of clemency successful? Can we quantify those benefits in terms of costs saved on additional corrections expenditures or state economic assistance that becomes unnecessary because an individual successfully reenters and gains employment? How do recidivism rates for those with clemency compare with those who do not receive it? What conditions are appropriately attached to pardons and commutations to ensure a successful reentry? A clemency board should be collecting just this type of information so that the benefits can be weighed against the costs and so that we can better identify those factors that are associated with successful reentry.

The board would not be driven exclusively by data, of course, because its focus would remain on correcting injustices in particular cases. But those individualized decisions would be better informed if the recommendations came from a board sensitive to overall data patterns on race, recidivism, and prosecutorial practices. And positive grant recommendations would mean more if they came from an expert, politically diverse body.

⁹⁷ See *Establishing Conviction Integrity Programs in Prosecutors' Offices* *31–33 (Center on the Administration of Criminal Law, 2011), archived at <http://perma.cc/453Y-ZBPB>.

CONCLUSION

Clemency occupies an odd place in American government today. It is one of the greatest powers that the president has, yet presidents have found themselves either unwilling or unable to use it. While President Obama's recent efforts to pave the way for more grants should be applauded, more could and should be done to fix the federal clemency process. It should not be a tool that presidents use only on their way out the door or to fix a specific problem that the president identifies in advance (as Obama appears ready to do with drug penalties that have been changed). The process should be able to detect errors and injustices that cannot be identified *ex ante* and even when laws themselves have not undergone legislative change.

When the Framers spoke of the pardon power, they noted that it was necessary because prevailing criminal law might be too severe. They did not reserve it for retroactive adjustments, nor did they think that all errors could be identified and corrected in advance. Rather, they set up a mechanism to ensure that justice could be done in every federal case. It is time to restructure clemency so that it fulfills this quiet but crucial constitutional function.