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## Memo to the President: Two Steps to Fix the Clemency Crisis

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## ARTICLE

# MEMO TO THE PRESIDENT: TWO STEPS TO FIX THE CLEMENCY CRISIS

MARK OSLER\*

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\* Robert and Marion Short distinguished professor of law, University of St. Thomas School of Law (MN). I would like to thank Rachel E. Barkow; many of the ideas proposed here have come out of our collaboration in looking at these issues. It is also important to recognize the organizers of and participants in the March 29, 2019 University of St. Thomas Law Journal symposium on clemency. Those inspiring participants included Roy Austin, Erin Collins, Rudy Martinez, Nkechi Taifa, Jason Hernandez, Mark Holden, Shon Hopwood, Jeffrey Crouch, Paul J. Larkin, Jr., Amy Ralston Povah, and Alice Marie Johnson.

From: Mark Osler, constituent  
To: The President of the United States  
Re: Solving the Clemency Crisis

## I. INTRODUCTION

Federal clemency is in crisis. As of the end of July 2019, a record number<sup>1</sup> of unresolved petitions for pardons and commutations—a total of 13,823—had piled up in a broken system.<sup>2</sup> The president has the power to fix this and a duty to do so. This article sets out a simple plan for that project, identifying the key decisions that must be made.

At stake is nothing less than a core function of the presidency, set out in the Pardon Clause of the Constitution.<sup>3</sup> The framers knew that criminal law would create undue harshness and require a mechanism of balance; as Alexander Hamilton put it, “The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”<sup>4</sup> That’s why they left a single prerogative of kings, the pardon power, in the hands of the executive. Clemency is a tool fit solely to the hand of the president, and it should again be used with principle and intention.

I have written before about the need for clemency reform and proposed the idea of a clemency board to replace the archaic, bureaucratic, and stultifying process now used in the federal system.<sup>5</sup> Here, though, I seek to go beyond those general pleadings and offer a detailed plan for how clemency can be reformed. Specifically, I set out two steps. First, the president must reconfigure the clemency process to become efficient, effective, and free of conflicts. Second, the president must define principles for his or her use of clemency before embarking on the project. In the pages that follow, I set out how both can be accomplished.

Section II will briefly describe the clemency crisis we find ourselves in after decades of unfortunate neglect. The problem has two root causes. The

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1. RJ Vogt, *How Courts Could Ease the White House’s Clemency Backlog*, LAW360 (Aug. 25, 2019, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1191991/how-courts-could-ease-these-white-house-s-clemency-backlog>.

2. Office of the Pardon Attorney, *Clemency Statistics*, U.S. DEP’T OF JUST. (last updated Jan. 14, 2020), <https://www.justice.gov/pardon/clemency-statistics>.

3. U.S. CONST. art. II, § 2.

4. THE FEDERALIST NO. 74 (Alexander Hamilton).

5. Mark Osler, *Clemency as the Soul of the Constitution*, 34 J.L. & POL. 131 (2019) [hereinafter Osler, *Clemency as the Soul*]; Rachel E. Barkow & Mark Osler, *Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387 (2017) [hereinafter Barkow & Osler, *Designed to Fail*]; Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465 (2017) [hereinafter Osler, *Fewer Hands, More Mercy*]; Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015) [hereinafter Barkow & Osler, *Restructuring Clemency*].

first is a process that is bogged down in bureaucracy, situated within an intrinsically conflicted Department of Justice (hereinafter “DOJ”), and bottlenecked by generalists with too many other duties. The second problem is a consistent failure to articulate a vision for the use of the pardon power, particularly in the early years of an administration.

Section III will turn to the first imperative in reforming clemency: restructuring the process. Key decision points are addressed, including the removal of the process from the hands of the DOJ, the structure to be used, funding, staffing, and compliance with existing law. The core recommendation is that the president create a clemency board by executive order, transform the pardon attorney into the staff director for that board, and import the pardon attorney’s staff to serve the board.

Finally, Section IV will address the second imperative: the articulation of a clear, principled, and ambitious agenda for use of the pardon power. Three nonexclusive models are presented: setting a numerical goal, focusing on “buckets” of similar cases, and looking for a mix of characteristics that can cross over several types of cases.

Before taking office, presidents deeply consider how they will use their power as commander-in-chief, as leader of their party, and as the head of government agencies that help vulnerable Americans. The president should also take time to think of how they will act as the sole holder of the pardon power, the forgiver-in-chief. Much of the president’s job is crucial to the nation’s well-being; clemency, though, is a key to its soul.

## II. THE CLEMENCY CRISIS

Federal clemency as it exists today is dysfunctional,<sup>6</sup> inefficient,<sup>7</sup> and raises false hopes—as those with Fox News or celebrity connections get expedited consideration while thousands who followed the proper channels hear nothing.<sup>8</sup> This is not just a Trump administration problem; President Obama was stingy with mercy for almost seven years,<sup>9</sup> and then granted over seventeen hundred commutations and over one hundred and forty pardon petitions in a rush over the last several months of his second term.<sup>10</sup> This program was later criticized in an inspector general’s report as rife

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6. Editorial Board, *The President and His Power to Pardon*, N.Y. TIMES (May 19, 2019), <https://www.nytimes.com/2019/05/19/opinion/trump-pardon-conrad-black-patrick-nolan.html>.

7. Tana Ganeva, *Can Trump Succeed Where Obama Failed—Offering Clemency for Nonviolent Offenders?*, THE INTERCEPT (June 2, 2018, 1:47 PM), <https://theintercept.com/2018/07/02/alice-johnson-trump-commuted-sentence-obama>.

8. Matt Gertz, *The Fox News Pardon Pipeline*, SALON (Apr. 23, 2018, 11:00 AM), [https://www.salon.com/2018/04/23/the-fox-news-pardon-pipeline\\_partner/](https://www.salon.com/2018/04/23/the-fox-news-pardon-pipeline_partner/).

9. Editorial Board, *Mr. Obama’s Trickle of Mercy*, N.Y. TIMES (Dec. 31, 2015), <https://www.nytimes.com/2015/12/31/opinion/mr-obamas-trickle-of-mercy.html>.

10. The Office of the Pardon Attorney, *supra* note 2.

with mismanagement.<sup>11</sup> President George W. Bush, frustrated with the clemency process, told aides that “this system is broken” and “doesn’t make any sense.”<sup>12</sup> He regretted his own treatment of the pardon power so much that in the limousine with Barack Obama on the way to the latter’s inauguration, Bush took the opportunity to urge Obama to make a clemency plan early and stick to it.<sup>13</sup> Bill Clinton, of course, sullied his legacy with a last-minute pardon of fugitive Marc Rich,<sup>14</sup> after making no grants at all in fiscal years 1993, 1994, 1996, and 1997.<sup>15</sup> Before him, George H.W. Bush set a record for inaction, granting only three commutations in his entire four-year term.<sup>16</sup> Things have been messy for a while.

Modern clemency seems to veer from inaction to controversy and back. It was not always like this. For example, compared to George H.W. Bush’s seventy-seven grants of clemency (including both pardons and commutations) over four years, fellow one-term President Rutherford B. Hayes granted over one thousand clemencies (from a much smaller group of people convicted of federal crimes),<sup>17</sup> Coolidge granted nearly seventeen hundred clemencies over six years, and even much-maligned one-termer Herbert Hoover granted almost twelve hundred—and none of these patterns were atypical for the period from the Civil War to the 1980’s.<sup>18</sup> Moreover, through our history there were not only more grants, but they were given more consistently over a president’s term. For example, Franklin Delano Roosevelt granted 204 clemencies in his first year in office—more than either Bush did during their entire time in office.<sup>19</sup> The so-called “tradition” of holding off on grants until near the end of a president’s last term began with Bill Clinton.<sup>20</sup>

So, what changed? Certainly, during the past four decades the federal prison population has exploded, sentences have become harsher,<sup>21</sup> and pa-

11. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUST., EVALUATION AND INSPECTIONS DIVISION REPORT 18-04, REVIEW OF THE DEPARTMENT’S CLEMENCY INITIATIVE (2018).

12. Peter Baker, *The Final Insult in the Bush-Cheney Marriage*, N.Y. TIMES (Oct. 10, 2013), <https://www.nytimes.com/2013/10/13/magazine/the-final-insult-in-the-bush-cheney-marriage.html>.

13. GEORGE W. BUSH, DECISION POINTS 104–05 (2011).

14. Eric Lichtblau & Davan Maharaj, *Clinton Pardon of Rich a Saga of Power, Money*, CHI. TRIB. (Feb. 18, 2001), <https://www.chicagotribune.com/sns-clinton-pardons-analysis-story.html>.

15. The Office of the Pardon Attorney, *supra* note 2.

16. *Id.*; Bush also granted seventy-four pardons, including several controversial pardons of those involved in the Iran-Contra scandal. Andrew Glass, *Bush Pardons Iran-Contra Felons*, DEC. 24, 1992, POLITICO (Dec. 24, 2018, 7:21 AM), <https://www.politico.com/story/2018/12/24/bush-pardons-iran-contra-felons-dec-24-1992-1072042>.

17. Osler, *Clemency as the Soul*, *supra* note 5, at 135.

18. *Id.* at 136.

19. The Office of the Pardon Attorney, *supra* note 2.

20. *Id.*

21. *Federal Sentencing Reform*, ABA, [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/criminal\\_justice\\_system\\_improvements/federalsentencingreform](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/criminal_justice_system_improvements/federalsentencingreform) (last visited Feb. 7, 2020).

role was eliminated from the federal system.<sup>22</sup> But these are things that should *raise* clemency numbers, not lower them—after all, with more prisoners and fewer avenues of release, clemency would seem to be more relevant than ever. The crucial change was a quiet evolution to a remarkably opaque and ineffective process for considering clemency petitions, all while modern presidents (save, briefly, for President Obama) failed to articulate any kind of coherent vision for the use of the pardon power.<sup>23</sup>

The modern process, which goes back to decisions made in the Carter administration,<sup>24</sup> involves no fewer than seven discrete and sequential steps.<sup>25</sup> The pardon attorney’s staff review petitions and contact local prosecutors for their opinions.<sup>26</sup> They then make a recommendation to the pardon attorney,<sup>27</sup> who makes a recommendation to an assistant to the deputy attorney general (hereinafter “DAG”),<sup>28</sup> who then sends a recommendation to the DAG,<sup>29</sup> who sends a recommendation to the staff of the White House Counsel,<sup>30</sup> who makes a recommendation to the White House Counsel, who . . . finally . . . passes the file, with a recommendation, to the president.<sup>31</sup>

This process has three fundamental flaws. First, it is simply a needlessly redundant and inefficient system, problems which are compounded by a bias towards negative decisions built into each step (after all, no one gets in trouble when a petitioner stays in prison—the risk is in releasing people). Second, the first four steps are within the DOJ, which carries an inherent bias in favor of the status quo.<sup>32</sup> Finally, the last five steps (running through the DAG staff, the DAG, the White House Counsel staff, the White House Counsel, and the president) are conducted by generalists with many other duties, who understandably can see clemency decisions as a low priority. These last two problems come together most acutely in the person of the DAG, who has a remarkable array of other tasks and an unusual level of

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22. U.S. PAROLE COMM’N, HISTORY OF THE FEDERAL PAROLE SYSTEM (2003), <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf>.

23. Osler, *Fewer Hands, More Mercy*, *supra* note 5.

24. Specifically, then-Attorney General Griffin Bell delegated his role in the clemency process to the Deputy Attorney General. Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 606 (2012).

25. Osler, *Fewer Hands, More Mercy*, *supra* note 5; Barkow & Osler, *Restructuring Clemency*, *supra* note 5, at 2–3; Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL’Y 833, 886–88 (2016) [hereinafter Larkin, *Revitalizing Clemency*]; Bill Keller, *The Bureaucracy of Mercy*, MARSHALL PROJECT (Dec. 14, 2015), <https://www.themarshallproject.org/2015/12/13/the-bureaucracy-of-mercy>.

26. U.S. DEP’T OF JUST., JUSTICE MANUAL, § 9-140.111, <https://www.justice.gov/jm/jm-9-140000-pardon-attorney>.

27. Osler, *Fewer Hands, More Mercy*, *supra* note 5, at 478–79.

28. *Id.* at 479–81.

29. *Id.* at 481–83.

30. *Id.* at 483.

31. *Id.* at 484–85.

32. Margaret Colgate Love, *Justice Department Administration of the President’s Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89, 105 (2015).

connection to local prosecutors.<sup>33</sup> And, of course, if any one of these jobs is vacant, the process grinds to a halt.<sup>34</sup>

In the same way that preceding presidents have failed to fix the broken process of clemency review, they have also failed to articulate how they intend to use the pardon power or describe the principles that will guide that use. This may, in the end, be the greater failure. Only briefly, at the end of President Obama's presidency, did will, principle, and outcome even come close to lining up.<sup>35</sup> Given that Obama's relative (though limited)<sup>36</sup> success came while using a broken system, it demonstrates the power of guiding principles.

Federal clemency doesn't work. The reasons it does not work are well-known. Fortunately, the solution is not far from hand: the president needs to create a better process for recommendations on clemency petitions, and articulate goals and principles before that process begins to operate.

### III. A BETTER PROCESS

#### A. Key Elements of a Better Process

##### 1. Placement and Structure

Among those who pay attention to such things, there is a consensus that the clemency process must be taken out of the DOJ if it is to function properly.<sup>37</sup> After all, the very purpose of executive clemency is to serve as a check on sentences that were almost always sought by prosecutors<sup>38</sup>—it makes no sense to put this corrective power in the hands of those being corrected. The current system not only places the evaluation process deep within the DOJ itself but requires that “substantial consideration” be given to the views of local prosecutors who pursued the case in the first place.<sup>39</sup>

33. Osler, *Fewer Hands, More Mercy*, *supra* note 5, at 481–83.

34. This is a central distinction between vertical (sequential) decision chains versus horizontal (consensus) processes. With a sequential chain, the absence of any one decision-maker stops the process, while boards and commissions can function in the absence of a member or two.

35. John Gramlich & Kristin Bialik, *Obama Used Clemency Power More Often Than Any President Since Truman*, PEW RES. CTR. (Jan. 20, 2017), <https://www.pewresearch.org/fact-tank/2017/01/20/obama-used-more-clemency-power>.

36. Rebecca Morin, *DOJ Finds 'Several Shortcomings' in Obama-era Clemency Program*, POLITICO (Aug. 2, 2018, 8:49 AM), <https://www.politico.com/story/2018/08/02/obama-clemency-program-doj-watchdog-757126>.

37. Larkin, *Revitalizing Clemency*, *supra* note 25; P.S. Ruckman, Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. ST. THOMAS L.J. 446, 471–72 (2016); Love, *supra* note 32, at 105; Rosenzweig, *supra* note 24; Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse?*, 13 FED. SENT'G REP. 177 (2001); Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139 (2001).

38. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 832 (2015).

39. U.S. DEP'T OF JUST., JUSTICE MANUAL, § 9-140.111, <https://www.justice.gov/jm/jm-9-140000-pardon-attorney>.

At base, there is always going to be a tension between justice, in the sense of seeking punishment for wrongful acts (which is a large part of what prosecutors do), and mercy (which is the moral core of clemency). The DOJ is hard-wired towards only the first of these. Molly Gill of Families Against Mandatory Minimums described this well:

[T]he current commutation process is dominated by a prosecutorial perspective grounded in retributivism, which is exceptionally difficult to reconcile with executive clemency. The Department of Justice exists to do justice and put people in prison, not to grant them mercy and let them out. It is time to admit that, in practice, asking any one government body to do justice and grant mercy is just too difficult and creates an insurmountable conflict of interest.<sup>40</sup>

If nothing else, the current DOJ-centered process has simply failed. It has led us to an unprecedented backlog of unresolved petitions<sup>41</sup> and has ill-served modern presidents who face a large prisoner population and shifting attitudes towards criminal justice.<sup>42</sup>

Acknowledging the need to take clemency out of the DOJ is a crucial step, but not the only one; it leaves open the question of where to put it. I will examine three possibilities here:<sup>43</sup> (1) giving the vice president authority over the clemency process, (2) simply bringing the pardon attorney into the White House, and (3) establishing a board or commission to oversee the evaluation of clemency petitions.

#### *a. Assigning Clemency to the Vice President*

Paul J. Larkin, Jr., a deep thinker and research scholar at the Heritage Foundation, has proposed that the task of evaluating clemency petitions and making recommendations to the president should “transfer the clemency process from the Justice Department to a new clemency office in the White

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40. Molly M. Gill, *Into the Bottomless Black Box: The Prisoner’s Perspective on the Commutation Process*, 20 FED. SENT’G REP. 16, 19 (2007).

41. Vogt, *supra* note 1.

42. Love, *supra* note 32, at 100.

43. I am setting aside for purposes of this discussion the idea of turning clemency over to the legislature or judiciary. Either would conflict with the constitutional structure—which plainly gives the president this power—and invite other problems. Legislative clemency works poorly in the one state where it exists—Rhode Island; the state Senate must approve all grants of clemency, and no grants have been made in a decade. *Rhode Island Restoration of Rights, Pardon, Expungement & Sealing*, RESTORATION OF RIGHTS PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/rhode-island-restoration-of-rights-pardon-expungement-sealing> (last updated Feb. 20, 2019). A scheme that would send clemency cases to sentencing judges would exacerbate existing disparities, as “tough” judges refused clemency and their less-harsh colleagues granted them. This compounding of disparity would be especially acute because the bias against clemency would come from the same judges that likely gave long sentences in the first place. Thus, a defendant is punished disproportionately not just once but twice for drawing a tough-on-crime judge.

House, and should designate Vice President Mike Pence as his principal clemency advisor.”<sup>44</sup>

Larkin argues that the vice president enjoys a measure of freedom from the DOJ’s conflicts and “would be seen as impartial. He has no law enforcement responsibility and so lacks an institutional conflict of interest.”<sup>45</sup> Moreover, Larkin points out, the vice president has institutional advantages—as a public leader and a constitutional officer elected for the same term as the president—in fending off pressure on any given case from interest groups ranging from the American Bar Association to the DOJ itself.<sup>46</sup> Finally, and importantly, the vice president has (in some administrations, at least)<sup>47</sup> unparalleled access to the president. Larkin quotes Joe Biden as describing this as the ability to be the “last guy in the room at meetings.”<sup>48</sup>

Certainly, the Larkin proposal would be an improvement from the sluggish status quo. It would achieve, at least, three objectives: it would shorten the process, it would eliminate the conflict of interest that the DOJ brings with it, and it would raise the likelihood of the clemency recommender having regular access to the president. This last advantage is particularly worthwhile, since the desuetude of clemency stems from its divestiture from a powerful official close to the president, the attorney general.<sup>49</sup>

However, there are problems with the vice-presidential model that make it inferior to other possible reforms. Most significantly, the vice president often has political ambitions of their own: no fewer than eight of the past twelve vice presidents<sup>50</sup> have run for president themselves:<sup>51</sup> Nixon,<sup>52</sup>

44. Paul Larkin, *Reforming the Federal Clemency Process*, WASH. TIMES (June 12, 2017), <https://www.washingtontimes.com/news/2017/jun/12/donald-trump-can-reform-clemency-process>.

45. Paul J. Larkin, Jr., *Reorganizing the Federal Clemency Process*, HERITAGE FOUND., 3 (May 31, 2017), <https://www.heritage.org/sites/default/files/2017-05/LM-206.pdf>.

46. Paul J. Larkin, Jr., *Reforming Federal Clemency*, JEWISH POL’Y CTR. (Fall 2018), <https://www.jewishpolicycenter.org/2018/10/09/reforming-federal-clemency>.

47. Mike Purdy, *Three Reasons Why the Vice-Presidency Matters*, PRESIDENTIAL HISTORY (July 13, 2016), <https://presidentialhistory.com/2016/07/3-reasons-the-vice-president-matters.html>.

48. Paul J. Larkin, Jr., *A Proposal to Restructure the Clemency Process—the Vice President as Head of a White House Clemency Office*, 40 HARV. J.L. & PUB. POL’Y 237, 249 (2017) [hereinafter Larkin, *Vice President and Clemency*].

49. The line of recommendation was changed in the Carter administration, when the Attorney General delegated this duty to the Deputy Attorney General. Rosenzweig, *supra* note 24.

50. This list does not include the current vice president, Mike Pence, whose future aspirations are not known.

51. Those who did not run for president were Agnew, Rockefeller, Quayle, and Cheney. *Vice Presidents of the United States (President of the Senate)*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/briefing/Vice\\_President.htm](https://www.senate.gov/artandhistory/history/common/briefing/Vice_President.htm) (last visited Jan. 27, 2020).

52. Martin Weil & Eleanor Randolph, *Richard M. Nixon, 37th President, Dies*, WASH. POST (Apr. 23, 1994), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/stories/nixobit.htm>.

Johnson,<sup>53</sup> Humphrey,<sup>54</sup> Ford,<sup>55</sup> Mondale,<sup>56</sup> George H.W. Bush,<sup>57</sup> Gore,<sup>58</sup> and Biden.<sup>59</sup> The frequency with which vice presidents use the job as a launching pad to the presidency creates a real disincentive for vice presidents to fairly consider clemency. After all, the vice president could pay a political price if a commutation recipient commits further crimes, and they will tend to avoid that risk. One of the roles of clemency advisors is to provide political cover for the president in making risky decisions, and the process is subverted if the advisor herself is strongly averse to that same risk.

Another problem with using the vice president as the clemency advisor is that the vice president may have his or her own agenda regarding clemency and its employment. This disjuncture between two officials who must collaborate could be particularly acute in relation to the (nearly inevitable) use of the pardon power to reward supporters. Even without the vice president in this role, we have an example in recent memory of this dynamic creating a rift between the two officials. During the George W. Bush administration, the former Chief of Staff to Vice President Dick Cheney, Lewis “Scooter” Libby, was indicted, convicted, and sentenced to a two-and-a-half year prison term for perjury and obstruction of justice.<sup>60</sup> President Bush commuted the sentence, but did not grant him a pardon.<sup>61</sup> Despite a constant haranguing from Cheney, Bush concluded that Libby had committed the crimes. The final hours of the Bush presidency were consumed by this conflict between the President and Cheney, who is often considered the vice president with the most influence over the president in

53. Between the death of John F. Kennedy and his own election as president, Lyndon Johnson did not have a vice president. *Presidential Succession During the Johnson Administration*, LBJ LIBRARY, <http://www.lbjlibrary.net/collections/quick-facts/lyndon-baines-johnson-presidential-succession.html> (last visited Jan. 27, 2020).

54. Michael Brenes, *The Tragedy of Hubert Humphrey*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/opinion/vietnam-hubert-humphrey.html>.

55. Gerald Ford, of course, became president when he did not run (upon Nixon’s resignation) and lost to Jimmy Carter when he did. Andrew Glass, *Gerald Ford Dies at Age 93, Dec. 26, 2006*, POLITICO (Dec. 26, 2018, 5:25 AM), <https://www.politico.com/story/2018/12/26/this-day-in-politics-dec-26-2006-1074185>.

56. Pam Louwagie, *Vice President Walter Mondale’s Influence Pervades Minnesota, Even in His 90s*, STAR TRIB. (June 11, 2019, 3:33 PM).

57. Adam Nagourney, *George Bush, Who Steered Nation in Tumultuous Times, is Dead at 94*, N.Y. TIMES (Nov. 30, 2018), <https://www.nytimes.com/2018/11/30/us/politics/george-hw-bush-dies.html>.

58. Frank Bruni, *Save Us, Al Gore*, N.Y. TIMES (Nov. 13, 2018), <https://www.nytimes.com/2018/11/13/opinion/al-gore-trump.html>.

59. Alexander Burns & Jonathan Martin, *Biden Announces 2020 Run for President, After Months of Hesitation*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/politics/joe-biden-2020-announcement.html>.

60. Olivia B. Waxman, *Why Scooter Libby Didn’t Get a Presidential Pardon Until Just Now*, TIME (Apr. 13, 2018), <https://time.com/5239767/trump-george-w-bush-dick-cheney-scooter-libby-pardon>.

61. *Id.*

American history.<sup>62</sup> “You are leaving a good man wounded on the field of battle,” Cheney told Bush bitterly.<sup>63</sup> The incident left a mark; after leaving office, their collaboration did not continue.<sup>64</sup>

Finally, the vice-presidential model suffers a drawback that already plagues the existing system: it puts a specialized function in the hands of a generalist. Just as the DAG and the White House counsel are hampered by the breadth of their duties, the vice president is a generalist. While some vice presidents were less than overwhelmed with work,<sup>65</sup> recent holders of the office have been quite busy with a diversity of important tasks.<sup>66</sup> For example, Dick Cheney reshaped national security law, initiated a secret interrogation program, screened Supreme Court nominees, presided over the budget, chose cabinet members, and revamped environmental regulations.<sup>67</sup> His successor, Joe Biden, was tasked with implementing the Obama economic stimulus plan, negotiating budget deals, and traveling to international trouble zones to speak for the president.<sup>68</sup> Given these tasks, it is easy to see how clemency could be quickly relegated to a place of neglect. Efficiency and effectiveness dictate that the person or body charged with this duty be specialists, focused on the constant flow of clemency petitions.

*b. Bringing the Pardon Attorney into the White House*

Another option is to simply slice away all of the layers of bureaucracy in the current process between the pardon attorney and the president—the staff of the DAG, the DAG, the staff of the White House counsel, and the White House counsel<sup>69</sup>—leaving the pardon attorney to report directly to the president from an office within the White House. An alternative would be to have the pardon attorney report to the White House counsel, which would effectively excise two layers of bureaucracy (the DAG and her staff).

Certainly, this plan would have three key advantages: it would eliminate bureaucracy, pull the process closer to the president, and eliminate the

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62. Baker, *supra* note 12.

63. *Id.*

64. Philip Bump, *The Bush-Cheney Marriage Ended with a Fight Over Another Man*, ATLANTIC (Oct. 10, 2013), <https://www.theatlantic.com/politics/archive/2013/10/bush-cheney-marriage-convenience-ended-fight-over-another-man/310111>.

65. Teddy Roosevelt, for example, was so bored with the job that he thought about returning to law school while continuing to hold the office. Jack Torry, *VP, As in Very Powerful*, PITT. POST-GAZETTE (July 9, 2000), <http://old.post-gazette.com/headlines/20000709veep2.asp>.

66. The modern, active role of the vice president was shaped by Walter Mondale, who served under Jimmy Carter. Mondale made the vice president an important part of the White House, a model followed by his successors. Joel Goldstein, *Why Joe Biden Was a Most Unusual—and Effective—Vice President*, WASH. POST (Jan. 18, 2017, 4:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/18/why-joe-biden-was-a-most-unusual-and-effective-vice-president>.

67. Nina Totenberg, *Cheney: A VP with Unprecedented Power*, NPR (Jan. 15, 2009, 5:00 PM), <https://www.npr.org/templates/story/story.php?storyId=99422633>.

68. Goldstein, *supra* note 66.

69. *See supra* Section II.

conflicts inherent in a decision chain couched in the DOJ; all while avoiding the problems of a system centered around a vice president averse to imperiling his or her own shot at the presidency. It is certainly preferable to the present system and has strong advantages over the vice-presidential model.

Unfortunately, this plan would also have negatives. Most prominently, because of the hidden nature of the pardon attorney's work, this plan would offer little to no political cover for the president in the event of a clemency gone bad—it is not much of an excuse to say that one followed the advice of an unknown advisor. The institutional weight of the pardon attorney is also much less than that of the vice president and likely to be less than that of a well-stocked clemency board. That means a lessened ability to fend off influencers, and an inability to demand access to the president. Finally, it would be tempting to put the pardon attorney, once in the White House, under the White House Counsel. That reintroduces a level of bureaucracy and adds another generalist with many other things to do.

*c. Establishing a Clemency Board or Commission*

A third, and superior, option is to create a high-profile clemency board to evaluate petitions and make recommendations to the president. A part-time board would meet regularly to review petitions and decide on recommendations.<sup>70</sup> This does not necessitate getting rid of the pardon attorney and her staff; instead, the pardon attorney would serve as the staff director,<sup>71</sup> and the staff could be imported to serve the new board.

A clemency board offers an ideal fix to the vertical, sequential decision process we have by creating a horizontal, consensus-driven decision process. To put it another way, instead of having seven people making the same decision one after another, it would be done at once by a group of people able to discuss the case and come to a conclusion. It also allows the existing repetitious bureaucracy to be replaced while still ensuring that multiple people review a petition for clemency—enhancing the ability to spot significant problems or positive attributes presented by the petitioner.

A board structure also avoids problems presented by the other two options. Unlike the vice-presidential plan, it features decision-makers who are unlikely to be seeking higher office and the inhibitions that brings. The board could also contain criminal justice specialists, avoiding the trap of implanting generalists into the decision chain. Moreover, the relationship

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70. Part-time boards are ubiquitous in the states. Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730, 743–51 (2012).

71. A part-time board supported by a staff director managing a permanent staff is the structure employed successfully by the United States Sentencing Commission. *Organization*, U.S. SENT'G COMM'N, <https://www.ussc.gov/about/who-we-are/organization> (last visited Jan. 27, 2020).

between the board and the president would be limited to a single function, meaning that conflicts would not imperil other crucial functions of government.<sup>72</sup>

A board structure also offers advantages relative to the idea of simply bringing the pardon attorney out of the DOJ and into the White House. A board would offer much more effective cover to the executive for the decisions that he or she makes, particularly if the members are well-known people with strong records and expertise. For example, when establishing a presidential clemency board to consider pardons for Vietnam-era draft evaders and other crimes related to the war, President Gerald Ford included figures such as former senator Charles Goodell and Notre Dame President Father Theodore Hesburgh.<sup>73</sup> The institutional weight of similar groups—such as the Sentencing Commission—is predictive of the kind of status that a clemency board could attain within the executive branch.<sup>74</sup>

Another potential strength of a specialized clemency board, again looking to the precedent of the United States Sentencing Commission,<sup>75</sup> is its ability to accumulate and analyze clemency data. In particular, such a board could provide data sets and analysis on re-entry and recidivism by those who receive clemency—important decision-making tools that presidents currently do not have. The other two alternative clemency systems don't lend themselves to this capability. As a generalist, the vice president is ill-suited to supervising data collection in a field as specialized as reentry after commutation. Importing the pardon attorney into the White House doesn't solve the problem, either, as the pardon attorney currently does not serve that function and without a broader restructure of the process is unlikely to get the resources to do so.

Though a board would likely be more expensive than the other options, it would still be revenue-positive—after all, even a dozen commutations of life sentences can produce millions of dollars in prison cost savings

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72. Paul Larkin has argued that, somehow, the creation of a clemency board would be confused with resuscitation of a parole system. Larkin, *Vice President and Clemency*, *supra* note 48. Obviously, the two are quite different. Most basically, the kind of advisory board described here would not have the independent authority to act enjoyed by parole boards—it would simply serve to advise the president. Even if a clemency board had such authority, the overwhelming majority of clemency petitions granted have historically been for pardons, not commutations, usually in cases where a sentence has been completed—something very different than the parole of a sentence being served. The Office of the Pardon Attorney, *supra* note 2.

73. PRESIDENTIAL CLEMENCY BD., REPORT TO THE PRESIDENT at v, 6 (1975), <https://heinonline.org/HOL/Page.=beal>.

74. Notably, the Sentencing Commission is assigned to the judicial branch, while the clemency board would be firmly within the executive. 28 U.S.C. § 991(a) (2008).

75. The Sentencing Commission makes public reports on a variety of data sets. *Research*, U.S. SENT'G COMM'N, <https://www.ussc.gov/research> (last visited Jan. 27, 2020).

as prisoners are converted to taxpayers.<sup>76</sup> A well-functioning clemency system would probably be strongly revenue-positive.

It is telling that the states have overwhelmingly chosen boards or commissions to either make clemency decisions directly or to make recommendations to a governor. Six states give a board independent authority to make decisions, twenty states have power-sharing between a board and a governor, and eighteen more require that the governor take advice from and rely on the investigations done by a board.<sup>77</sup> Thus, forty-four states, left to their own devices to come up with a workable approach to analyzing clemency petitions, have evolved to use clemency boards.<sup>78</sup> That is a remarkable consensus. If, as Justice Brandeis put it, the states are the “laboratories” of democracy,<sup>79</sup> then the findings on clemency are by now obvious.<sup>80</sup>

## 2. *Key Issues in Establishing a Clemency Board*

If a board model is chosen, three crucial questions must be resolved: the membership of the board, how to fund it, and how this board would communicate with the president.

### a. *Membership of the Clemency Board*

The membership of the board will be crucial to success. The president will face the dilemmas of stocking the board with talented individuals and determining the size of the board.

In assessing the ideal size for a federal clemency board, two examples bear examination. The United States Sentencing Commission (when all positions are full)<sup>81</sup> has seven members. In contrast, Gerald Ford’s Presidential Clemency Board started with nine members and then expanded to eighteen after an overwhelming number of petitions for clemency swamped

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76. The Bureau of Prisons calculates the annual cost to imprison an individual to be \$31,977.65 a year. Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46957 (July 19, 2016). Cutting just twenty years off a life sentence thus saves over \$600,000. These costs will be fully realized only if prisons close, but that is likely to happen if prison populations continue to shrink. Nicole Lewis, *The U.S. Prison Population is Shrinking*, THE MARSHALL PROJECT (Apr. 24, 2019), <https://www.themarshallproject.org/2019/04/24/the-us-prison-population-is-shrinking>.

77. Osler, *Fewer Hands, More Mercy*, *supra* note 5, at 492.

78. Notably, one of the most successful federal clemency programs also involved the use of a board to bypass the DOJ: President Ford’s Presidential Clemency Board, which recommended thousands of conditional pardons relating to the Vietnam War. *Id.* at 496–99.

79. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

80. State systems, of course, have evolved over time to their current configuration. South Carolina’s pardon system, for example, was revised in 1946, 1949, 1981, and 1994. *Chronological History of the Department of Probation, Parole, and Pardon Services*, SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES, <https://www.dppps.sc.gov/About-PPP/Our-History> (last visited Jan. 27, 2020).

81. *About the Commissioners*, U.S. SENT’G COMM’N, <https://www.ussc.gov/commissioners> (last visited Jan. 27, 2020).

the original group.<sup>82</sup> This larger number allowed them to form panels of three to four members to consider petitions, with any member having the right to refer a case to the full board—a second-review process that was invoked in only 5 percent of their cases.<sup>83</sup>

The Ford precedent suggests two things: a larger board can do more work and allowing the size of the board to be flexible can accommodate spikes in petitions without creating backlogs. This second lesson may be particularly important. An executive order establishing the board can—and should—only define the number of people who will initially be appointed, without setting a number of “slots.” In other words, it should name the nine people appointed, while reserving the ability to change the number of people on the board going forward. This would have two positive effects. First, it would allow the board to grow or shrink according to the volume of cases to review. Second, it would mean that the board would never lose its power due to lack of a quorum if the president fell behind in making appointments.<sup>84</sup>

The board members’ term of service could either be for a term of years or run with the president’s own term. One advantage of the latter plan would be that because the pardon power is inevitably going to be a reflection of the president’s values, it makes sense that these advisors would be chosen by the new executive.

And who should those nine to eighteen people be? Three imperatives must be considered in the selection of a clemency board: diversity, expertise, and representation of key stakeholders. These three factors naturally intersect, of course, since the representation of people with different types of expertise will naturally add to the diversity of viewpoints within the newly formed board.

Diversity must take several meanings in this context: racial and gender diversity, ideological diversity, and geographic diversity. Racial and gender diversity are essential, given the racial issues<sup>85</sup> inherent in American criminal law<sup>86</sup> and the changing dynamics of gender (and awareness of the dy-

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82. PRESIDENTIAL CLEMENCY BOARD, *supra* note 73, at xvii.

83. *Id.*

84. As of July 2, 2019, four crucial federal agencies—including the United States Sentencing Commission—were not functioning due to the lack of a quorum. Center for Economic and Policy Research, *June Update on the State of Independent Federal Agencies*, CEPR BLOG (July 2, 2019), <http://cepr.net/blogs/cepr-blog/june-update-on-the-state-of-independent-federal-agencies>.

85. Reform and second-look processes like clemency have the potential to directly address racial disparities in sentencing. For example, over 90 percent of those released from prison under the second-look provisions of the First Step Act—all convicted of crimes related to the trafficking of crack cocaine—were black. Michael Harriot, *91% of Inmates Freed by First Step Act Were Black. Should We Give Republicans Credit?* THE ROOT (June 10, 2019), <https://www.theroot.com/91-percent-of-inmates-freed-by-first-step-act-were-blac-1835387925>.

86. For a good description of racial dynamics relating to re-entry, see generally Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 IND. L.J. 421 (2018).

namics of gender) within the field.<sup>87</sup> Just as important are ideological and party identity diversity. It is essential that reform of clemency not become a captive of party politics.<sup>88</sup> The statute defining the United States Sentencing Commission accounts for this problem by requiring that no more than four of the members of the seven person commission can be members of the same political party.<sup>89</sup> It would make sense to impose a similar rule on the clemency board. Finally, geographic diversity is important because criminal law issues (and concomitant issues like reentry) are not homogeneous across the United States. For example, the use of enhanced sentences for narcotics convictions under 21 U.S.C. § 851 varies widely from one part of the country to another.<sup>90</sup> Other significant regional variations include the prevalence (or lack thereof) of narcotics such as methamphetamine,<sup>91</sup> the availability of reentry resources,<sup>92</sup> and the presence of federal enclaves such as Indian reservations.<sup>93</sup>

Expertise should also be a factor when choosing members of a clemency board. The realities of criminal law can be both surprising and sobering; it is a field strewn with tragedy and grim realities. An exposure to those realities is important, but we should not re-create the mistake of looking only to prosecutors (or former prosecutors) to provide that knowing eye.<sup>94</sup> Federal defenders, probation officers, judges, reentry specialists, and those who themselves have been incarcerated certainly have more experience with the lives of incarcerated people once the prison doors swing shut while, in contrast, the prosecutor's relationship with the convicted person expires once an appeal is concluded.<sup>95</sup>

87. Reentry issues and related problems involving reentry present differing dynamics depending on gender. Megan Davidson et al., *Gender-Responsiveness in Corrections: Estimating Female Inmate Misconduct Risk Using the Personality Assessment Inventory (PAI)*, 40 LAW & HUMAN BEHAVIOR 72, 73 (2016).

88. Paul Larkin cites the danger of partisanship as a central potential problem were a board system to be implemented. Larkin, *Vice President and Clemency*, *supra* note 48, at 248.

89. 28 U.S.C. § 991(a) (2008).

90. U.S. SENT'G COMM'N, APPLICATION AND IMPACT OF 21 U.S.C. § 851: ENHANCED PENALTIES FOR DRUG OFFENDERS, 20–21, (2018), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712\\_851-Mand-Min.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf).

91. Amelia McDonnell-Parry, *Meth is Making a Comeback Across America*, ROLLING STONE (Oct. 8, 2018), <https://www.rollingstone.com/culture/culture-news/meth-comeback-opioid-epidemic-america-734097>.

92. For a list of re-entry resources by state, see *Re-entry Resources for Ex-Offenders by State*, HELP FOR FELONS, <https://helpforfelons.org/reentry-programs-ex-offenders-state/> (last visited Feb. 7, 2020).

93. Cassidy McDonald, *Drugs Were Around Me Every Day*, N.Y. TIMES (Oct. 28, 2016), <https://kristof.blogs.nytimes.com/2016/10/28/drugs-were-around-me-every-day>.

94. Notably, some state boards seem to work well without requiring criminal law backgrounds among the members. For example, South Carolina's high-functioning board was staffed in 2016 with a nurse, a phone company supervisor, an engineer, a retiree, a social studies teacher, a car broker, and a fitness trainer. Osler, *Fewer Hands, More Mercy*, *supra* note 5 at 496.

95. Previously, Rachel Barkow and I suggested that such a board "should include individuals with experience as federal defenders, judges, victims' representatives, probation officers, and police officers, among others, to get a range of perspectives aired and discussed." Barkow & Osler,

Finally, tough decisions must be made regarding the representation of key stakeholders, particularly those who have previously had control of the process: the DOJ and the White House counsel. Certainly, it would be possible to put a representative of each on the new board, but that may not be advisable given the institutional weight each entity bears within the White House. A reserved seat might guarantee a degree of influence that would undercut the independence of the body. This argument, admittedly, applies much more to the DOJ than it would to the office of the White House Counsel, which lacks the inherent conflict of interest that we see in the DOJ. The United States Sentencing Commission finesses a middle ground and gives a representative of the DOJ a seat as a nonvoting *ex officio* member.<sup>96</sup>

*b. Funding the Board*

As discussed previously, a clemency board would be revenue-positive for the government as a whole, given the expected savings in incarceration costs.<sup>97</sup> Moreover, much of the staff expenses for the board already exist as part of the office of the pardon attorney (which, as proposed here, would transfer out of the DOJ). Expenses relating to the added personnel—the board members—are limited too since the board would be part-time and government service on the board would not be the principle source of income for the board members. That said, proper funding of the board to support a staff sufficient to both analyze petitions and collect data would be crucial to its success. If the board was positioned within the Executive Office of the President alongside bodies like the National Security Council, the Council of Economic Advisors, and the Office of Science and Technology Policy,<sup>98</sup> its funding would come from an additional line item (and a relatively small one) in the budget for the Executive Office of the President.

*c. Communication with the President*

Guaranteeing access to the president would be crucial to the success of board-based clemency reform. Quarterly meetings between the chairperson of the board and the president would be essential. This would allow, finally, for regularity in the announcement of clemency grants and denials and alleviate the modern plague of a last-minute rush as a president prepares to leave office.

Crucial to this regularity would be the appointment of a chair who is close to the president and bears sufficient gravitas to maintain the proper

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*Designed to Fail*, *supra* note 5, at 462. We also previously argued in favor of including a previously incarcerated person. Barkow & Osler, *Restructuring Clemency*, *supra* note 5, at 21.

96. 28 U.S.C. § 991 (2008).

97. See *supra* Section III(A)(1)(c).

98. *The Administration*, THE WHITE HOUSE, <https://www.whitehouse.gov/the-trump-administration> (last visited Jan. 27, 2020).

role of the board. While the board as a whole should not be composed of those with ties to the president, there is value in a chair with that personal connection.

## B. How to Create This Better Structure

### 1. Executive Order

The structure suggested here—a clemency board within the Executive Office of the President—could be created without legislation.<sup>99</sup> The current structure, after all, is constructed through federal regulations and historical practice and is free of legislative strictures. In fact, the Federal Advisory Committee Act expressly recognizes that such boards can be created by the president without legislation.<sup>100</sup> A new process can be created through an executive order that sweeps away the existing regulations and establishes a new and better structure.

Currently, 28 CFR §§ 1.1–1.11 establishes the contours of the current clemency process—in particular, the roles of the pardon attorney and the DOJ—and would need to be revoked as part of creating a better system.<sup>101</sup> Certain aspects of those regulations might merit consideration as part of the new process, though. For example, 28 CFR § 1.6(b) directs the Attorney General to solicit the views of victims where applicable—a task that can and should be transferred to the new board. Further, 28 CFR §§ 0.35 & 0.36 would need to be revoked, as they set out the line of review within the DOJ, beginning with the pardon attorney and ending with the DAG.

Beyond revoking the existing mechanisms, an executive order would have to establish the new ones, including defining the size and composition of a clemency board; establishing the relationship between that board and the president;<sup>102</sup> defining the meeting schedule and protocol between the board and the president; reassigning the pardon attorney and staff to be-

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99. This is one of four ways, in fact, that an advisory committee can be formed. The others are to create a committee directly by act of Congress, through a Congressional directive to the president asking that he form such a committee, or the president can request private citizens to form a committee or utilize an existing advisory body. Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 *YALE L.J.* 51, 57–58 (1994).

100. The Federal Advisory Committee Act recognizes that the president can create an advisory committee without legislation. 5 U.S.C. App. 2 §§ 5(c), 9(a)(1) (2010).

101. In particular, 28 CFR § 1.1 requires that clemency petitions be submitted to the pardon attorney, § 1.6 creates review, investigation, and recommendation to the president by the attorney general (all functions now delegated to the Deputy Attorney General), § 1.8 describes the relationship between the attorney general (or designee) and the president, § 1.9 allows delegation of the attorney general's duties to "any officer of the Department of Justice, and § 1.11 establishes that these regulations "are advisory only and for the internal guidance of Department of Justice personnel."

102. In defining the relationship between the president and the board, the executive order might address the effect of presidential inaction on recommendations by the board. Currently, if the president takes no action within thirty days of submission of a recommendation that a petition be denied, the petition is deemed to be denied.

come the staff director and staff of the board; and empowering the board to utilize the resources of the executive branch. The last of these is especially important because the key documents relating to a petitioner—the presentence investigation report and the Bureau of Prison’s progress report—will still be controlled by the courts and the DOJ, respectively.<sup>103</sup>

Finally, the executive order would have to set out one more thing: the procedures that would ensure compliance with the Federal Advisory Committee Act, which sets some rules for committees that advise the president, such as a clemency board.<sup>104</sup>

## 2. *The Federal Advisory Committee Act & Government in the Sunshine Act*

The use of outside advisors by the president has a long history in the United States, and advisory committees have served many prominent public functions ranging from the investigation of President Kennedy’s death by the Warren Commission to the evaluation of health care.<sup>105</sup> In 1972, Congress found that these advisory committees “had not been adequately reviewed”<sup>106</sup> and sought to rein in and regulate these committees through the Federal Advisory Committee Act (hereinafter “FACA”).<sup>107</sup> The provisions of that law entwine with the requirements of an open-meeting law, the Government in the Sunshine Act, which was passed in 1976.<sup>108</sup>

First things first: FACA would apply to a presidential clemency board. On its own terms, it applies to any board or commission that is established or utilized by the president.<sup>109</sup> The requirements of FACA, however, are not onerous. In summary, the statute would mandate the following restrictions and requirements on a clemency board established by executive order:

- The board would have to file a charter.<sup>110</sup>
- Meetings of the board would have to be noticed (even for closed meetings) in the Federal Register.<sup>111</sup>
- The board would have to issue an annual report setting forth a summary of its activities.<sup>112</sup>
- Annual reports would need to be provided to the Library of Congress.<sup>113</sup>

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103. Provision of criminal justice records by organizations such as a clemency board is defined in 5 U.S.C. § 9101 and allows for access to and use of these key records.

104. 5 U.S.C. App. 2 §§ 1–16 (2010).

105. Bybee, *supra* note 99, at 53–57.

106. 5 U.S.C. App. 2 § 2(b)(1) (2010).

107. Federal Advisory Committee Act, Pub. L. 92-463, § 2, 86 Stat. 770 (1972).

108. Government in the Sunshine Act, Pub. L. 94-409, 90 Stat. 1241 (1976).

109. 5 U.S.C. App. 2 § 3(2)(B).

110. *Id.* § 9(c). This section also sets out the information that must be included in the charter.

111. *Id.* § 10(a)(2).

112. *Id.* § 10(d). This requirement flows from the fact that the board would be exempt from open meeting laws, discussed *supra*.

113. *Id.* § 13.

- The president would need to re-authorize the board every two years.<sup>114</sup>

Importantly, a clemency board would be largely exempt from open meeting requirements. The open meeting requirements within FACA incorporate the exceptions included in the Government in the Sunshine Act<sup>115</sup> and that law contains two express provisions that would apply to nearly all of a clemency board's work in investigating and reviewing petitions. First, the law exempts meetings where open meeting provisions would "disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy."<sup>116</sup> Second, and perhaps even more directive, is an exception for work that threatens to "disclose investigatory records compiled for law enforcement purposes," where such disclosure would constitute an "unwarranted invasion of personal privacy." Given that the review, investigation, and formulation of recommendations on clemency petitions requires the constant use of presentence investigation reports, the work of a board would seem to fit both of those exemptions. Presentence Investigation Reports, which are prepared by probation officers prior to sentencing,<sup>117</sup> contain the most personal information imaginable: an analysis of the subject's financial condition,<sup>118</sup> "circumstances affecting the defendant's behavior,"<sup>119</sup> and psychological and medical details about the person's life.<sup>120</sup>

In the end, the requirements of FACA are not a reason to avoid the board model proposed here since its requirements are not onerous and would offer structure to the functioning of the board as it did its work.

#### IV. ARTICULATING A PRINCIPLED USE OF THE PARDON POWER

##### A. *The Need to Announce Principles*

Historically, presidents have had no problem promising how they would use their other constitutional powers. President Trump, for example, clearly explained that he would restrict immigration through harsh new tactics,<sup>121</sup> use tariffs to fight trade wars,<sup>122</sup> and reduce America's involvement

114. *Id.* § 14(a)(2).

115. 5 U.S.C. App. 2 § 10(d).

116. 5 U.S.C. § 552b(c)(6) (1992).

117. 18 U.S.C. § 3552(a) (1990).

118. FED. R. CRIM. PRO. 32(d)(2)(A)(ii).

119. *Id.* 32(d)(2)(A)(iii).

120. *Id.* 32(d)(2)(B).

121. Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, N.Y. TIMES (Aug. 31, 2016), <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html>.

122. Michelle Fleury, *Donald Trump Favours High Tariffs on Chinese Exports*, BBC NEWS (Jan. 7, 2016), <https://www.bbc.com/news/business-35258620>.

in foreign conflicts.<sup>123</sup> But, like everyone else who has run for president in recent memory, he said nothing about how he would use the pardon power. There is a cost in that continuing failure: we are deprived of the ability to build expectations and debate the reasonableness of a plan.

Instead, presidents feel their way along and step on land mines like the Marc Rich pardon.<sup>124</sup> There is a better path: clearly announce the principles that will guide your use of clemency, and the goals you will pursue. I will describe some possibilities here. They are not exclusive of one another, of course.

### B. *Reassessment of the Current Criteria*

Any of the approaches described below would include a reassessment of the current criteria, which have been defined by the DOJ, not the president—and not surprisingly, primarily serve the institutional interests of the DOJ.

The pardon attorney, as a part of the DOJ, finds direction in the DOJ's "Justice Manual," which directs that the views of local US Attorneys (or, in cases where main justice was the prosecutor, the assistant attorney general) be solicited when evaluating a case, and that "The views of the United States Attorney or Assistant Attorney General are given considerable weight in determining what recommendations the Department should make to the president."<sup>125</sup> Thus, the first criteria is to give "considerable weight" to the views of those who chose to prosecute the case and pursue the sentence given in the first place.<sup>126</sup> This is akin to having Yankees fans pick the Red Sox's starting pitcher—prosecutors have no interest in seeing clemency succeed, given the implied rejection of their work contained in each grant.

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123. Ben Jacobs, *The Donald Trump Doctrine: 'Assad is Bad,' but the U.S. Must Stop 'Nation-Building'*, GUARDIAN (Oct. 13, 2015, 8:34 AM), <https://www.theguardian.com/us-news/2015/oct/13/donald-trump-foreign-policy-doctrine-nation-building>.

124. The Rich pardon was so controversial that Clinton felt compelled to write an op-ed defending the move, which in turn led to an extensive correction explaining that Clinton had falsely claimed to rely on the advice of three lawyers, one of whom was Lewis "Scooter" Libby. *Editor's Note*, N.Y. TIMES (Feb. 19, 2001), <https://www.nytimes.com/2001/02/19/opinion/editors-note-985392.html>.

125. U.S. DEP'T OF JUST., JUSTICE MANUAL, § 9-140.111, <https://www.justice.gov/jm/jm-9-140000-pardon-attorney>.

126. Notably, President Ford's Presidential Clemency Board, already outside of the Department of Justice, avoided this kind of conflict in its own investigations, explaining that "Because this was a program of clemency, not law enforcement, we unanimously decided not to seek the assistance of the FBI in preparing our cases." PRESIDENTIAL CLEMENCY BD., *supra* note 73, at xvii.

Beyond that, the manual describes a set of generally reasonable “principal factors” that should be taken into account in considering pardons (usually after the service of a sentence),<sup>127</sup> including:

- A five-year waiting period between release from prison and application for a pardon,<sup>128</sup>
- Post-conviction conduct, character, and reputation,<sup>129</sup>
- Seriousness and relative recentness of the offense,<sup>130</sup>
- Acceptance of responsibility, remorse, and atonement,<sup>131</sup> and
- Need for relief.<sup>132</sup>

In contrast, the “appropriate grounds” for considering shortening a sentence through commutations<sup>133</sup> include:<sup>134</sup>

- Demonstrated rehabilitation while in custody,
- The amount of time already served,
- Disparity or undue severity of sentence,
- Critical illness or old age,
- Meritorious service rendered to the government,
- Exigent circumstances unforeseen at the time of sentencing, and
- The availability of other remedies.<sup>135</sup>

These criteria exist on paper and are both defensible and fairly broad, but do not seem to match the reasons given for some recent grants of clemency.<sup>136</sup> Moreover, their breadth would seem to dictate many more grants of both pardon and commutation than are given if they were truly guiding decisions.

127. U.S. DEP’T OF JUST., JUSTICE MANUAL, § 9-140.112, <https://www.justice.gov/jm/jm-9-140000-pardon-attorney>.

128. *Id.*

129. *Id.* § 9-140.112(A).

130. *Id.* § 9-140.112(B).

131. *Id.* § 9-140.112(C).

132. *Id.* § 9-140.112(D). This refers to the ability of a pardon to restore rights, including the ability to seek certain types of employment. A fifth factor, already described here, is the views of the local U.S. Attorney or the Assistant Attorney General. *Id.* § 9-140.112(E).

133. The Justice Manual also inappropriately asserts that “commutation is an extraordinary remedy.” *Id.* § 9-140.113; Nothing in the Constitution or the history of clemency suggests this. Osler, *Clemency as the Soul*, *supra* note 5, at 133–55.

134. I have re-ordered these grounds to track their analogues in consideration of pardons. U.S. DEP’T OF JUST., JUSTICE MANUAL, § 9-140.113, <https://www.justice.gov/jm/jm-9-140000-pardon-attorney>.

135. *Id.*

136. For example, conservative commentator Dinesh D’Souza was pardoned by President Trump, but hardly seemed to have demonstrated a taking of “responsibility, remorse, and atonement” as he raged against his conviction even after receiving clemency. Peter Baker, *Dinesh D’Souza, Pardoned by Trump, Claims Victory Over Obama Administration*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/us/politics/trump-pardon-dsouza.html>.

### C. *Principled Approaches to Clemency*

So, what else is possible? Here I suggest three constructs. The “numerical goal” approach, rooted in the principle that we simply incarcerate too many people, would establish a target number for a president’s term (or, better, for each year of his or her term). The “bucket” approach would look to particular injustices in the federal criminal justice scheme and target those affected by those injustices for clemency. Finally, a “characteristic mix” system would identify qualities in individual petitioners (regardless of crime of conviction) that would favor them for clemency grants. With each, separate consideration should be given to commutations and pardons since circumstances play out differently depending on whether a sentence is shortened or not.

#### 1. *The Numerical Goal Approach*

There is political appeal, certainly, to setting a numerical goal for clemency. Doing so, however, is in tension with setting standards for the types of grants a president wants to make. In other words, ambitiously promising or predicting a number of grants virtually guarantees that either the goal will not be met or it will be difficult to consistently hew to a set of principles or guidelines about who should receive clemency, as the outcomes will be driven by the need to match the announced norm.

A recent example of this reveals the problem. As President Barack Obama launched his clemency initiative in 2014, Attorney General Eric Holder ambitiously speculated that ten thousand prisoners might be released under the program.<sup>137</sup> The ten thousand number—nice, round, and easily understandable<sup>138</sup>—quickly settled into the public imagination, particularly within prisons.<sup>139</sup> However, it was not attached to anything, and made the Obama efforts (which yielded about seventeen hundred commutations) seem like a failure.<sup>140</sup>

It could be that a numerical goal is a better fit for postprison pardons rather than commutations. A target number for pardons carries less risk and would be easier to consistently attain.

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137. Sari Horwitz, *Struggling to Fix a ‘Broken’ System*, WASH. POST (Dec. 5, 2015), <https://www.washingtonpost.com/sf/national/2015/12/05/holderobama>.

138. Jordan Fabian, *For Trump, 10,000 is His Favorite Number When Making Big Claims*, BLOOMBERG NEWS (Sept. 6, 2019), <https://www.bloomberg.com/news/articles/2019-09-06/trump-has-a-favorite-number-when-he-makes-big-claims-10-000>.

139. CTR. ON THE ADMIN. OF CRIMINAL L. AT NYU LAW SCHOOL, *THE MERCY LOTTERY: A REVIEW OF THE OBAMA ADMINISTRATION’S CLEMENCY INITIATIVE* (2018), [http://www.law.nyu.edu/sites/default/files/upload\\_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf).

140. *Id.*

## 2. *The “Bucket” Approach*

Another, and better, approach is to identify “buckets” of cases which will be the focus of clemency efforts. These buckets can serve to prioritize the types of cases the president cares about the most. A nonexclusive list of potential buckets for commutations would target sentences that don’t match the nation’s sense of justice—often because attitudes and laws have changed without retroactive effect. These buckets could include those serving sentences for marijuana offenses, older prisoners unlikely to reoffend, crack cases that were not reached by prior initiatives, those whose cases were under statutes altered by the First Step Act (without retroactive effect), those who were impacted by overuse of enhanced drug sentences through 21 U.S.C. § 851 notices,<sup>141</sup> those given a long sentence under conspiracy rules where they were not a leader of the organization, and sex trafficking defendants who themselves were the victims of sex trafficking.

Buckets for pardons may be more difficult to define, and it is less important that they be defined since the connection between unjust sentences and clemency is disconnected in pardon cases (since almost always the sentence has been completed). Certainly, categories of crime that are no longer crimes within the community supposedly victimized (for example, marijuana convictions where marijuana has been legalized under state law) would be an obvious bucket for pardons.

Importantly, a bucket approach can’t be the entirety of the clemency process, as there will always be strong cases that do not fit into a defined bucket. However, it can focus efforts on those cases with the best chance of success while publicly reflecting the executive’s most deeply held beliefs about justice.

## 3. *The “Characteristic Mix” Approach*

Finally, a president could charge the clemency board to look for a mix of characteristics in petitioners that would favor particular values. For example, exemplary rehabilitation could be a favored basis, regardless of the crime of conviction. This would have the advantage of breaking down some of the “red lines”—like conviction for a crime characterized as “violent”—that can bar truly rehabilitated prisoners from consideration for clemency.

Again, the Obama clemency initiative offers a cautionary tale. There, the DOJ announced eight characteristics that it supposedly required: (1) the petitioner likely would have received a lower sentence under current law; (2) the petitioner was a non-violent offender; (3) the petitioner was a low-level offender; (4) the petitioner did not have significant ties to large scale criminal organizations, gangs, or cartels; (5) the petitioner had completed

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141. These enhancements, which have a profound effect on sentences, vary widely in their use from one district to another. A striking analysis of this was provided by Judge Mark Bennett in *United States v. Young*, 960 F. Supp. 2d 881 (N.D. Iowa 2013).

ten years of the sentence; (6) the petitioner did not have a significant criminal history; (7) the petitioner had demonstrated good conduct in prison; and (8) the petitioner had no history of violence.<sup>142</sup> Despite its seeming rationality, this list was fatally flawed. Its requirements ruled out many good candidates (for example, exemplary candidates with a single violent prior offense), and didn't reveal what turned out to be the true underlying interest of the project: to address narcotics sentences that were too long.<sup>143</sup> After all, the criteria themselves facially applied to child porn cases, fraud, or human trafficking as much as they did to narcotics. In the end, the grants did not fit the criteria. According to a Sentencing Commission analysis, only about 5.1 percent of those granted a commutation actually met all of the criteria, while only about 5.3 percent of narcotics defendants who *did* meet the criteria actually got a commutation.<sup>144</sup> The lesson from the Obama experience should be that if key characteristics are going to set the targets for commutations or pardons, they need to be simple, limited, and reflect the true intent of the administration.

## V. CONCLUSION

Clemency is in crisis, with thousands of petitions piled up somewhere in the executive branch. For the past four decades, it has not functioned consistently as a principle-driven exercise of a constitutional power. In that failure is a betrayal not only of a function that the framers intended to exist, but a value—mercy—which is central to our society. To create a lasting solution, the president should create a clemency board, remove the process from the DOJ, and announce clear principles that will guide the use of the pardon power. Doing so will revive a crucial constitutional tool and create a legacy that extends beyond the term of the new system's creator.

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142. OFFICE OF THE INSPECTOR GENERAL, *supra* note 11.

143. Deputy Attorney General Sally Yates described the legacy of the project as “restoring proportionality to unnecessarily long drug sentences,” for example. Sari Horwitz, *Obama Grants Final 330 Commutations to Nonviolent Drug Offenders*, WASH. POST (Jan. 19, 2017), [https://www.washingtonpost.com/world/national-security/obama-grants-final-330-commutations-to-non-violent-drug-offenders/2017/01/19/41506468-de5d-11e6-918c-99ede3c8cafa\\_story.html](https://www.washingtonpost.com/world/national-security/obama-grants-final-330-commutations-to-non-violent-drug-offenders/2017/01/19/41506468-de5d-11e6-918c-99ede3c8cafa_story.html).

144. *An Analysis of the Implementation of the 2014 Clemency Initiative*, U.S. SENT'G COMM'N (Sept. 2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901\\_clemency.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf).