

# FEWER HANDS, MORE MERCY: A PLEA FOR A BETTER FEDERAL CLEMENCY SYSTEM

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## INTRODUCTION

There is a broad consensus in the United States that we incarcerate too many people for non-violent narcotics crimes.<sup>1</sup> One way to address that

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1. Erik Eckholm, *Cutting the Federal Prison Population Will Be Hard. Here’s Why*, N.Y. TIMES (Oct. 26, 2015), <https://www.nytimes.com/2015/10/28/upshot/cutting-federal-prison-population->

issue, at least within the federal system, is through the use of federal clemency.<sup>2</sup> While President Obama used the Pardon Power in a significant way to grant commutations to 1,715 prisoners,<sup>3</sup> he accomplished this in spite of an archaic, bureaucratic review process that limited his results. To use the Pardon Power consistently and effectively, Obama's successors must reform the process of consideration.

For centuries, the United States maintained a relatively simple system for the review of federal clemency petitions.<sup>4</sup> That changed in the 1980s, and we now have 7 to 12 levels of review<sup>5</sup> to arrive at the same decision: whether to grant or deny a petition for clemency. Since that shift towards complexity, grant rates have plunged,<sup>6</sup> and the Pardon Power has largely either been ignored or a source of political scandal.<sup>7</sup> While President Obama cranked this archaic machine faster, he did not replace it.<sup>8</sup> To fix the problem, we need to restore simplicity to this essential mechanism of mercy created by the Constitution.<sup>9</sup> This article sets out why reform is necessary in the face of an unproductive bureaucracy, and how that reform should be structured.

Our greatest president<sup>10</sup> had the simplest approach of all: Abraham Lincoln met personally with those seeking clemency on behalf of

will-be-hard-heres-why.html. Eckholm points out that there is much less of a consensus around lowering sentences for those convicted of violent crimes. *Id.*

2. The vast majority of prisoners, of course, are held in state prisons. *Id.* Each state system has its own clemency process, though these vary wildly in efficacy. For a good examination of state clemency processes, see Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730, 731 (2012) [hereinafter Love, *Reinvigorating the Federal Pardon Process*]. See also *id.* at 732, 744 (suggesting ways to restore presidential pardoning in the federal justice system).

3. 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-nonviolent-drug-offenders/2017/01/19/41506468-de5d-11e6-918c-99ede3c8cafa\\_story.html?utm\\_term=.bb3dd765bf57](https://www.washingtonpost.com/world/national-security/obama-grants-final-330-commutations-to-nonviolent-drug-offenders/2017/01/19/41506468-de5d-11e6-918c-99ede3c8cafa_story.html?utm_term=.bb3dd765bf57).

4. See *infra* Part II.A (detailing the evolution of the America's federal clemency program).

5. See *infra* Part II.B (explaining the current United States federal clemency program).

6. *Clemency Statistics*, OFFICE OF THE U.S. PARDON ATTORNEY, <https://www.justice.gov/pardon/clemency-statistics> (last updated Feb. 7, 2017).

7. JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* 146 (Univ. Press of Kan., 2009).

8. President Obama's grants of commutation (shortening of a sentence) were historically significant, but only came after more than seven years of frustration, and through largely ignoring pardons (which restore rights after a sentence has been served). *Clemency Statistics*, *supra* note 6.

9. U.S. CONST. art. II, § 2.

10. *Id.* Any judgment of a president's value is necessarily subjective. Lincoln was ranked best in a recent poll of the American Political Science Association's "Presidents and Executive Politics" section. Brandon Rottinghaus & Justin Vaughn, *New Ranking of U.S. Presidents Puts Lincoln at No. 1, Obama at 18; Kennedy Judged Most Overrated*, WASH. POST (Feb. 16, 2015),

themselves or others.<sup>11</sup> Job Smith's father, for example, waited in tears in Lincoln's anteroom.<sup>12</sup> His son had been court-martialed and sentenced to die. When the old man told Lincoln about his son, Lincoln's face reflected a "cloud of sorrow" according to a witness.<sup>13</sup> There was a complication to clemency, though. The condemned soldier served in General B.F. Butler's Army of the James, and Butler had just sent Lincoln a note imploring him "not to interfere with the courts-martial of the army."<sup>14</sup> In the end, contrary to the General's request and in the presence of the soldier's father, Lincoln spared Job Smith's life.<sup>15</sup>

Contrast that with the process a prisoner faced when seeking clemency from President Obama in 2016. The process had changed in a century and a half. A prisoner's father would not get to chat with the president, of course; that one degree of separation between the president and Job Smith's father has blossomed into no less than 12 discrete, successive reviews by people with different interests, values, and filters from one another.<sup>16</sup>

A typical non-violent narcotics prisoner in 2016 likely would have filed his clemency petition through the Clemency Project 2014,<sup>17</sup> a special program established by the Obama Administration and five outside organizations.<sup>18</sup> The Clemency Project 2014 was directed towards petitioners who met certain criteria.<sup>19</sup> Here is a lightning-round synopsis of

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<https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/02/16/new-ranking-of-u-s-presidents-puts-lincoln-1-obama-18-kennedy-judged-most-over-rated>.

11. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1177-78 (2010) [hereinafter Love, *The Twilight of the Pardon Power*].

12. Schuyler Colfax, *Leg Cases, in MEETING MR. LINCOLN: FIRSTHAND RECOLLECTION OF ABRAHAM LINCOLN BY PEOPLE, GREAT AND SMALL, WHO MET THE PRESIDENT* 81, 83 (Victoria Radford ed., 1998).

13. *Id.*

14. *Id.*

15. *Id.*

16. See *infra* Part II.B (discussing America's federal clemency program, including the 12-step petition review process).

17. Disclosure: The author, through the Federal Clemency Clinic at the University of St. Thomas, filed clemency petitions for several prisoners.

18. Sari Horwitz, *Justice Department Outlines Criteria for Clemency to Nonviolent Prison Inmates*, WASH. POST (Apr. 23, 2014), [https://www.washingtonpost.com/world/national-security/justice-department-outlines-criteria-for-clemency-to-nonviolent-prison-inmates/2014/04/23/1c5e9932-cad7-11e3-95f7-7ecdde72d2ea\\_story.html](https://www.washingtonpost.com/world/national-security/justice-department-outlines-criteria-for-clemency-to-nonviolent-prison-inmates/2014/04/23/1c5e9932-cad7-11e3-95f7-7ecdde72d2ea_story.html).

19. Those criteria were:

- (1) Defendant would have received a substantially lower sentence today;
- (2) The offense was non-violent;
- (3) Defendant was a low-level offender;
- (4) Defendant has no significant ties to large-scale criminal organizations, gangs, or cartels;
- (5) Defendant has served at least ten years in prison;
- (6) Defendant has no significant criminal history;

the harrowing review process one of those cases was subjected to as it coursed through that Clemency Project and then the Administration's review process, with each step in succession. It was:

- (1) Screened by a Clemency Project staffer;
- (2) Sent to a lawyer for examination and summary;
- (3) Reviewed by a committee of three;
- (4) Revised, then reviewed, by a committee of five;
- (5) Returned to the lawyer, then returned to and reviewed by the Clemency Project as a petition;
- (6) Submitted to the staff of the pardon attorney, and then reviewed by that staff;
- (7) Reviewed by the Pardon Attorney;
- (8) Reviewed by the staff of the Deputy Attorney General;
- (9) Reviewed by the Deputy Attorney General;
- (10) Reviewed by the staff of the White House Counsel;
- (11) Reviewed by the White House Counsel;
- (12) And then, only then, sent the President for consideration.<sup>20</sup>

Job Smith's father was told on the spot that President Lincoln was sparing his son's life. We cannot expect a president today to meet each clemency applicant personally.<sup>21</sup> Still, we can make the system more effective, fair, and efficient by removing at least some of these levels of bureaucracy.<sup>22</sup> This article will examine the problem, look to examples in the states and prior administrations, and describe two options for a new and thorough—yet efficient—clemency process.

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(7) Defendant has demonstrated good conduct in prison; and

(8) Defendant has no history of violence prior to or during his or her term of incarceration.

In some iterations, the second, third, and fourth criteria were conflated, and "six" criteria were listed. See POCKET GUIDE TO THE CLEMENCY PROJECT 2014 PROCESS (WITH CHECKLIST) 8–11, <https://www.stthomas.edu/media/interprofessionalcenter/PocketGuidev3.pdf> (last updated July 13, 2015) (listing criteria required by the Department of Justice).

20. Mark Osler, *Clementia, Obama, and Deborah Leff*, 28 FED. SENT'G REP. 309, 309–10 (2016).

21. *Id.* In fact, that did not even work very well for Lincoln. His staff eventually learned that they had to control access to the President so that important work could be done. Love, *The Twilight of the Pardon Power*, *supra* note 11, at 1177 (commenting on the importance of ensuring that President Lincoln met only the "most deserving" clemency cases).

22. The current system has produced some shockingly unfair outcomes, including remarkable racial disparities. A ProPublica analysis of George W. Bush's clemency record found that, "[a]ll of the drug offenders forgiven during the Bush administration at the pardon attorney's recommendation — 34 of them — were white." Dafna Linzer & Jennifer LaFleur, *ProPublica Review of Pardons in Past Decade Shows Process Heavily Favored Whites*, WASH. POST (Dec. 3, 2011), [https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElNvQO\\_story.html](https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElNvQO_story.html).

Part II recounts how we got into this swamp, then describes the process under the Obama Administration, summarized above. It is a story that involves a dizzying array of players with very different backgrounds and tasks. Importantly, many of those charged with analyzing clemency cases are generalists; they have many and sometimes conflicting tasks other than the review of petitions for clemency.

Part III examines a few of the higher-functioning state processes for clemency and looks for commonalities. A prior federal effort also warrants discussion—President Ford’s Presidential Clemency Board, which granted pardons to thousands of draft evaders and wartime deserters.<sup>23</sup>

Finally, Part IV describes a model for a new federal clemency process based on the high-functioning systems already described. President Ford’s clemency board and the structure used by productive state systems share certain key elements—most importantly, the use of a board that has some degree of independence in making its determinations.

We live in an era where bureaucracy is in the decline. Microsoft, with 6 to 12 layers of bureaucracy, has lost much of its business to a flatter-structured upstart, Google.<sup>24</sup> Analysts like Gary Hamel have concluded that “[t]here’s no other way to put it: bureaucracy must die. We must find a way to reap the blessings of bureaucracy—precision, consistency, and predictability—while at the same time killing it. Bureaucracy, both architecturally and ideologically, is incompatible with the demands of the 21st century.”<sup>25</sup>

The complex bureaucracy we have in place to evaluate clemency is not just a bad system by modern standards. It is a corruption of the intent of those who wrote the United States Constitution. Alexander Hamilton argued that “[h]umanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”<sup>26</sup> Our machine of mercy and justice is unduly fettered, and it is we who should be embarrassed.

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23. See *infra* Part III.B–C (explaining the work of President Ford’s Clemency Board).

24. Karl Moore & Kyle Hill, *The Decline but Not Fall of Hierarchy -- What Young People Really Want*, FORBES (June 14, 2011, 2:24 PM), <http://www.forbes.com/sites/karlmoore/2011/06/14/the-decline-but-not-fall-of-hierarchy-what-young-people-really-want/#3500668c3463>.

25. Gary Hamel, *Bureaucracy Must Die*, HARV. BUS. REV. (Nov. 4, 2014), <https://hbr.org/2014/11/bureaucracy-must-die>.

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

## I. A SWAMP OF UNNECESSARY PROCESS

A. *From Simplicity to Complexity*

To understand the shape of the beast that is the current clemency review system, it is helpful to understand how it evolved. The process grew up organically in response to workload issues and the protection of power within the executive branch, rather than through an intentional scheme to produce efficiency or regularity. There never has been a well-considered plan employed intentionally to construct a sound and efficient federal clemency process in the modern era. However, we have that opportunity now.

Clemency itself is an ancient idea. The Code of Hammurabi contained a clemency provision, and both Greek and Roman rulers wielded the power of mercy for those condemned to punishment.<sup>27</sup> My own treasured possessions include an ancient Roman coin bearing the name *Clementia*, the Roman Goddess of governmental mercy.<sup>28</sup> It is a treasure, but not expensive; so many were minted that they are available for under \$50.<sup>29</sup> Clemency was part of the fabric of government to the Romans.<sup>30</sup>

Within the British antecedents to American law, the ability of monarchs, lords, and the church to grant clemency likely extends back to Edward the Confessor in the mid-1000s,<sup>31</sup> and, as part of the Jurisdiction in Liberties Act in 1535, the monarch had the sole ability to grant clemency.<sup>32</sup>

Strikingly, this one absolute power of kings was unique in its straightforward inclusion in the United States Constitution,<sup>33</sup> a document that in nearly every other respect balances power between the distinct

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27. Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 843 (2016).

28. Mark Osler, Opinion, *Obama's Clemency Problem*, N.Y. TIMES (Apr. 1, 2016), <http://www.nytimes.com/2016/04/01/opinion/obamas-clemency-problem.html>.

29. *Id.*

30. As Paul Larkin, Jr. has noted, both Jews and Romans practiced clemency, and the Roman authority Pontius Pilate is described in the Bible (Matthew 27:15–23) as presenting Jesus with a clemency process that was a part of a distinctive Jewish tradition. Larkin, *supra* note 27, at 843 n.26.

31. See generally SAMUEL WARREN, BLACKSTONE'S COMMENTARIES 643 (1855) (describing the use of the pardon power, which could be exercised by King Edward in the mid 1000s). See also ANDREW NOVAK, COMPARATIVE EXECUTIVE CLEMENCY: THE CONSTITUTIONAL PARDON POWER AND THE PREROGATIVE OF MERCY IN GLOBAL PERSPECTIVE 17–18 (2016).

32. *Id.* at 21.

33. U.S. CONST. art. II, § 2.

branches of government.<sup>34</sup> With the Constitution's sole limitation being that it cannot be used in cases of impeachment, the Pardon Power was entrusted to the President alone and cannot be directly limited by Congress or the courts.<sup>35</sup> While the Constitution was still fresh and its authors active in government, President George Washington first used the pardon power in 1795 to save the lives of two condemned leaders of the Whiskey Rebellion.<sup>36</sup> John Adams followed Washington's lead and "pardoned participants in Fries's [R]ebellion," while Jefferson used the pardon power to free those Adams had imprisoned under the Alien and Sedition Act.<sup>37</sup>

In those early years, there was no formalized process for the consideration of clemency. The first presidents relied at times on the advice of cabinet members, and Thomas Jefferson tended to seek out the opinion of sentencing judges and prosecutors.<sup>38</sup> The Secretary of State became the official custodian of pardon documents, and presidents often relied on their Attorney General for counsel as well<sup>39</sup> (the Attorney General was not a cabinet member at that time).<sup>40</sup> At times, defendants would even take their clemency petition to the sentencing judge, hoping that he might send the petition to the president with a positive recommendation.<sup>41</sup>

In 1852, Secretary of State Daniel Webster handed the responsibility of investigating clemency petitions to the Attorney General, but the process

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34. *Schick v. Reed*, 419 U.S. 256, 267 (1974) (holding that the pardon power's "limitations, if any, must be found in the Constitution itself").

35. *Id.* See also Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 32 CAP. U. L. REV. 185, 187–88 (2003) [hereinafter Love, *Pardon Paradox*] (explaining that the Framers gave the President sole discretion over pardons). Congress can exercise indirect control, however, through its ability to limit funding for clemency review and investigate presidential actions. This has been a live issue during the Obama Administration, as some members of the House of Representatives have tried to block funding for clemency personnel, *U.S. Clemency Program Threatened*, USA TODAY (May 30, 2014, 4:38 PM), <http://www.usatoday.com/story/news/nation/2014/05/30/presidential-clemency-funding/9776703/>, and questioned the need for broadened clemency at all while demanding more facts. Christi Parsons, *Obama Becomes First President to Visit Prison, but Reform Push Has Limits*, L.A. TIMES (July 16, 2015), <http://www.latimes.com/nation/la-na-obama-prison-20150716-story.html>.

36. CROUCH, *supra* note 7, at 55.

37. *Id.* at 56.

38. Love, *Pardon Paradox*, *supra* note 35, at 189; George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT'G REP. 212, 213 (2004).

39. Love, *The Twilight of the Pardon Power*, *supra* note 11, at 1175.

40. The job of Attorney General was established as a part-time job by the Judiciary Act of 1789. The Judiciary Act of 1789, 1 Stat. 73, 93. See also *About DOJ*, U.S. DEP'T JUST., <https://www.justice.gov/about> (explaining that the Attorney General position was created as a one-person, part-time job) (last visited Apr. 11, 2017).

41. Lardner & Love, *supra* note 38, at 213–14.

itself remained strikingly informal,<sup>42</sup> allowing Lincoln to meet personally with clemency seekers. In 1865, Congress funded a “Pardon Clerk,” the forerunner of today’s Pardon Attorney, to assist in reviewing petitions.<sup>43</sup> No formal rules were developed until 1898, when President McKinley directed that all applications for clemency had to be submitted to the Pardon Attorney, an officer within the Department of Justice<sup>44</sup> (which itself had been established in 1870).<sup>45</sup>

McKinley’s rules survived for roughly a century, establishing a fairly simple structure: the Pardon Attorney investigated the petition and made a report and recommendation for the signature of the Attorney General, who sent it along to the President if he approved.<sup>46</sup> This system had three simple and non-redundant steps that involved an investigator (the Pardon Attorney), a reviewer (the Attorney General), and a decider (the President).<sup>47</sup> The system worked fairly well; almost every year between 1900 and 1980, there were over 100 grants of clemency, signed at regular intervals four or five times a year.<sup>48</sup> It is a common myth that it is “traditional” for presidents to wait until the end of their last term to grant clemencies.<sup>49</sup> In fact, so long as there was a simple and functioning system of review, that did not happen.

Former Pardon Attorney Margaret Colgate Love has argued briefly but convincingly that a key to this success was the role of the Attorney General as the conduit to the President: “As a political counselor to the President as well as the chief law enforcement officer, the Attorney General was in a good position to reconcile the tension between the President’s duty to enforce the law and his occasional duty to dispense with it, for mercy’s sake.”<sup>50</sup>

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42. 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, 94 (2015) [hereinafter Love, *Administration of the President’s Pardon Power*].

43. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 814 (2015).

44. Margaret Colgate Love, *Reinventing the President’s Pardon Power*, 20 FED. SENT’G REP. 5, 6 (2007) [hereinafter Love, *Reinventing the President’s Pardon Power*]. Interestingly, the Pardon Attorney position was created less than 30 years into the Department of Justice’s existence. *About DOJ*, *supra* note 40 (identifying the 1870 law that created the executive department).

45. *About DOJ*, *supra* note 40.

46. Love, *Reinventing the President’s Pardon Power*, *supra* note 44, at 6.

47. See Love, *The Twilight of the Pardon Power*, *supra* note 11, at 1181 (detailing that the process of securing a pardon from the President through the Attorney General was developed during President Cleveland’s administration and later codified by President McKinley).

48. Love, *Pardon Paradox*, *supra* note 35, at 191.

49. *Id.*

50. *Id.* at n.18.

So how did things go wrong? It appears that at exactly the same time that clemency grants dropped—the 1980s—the clemency process became more complex.<sup>51</sup> The drop-off is well-defined in the Pardon Attorney's published statistics, which extend back to 1900.<sup>52</sup> Considering both commutations of sentence and pardons, granted petitions almost always exceeded 100 per year. During the Reagan Administration, they dipped below that level and then crashed under George H.W. Bush, who granted less than 100 over his entire four-year term.<sup>53</sup> This trend is particularly notable given that incarceration rates (and thus the number of people who might seek clemency) were rising at the same time that the number of clemency grants was falling. This means that the change in clemency grant *rates* was severe, with a sharp shift between Carter and Reagan. In order: President Kennedy granted 36% of the pardon and commutation petitions filed, Johnson 31%, Nixon 36%, Ford 27%,<sup>54</sup> Carter 21%, Reagan 12%, George H.W. Bush 5%, Clinton 6%, and George W. Bush 2%.<sup>55</sup>

The crucial shift in procedure, which corresponds with this Carter/Reagan breaking point, seems to have happened almost imperceptibly. At the end of the Carter Administration, Attorney General Griffin Bell delegated responsibility for approving and transmitting clemency recommendations to his subordinates.<sup>56</sup> This was formalized in the Reagan Administration under Attorney General William French Smith, and the review and recommendation function of the Attorney General passed to the Deputy Attorney General (“DAG”).<sup>57</sup>

It appears that once the Department of Justice's responsibilities shifted from the Attorney General to the DAG, another level of bureaucracy may have appeared. While the Attorney General has direct contact regularly as a

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51. This was a time of great flux in federal criminal law, as parole was eliminated and mandatory sentencing guidelines were imposed. Sentencing Reform Act, 12 U.S.C. § 3551(b) (2016).

52. *Clemency Statistics*, *supra* note 6.

53. *Id.*

54. *See infra* Part III.B (explaining that this figure does not include the over 13,000 pardons Ford issued outside of the regular clemency process to draft evaders and Army deserters. Presumably, the Pardon Attorney's statistics only include cases that went through that office, and the Ford grants came through an alternative process)

55. Barkow, *supra* note 43, at 816–17.

56. Love, *The Twilight of the Pardon Power*, *supra* note 11, at 1194.

57. Love, *Administration of the President's Pardon Power*, *supra* note 42, at 98. *See also* 28 C.F.R. §§ 0.35–0.36 (2016) (“The Pardon Attorney shall submit all recommendations in clemency cases through the Deputy Attorney General and the Deputy Attorney General shall exercise such discretion and authority as is appropriate and necessary for the handling and transmittal of such recommendations to the President.”).

member of the Cabinet, the same is not true of the DAG.<sup>58</sup> When the DAG shuttles recommendations to the White House, they go not to the President, but to the White House Counsel and his staff,<sup>59</sup> adding two additional levels of review.<sup>60</sup> In sum, what seems like a simple delegation in responsibility actually created significant new hurdles within the process.

While there is no doubt that this shift in procedure corresponded with the sudden drop in grant rates, is it fair to claim causation? It could be that the same retributivist theories of justice that brought us sharp increases in incarceration rates through tough new sentencing laws also convinced presidents from Reagan to Obama not to grant convicted criminals a break through clemency, as Rachel Barkow has argued.<sup>61</sup> While political shifts towards retribution played some role in restricting clemency,<sup>62</sup> they do not explain the entirety of the abrupt fall in grant rates. Three arguments cut the other way.

First, as Margaret Colgate Love has pointed out, a shift in political philosophy towards retribution might explain the drop in commutations (which shorten a term of imprisonment) but not the corresponding drop in the granting of pardons (which restore rights such as the ability to possess a gun for people who have completed prison terms already).<sup>63</sup> Pardon recipients have paid the principal price of hardship demanded in a sentence

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58. See Gregory Korte, *Former Administration Pardon Attorney Suggests Broken System in Resignation Letter*, USA TODAY (Mar. 28, 2016), <http://www.usatoday.com/story/news/politics/2016/03/28/former-administration-pardon-attorney-suggests-broken-system-resignation-letter-obama/82168254> (writing about the clemency system and powers of the executive branch).

59. *Id.* (discussing that the DAG forwards recommendations to the White House Counsel, who then brings the recommendations to the President). White House Counsel Neil Eggleston recently reflected on this new level. Sarah Wheaton, *White House Promises to Speed Up Clemency Program*, POLITICO (Apr. 1, 2016, 1:23 PM), <http://www.politico.com/blogs/under-the-radar/2016/04/white-house-clemency-speeding-up-221467>.

60. Prior to this, presidents may well have included White House Counsel in discussions of clemency, but the current process is firmly constructed to always include this level of review. Casey Tolan, *The Bold Step President Obama Could Take to Let Thousands of Federal Inmates Go Free*, FUSION (May 4, 2016, 3:44 PM), <http://fusion.net/story/298158/obama-clemency-board-gerald-ford/>.

61. See Barkow, *supra* note 43, at 818–19 (arguing that politics was a principal driver of the drop in clemency rates).

62. In 1989, philosophy professor Kathleen Dean Moore expressly rejected mercy as a basis for clemency and argued for a retributivist model for the Pardon Power. KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989). Her position was immediately disputed; Harvard Law professor Alan Dershowitz's review of her book concluded that "in a world in which errors are inevitable, it is better to err on the side of overly lenient, rather than overly harsh, punishment." Alan M. Dershowitz, *What's Mercy Got to Do with It?*, N.Y. TIMES (July 16, 1989), <http://www.nytimes.com/1989/07/16/books/what-s-mercy-got-to-do-with-it.html>.

63. Love, *Administration of the President's Pardon Power*, *supra* note 42, at 97.

through full service of a prison term. The additional punishment value of denying voting and other rights is *de minimus* as to that individual compared to the absolute loss of freedom imposed through imprisonment. A focus on retribution is unlikely to account for the precipitous drop in pardon grants.<sup>64</sup>

Second, a societal enthusiasm for retribution and antagonism to rehabilitation does not explain the mixed clemency record of Barack Obama, who did not seem to hold a retributivist theory of justice,<sup>65</sup> yet failed to reverse the clemency slide during the first six years of his presidency.<sup>66</sup> In fact, the same week in 2016 that Obama took a group of clemency recipients to lunch in Washington with less than a year to go in his presidency,<sup>67</sup> clemency experts George Lardner Jr. and P.S. Ruckman Jr. published an analysis in the Washington Post under the headline *On Pardons, Obama Could Go Down as One of the Most Merciless Presidents in History*.<sup>68</sup>

Finally, if political ideology directed clemency results, we would expect to see that reflected in state practices—that is, conservative states would have low rates of clemency grants within their own systems, while liberal states would have high rates.<sup>69</sup> That simply is not true. The high-pardon grant rate states include conservative bastions like Alabama, Oklahoma, and South Carolina, while low-pardon states include

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64. *See id.* (arguing that retributivism does not account for the drop in presidents' use of the pardon power because post-sentence pardon cases typically involve applicants who have completed long sentences and are currently functioning as productive members of society).

65. President Obama not only pressed for changes in retributivist policy and law, but took a personal interest in the lives of those convicted. Sari Horwitz & Ann E. Marimow, *President Obama Grants Early Release to 61 More Federal Drug Offenders*, WASH. POST (Mar. 30, 2016), [https://www.washingtonpost.com/world/national-security/president-obama-grants-early-release-to-61-more-federal-drug-offenders/2016/03/30/7256bb60-f683-11e5-8b23-538270a1ca31\\_story.html](https://www.washingtonpost.com/world/national-security/president-obama-grants-early-release-to-61-more-federal-drug-offenders/2016/03/30/7256bb60-f683-11e5-8b23-538270a1ca31_story.html) (describing Obama's proposed reforms, grants of clemency, and going to lunch with a group of released prisoners).

66. *Clemency Statistics*, *supra* note 6.

67. Neil Eggleston, *President Obama Has Now Commuted the Sentences of 348 Individuals*, NAT'L ARCHIVES, WHITE HOUSE: PRESIDENT BARACK OBAMA BLOG (June 3, 2016, 3:30 PM), <https://obamawhitehouse.archives.gov/blog/2016/03/30/president-obama-has-now-commuted-sentences-348-individuals>.

68. George Lardner, Jr. & P.S. Ruckman, Jr., *On Pardons, Obama Could Go Down as One of the Most Merciless Presidents in History*, WASH. POST (Mar. 25, 2016), [https://www.washingtonpost.com/opinions/obamas-unpardonable-inaction-on-pardons/2016/03/25/df670a8-f07a-11e5-a61f-e9c95c06edca\\_story.html](https://www.washingtonpost.com/opinions/obamas-unpardonable-inaction-on-pardons/2016/03/25/df670a8-f07a-11e5-a61f-e9c95c06edca_story.html).

69. *See infra* Part III.A.1 (explaining that there is no correlation between political views of the states and their clemency statistics).

traditionally liberal Minnesota and Vermont.<sup>70</sup> While other factors play a role, it is not political ideology that creates differentiation among the states.<sup>71</sup>

The same points also rebut the argument that clemency was diminished because of the “Willie Horton Effect”—that is, the theory that clemency and related programs became disfavored in response to the infamous Willie Horton political advertisement that George H.W. Bush successfully used in the 1988 election. These advertisements depicted a man who committed a rape while out on furlough from prison.<sup>72</sup> While the specter of Willie Horton may still scare politicians and deter statutory reform<sup>73</sup> or consideration of the reinstatement of parole,<sup>74</sup> it should not affect pardon decisions where the defendant is free from prison already or second-term presidents who have no more political races before them (most recently, Reagan, George W. Bush, and Obama). And yet even in those situations, we see a drop in grants.

Neither theory nor politics alone created the failure of clemency we have seen over the past three decades. A primary culprit is the clemency review process, which emerged in the 1980s. The truth that it is the *process* that failed, rather than simply the will of the presidents we have elected recently, is reflected in the bare fact that the last three presidents have each complained that they did not see good clemency applications,<sup>75</sup> even though the system was bloated with over-sentenced drug defendants. Good cases were there; they just got beat up and run off as they ran through the ricket-line that the clemency process had become.

The Carter/Reagan procedural change did two things, each of which made the system more inconsistent, inefficient, and unreliable. First, this new process inserted new levels of review. Second, a key player inserted

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70. Love, *Reinvigorating the Federal Pardon Process*, *supra* note 2, at app., 756–68 (showing a comparison between the high-pardon grant rate states and the low-pardon states). Minnesota utilizes a board of which the governor is a member, while Vermont leaves decisions to the governor. *Id.*

71. See *infra* Part III.A (asserting that a state’s political ideology does not correlate with the amount of pardons it issues).

72. Bernard Weinraub, *Campaign Trail: A Beloved Mug Shot for the Bush Forces*, N.Y. TIMES (Oct. 3, 1988), <http://www.nytimes.com/1988/10/03/us/campaign-trail-a-beloved-mug-shot-for-the-bush-forces.html>.

73. Carl Hulse, *Bipartisan Criminal Justice Overhaul Is Haunted by Willie Horton*, N.Y. TIMES (Jan. 4, 2016), <https://www.nytimes.com/2016/01/05/us/politics/bipartisan-criminal-justice-overhaul-is-haunted-by-willie-horton.html>.

74. Frank O. Bowman III, *Freeing Morgan Freeman: Expanding Back-End Release Authority in American Prisons*, 4 WAKE FOREST J.L. & POL’Y 9, 44–45 (2014).

75. See generally Love, *Administration of the President’s Pardon Power*, *supra* note 42, at 100 (discussing the presidential use of pardons as favors).

into the new system, the DAG, carries a conflict of interest not suffered by other actors because of her other duties within the Department of Justice. The next section explores these procedural changes in greater depth.

### *B. The Clemency System Today*

Even before the implementation of President Obama's Clemency Project 2014 (which added bureaucracy),<sup>76</sup> the clemency review process in recent administrations involved seven sequential levels of review traversing four different buildings in Washington D.C. The below section walks through the existing process and describes the layers of bureaucracy that Clemency Project 2014 added on top of that existing disaster, all before discussing the problems with this system and the effects of negative decision bias.

#### 1. The Basic Process

Little has been written about the actual mechanics of the clemency process as it operates today.<sup>77</sup> Former Pardon Attorney staffer Sam Morison has argued that the need to protect the privacy of clemency seekers and the need to preserve frank advice to the president has led to a system that "is to a large extent shielded from public scrutiny, which inevitably shrouds it with a certain air of mystery."<sup>78</sup>

Here, we will attempt to lift that shroud of mystery and describe the process which has encased and befuddled the Constitutional imperative of pardoning. Setting aside for now the mechanics of Clemency Project 2014, a contemporary clemency petition will be considered in turn by the staff of the Pardon Attorney, the Pardon Attorney, the staff of the DAG, the DAG, the staff of the White House Counsel, the White House Counsel, and finally by the President.<sup>79</sup> No hearing is required or provided for at any point.<sup>80</sup>

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76. See *infra* Part II.B.2 (asserting that President Obama's 2014 Clemency Project was unsuccessful because it failed to reduce bureaucracy in the clemency process).

77. Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 28 (2005).

78. *Id.*

79. Osler, *supra* note 20, at 309.

80. 28 C.F.R. §§ 1.1–.11 (2016).

*a. The Pardon Attorney's Staff*

When a prisoner or other convicted felon (with or without a lawyer) petitions for commutation of sentence or a pardon, they are required to submit a fairly simple form created by the Pardon Attorney,<sup>81</sup> which federal prison wardens make available to prisoners.<sup>82</sup> That form requests straightforward information about the defendant's conviction, sentence, appeals and other legal actions,<sup>83</sup> and criminal history.<sup>84</sup> Two questions require a narrative response. Question Five requests a "complete and detailed account of the offense,"<sup>85</sup> and Question Seven simply asks that petitioners lay out their "reasons for seeking commutation of sentence."<sup>86</sup>

Unless an attorney or someone else has compiled letters of support or other documents for the petitioner, it is generally this bare-bones form that will arrive at the Pardon Attorney's office and be assigned to a staff member. First, an initial screening is performed, looking to whether the form is complete and basic eligibility is met<sup>87</sup> (for example, that the defendant is a federal convict, rather than one who was convicted in a state court).<sup>88</sup> If a commutation petition passes that screen,<sup>89</sup> the staffer begins an investigation by contacting the warden of the prison to request three key documents: the judgment of conviction, the presentence investigation report, and the most recent prison progress report for that inmate.<sup>90</sup> With these documents in hand, the staffer can independently evaluate the defendant's criminal history, crime of conviction, and conduct and achievement in prison.

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81. The form is publicly available at the Pardon Attorney's website, with separate forms available for pardons and commutations. *Application Forms*, U.S. DEP'T JUST., <https://www.justice.gov/pardon/application-forms> (last updated Feb. 2, 2017); PETITION FOR COMMUTATION OF SENTENCE, U.S. DEP'T JUST., [https://www.justice.gov/sites/default/files/pardon/legacy/2007/06/12/commutation\\_form.pdf](https://www.justice.gov/sites/default/files/pardon/legacy/2007/06/12/commutation_form.pdf).

82. 28 C.F.R. § 1.1 (2016).

83. Federal regulations bar a petition for clemency from being filed while other forms of relief are available. 28 C.F.R. § 1.3 (2016)

84. PETITION FOR COMMUTATION OF SENTENCE, *supra* note 81, at 1–3 (requesting this information under questions one through four).

85. *Id.* at 3.

86. *Id.* at 5.

87. Morison, *supra* note 77, at 36.

88. 28 C.F.R. § 1.4 (2016).

89. The process for a pardon petition is distinct but substantially similar. Morison, *supra* note 77, at 38–39.

90. The staffer may also seek out a variety of other documents if needed, such as published judicial opinions, trial and sentencing transcripts, newspaper accounts, or even grand jury transcripts. *Id.* at 37.

According to Sam Morison, this investigation is often sufficient to draft a recommendation, particularly where the recommendation will be negative.<sup>91</sup> If the petition is seen as possibly meritorious,<sup>92</sup> the staff will then solicit the opinions of the sentencing judge and the prosecutor.<sup>93</sup> This step—seeking the advice of the very people who created the long sentence in the first place—is historically well-grounded,<sup>94</sup> yet controversial.<sup>95</sup> The Pardon Attorney’s internal standards dictate that “[t]he views of the United States Attorney are given considerable weight in determining what recommendations the Department should make to the President.”<sup>96</sup>

The role of the Pardon Attorney staff in conducting these investigations and drafting recommendations is important in the same way that an FBI investigation is important in a criminal case—it is foundational and shapes all that follows. There is a fair amount of discretion built into this role, and it is expected that some staffers will pursue and support a good case more than others. Historically, some staffers have been clearly antagonistic to the project: one former deputy “arrived in the pardons office with a duplicate of a Monopoly ‘Get Out of Jail’ card [with] a red-circle-and-slash ‘no’ symbol over it,”<sup>97</sup> while others were presumably more open-minded.

### *b. The Pardon Attorney*

The Pardon Attorney is ultimately responsible for the recommendation that is sent up the chain through the remaining levels of review.<sup>98</sup> Certainly, the Pardon Attorney’s viewpoint will vary depending on who holds the job.

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91. Morison notes that further investigation is done if “an initial review of the petition indicates that it might have some substantive merit.” *Id.* at 37–38.

92. More investigation is also conducted if the petition is likely to draw public attention, involves a public figure, or open questions remain presumably so that a negative recommendation can be substantiated. *Id.*

93. *Id.*

94. The practice of soliciting the opinion of the judge and prosecutor extends back to Thomas Jefferson. Lardner & Love, *supra* note 38, at 213.

95. Compare The Editorial Board, *Mr. Obama’s Pardon Problem*, N.Y. TIMES (Jan. 27, 2016), <http://www.nytimes.com/2016/01/27/opinion/mr-obamas-pardon-problem.html> (alleging that prosecutors are “determinedly and irreconcilably hostile” to clemency), with Love, *Administration of the President’s Pardon Power*, *supra* note 42, at 105–06 (arguing that, in a reformed system, prosecutors’ opinions should continue to be requested, yet not dispositive).

96. U.S. Attorneys’ Manual § 1-2.111, *Role of the United States Attorney in Clemency Matters*, U.S. DEP’T JUST., <https://www.justice.gov/usam/usam-1-2000-organization-and-functions> (last visited Apr. 18, 2017).

97. George Lardner, Jr., Opinion, *Begging Bush’s Pardon*, N.Y. TIMES (Feb. 4, 2008), <http://www.nytimes.com/2008/02/04/opinion/04lardner.html>.

98. Morison, *supra* note 77, at 40.

Intriguingly and notably, the Pardon Attorney holds a civil service job, and thus her tenure extends from one administration to the next: Margaret Colgate Love (1990-1997) served both George H.W. Bush and Clinton,<sup>99</sup> Roger Adams (1998-2008) spanned the Clinton and George W. Bush regimes,<sup>100</sup> and Ronald Rodgers (2008-2014) served the end of the George W. Bush Administration and most of Barack Obama's two terms.<sup>101</sup> Having been appointed by a predecessor with a different outlook, the Pardon Attorney's policy interests may not match the President's.

The importance of this was revealed during the tenure of Ronald Rodgers. The Justice Department's Inspector General harshly censured Rodgers, a former prosecutor and military judge,<sup>102</sup> based on his written recommendation for Clarence Aaron, a narcotics defendant serving a life term.<sup>103</sup> The U.S. Attorney and the sentencing judge supported Aaron's clemency petition, but Rodgers misrepresented this in his written recommendation to President Obama.<sup>104</sup> The Inspector General found that Rodgers's misstatement "was colored by his concern . . . that the White House might grant Aaron clemency presently and his desire that this not happen."<sup>105</sup>

The Clarence Aaron scandal also highlights a hidden power of the Pardon Attorney. Rather than sending an entire file up to the higher levels of review, only the Pardon Attorney's written recommendation is passed up

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99. Margaret Colgate Love, *Time to Pardon People as Well as Turkeys, Mr. President*, WASH. POST (Nov. 12, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/11/AR2010111106093.html>.

100. Adams was fired after a recommendation surfaced in which he said that "This might sound racist, but [the applicant] is about as honest as you could expect for a Nigerian. Unfortunately, that's not very honest, . . ." Alison Gendar, *Furor Over Bush Lawyer's Racism in Deportation Case of Nigerian Minister*, N.Y. DAILY NEWS (July 14, 2008, 10:57 PM), <http://www.nydailynews.com/news/world/furor-bush-lawyer-racism-deportation-case-nigerian-minister-article-1.349796>.

101. See Emily Bazelon, *Power of the Pardon*, SLATE (Apr. 25, 2014, 4:46 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/04/mass\\_pardon\\_obama\\_may\\_grant\\_clemency\\_to\\_thousands\\_of\\_drug\\_offenders\\_that.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/mass_pardon_obama_may_grant_clemency_to_thousands_of_drug_offenders_that.html) (discussing Ronald Rodgers's role in both the Bush and Obama Administrations).

102. Liz Goodwin, *Report: Pardon Attorney Steps Down as Part of Drug Offender Clemency Push*, YAHOO! NEWS (Apr. 23, 2014), <https://www.yahoo.com/news/pardon-attorney-steps-down-as-part-of-drug-offender-clemency-push-162336116.html>.

103. Dafna Linzer, *Pardon Attorney Misrepresented Facts to White House in Clarence Aaron Case*, PBS: FRONTLINE (Dec. 18, 2012), <http://www.pbs.org/wgbh/frontline/article/report-pardon-attorney-misrepresented-facts-to-white-house-in-clarence-aaron-case>.

104. Dafna Linzer, *Head of Pardons Office Withheld Facts from White House in Key Case*, PROPUBLICA (Dec. 18, 2012, 11:59 AM), <https://www.propublica.org/article/pardon-attorney-misrepresented-facts-to-white-house-in-clarence-aaron-case>.

105. *Id.*

the chain.<sup>106</sup> Those further down the line—including the DAG, the White House Counsel, and the President—do not have regular access to documents such as the presentence investigation report, the prison’s progress report, support letters, or the petition form itself.<sup>107</sup> Instead, they must rely on the representations of the people at the bottom of the chain.

*c. The Staff of the Deputy Attorney General*

The file, now reduced to a written recommendation, traverses over to the office of the DAG. Recent DAGs have delegated an initial review of clemency cases to staff members.<sup>108</sup> Each staff member brings their own experience and viewpoint in the same way that the Pardon Attorney staffers will vary in outlook. One would expect the DAG to provide guidance for this review, but the very fact that staffers review each recommendation suggests that they have some discretion in the process, at the very least in questioning or reaffirming the opinion of the Pardon Attorney.<sup>109</sup>

At this point, another subtle but important element comes into play. While the Pardon Attorney and his or her staff are specialists, the rest of the reviewers—the DAG staff, the DAG, the White House Counsel staff, the White House Counsel, and the President<sup>110</sup>—are all generalists who have a plate full of other responsibilities, many of which (e.g., reacting to police shootings or terrorist events) can hijack their schedule for days or weeks.<sup>111</sup> Given the many and complicated tasks before them, it should not be a surprise when clemency falls far down the priority list on any given day.

*d. The Deputy Attorney General*

Since the 1980s, the DAG has had the responsibility of reviewing clemency cases and transmitting them to the White House.<sup>112</sup> The DAG has

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106. *Id.*

107. *Id.* This makes a lie of one of the instructions for that petition, which is to be addressed to the “President of the United States.” *U.S. Attorneys’ Manual* § 1.1, *Submission of Petition; Form to be Used; Contents of Petition*, U.S. DEP’T JUST., <https://www.justice.gov/pardon/rules-governing-petitions-executive-clemency> (last updated Jan. 13, 2015).

108. This step has been confirmed in discussion with some of those involved. Osler, *supra* note 20, at 309.

109. *Id.*

110. *Id.*

111. See *infra* Part II.B.1.d–f (explaining the role of the DAG, White House counsel, and the White House Counsel Staff in clemency systems today).

112. See *infra* Part II.B.1.d–f (describing the many responsibilities of these positions and asserting that clemency is often a minor role of the position).

a broad set of responsibilities, which includes “providing overall supervision and direction to all organizational units of the Department.”<sup>113</sup> This means that the DAG is the direct supervisor of U.S. Attorneys and their Assistants—the very people who prosecute cases and who have the least to gain by clemency, which undoes the outcomes that they have pursued.

The DAG lacks the continuity of the line prosecutors, however. Unlike the Assistant U.S. Attorneys and the Pardon Attorney, the DAG is a political appointee who requires Senate confirmation,<sup>114</sup> and is thus subjected to a political appointment process that creates differentiation (and subsequent disparity) from one administration to the next.

Former Obama DAG James Cole perhaps inadvertently emphasized that clemency can be a relatively minor part of a crowded plate. In describing his efforts on clemency, a reporter who talked to Cole explained that Cole carried home “piles of documents” on fall Saturdays and sorted through clemency cases at his kitchen table.<sup>115</sup> Cole’s successor, Sally Yates, continued the theme, and she served as DAG when the Obama Administration’s clemency push was in full effect. Arguing that Yates was deeply involved, Associate DAG Matthew Axelrod told the Washington Post that Yates “takes a grocery bag of petitions home and spends her weekends reading them.”<sup>116</sup>

The image of the DAG sifting through reports at the kitchen table while a football game plays in the background does not depict clemency as a top priority—that is, the kind of important work that one actually does at the office. The sorting-through of human lives being seen as weekend work is simply one symptom of this dysfunctional system and the primary role it gives to generalists.

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113. *About the Office*, U.S. DEP’T JUST., <https://www.justice.gov/dag/about-office> (last updated Sept. 18, 2014). The Department of Justice’s organizational chart illustrates the breadth of the job, as literally everything courses through this one position. *Agencies*, U.S. DEP’T JUST. (June 5, 2015), <https://www.justice.gov/agencies/chart>.

114. Sally Yates, for example, was confirmed by an 84-12 vote in the Senate. Josh Gerstein, *Sally Yates Confirmed as No. 2 at Justice Department*, POLITICO (May 13, 2015, 2:35 PM), <http://www.politico.com/blogs/under-the-radar/2015/05/sally-yates-confirmed-as-no-2-at-justice-department-207069>.

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

116. Sari Horowitz, *Lack of Resources, Bureaucratic Tangles Have Bugged Down Obama’s Clemency Efforts*, WASH. POST (May 6, 2016), [https://www.washingtonpost.com/politics/courts\\_law/lack-of-resources-bureaucratic-tangles-have-bugged-down-obamas-clemency-efforts/2016/05/06/9271a73a-1202-11e6-93ae-50921721165d\\_story.html?utm\\_term=.1ff4347bf23](https://www.washingtonpost.com/politics/courts_law/lack-of-resources-bureaucratic-tangles-have-bugged-down-obamas-clemency-efforts/2016/05/06/9271a73a-1202-11e6-93ae-50921721165d_story.html?utm_term=.1ff4347bf23).

The DAG is no simple pass-through, however. Pardon Attorney Deborah Leff resigned in January 2016, and writer Gregory Korte of USA Today later obtained her letter of resignation.<sup>117</sup> In that letter to DAG Yates, Leff laid bare a few of the ghosts in the machine: “I have been deeply troubled by the decision to deny the Pardon Attorney all access to the Office of the White House Counsel, even to share the reasons for our determinations in the increasing number of cases where you have reversed our recommendations.”<sup>118</sup> In terms of process, Leff revealed something important: that the DAG often reversed her recommendations, and apparently forwarded to the White House only her own view and recommendation without including the contrary view of the Pardon Attorney. Given this power, the importance of the DAG’s role can no longer be doubted.

*e. The White House Counsel Staff*

The case now moves to a third physical location, as the staff of the White House Counsel is lodged in the Eisenhower Executive Office Building within the White House complex.<sup>119</sup> There, a staffer will review whatever the DAG forwarded.<sup>120</sup> Again, as with the DAG’s staff, this is just one of many tasks handled by a small group of people. Other jobs assigned to this same office include advising the President on the legal aspects of national security issues and vetting judicial nominees.<sup>121</sup> Naturally, these other tasks will take priority when, say, a new Supreme Court nominee is being selected.<sup>122</sup>

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117. Gregory Korte, *Former Administration Pardon Attorney Suggests Broken System in Resignation Letter*, USA TODAY (Mar. 28, 2016, 2:48 PM), <http://www.usatoday.com/story/news/politics/2016/03/28/former-administration-pardon-attorney-suggests-broken-system-resignation-letter-obama/82168254> (obtaining the letter through a Freedom of Information Act request).

118. Deborah Leff, *Letter of Resignation*, 28 FED. SENT’G REP. 312, 312 (2016).

119. Horwitz, *supra* note 115.

120. This step has been confirmed in discussion with some of those involved. Osler, *supra* note 20, at 309.

121. *Presidential Department Descriptions*, NAT’L ARCHIVES, THE WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/participate/internships/departments> (last visited Apr. 18, 2017).

122. Unfortunately, the end of President Obama’s term saw an extended drama involving such a nomination, as Merrick Garland set a record as the Supreme Court nominee suffering the longest pending nomination. Lawrence Hurley, *Supreme Court Nominee Out in the Cold as Election Heats Up*, REUTERS (July 19, 2016, 3:49 PM), <http://www.reuters.com/article/us-usa-election-garland-idUSKCN0ZZ17L>.

*f. The White House Counsel*

The final step before the President is the White House Counsel. This position has a particularly political inflection, since the Counsel must advise the President on the legal issues that governing and politics so often create.<sup>123</sup> Clemency cases must seem a necessary but distracting task at times.<sup>124</sup>

That sense of annoyance seems to be reflected in an apparently sarcastic remark that White House Counsel Neil Eggleston made at a time when activists were demanding more action on clemency: “No more eating, sleeping or drinking until we get all these commutations done,” he claimed to have told his staff.<sup>125</sup>

Other White House Counsel have been more proactive than dismissive, and at least one hatched a plan for a new and better structure. President Obama’s first Counsel, Greg Craig, proposed that a commission located outside of the Department of Justice handle clemency, reporting directly to the President.<sup>126</sup> Craig explained later that it was clear to him that “[t]his is an important executive power that has wasted away because it’s been badly managed and politically mishandled,”<sup>127</sup> but nothing was done.

*g. The President*

The ultimate generalist, the President makes the final decision and signs the warrant for clemency. Barack Obama clearly cared about the project of clemency, a fact reflected in the letter he sent to each clemency recipient.<sup>128</sup> Given that interest, one wonders why his administration was so

123. For example, Kathryn Ruemmler, who was Obama’s White House Counsel from 2011 through 2014, advised the President on a military strike in Syria, dealing with Senate filibusters, and keeping documents secret, as well as judicial appointments. Charlie Savage, *Departing White House Counsel Held Powerful Sway*, N.Y. TIMES (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/us/politics/departing-white-house-counsel-held-powerful-sway.html>.

124. White House Counsel also often have remarkably short tenures. Kathryn Ruemmler was described as being unusual in that she served for three years. *Id.*

125. Sarah Wheaton, *White House Promises to Speed Up Clemency Program*, POLITICO (Apr. 1, 2016, 1:23 PM), <http://www.politico.com/blogs/under-the-radar/2016/04/white-house-clemency-speeding-up-221467>.

126. Bill Keller, *The Bureaucracy of Mercy*, MARSHALL PROJECT (Dec. 14, 2015), <https://www.themarshallproject.org/2015/12/13/the-bureaucracy-of-mercy#.ELxqAWsO5>.

127. *Id.*

128. Alan Schwarz, *With Clemency from Obama, Drug Offender Embraces Second Chance*, N.Y. TIMES (Aug. 14, 2015), <https://www.nytimes.com/2015/08/15/us/with-clemency-from-obama-drug-offender-embraces-second-chance.html>.

slow to take up a significant number of clemency cases. The answer, very likely, lies in the layers of redundant bureaucracy described in the preceding paragraphs.

## 2. Clemency Project 2014

From the day of his first inauguration, President Obama was urged to proactively address clemency. That urging came from someone who would know: his predecessor, George W. Bush. As the two rode together in a limousine to the inauguration ceremony, Bush advised Obama to “announce a pardon policy early on, and stick to it.”<sup>129</sup> Bush had good reason to give this advice: the dysfunctional clemency process plagued his own administration. Two of his White House Counsels, Harriet Miers and Fred Fielding, grew frustrated as they struggled to make it work.<sup>130</sup> Miers even implored the Pardon Attorney and DAG for more favorable recommendations at a personal meeting, to no avail.<sup>131</sup>

Obama passed on his first and best chance to amend the clemency process when he ignored the plan presented by White House Counsel Greg Craig for a system using a commission established outside of the Department of Justice.<sup>132</sup> Predictably, the existing system worked no better for him than it had for his immediate predecessors. Well into his second term he faced headlines like *Judging From His Clemency Record, Obama Likes Turkeys 10 Times As Much As People*<sup>133</sup> and *Obama Neglects His Power to Pardon*.<sup>134</sup>

In 2014, the Administration apparently decided to act. Sadly, they did not attack the bureaucracy of clemency or address the conflict of interest

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129. GEORGE W. BUSH, DECISION POINTS 105 (2010).

130. Dafna Linzer & Jennifer LaFleur, *ProPublica Review of Pardons in Past Decade Shows Process Heavily Favored Whites*, WASH. POST (Dec. 3, 2011), [https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElVQO\\_story.html](https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElVQO_story.html).

131. *Id.*

132. See *supra* Part II.B.1.f (explaining that White House Counsel Greg Craig proactively tried to create a new clemency structure).

133. Jacob Sullum, *Judging From His Clemency Record, Obama Likes Turkeys 10 Times As Much As People*, FORBES (Nov. 27, 2013, 12:19 PM), <http://www.forbes.com/sites/jacobsullum/2013/11/27/judging-from-his-clemency-record-obama-likes-turkeys-10-times-as-much-as-people/#25333c1a1be8> (noting that Obama had pardoned ten turkeys but commuted the sentence of only one drug offender).

134. Editorial Board, *Obama Neglects His Power to Pardon*, WASH. POST (Dec. 1, 2013), [https://www.washingtonpost.com/opinions/obama-neglects-his-power-to-pardon/2013/12/01/283600c8-579c-11e3-8304-caf30787c0a9\\_story.html](https://www.washingtonpost.com/opinions/obama-neglects-his-power-to-pardon/2013/12/01/283600c8-579c-11e3-8304-caf30787c0a9_story.html).

inherent in the crucial role that the Department of Justice plays. Instead, they created more bureaucracy.<sup>135</sup> Clemency Project 2014, announced by DAG James Cole in April of that year,<sup>136</sup> was a strange concoction.<sup>137</sup> It began with a stutter-step, when Cole addressed the New York State Bar Association that January and vaguely urged them to help locate narcotics prisoners worthy of clemency and encourage them to apply for clemency.<sup>138</sup> Four months later, a more complete plan emerged,<sup>139</sup> one that Attorney General Eric Holder suggested could lead to the early release of some 10,000 federal prisoners.<sup>140</sup>

In short, Clemency Project 2014 was to receive statements of interest from prisoners, screen them for eligibility under defined criteria, then assign the cases to attorneys who had volunteered to work on these cases pro bono.<sup>141</sup> Organization of this effort was outsourced to five groups: the American Bar Association, the National Association of Criminal Defense Lawyers, Families Against Mandatory Minimums, the American Civil Liberties Union, and the Federal Defenders.<sup>142</sup>

Within a year, two things happened, which taken together overwhelmed the new system. The first was sheer numbers: over 35,000

135. Osler, *supra* note 20, at 309–10. Clemency experts and activists, including the author, urged White House officials to reform the process by removing it from the Department of Justice. *Id.* These arguments were ignored, perhaps because the Administration feared that Congress would not sufficiently fund the project despite the tremendous net savings for the government that would result from shortened prison times.

136. Josh Gerstein, *Obama Drug Clemency Guidelines Issued*, POLITICO (Apr. 23, 2014, 7:30 AM), <http://www.politico.com/blogs/under-the-radar/2014/04/obama-drug-clemency-guidelines-issued-187266>.

137. The name itself was almost immediately a misnomer, as the plan was going to extend beyond the year 2014. *Clemency Initiative*, U.S. DEP'T JUST., <https://www.justice.gov/pardon/clemency-initiative> (last updated Feb. 2, 2017).

138. Matt Apuzzo, *Justice Dept. Starts Quest for Inmates to Be Freed*, WASH. POST (Jan. 30, 2014), <http://www.nytimes.com/2014/01/31/us/politics/white-house-seeks-drug-clemency-candidates.html>.

139. At the same time the new plan was announced, Ronald Rodgers was replaced as Pardon Attorney by Deborah Leff. Dara Lind, *President Obama Was Supposed to Shorten 10,000 Prison Sentences. What Happened?*, VOX (Mar. 29, 2016, 12:40 PM), <http://www.vox.com/2016/3/29/11325502/obama-pardon-clemency-leff>.

140. *Id.*

141. CLEMENCY PROJECT 2014, *supra* note 19.

142. Lorelei Laird, *Clemency Project 2014 Is Out to Help Prisoners Doing Excessive Time Due to Inflexible Sentencing*, A.B.A. JOURNAL (July 1, 2015, 6:25 AM), [http://www.abajournal.com/magazine/article/clemency\\_project\\_2014\\_is\\_out\\_to\\_help\\_prisoners\\_doing\\_excessive\\_time](http://www.abajournal.com/magazine/article/clemency_project_2014_is_out_to_help_prisoners_doing_excessive_time).

federal inmates applied for the project.<sup>143</sup> The second event was the development of a complicated review system by the five supervising groups, which the Marshall Project outlined as ten distinct steps.<sup>144</sup> The result of this combination of huge numbers and an unwieldy process is about what one would expect. By April 1, 2015, nearly a year later, the Clemency Project 2014 had submitted only 14 petitions to the Pardon Office.<sup>145</sup> While Obama finished with a total of 1,715 commutations and 212 pardons granted, he also denied over 25,000 clemency petitions and failed to rule on another 9,400 received during his presidency.<sup>146</sup> The uneven results, too, left some with the impression that the process was a “lottery.”<sup>147</sup>

Part of the problem was beyond the control of the Clemency Project, created by a pool of pro bono lawyers who were largely inexperienced in the complicated field of federal sentencing law.<sup>148</sup> This problem was compounded when those with the most experience in that area—the federal defenders—were largely pushed out of the process by the ruling of an administrative law judge.<sup>149</sup>

On top of the unwieldy process described above,<sup>150</sup> the Clemency Project constructed its own wobbly structure comprising of redundant reviews and part-time experts. Those 35,000-plus cases from prisoners were first sent to the Clemency Project, which did a minimal screen for basic disqualifying factors.<sup>151</sup> From there, four more principle points of review

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143. Liz Goodwin, *Behind Obama's Commutations: 'Clemency Project' Off to a Slow Start*, YAHOO! NEWS (Apr. 1, 2015), <https://www.yahoo.com/news/behind-obamas-commutations-clemency-project-off-115227232071.html>.

144. Keller, *supra* note 126.

145. Goodwin, *supra* note 143.

146. *Clemency Statistics*, OFFICE OF THE U.S. PARDON ATTORNEY, <https://www.justice.gov/pardon/clemency-statistics> (last updated Feb. 7, 2017).

147. Sean Nutall, *Inside the Clemency Lottery*, MARSHALL PROJECT (Jan. 26, 2017), <https://www.themarshallproject.org/2017/01/26/inside-the-clemency-lottery#.Nhq1c18R7>.

148. Keller, *supra* note 126.

149. *Id.*

150. *See supra* Part II.B.1 (describing the emergence of a new federal clemency system).

151. For example, cases where a prisoner had been held for fewer than ten years were weeded out at this point. The factors for consideration established by James Cole at the onset of the project targeted inmates who: (1) are currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense today; and (2) are non-violent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels; (3) have served at least ten years of their sentence; (4) do not have a significant criminal history; (5) have demonstrated good conduct in prison; and (6) have no history of violence prior to or during their current term of imprisonment. Ryan J. Reilly, *DOJ Gears Up for Massive Obama Clemency Push*, HUFFINGTON POST (Apr. 23, 2014, 09:23 AM), [http://www.huffingtonpost.com/2014/04/23/obama-clemency-doj\\_n\\_5196110.html](http://www.huffingtonpost.com/2014/04/23/obama-clemency-doj_n_5196110.html).

were established (for a total of five, including the initial screen): (1) a pro bono attorney assessed the case, then (2) a “screening committee” reviewed a summary prepared by the attorney, followed by (3) a similar, redundant review by a “steering committee,”—all before a petition was even written up—and finally (4) the petition was reviewed again by the Project,<sup>152</sup> before being submitted to the Pardon Attorney to run through the entire previously described gauntlet within the administration.

In all, a clemency case traversing the Clemency Project and then the administration would face 12 different reviews—no less than a dozen chokepoints with different personnel and filters.

Even given the built-in disadvantages the Clemency Project faced, it is easy to imagine a better system if the administration was intent on using outside groups and pro bono attorneys to evaluate and prepare clemency petitions. For example, instead of having redundant reviews after a case was assigned to an attorney, those resources could have been devoted to a “hard screen” at the start of the process, which would only allow the best cases to proceed. Those best cases could be assigned to attorneys who would go directly to drafting a petition, which then the Project could review. Presumably, this route was not pursued because the Clemency Project did not have the resources to gather documents and conduct a hard screen at the front end of the process. Sadly, the same type of resource failure that may have prevented the administration from creating a more functional system may have also barred the Clemency Project’s ability to do a better job of providing and guiding outside attorneys.

There is deep irony in this stinginess, of course. Hiring 100 lawyers for one year at \$100,000 a year apiece would have cost \$10 million. That seems like a lot of money. However, consider just one case, a famous<sup>153</sup> one: that of Weldon Angelos.<sup>154</sup> Angelos was caught selling a small amount of marijuana while possessing—but not brandishing or using—a firearm, on two occasions.<sup>155</sup> By charging the firearms in such a way that the sentences stacked on top of one another,<sup>156</sup> federal prosecutors created a mandatory

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152. Keller, *supra* note 126.

153. The Koch Brothers, among others, championed Angelos’ case. Sari Horwitz, *Unlikely Allies*, WASH. POST (Aug. 15, 2015), <http://www.washingtonpost.com/sf/national/2015/08/15/clemency-the-issue-that-obama-and-the-koch-brothers-actually-agree-on>.

154. Disclosure: The author represented Angelos in his clemency petition and resentencing.

155. *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004). The police also found additional firearms in a subsequent search of his home. *Id.*

156. 18 U.S.C. § 924(c) (2012).

55-year sentence, which the judge reluctantly imposed.<sup>157</sup> Angelos had no significant prior criminal history.<sup>158</sup> After his clemency petition had been pending for three-and-a-half years, Angelos was released from prison (on grounds other than clemency) in 2016,<sup>159</sup> 42 years early. Given that the cost of imprisoning someone in the federal system is about \$30,000 per year,<sup>160</sup> the cost of holding Angelos for the full remaining term (even accounting for time off for good conduct) would be well over \$1 million.

In other words, one case, just one, could produce 1/10 of the total cost required to have hired 100 lawyers for one year to do clemency right. One hundred cases like his would have produced a government surplus of \$90 million, and a thousand would yield \$990 million.

### C. The Effect of a Bias in Favor of Negative Decisions

The administration's clemency evaluation system described here is "vertical"—that is, each level of review operates only if the preceding level completes its task, and the case moves vertically up the chain.<sup>161</sup>

Importantly, strong incentives at each level mitigate in favor of a negative decision rather than a positive one.<sup>162</sup> After all, if a person is granted clemency and commits a crime, the administration's failure is very public.<sup>163</sup> Making a negative decision and denying clemency, though,

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157. The judge, Paul Cassell, found the sentence "unjust, cruel, and even irrational," but not unconstitutional. *Angelos*, 345 F. Supp. 2d at 1230.

158. *Id.* at 1231.

159. Greg Jaffe & Sari Horwitz, *Utah Man Whose Long Drug Sentence Stirred Controversy Is Released*, WASH. POST (June 3, 2016), [https://www.washingtonpost.com/politics/president-obama-just-commuted-the-sentences-of-42-people-here-are-their-names/2016/06/03/08f23b7c-29c3-11e6-a3c4-0724e8e24f3f\\_story.html](https://www.washingtonpost.com/politics/president-obama-just-commuted-the-sentences-of-42-people-here-are-their-names/2016/06/03/08f23b7c-29c3-11e6-a3c4-0724e8e24f3f_story.html).

160. Annual Determination of Average Cost of Incarceration, 80 Fed. Reg. 12,523 (Mar. 10, 2015) (determining cost of incarceration in 2014 at \$30,619.85 per inmate). That figure assumes the closing of prisons; the marginal cost per prisoner is much lower if prisons are kept open despite the drop in inmate numbers.

161. See *supra* Part II.B.1 (describing the actors, and responsibilities of those involved, in the current federal clemency system).

162. Social scientists have described an "Omission Bias" which leads to favoring inaction over action. This has been used to explain the way in which some parents choose not to vaccinate their children; there, both vaccinating or not may pose risks, and this leads to inaction as a default (even where the risk of not vaccinating is in fact greater), because personal culpability adheres more strongly to an affirmative choice. Ilana Ritov & Jonathon Baron, *Reluctance to Vaccinate: Omission Bias and Ambiguity*, 3 J. BEHAV. DECISION-MAKING 263, 263 (1990).

163. For example, Former Arkansas Governor Mike Huckabee granted clemency to a man who went on to kill four police officers. He later was "dogged by questions" about the grant, and aides blamed Arkansas officials involved in the decision. Perry Bacon, Jr. & Garance Franke-Ruta, *After*

carries very little risk. Thus, positive decisions are high-risk, and negative decisions are low-risk. To put it another way, the cost of a positive decision is borne publicly by the decisionmakers (in the form of risk), while the cost of a negative decision is borne privately by the inmate. This bakes in a negative bias at each level of the process.<sup>164</sup>

The effect of this bias is compounded by the multiple decisionmakers in this vertical process. Let's say that 2,000 people apply for clemency and half are good candidates. However, the decision makers are cautious, because of the bias built into the system. So, of the 1,000 good candidates, they recommend only half; this caution proceeds up each level leading half the group to be removed at each stage. At the first level, 500 candidates pass through; 250 get through a second review, and 125 survive the third. After the fourth review, 62 make it past, then 31 from the fifth review. Fifteen slide through the sixth review, and in the end only seven or eight receive relief, of the 1,000 good candidates.

The more reviewers there are, the worse the effects of the bias towards negative decisions becomes—because that bias is personal, what matters is how many persons evaluate a petition in succession. While I do not suggest that such uniform rates of decision apply to this process, the underlying principle holds true. The strong political incentive to deny petitions is magnified by the number of levels of review in play.<sup>165</sup>

In the end, we should not be surprised that the federal clemency system doesn't work—it is structured not to work. At best (which some would argue we have seen at the end of Obama's second term), it allows for a burst of clemency at the end of an administration; a rush that is both dangerous<sup>166</sup> and unnecessary.

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*Police Killings, Huckabee Defends Clemency for Suspect*, WASH. POST (Dec. 1, 2009, 5:14 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/01/AR2009120102601.html>.

164. *Id.* This effect, of course will be more pronounced the more public a person is. Thus, the President likely has the highest disincentive, while the staff of the Pardon Attorney may have the least. That said, people above will exert pressure on those below to make negative decisions. *See, e.g.*, Samuel T. Morison, *A No-Pardon Justice Department*, L.A. TIMES (Nov. 6, 2010), <http://articles.latimes.com/2010/nov/06/opinion/la-oe-w-morison-pardon-20101106> (explaining that there is an aversion against favorable recommendations, which is resulting in “uniformly negative advice”).

165. Admittedly, the political effects will vary from one level to another. It is the President, of course, who would suffer the most direct political impact should a clemency recipient commit a heinous crime. Love, *Administration of the President's Pardon Power*, *supra* note 42, at 104.

166. The danger in a rushed process is multifaceted: unworthy or dangerous people may be released, political connections may be rewarded over merit, and worthy candidates may be forgotten.

## II. BETTER EXAMPLES: STATE AND FEDERAL

The current federal clemency system—a bureaucratic disaster coursing through four federal buildings and at least seven sets of hands—is the worst clemency evaluation system in the history of the United States (with the possible exception of Rhode Island’s process, which sends clemency consideration through the state senate for “advice and consent”).<sup>167</sup> Our previous mechanisms served the federal system better than the current one,<sup>168</sup> and no state system includes the federal process’s toxic combination of endless review and a central role for prosecutors.<sup>169</sup> To see what a functioning clemency system might look like, we need to look into state systems and federal history.

A. *State Systems*

## 1. A Diversity of Systems

Even a cursory examination of state systems reveals a fascinating truth: there seems to be no correlation between liberalism and broad grants of clemency, or political conservatism and stinginess. In fact, we find some of the most functional and effective systems in states like South Carolina, while my own famously progressive state (Minnesota) issues pardons sparingly.<sup>170</sup> Many state systems (including those described below) offer features that are lacking in the current federal system, beyond efficiency and consistent productivity: political diversity among decisionmakers, transparency, and (importantly) an opportunity for victims or victims’ family members to have a voice in the process.

Perhaps the most striking indictment of the federal clemency system is the bare fact that not a single state has adopted that system of redundant reviews, or anything remotely like it.<sup>171</sup> Instead, as Margaret Colgate Love

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167. R.I. CONST. art. IX, § 13.

168. See *supra* Part II.A (discussing the growing complexity of the federal clemency program).

169. The Criminal Justice Policy Foundation maintains an online database for state clemency procedures. *State Clemency Guide*, CRIM. JUST. POL’Y FOUND., <http://www.cjpf.org/state-clemency> (last visited Apr. 21, 2017). Margaret Colgate Love has created a similar site for state pardon procedures in conjunction with the National Association of Criminal Defense Lawyers. Margaret Colgate Love, *Restoration of Rights Project*, NAT’L ASS’N CRIM. DEF. LAW., <https://www.nacdl.org/rightsrestoration> (last visited Apr. 21, 2017).

170. *Id.*

171. Love, *Reinvigorating the Federal Pardon Process*, *supra* note 2 at 754 (surveying all of the state practices and concluding that, “[t]here is not a single state whose pardon process is as poorly

described it after a thorough survey, the states<sup>172</sup> fall into three general categories.<sup>173</sup> The first includes six states that leave pardoning almost entirely to an independent board.<sup>174</sup> The second describes the 21 states where the governor shares the pardon power with a board or (in Rhode Island) the legislature.<sup>175</sup> The third is comprised of 23 states where the governor has the sole power to pardon, though 18 of these states require an advisory consultation with a board that investigates the cases.<sup>176</sup>

The state systems vary not only in their construction, but in their effectiveness and fairness. They certainly are not immune from scandal, either. For example, outgoing Mississippi Governor Haley Barbour granted full pardons to 193 felons on his last day in office, including a man who had shot and killed his wife while she held their infant.<sup>177</sup> Still, there is much to learn from the higher-functioning systems.<sup>178</sup>

In her 2012 survey of state practices, Margaret Colgate Love identified 14 states that demonstrate well-functioning systems that provided “frequent and regular” pardon grants: Alabama, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Iowa, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, and South Dakota.<sup>179</sup> That list is striking for its deviation from the red/blue divide we are used to, further establishing that fair and efficient administration of clemency can be and is accomplished by either party. It’s not politics that matters, it’s process.

So, what kind of process do we see in those states? First, five of the six states where highly independent boards make clemency decisions—Alabama, Georgia, Idaho, Connecticut, and South Carolina—are also among the 14 members of the “frequent and regular” list, while the sixth such jurisdiction, Utah, misses the cut largely because the board in that state

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conceived and managed as the federal government’s, which has failed to evolve with the changing needs of the presidency and the justice system over the past one hundred years”).

172. Washington D.C. does not have an executive with clemency powers. *Id.* at 756–68.

173. *Id.* at 743.

174. *Id.* at 743–44.

175. *Id.* at 744–45.

176. *Id.* at 744, 747–48.

177. Campbell Robertson, *Mississippi Governor, Already Criticized on Pardons, Rides a Wave of Them Out of Office*, N.Y. TIMES (Jan. 10, 2012), <http://www.nytimes.com/2012/01/11/us/gov-haley-barbour-of-mississippi-is-criticized-on-wave-of-pardons.html>.

178. Some state systems are distinct from the federal clemency system because of the effects of parole. The federal system does not have parole, but for states that retain that mechanism, parole will largely serve the function of commutations—that is, shortening existing sentences—while the clemency system will largely address pardons (which generally restore rights to those who have fulfilled a term of imprisonment).

179. Love, *Reinvigorating the Federal Pardon Process*, *supra* note 2, at 756–68.

only gets three to five requests for pardon a year.<sup>180</sup> There is a remarkable correlation between high-functioning clemency systems and the use of an independent board as primary arbiter.<sup>181</sup>

Moreover, in each of the other states with high-functioning systems, we see a board playing a significant role in decision-making.<sup>182</sup> Thus, one common thread is clear: while other factors (local tradition or culture, for example) likely play a role, high-functioning state systems use clemency boards.

Why does this correlation exist? Notably, the clemency board system is just as horizontal as the federal system is vertical. While the reviewers in the federal system are stacked one atop the other in a hierarchy—Pardon Attorney, DAG, White House Counsel, President—the members of a board are relative equals. One strength of that structure is that it allows for deliberation and consensus in a way that a vertical hierarchy does not. In other words, in a horizontal system, deciders with different filters must directly consult one another to harmonize their views. The horizontal federal system consecutively applies different filters in a way that allows nearly everything to be strained out.<sup>183</sup>

## 2. Delaware

We see the dynamic of a horizontal system at work if we look more closely at a high-functioning state: Delaware. There, the Governor has the pardon power, but the state constitution sets out that:

no pardon, or reprieve for more than six months, shall be granted, nor sentence commuted, except upon the recommendation in writing of a majority of the Board of Pardons after full hearing; and such recommendation, with the reasons therefor at length, shall be filed and recorded in the office of the Secretary of State . . . .<sup>184</sup>

That short bit of constitutional text establishes three things, all of which differentiate Delaware from the federal system. First, a Board of

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180. *Id.*

181. *Id.* at 744 (concluding that states with independent pardon boards are effective in issuing numerous pardons).

182. *Id.* at 756–68.

183. *See supra* Part II.C (asserting that the horizontal system also avoids the multiplication of negative decision bias because the group makes one decision collectively).

184. DEL. CONST. art. VII, § 1.

Pardons is the gatekeeper rather than a hierarchy of officials.<sup>185</sup> Second, hearings are conducted.<sup>186</sup> Third, the reasons for recommending a grant are to be described “at length.”<sup>187</sup> The latter two features create transparency that the federal system utterly lacks.

The Board itself is chaired by the Lieutenant Governor and includes Delaware’s Chancellor, Secretary of State, Treasurer, and Auditor.<sup>188</sup> The Board does not include the Attorney General, but the Delaware Constitution allows the Attorney General to receive requests for information from the Board.<sup>189</sup> It seems to be an efficient and effective system, granting over 200 pardons annually in a small state.<sup>190</sup> In contrast, President Obama granted only 70 pardons in his first seven-and-a-half years in office.<sup>191</sup>

Delaware Lieutenant Governor Matthew Denn<sup>192</sup> helpfully described the workings of that state’s Board of Pardons in an article for the Delaware Law Review.<sup>193</sup> Since neither Delaware’s Constitution nor statute provide guidance on Board procedures (other than notification to victims and their families),<sup>194</sup> this insight is particularly important. Denn carefully notes the differing views of the Board members; for example, members were divided on whether or not an applicant’s practical need for clemency (i.e., to pursue employment) deserved significant weight, and the weight to be accorded to acceptance of responsibility.<sup>195</sup> This is precisely the sort of diversity of viewpoint that one would expect to find in any clemency process, whether vertical or horizontal. The difference is that, in a horizontal system, the Board members are at the same level and are able to actively discuss and resolve those conflicts as they address discrete, real cases. As Denn puts it, “the Board’s decisions are often the result of five individuals employing

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* § 2.

189. *Id.* § 3.

190. Love, *Reinvigorating the Federal Pardon Process*, *supra* note 2, at 758 (noting the frequency of grants in Delaware).

191. *Clemency Statistics*, *supra* note 6.

192. Denn served two terms as Lieutenant Governor before being elected Delaware Attorney General in 2014 (replacing Beau Biden). Esteban Parra, *Denn Takes Race for Attorney General*, DEL. ONLINE (Nov. 4, 2014, 11:04 PM), <http://www.delawareonline.com/story/news/politics/2014/11/04/denn-takes-race-attorney-general/18508679>.

193. Matthew Denn, *Clemency in the State of Delaware: History and Proposals for Change*, 13 DEL. L. REV. 55 (2012).

194. *Id.* at 60–61.

195. *Id.*

multiple methods of analysis.”<sup>196</sup> The distinction from the federal process is that they do this in concert rather than successively.<sup>197</sup> The difference is clear: even when the deciders are political actors, a flat system can produce results unlikely to come from a vertical hierarchy.

### 3. South Carolina

According to Margaret Colgate Love, South Carolina is also among the elite group of states where pardoning is “frequent and regular,” issuing about 300 grants per year.<sup>198</sup> Like Delaware, South Carolina relies primarily on a board, but South Carolina’s Board is even more powerful because the Governor only has the power to grant clemency in capital cases. In all others, the Board acts on its own.<sup>199</sup> South Carolina’s Board also has broader jurisdiction than the Delaware Commission, and is formally known as the Board of Probation, Parole and Pardon Services.<sup>200</sup>

While Delaware’s Board is comprised of state officials with other substantial duties, the South Carolina Board is made up of seven gubernatorial appointees.<sup>201</sup> The statute is quite specific as to members’ qualifications: the director “must have at least ten years of training and experience in one or more of the following fields: parole, probation, corrections, criminal justice, law, law enforcement, psychology, psychiatry, sociology, or social work,”<sup>202</sup> and at least one of the other members must have at least five years of similar experience.<sup>203</sup> Geographic diversity is assured, as one member is appointed from each of South Carolina’s congressional districts.<sup>204</sup>

South Carolina’s system provides an unusual amount of transparency and engagement. Hearings, as in Delaware, are a regular part of the

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196. *Id.* at 61.

197. Denn does recommend some changes; he suggests that, for easy cases, the Board be given the ability to make decisions without the Governor’s review, and limit multiple petitions by violent felons. *Id.* at 68–69. He concludes, however, that “[i]n general, Delaware’s unique clemency process works well and results in thoughtful, just outcomes from a Board of Pardons that has an unusually high level of public accountability.” *Id.* at 69.

198. Love, *Reinvigorating the Federal Pardon Process*, *supra* note 2, at 766.

199. S.C. CONST. art. IV, § 14; *Pardons*, CRIME MUSEUM, <http://www.crimemuseum.org/crime-library/pardons> (last visited Apr. 21, 2017).

200. S.C. CODE § 24-21-10 (2012).

201. S.C. CODE § 24-21-10(A)–(B) (2012).

202. S.C. CODE § 24-21-10(A) (2012).

203. S.C. CODE § 24-21-10(B) (2012).

204. *Id.*

clemency process,<sup>205</sup> and in 2016 pardon hearings were scheduled for every month except January and February.<sup>206</sup> Victims are invited to participate in pardon hearings,<sup>207</sup> and a record of the hearings is kept.<sup>208</sup> The Board itself is strikingly diverse both racially and in vocational background. As of July 2016, the members of the Board included a nurse, a phone company supervisor, an MIT-trained engineer, a retired pharmaceutical manager, a social studies teacher, a car broker and fitness trainer, and a Methodist minister.<sup>209</sup>

Why does South Carolina's system provide regular grants, even within a deeply conservative political culture?<sup>210</sup> Part of the answer may lie in the diversity of that Board, combined with a flat structure that requires them to work together regularly over a long period.<sup>211</sup>

### *B. Gerald Ford's Presidential Clemency Commission*

The modern era of dysfunctional federal clemency contains a striking anomaly: President Ford's Presidential Clemency Board, which lasted just one year and led to the pardon of over 13,000 people who had been convicted or court martialed in relation to the Vietnam War.<sup>212</sup> This shockingly brief period of competence was a creature of a dark time in our nation's history, coming in the wake of that war and Watergate. Both of those debacles played a role in Ford's successful experiment.

While Gerald Ford's use of the pardon power is most often considered in relation to his controversial pardon of Richard Nixon,<sup>213</sup> his more relevant action was the creation of the Presidential Clemency Board three

205. S.C. CODE § 24-21-50 (2012).

206. 2016 PAROLE AND PARDON HEARINGS, S.C. DEP'T OF PROB., PAROLE & PARDON SERVS.

207. *Pardon Hearing Explanation*, S.C. DEP'T OF PROB., PAROLE & PARDON SERVS., <http://www.dppps.sc.gov/Victim-Services/Pardon-Hearing-Explanation> (last visited Apr. 21, 2017).

208. S.C. CODE § 24-21-40 (2012).

209. *Parole Board*, S.C. DEP'T OF PROB., PAROLE, & PARDON SERVS., <http://www.dppps.sc.gov/Parole-Pardon-Hearings/Parole-Board> (last visited Apr. 21, 2017).

210. *Id.* A 2010 Gallup poll found South Carolina to be one of the ten most conservative states in the country. Brian Montopoli, *And the Most Conservative State in the Union Is . . .*, CBS NEWS (Aug. 2, 2010, 4:38 PM), <http://www.cbsnews.com/news/and-the-most-conservative-state-in-the-union-is>.

211. Terms for the Board members are six years. S.C. CODE § 24-21-10(B) (2012).

212. Clemency Expert P.S. Ruckman has evaluated the Ford project results, and concluded that the project resulted in 13,603 clemency grants. P.S. Ruckman, Jr., *Ford's Clemency Board Revisited (2)*, PARDON POWER (Aug. 16, 2016), <http://www.pardonpower.com/2016/08/fords-clemency-board-revisited-2.html>.

213. Ford's proclamation of the pardon and accompanying remarks reflected a desire to end a potentially prolonged debate over Nixon's criminal liability. *President Gerald Ford's Pardon of Richard Nixon*, 13 FED. SENT'G REP. 207, 207 (2000-2001).

weeks earlier.<sup>214</sup> That Board left behind two lasting legacies, both of which have been largely ignored by history: the uncontroversial pardon of thousands, and a comprehensive report about how this was accomplished.<sup>215</sup>

Ford intended the Board to be temporary<sup>216</sup> and gave it precisely one year to complete its work,<sup>217</sup> ending on September 15, 1975.<sup>218</sup> The goal was to create a “program of conditional clemency for roughly 13,000 civilians and 100,000 servicemen who had committed draft or military absence offenses” during the Vietnam War.<sup>219</sup> A total of 21,729 eligible persons applied for this clemency,<sup>220</sup> and the Clemency Board recommended relief for 14,514 of them.<sup>221</sup> It was an ambitious and successful effort.

Like South Carolina’s Board of Probation, Parole, and Pardon Services, President Ford’s Clemency Board was diverse in terms of background and race. Former Senator Charles Goodell, a Republican from New York, chaired the Board.<sup>222</sup> Other members included prominent African American attorney Vernon Jordan, Notre Dame President Father Theodore Hesburgh, Troy State University (Alabama) President Dr. Ralph

214. Exec. Order No. 11803, 39 Fed. Reg. 33,297 (Sept. 16, 1974). Oddly, Ford chose to announce his clemency project for draft dodgers at a VFW Convention, where it was poorly received. He may have chosen that date in an attempt to hide it behind another national news event: Evel Knievel’s attempt to jump the Snake River Canyon on a motorcycle. Laura Kalman, *Gerald Ford, the Nixon Pardon, and the Rise of the Right*, 58 CLEV. ST. L. REV. 349, 360 (2010); JIM KRATSAS, A “PROVIDENTIAL” PRESIDENT: GERALD R. FORD AT 100 (Summer 2013), <https://www.archives.gov/files/publications/prologue/2013/summer/ford.pdf>.

215. PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT x–xi (1975).

216. A post-war temporary clemency program was not a new innovation. Such efforts were undertaken by several presidents: George Washington after the Whiskey Rebellion; Lincoln and Johnson used clemency to heal wounds of the Civil War; Theodore Roosevelt employed it after the Spanish American War; Coolidge pardoned those convicted under the Espionage Act in World War I; and Truman issued four broad clemency proclamations after World War II. *Id.* at 355–56, 364, 366–67, 374–75.

217. The Board’s report notes that Ford announced his clemency six weeks after taking office, the precise interval between Andrew Johnson’s taking office after the death of Lincoln and the clemency program he announced in the wake of the civil war. *Id.* at 1, 178.

218. Exec. Order No. 11878, 40 Fed. Reg. 42,731 (Sept. 10, 1975); PRESIDENTIAL CLEMENCY BOARD, *supra* note 215, at 165.

219. PRESIDENTIAL CLEMENCY BOARD, *supra* note 215, at xi.

220. *Id.* at xii.

221. *Id.* at xxiii.

222. See *Gerald Ford*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=23895> (last visited Apr. 21, 2017) (discussing the members of the Presidential Clemency Board). Goodell was a war critic and liberal Republican, and the father of NFL Commissioner Roger Goodell. Patrick Hruby, *Roger Goodell’s Tragic Sanctimony*, THE ATLANTIC (Sept. 12, 2014) <http://www.theatlantic.com/entertainment/archive/2014/09/roger-goodells-the-nfls-nixon-on-the-ray-rice-scandal/380112>.

Adams, Paralyzed Veterans of America Executive James Maye, General Lewis Walt, and Aida Casanas O'Connor,<sup>223</sup> who was described in the Executive Order as “a woman lawyer.”<sup>224</sup>

The Board itself (which began with 9 members, then doubled in size to 18 as applications increased)<sup>225</sup> relied on a staff of attorneys detailed from other departments and 125 summer interns.<sup>226</sup> The process they used was relatively simple. It began with a letter or phone call from a prospective applicant; the Board considered “any affirmative expression of interest” as a provisional application.<sup>227</sup> The applicant then received a set of instructions to fill out forms setting out “only the minimum amount of information necessary for us to order pertinent government records,” according to the Board, in an effort to make the application as easy as possible.<sup>228</sup> A staff member then gathered documents and prepared a case summary, which a supervisor would review.<sup>229</sup> The Board then mailed that summary to the applicant for review and comment.<sup>230</sup> Once the Board received the applicant’s comments, the staff member who prepared the case summary would meet with a panel of three or four board members and make a decision.<sup>231</sup>

The Board showed remarkable focus on consistency, and was innovative in pursuing that goal. One tool was the “Clemency Law Reporter,” an internal publication that addressed recurring issues and provided staff with direction.<sup>232</sup> Remarkably for their time, the Board also used cutting-edge technology (for 1975) and employed “a computer-aided review of case dispositions for consistency with Board precedent.”<sup>233</sup> Specifically for this project, NASA developed and implemented the system, which identified outlier decisions that could be referred to the entire Board for review at a cost of \$5 per case.<sup>234</sup> Oddly, some four decades later, such a system is not used to assess clemency outcomes.

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223. PRESIDENTIAL CLEMENCY BOARD, *supra* note 215, at 219–24.

224. *Gerald Ford*, *supra* note 2222.

225. PRESIDENTIAL CLEMENCY BOARD, *supra* note 215, at xvii.

226. *Id.* at 164.

227. *Id.* at 24.

228. *Id.*

229. *Id.* at 25.

230. *Id.*

231. *Id.*

232. *Id.* at 283–89.

233. *Id.* at 327.

234. *Id.*

The Ford Clemency Board worked. Yet, it is telling that few remember it; after all, we remember disasters, not quiet successes.

### *C. Lessons from the States and the Ford Clemency Board*

The examples of the Ford Clemency Board and the high-functioning states set out a few simple commonalities and promise the possibility of features our federal system now lacks.

There are three strong commonalities among systems that work. High-functioning systems rely on boards, which serve to flatten out the process and force consensus among diverse voices. Because they consider petitions as a group rather than consecutively, they avoid redundancies and maintain consistency.<sup>235</sup>

Second, the more independence the board has, the more likely it is that the system will be efficient and offer frequent and regular grants of clemency.<sup>236</sup> This should not surprise us. An independent board gives a political actor such as a governor or president some political “cover” on tough decisions.

Third, diverse views on a board seemingly enhance the success of the larger project. President Ford intentionally sought out diverse voices (even on the subject of the Vietnam War), while the structure of the Delaware and South Carolina systems ensure that the makeup of their boards avoid monoculture.

The recipe for a working clemency system is short and sweet: it requires a horizontal structure centered on a well-chosen board that is both diverse and independent.

## III. CRAFTING A BETTER FEDERAL SYSTEM

### *A. The Use of a Clemency Board*

Obviously, a central feature of a new federal clemency system should be the replacement of the vertical hierarchy we have now with a horizontal model built around a clemency board. Bureaucracy, particularly redundant levels of review, unduly fetters the proper and constitutional exercise of mercy.

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235. *See supra* Part III.B (describing President Ford’s creation of Presidential Clemency Boards).

236. *See supra* Part III.A.1 (dividing state clemency programs into three general categories and evaluating the effectiveness of each type of program).

This article argues for a clemency board as a solution to the problem of stifling vertical bureaucracy. The general idea of a federal clemency commission, however, is not a new one; one variation or another has been suggested by Charles Shanor and Marc Miller in 2001,<sup>237</sup> Rachel Barkow in 2008,<sup>238</sup> and Jonathan Menitove in 2009.<sup>239</sup> In fact, White House Counsel Greg Craig even pressed for one from within the administration in 2009.<sup>240</sup> Others have made a more general critique of the status quo.<sup>241</sup>

This moment is different and important, though, because recent history has proven that the problem is the process, rather than a lack of will. We now have tried a vertical hierarchy for the review of clemency through many administrations, Republican and Democratic, hostile to clemency and seemingly embracing of it. The experiment has failed. Most strikingly, the system has failed even President Obama, a leader who by all accounts wanted clemency to work. We need to try something else. The experience of the states and the Ford Clemency Board provide a solid foundation for the next step.

Simplifying and flattening the process will benefit presidents regardless of their approach to clemency. Presidents could clearly communicate their imperatives to one level of a system rather than to several. For example, if a president cares about releasing those over-sentenced for gun crimes, that message can be easily communicated to a board. Right now, sending a message that will be equally received by the Pardon Attorney, the DAG, and the White House Counsel is a challenge

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237. Charles Shanor & Marc Miller, *Pardon Us: Systemic Presidential Pardons*, 13 FED. SENT'G REP. 139, 144 (2000-2001).

238. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1365 (2008) (arguing that “agencies might be employed to supplement — not replace — executive power over clemency by providing an additional check on overbroad criminal laws.”). Barkow renewed and refined that idea in a later article co-authored by this writer. Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 20 (2015).

239. Bill Keller, *On Pardons, Obama’s the Stingiest President Since John Adams*, POLITICO (Dec. 13, 2015), <http://www.politico.com/magazine/story/2015/12/barack-obama-criminal-justice-pardons-213435>; Osler, *supra* note 20, at 309.

240. Larkin, *supra* note 27, at 905–06 (2016).

241. Although she has not expressly embraced the idea of a clemency board, Margaret Colgate Love has recently amended her former view and now argues that the clemency process should at least be taken out of the Department of Justice, as “[t]he president cannot be well-served in the exercise of his pardon power as long as responsibility for pardon policy and practice remains in an agency responsible for criminal prosecutions and under the control of federal prosecutors.” Love, *Administration of the President’s Pardon Power*, *supra* note 42, at 103. Paul Larkin of the Heritage Foundation has similarly called for a simple relocation of the clemency process to the White House. Larkin, *supra* note 27, at 905–06 (2016).

because each official has different interests. For example, the DAG may resist or ignore such an imperative to placate line prosecutors who previously have been instructed to prosecute gun crimes aggressively.

### *B. Diversity and Independence*

A federal clemency board should be diverse in background and ideology, and have a relative level of independence, particularly from the Department of Justice.<sup>242</sup>

The models of Delaware, South Carolina, and the Ford Clemency Board offer three different paths to diversity. Delaware uses a variety of elected officials, which will usually ensure, at least, that both major parties are represented (provided that those officials either serve through several administrations or are elected independently). That model, however, does not align with the federal system, because only two executive officials (the President and Vice President) are elected while others are appointed, ensuring a certain sameness of outlook.

South Carolina's system, with one representative from each congressional district, offers at least geographic diversity and in practice seems to have allowed for racial and vocational diversity. In the federal system, it would be possible to replicate such a system by appointing one commissioner from each Court of Appeals Circuit. That would do little to encourage racial and ideological diversity. Similarly, the diversity of the Ford Board was achieved only through the intentional actions of the executive, and President Ford lived at a time when bipartisan cooperation was common. It is unlikely that self-restraint would be enough to ensure ideological diversity in today's political environment.

Previously, Rachel Barkow and I have suggested a clemency board where slots are filled by people of certain expertise; for example, we might require a commission to include a former federal prosecutor, a former federal defender, a former federal judge, a former federal probation officer, and a former police officer, among others.<sup>243</sup> Such a structure would ensure a variety of experiential knowledge and background, allowing for a fuller discussion of cases. Our inclusion of "former" in those descriptions was intentional; a board in charge of running federal clemency would benefit from being staffed with full-time, rather than part-time, commissioners.

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242. Because of the constitutional directive that clemency rests with the executive, independence from the president is not a relevant goal.

243. Barkow & Osler, *supra* note 238, at 21.

Independence of such a board from the Department of Justice would not bar the Department from participating in clemency; certainly, a clemency commission could include a Department representative, and input from the Department on individual cases could be a part of the investigative process.

*C. What May Be Gained*

A flatter, functional clemency process would open up the possibility of additional benefits beyond efficiency. As in the states, a greater degree of transparency could be achieved, as the system would become less complex and less hindered by the rules of multiple agencies. A permanent and professional staff could also collect and maintain data, providing useful guidance on issues such as the prediction of recidivism.<sup>244</sup>

Above all, a functioning clemency process would act to revive what should be a crucial constitutional tool. The Framers did not insert the Pardon Power into the Constitution by accident; they intended the President to use it. Given that truth, we need to craft a better machine to power this engine of mercy. The problem is clear, and so is the solution: we must replace our inefficient vertical hierarchy of decision with a modern horizontal process that can provide us with efficiency, fairness, and a return to prominence of the principled soul of the Constitution.

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244. *Id.* at 22–23.