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

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I. Introduction

The morning of March 30, 2010 presented a remarkable moment. The United States Supreme Court was hearing argument in the case of *Dillon v. United States*.\(^1\) The case presented the question of whether Dillon, a convicted crack dealer, could receive a reduction in his sentence based on post-conviction rehabilitation.\(^2\) It was going poorly for Dillon’s cause; the Court seemed disinclined to consider the relief he sought. Then things took a dramatic turn. As Solicitor General Elena Kagan looked on in surprise from counsel table, Justice Kennedy pointedly raised an unexpected issue in the following exchange with Assistant Solicitor General Leondra 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.\(^3\)

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\(^1\) 560 U.S. 817 (2010).
\(^2\) Dillon was seeking this reduction in the context of a resentencing based on a retroactive reduction in the Sentencing Guidelines relating to crack offenses. Id.
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 system of criminal law. The authors of the Constitution took the pardon power seriously, creating it as a virtually unchecked power of the presidency. Recent presidents, however, have largely ignored this powerful tool, even as some have sought to expand the power of the office in other ways.4

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 office of President. However, the current administrative process for reviewing clemency petitions stands in the way of just about any vision a president may have about this authority. Recent presidents from across the political spectrum – from President Clinton to President George W. Bush – have been unable to systemically grant clemency even when they have wanted to do so. If the wisdom of the framers is to be respected, each gear in the machine of government they created must be kept in good order, and 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,5 actively soliciting more petitions that meet the President’s announced criteria,6 encouraging U.S. Attorneys to support clemency in some cases,7 and hiring more lawyers in the Pardon Office to process them.8 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. It is not a model of structural reform but a plan to work within the existing framework to find and process more cases to grant based on factors outlined specifically by the President.

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

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4 For example, President Obama and others have sought to enlarge the president’s war powers. Curtis A. Bradley & Trevor W. Morrison, Presidential Power, Historical Practice, and Legal Restraint, 113 Columbia L. Rev. 1097, 1099-1100 (2013).
6 Id.
7 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”); Remarks of Ruemmler at CACL event, April 15, 2014 (stating that President Obama conveyed his interest in clemency to U.S. Attorneys at a recent meeting).
8 Press Release, supra note 4.
where a change in the law would mean a change in sentence. They may wish to have pardon attorneys look for injustices in individual cases based on the specific facts of that case, even if the underlying law had 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 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.

Section II of this essay sets the stage for the discussion by discussing the fading of the pardon power and the rusting-out of the clemency process. It then explores the costs of this development. Perhaps most obviously, a decline in clemency exacerbates the problem of over-incarceration in the federal system as very few prisoners receive commutations of their sentences. Compared to other factors, such as lengthy mandatory minimum sentences,9 the absence of a vigorous commutation policy may not seem significant; but it nonetheless contributes to the problem. Second, the falling-away of the pardon power risks an atrophy of the process mechanism. It seems that exactly this has happened, too, based on reports of how the pardon attorney’s office has functioned in recent years. 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. Finally, if the pardon power goes unused, the system becomes unbalanced. The Framers intended that clemency serve as a check on over-reach in punishing criminals. If this form of response is abandoned by the executive branch, the structure as a whole is strained.

Highlighting 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. Section III will suggest reforms that bring 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 Department of Justice has proven to be a failure. Instead, review of clemency petitions should be entrusted to an independent commission with a standing, diverse 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 these interests are given significant weight and 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 Department of Justice and

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9 Cite USSC Man Min Report (2011)
take the views of prosecutors seriously, the commission itself should exist outside the Department and its recommendations should go directly to the White House.

This institutional shift will help alleviate the prosecutorial bias in decision-making that exists within the Department and that handicaps the pardon office in policing prosecutorial abuses. It will allow clemency to serve as a check on the exercise of prosecutorial discretion to promote uniformity. Clemency, seen in this light, can thus help bring uniformity to prosecutorial decision-making in much the same way the creation of the independent Sentencing Commission helped bring uniformity to the exercise of judicial discretion in sentencing.

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 both to create uniform standards and to focus the use of the pardon power on policy 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. Presidents seem to realize 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 finally recognized as the duty of the office. But clemency deserves to be more than an afterthought to a presidential term. 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.

II. The Costs of a Latent Pardon Power

A. The Fading of the Principled Pardon Power

Within the course of about a month, two thoughtful documents emerged from the conservative Heritage Foundation and the progressive American Constitution Society. What was striking was their broad agreement. Writing in a Heritage Foundation “Legal Memorandum,”10 Paul Rosenzweig concluded that “Despite its prominence throughout the history of the American Republic, the pardon power is seldom used today,”11 and called for an institutional solution with a new review structure.12 Just weeks later, Margaret Colgate Love wrote a comprehensive piece for ACS, similarly lamenting that “For the past thirty years presidents have been increasingly reluctant to use their

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11 Id., “Key Points” at 1.
12 Id. at 7.
constitutional power to pardon,”¹³ and called for the consideration of new processes to change this current reality.¹⁴

When writers for the Heritage Foundation and ACS agree on a problem’s importance (and a common 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 office. In just his first two years as president, Abraham Lincoln granted clemency to several hundred soldiers and over 200 civilians.¹⁵ Looking at statistics for a full first term for later presidents, the numbers consistently reflect a vital clemency power even well beyond World War Two. Looking just at commutations (nearly always far more pardons than commutations are granted),¹⁶ we see that Franklin Roosevelt granted 309 sentence reductions, Kennedy commuted 100, Johnson allowed 226, and even Nixon commuted over 50 in his first term. In contrast, President Obama granted precisely one commutation petition in his own first term.¹⁷

The decade of the 1970’s, and particularly the presidencies of 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, Richard Nixon, of crimes that Nixon may have committed in office.¹⁸ The Nixon pardon rocked the nation on September 8, 1974.¹⁹ Less well remembered is a program that Ford had announced just three weeks previously. In an August 19, 1974 address to a convention of the Veterans of Foreign Wars (who were aghast), he set out a program to pardon large numbers of draft evaders and army deserters who had been convicted of these offenses.²⁰ Though they were controversial, both of these initiatives can be described as principled actions aimed at national healing after traumatic events.

¹⁴ Id. at 22.
¹⁶ Our thesis mainly addresses commutations, so we focus on them here.
¹⁸ Ford’s proclamation of the pardon claimed that the action was necessary to avoid a “prolonged and divisive debate.” The text of Ford’s proclamation and his accompanying remarks are available at 13 Fed. Sent. Rep. 207 (2001).
¹⁹ Ford may have picked the date in a failed attempt to hide the news behind another (and even more bizarre) national event: Evel Knievel’s attempt to jump the Snake River Canyon on that same day. Laura Kalman, Gerald Ford, the Nixon Pardon, and the Rise of the Right, 58 Cleveland St. L. Rev. 349, 360 (2010).
²⁰ Id. at 353.
After Ford, President Carter echoed his predecessor’s work in issuing an amnesty for draft evaders who had not been convicted, some of whom had fled abroad.\textsuperscript{21} And, with that, the era of presidents using the pardon power for a broad and principled purpose seemed to come to a close. Presidents Reagan, Clinton, and both Bushes seemed content to use the pardon power sporadically and inconsistently, and certainly did not use it to promote policy initiatives.\textsuperscript{22} Especially telling was the declining rate of petitions granted during this period: President Kennedy granted 40.9% of all clemency petitions ruled upon or closed (for both pardon and commutation), and all the presidents between Kennedy and Reagan granted over 20% of all petitions. Then the decline began. Reagan granted 12.6% of all petitions, George H.W. Bush 4.5%, Clinton 9.1%, and George W. Bush 1.65% (including the granting of only 11 out of 9,732 commutation petitions).\textsuperscript{23}

President Obama’s record has been strikingly inconsistent, with a first term nearly devoid of clemency (granting only .08% of petitions ruled upon or closed),\textsuperscript{24} and a second term which is witnessing at the time of this writing 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 where they are serving long sentences that would not be issued today under current law and where they have not committed acts of violence.

The remarkable slowdown in clemency through the regular process coincided with a larger event which compounded its effect—the elimination of parole in the federal system through the Sentencing Reform Act of 1984.\textsuperscript{25} Thus, the two principle features of second-look sentencing in the federal system shut down simultaneously, one through legislative action and one through executive disinterest. It is clemency that is the more remarkable of these two, however, because unlike parole, the pardon power exists as a creation of the Framers. The remainder of this section 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.\textsuperscript{26}

B. Over-Incarceration and the Desuetude of Clemency


\textsuperscript{22} Importantly, President Reagan’s “amnesty” of undocumented immigrants was accomplished through legislation, not via the pardon power.


\textsuperscript{24} Through 2012, President Obama pardoned just 22 people, and commuted only one sentence, according to the Pardon Attorney’s reports. United States Department of Justice Clemency Statistics, available at http://www.justice.gov/pardon/statistics.htm.


Certainly, the falling-away of robust clemency has not been a primary cause of what many perceive to be a wave of over-incarceration in the federal system. The numbers of people offered commutations in even a robust administration were only a fraction of the inmates held at that time. A telling example is the only attempt, prior to President Obama’s, to release prisoners sentenced to long terms for narcotics because those sentences were viewed as too harsh. That program was initiated by President Kennedy, and led to the release of over 200 inmates perceived to have been over-sentenced under the Narcotics Control Act of 1956. While this effort was historic (if quiet), it affected only a small part of the federal inmate population. That small reduction is 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 impact prison numbers directly. However, we should not too quickly dismiss indirect effects. 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, Thomas Jefferson believed the Alien and Sedition Act to be unconstitutional as a matter of law. As president, though, he was limited in the actions he could take. He couldn’t 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 Act’s constitutionality. Nor could he repeal the law, as that was within the power of Congress. Instead, the tool he had was the pardon power, and he exercised that power to free those held under the Act.

Kennedy’s actions, too, signaled his recognition of a problem with the onerous Narcotics Control Act. The signal was eventually heeded, and the most objectionable provisions of that law were repealed in 1970.

Presidents 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 were embedded in the federal sentencing guidelines and the statutory minimums from 1986-2010. Though both presidents publicly voiced their objections to this disparity, neither backed this up with the use of the tool in their hand—commutation. Either could have signaled the need for reform by strategically commuting the sentences of a significant number of crack defendants. Neither did so. Instead, they squandered this power on clemency for Marc Rich and Scooter Libby, which signaled something less principled. Pardon scholar Jeffrey Crouch was blunt in concluding that

29 Id.
32 Id.
Clinton and Bush “succumbed to the temptation to use clemency for their own personal reasons.”

This importance of this signaling function isn’t 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 United States Attorneys spread out across the country. Several layers of bureaucracy lie between the Chief Executive and these key actors—the Attorney General, the Deputy Attorney General, the United States 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.

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 President Obama has signaled that he will use the clemency power to address the effects of over-charging and over-sentencing narcotics cases in federal courts. 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 in eight years in office, examining each carefully and thereby signaling when prosecutorial discretion to charge has gone too far, rather than pushing through 1,000 in the last year.

C. The Atrophy of the Clemency Process

By failing 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.

Moreover, 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 President Clinton and President George W. Bush). Largely forgotten, during this period the Pardon Attorney and his staff met the low expectations embodied in the executive’s disinterest. This dynamic was magnified by the placement of the evaluation process within the Department of Justice itself—after all, the consideration of mercy takes place within a building largely devoted to crime-fighting and punishment.

This idea about atrophy is not hypothetical—it is the reality that developed within the Pardon Attorney’s office 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.” The author was Sam Morison, who had worked in the office of the United States Pardon Attorney for 10 years, well into the second Bush term. What he 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 merits of any individual petition…. the 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.

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. Several involved Clarence Aaron, who was serving a life sentence 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., 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.” Within the realm of clemency, the support of the prosecutor and judge is both rare and important. The failure to report this information shows a striking devotion to consistent denials.

35 Id.
36 Linzer’s full series is available at https://www.propublica.org/series/presidential-pardons
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. Because they expected less, those expectations were fulfilled. Now the system built of those low expectations no longer functions. The bare fact that President 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 them -- 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 is subjected to scrutiny. Given the politics of crime, presidents may be reluctant to grant clemency because there is no political upside and each grant carries the risk of a political attack ad should the recipient 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 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 creates 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 man-handling of the Anti-Terrorism and Effective Death Penalty Act of 1996, is limited to correcting the grossest of abuses raised by the most vigilant of prisoners. 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 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 to look to the 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.”39 He saw better prospects in other forms of second-chance relief.

Specifically, Protass found success in pressing federal cases through the use of Rule of Civil Procedure 60. On its face, that Rule expressly abolishes the writs of Coram Nobis and Audita Querela,40 but Protass found ways to finesse that point, convincing courts that the writs were only eliminated in civil cases. Coram Nobis traditionally was

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39 Email to the authors, dated April 7, 2014.
40 Fed. R. Civ. Pro. 60(e).
issued by a court to correct a previous error of the most fundamental character, to achieve
justice where there are extraordinary circumstances and no other remedy is available.\textsuperscript{41} Audita Querela was also a British common law writ, which allowed the consideration of
new law or evidence.\textsuperscript{42}

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 U.S.C. § 2255 which are subject to severe restrictions, or limiting their
relevance only to areas not covered by 28 U.S.C. § 2255. Already, Courts of Appeal
have moved in this direction.\textsuperscript{43} More simply, a flood of cases under this rule might push the Supreme Court (or a majority of Courts of Appeals) to simply find that Rule 60(e)
means what the government will urge it does—that these writs have been abolished, in
both civil and criminal actions.\textsuperscript{44}

The reason this matters is tied to the hopes and expectations of prisoners. If an
ancient writ offers hope, the word spreads fast within prison. If all 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 they will pop this balloon, and those writs will be reduced to less than a
wisp in the law. Their disadvantage 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. It 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 Powers

It is clear that the Framers intended the pardon power not only to be a vehicle for
the ancient value of mercy, but to play a role within the balance between the branches of
government. The importance of this role was significant enough to overcome even those
who were suspicious of a strong executive.\textsuperscript{45}

\textsuperscript{41} Nicks v. United States, 955 F. 2d 161, 167 (2d Cir. 1992).
\textsuperscript{42} United States v. LaPlante, 57 F. 3d 252, 253 (2d Cir. 1995). A good distinction between these writs is set
out in United States v. Torres, 282 F. 3d 1241, 1245 n. 6 (3d Cir. 2002).
\textsuperscript{43} See, e.g., Cherys v. United States, 2014 WL 67874 (3d Cir. 2014) (concluding that coram nobis is not
available to those who are “in custody” and asserting that their remedy is through 28 U.S.C. § 2255); United States v. London,
523 Fed. Appx. 510 (10th Cir. 2013) (holding that the petitioner was “not entitled
to a writ of audita querela because he is in custody).
\textsuperscript{44} To get to this conclusion, though, the Court would have to deal with the language of United States v.
Morgan, 346 U.S. 502, 510 (1954), which allowed a coram nobis petition and concluded that “Nowhere in
the history of Section 2255 do we find any purpose to impinge upon prisoner’s rights of collateral attack
upon their convictions.”
With striking foresight, the Framers identified the specific problem which 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 easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.

This argument, made some twenty-two decades ago, concisely describes the imbalance that has plagued our federal system of justice over the past three. Politicians reacted to public and media alarms over 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, sat latent as the injustice became clearer.

The pardon power is not sufficient (on its own) to right-size the federal prison population. The legislature must do its job by revising the laws and allowing retroactivity where 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 is used without principle, the carefully-balanced process of criminal justice is subtly undone. The structure for clemency must be rebuilt so this function can be restored.

III. The Path Forward: Redesigning Clemency

Reinvigorating clemency will help to minimize the costs discussed in Part II. 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 in the Department of Justice. 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. This conflict became increasingly pronounced in the late 1970s and early 1980s when the Department shifted responsibility over pardons to the Deputy

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46 Infra, Section II(B).
47 For a lengthier treatment, see Rachel E. Barkow, Prosecutorial Administration: Prosecutor Bias and the Department of Justice, 99 Va. L. Rev. 271, 286-291, 312-319 (2013) (describing the conflict of interest at the Department and explaining its development).
Attorney General, whose principal responsibility is to oversee federal prosecutions, and when a focus on tough-on-crime politics made the Department’s law enforcement efforts a key, high-profile aspect of the presidential administration. Given this conflict, it is thus not surprising that the pardon office fails to recommend grants, thereby frustrating presidents who want to use the power. President George W. Bush, after failing to receive positive recommendations for clemency from the office even after his White House Counsel requested them, remarked that the process “is broken” and “doesn’t make any sense.”

It is hard to disagree with President 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 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. Whereas pardon attorneys in the 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 it evaluates the Department’s position alongside other evidence as well as the President’s policies on criminal justice.

The key to strengthening clemency and maximizing its utility is to change this institutional structure and remove clemency from the supervision of the Department, where the prosecutorial perspective dominates and where 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.”

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48 Id. at 288-289 (noting that the Reagan Justice Department explicitly sought to “polarize the debate” on drugs and prisons to “further [its] agenda” and describing the shift in control over pardons in 1978 to the Deputy Attorney General, whose primary responsibility is to supervise federal prosecutions).

49 President Clinton, for example, expressed “dissatisfaction with the general approach to clemency cases being taken by his own Justice Department” that led him to turn to his lawyers in the White House to serve those functions. Presidential Pardon Power: Hearing Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary, 107th Cong. 25 (2001) (statement of Margaret Love).


While there is room for reasonable disagreement about who should be on such a board and where precisely it should be placed institutionally, we believe 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.\(^{52}\) While it could be a free-standing agency within the executive branch or placed within the White House counsel’s office or elsewhere in the Office of the President,\(^{53}\) it should not be subject to supervision by the Department of Justice because of the conflict created by putting those in charge of prosecution in charge of second-guessing those same prosecution decisions.

Although pardons have fallen in jurisdictions throughout the United States, and not just at the federal level, some states have better functioning clemency systems. Margaret Love’s 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.\(^{54}\) This is not sufficient, of course, as there are a number of states with independent boards who rarely grant clemency. But it does seem to be a necessary pre-condition 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.

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 make sure all those interests are represented and to increase the likelihood that the judgment of the board is substantively sound 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

\(^{52}\) Thus, although a body like the Sentencing Commission has the staff and capabilities for the kind of data analysis we propose, see infra, its placement in the judicial branch and the fact its members are subject to Senate confirmation would restrict the President’s constitutional clemency power to too great an extent should it have a role in clemency. In addition, its membership lacks the kind of diversity we believe is necessary for clemency determinations.

\(^{53}\) See Barkow, supra note 50, at 330-341 (discussing the advantages and disadvantages of different institutional placements).

crime or was a victim of crime and works on those issues; and individuals from academic with expertise in risk assessment, so at least one criminologist and one psychologist. 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 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 non-partisan body that is not tilted in a particular political direction or biased toward a 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. Indeed, it is critical that the commission have individuals with unassailable credentials on public safety and a concern for victim interests.

The body itself should also 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. A new model of clemency should pay close attention to racial and other disparities to make sure the process is not biased. That 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 be sources of disparity in the system. Margaret Love 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.”

55 The most successful sentencing commissions follow this model of a diverse membership and key stakeholders who have influence with other political actors. Rachel E. Barkow, Administering Crime, 52 U.C.L.A. L. Rev. 715, 800-804 (2005).
57 Margaret Colgate Love, The Twilight of the Pardon Power, 100 J. Crim. & Criminology, 1169, 1206 (2010).
There is currently no body in the federal system that keeps track of prosecutorial decisions across the 93 U.S. Attorney’s Offices, other than whatever metrics are kept by prosecutors themselves in the Department of Justice and the information from DOJ and the courts that gets reported to the Sentencing Commission. We know from existing data that there is a great deal of disparity in how prosecutors charge cases and the sentences they pursue. For instance, there is wide variation in the charging of crimes that carry mandatory minimum sentences. One General Accounting Office 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. In the Southern District of Texas and the Southern District of California, prosecutors dropped or reduced mandatory minimum charges regularly (over 50 times), while prosecutors in other districts, such as the Central District of California, rarely dropped or reduced charges after filing them.

Recent data also indicate wide variation in charging repeat offenders under the mandatory minimum sentencing provisions of 21 U.S.C. § 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 districts, none of the eligible drug offenders received the enhanced penalty.

There are also strong indications from available data there are large disparities between U.S. Attorney Offices in their willingness to file motions on behalf of defendants who offer substantial assistance. 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.

Undoubtedly there are other charging and sentencing practices that differ among U.S. 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

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60 Human Rights Watch, An Offer You Can’t Refuse, Appendix (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.” USSC Mandatory Minimum Report at 110-111.
only works in one direction – to reduce sentences – the board itself would serve as a check only on 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 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 this data in a useable format, in the same way the Sentencing Commission does with respect to its data on judicial decisionmaking. That data is a useful tool to a range of actors, and similar data on prosecutorial practices is just as vital.

The collection of data on prosecutors could also help identify those areas where federal prosecutors may be prone to error, if for example, clemency is necessary when an individual demonstrates innocence or identifies prosecutorial misconduct that should have a bearing on an individual’s ultimate sentence. In this respect, the clemency board can operate like conviction integrity units that have been established in state prosecutors’ offices that look for errors in cases but also establish mechanisms to avoid error in the future based on common mistakes that become identified through that backward review.

Finally, the clemency board could provide yet another useful benefit through its collection of data on individuals who receive clemency. Currently, the only information we receive on individuals granted some form of clemency is when the media highlights a case in which an individual reoffends after having been given a break, or what we might call the Willie Horton bias in media coverage to those cases where someone granted some form of mercy or leniency reoffends. What we lack is a systemic look at what happens in those cases where 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 are better at identifying 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 will be better informed if the recommendations come from a board that is sensitive to overall data patterns on race, recidivism, and prosecutorial practices. And positive grant recommendations will mean more when they come from an expert, politically diverse body.

Conclusion

Clemency occupies an odd place in American government today. It is one of the greatest powers the president has and 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 only a tool presidents use on their way out the door or to fix a specific problem that the president identifies in advance (as President 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 gone through legislative change. When the Framer’s spoke of the pardon power, they noted it was necessary because “the criminal code” would be too severe. They did not reserve it for retroactive adjustments, nor did they think all errors could be identified in advance to correct. They set up a mechanism to ensure that justice could be done in every federal case. It is time to restructure clemency so it fulfills this quiet but crucial constitutional function.