

# President Obama's Misunderstood Clemency Initiative

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*President Obama's Clemency Initiative resulted in the commutation of 1,696 federal sentences. Despite this achievement, some advocates of a more robust use of executive clemency criticize the initiative as overly bureaucratic, chaotic, and limited. This article argues that these criticisms stem from a combination of misunderstandings of and disagreements with the Obama administration's actual goals. Through exclusive and in-depth interviews conducted by the author with high ranking officials from the Obama White House, Department of Justice, and Clemency Initiative 2014, this article shows that administration officials did not envision the initiative as a substitute for broader criminal justice reform legislation. Rather, the administration viewed the initiative as a limited, time-specific remedy to help alleviate a particular unfairness: inmates serving excessively long sentences based on the date they were sentenced. Placed in its proper context, this article argues that many of the aspects of the Clemency Initiative that have been criticized were features necessary for the initiative's success, as defined by the administration.*

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## INTRODUCTION

On January 30, 2014, Deputy Attorney General, James Cole, delivered an address to the New York State Bar Association. Cole explained that there were “low-level, non-violent drug offenders” in prison who would have received a substantially lower sentence had they been convicted for the same offense in 2014. “This is not fair, and it harms our criminal justice system,” he told those present. To help correct this injustice, Cole called on various bar associations to help identify and assist potential candidates for executive clemency.<sup>1</sup> By January 20, 2017, 1,696 federal inmates received commutations through what has since come to be known as the Clemency Initiative.<sup>2</sup>

<sup>1</sup> James Cole, Deputy Att’y Gen., Remarks as Prepared for Delivery at the New York State Bar Association Annual Meeting (Jan. 30, 2014), <https://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-cole-new-york-state-bar>.

<sup>2</sup> U.S. Sentencing Comm’n, An Analysis of the Implementation of the 2014 Clemency Initiative 1 (2017) [hereinafter *U.S. Sentencing Comm’n Report*],

Despite this achievement, some advocates of criminal justice reform criticize the initiative.<sup>3</sup> In particular, Professors Rachel Barkow and Mark Osler argue that the clemency petition's review process implemented by the Department of Justice (the "DOJ") and the White House was unpredictable, impermanent, and overly bureaucratic.<sup>4</sup> They question why people with drug convictions were given priority while others with non-violent convictions, who also may have benefited from the Clemency Initiative, were almost entirely excluded.<sup>5</sup> They also claim that the final tally of granted petitions (1,696) reflects a drop in the bucket rather than a "change [to] the criminal justice system and the way it conceives of sentencing, punishment, and second chances."<sup>6</sup>

This article argues that these criticisms stem from a combination of misunderstandings of and disagreements with the Obama administration's actual goals. Through interviews conducted by the author with high ranking officials in the White House and DOJ, as well as publicly available information at the time, this article posits that administration officials

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[https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901\\_clemency.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf). Note: In order to save both space and the reader's attention, the Obama Clemency Initiative is referred to as "the Clemency Initiative" or "the Initiative" throughout the rest of this article.

<sup>3</sup> Margaret Colgate Love, *Obama's Clemency Legacy: An Assessment*, 29 Fed'l Sent'g Rep. 271, 272-3 (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2982242](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982242); see also Paul Larkin, Commentary, *Reforming the Federal Clemency Process*, The Heritage Found. (Jun. 13, 2017), <https://www.heritage.org/crime-and-justice/commentary/reforming-the-federal-clemency-process>; U. of St. Thomas, *UST Law Journal Spring Symposium on Clemency*, YouTube (Apr. 14, 2019) (Remarks by Erin Collins at 42:30) [hereinafter *St. Thomas Symposium*], [https://www.youtube.com/watch?v=yoP5\\_Nj7bE0](https://www.youtube.com/watch?v=yoP5_Nj7bE0).

<sup>4</sup> See Mark Osler, *Obama's Clemency Problem*, N.Y. Times (Apr. 1, 2016), <https://www.nytimes.com/2016/04/01/opinion/obamas-clemency-problem.html>; see also Rachel Barkow, Mark Holden, and Mark Osler, *The Clemency Process Is Broken. Trump Can Fix It.*, The Atlantic (Jan. 15, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enoughwe-need-clemency-reform/580300/>.

<sup>5</sup> See Center on the Administration of Criminal Law at NYU Law School, *The Mercy Lottery: A Review of the Obama Administration's Clemency Initiative 23* (2018) [hereinafter *NYU Law Report*], [http://www.law.nyu.edu/sites/default/files/upload\\_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf) (This report was produced with the help of the Center's faculty director, Rachael E. Barkow, Mark Osler, and Caitlin Glass); see also Rachel Elise Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration 83* (2019); @RachelBarkow, Twitter (Jul. 26, 2018, 6:22 AM), <https://twitter.com/RachelBarkow/status/1022472215378489344>; @RachelBarkow, Twitter (Oct. 23, 2017, 5:08 PM), <https://twitter.com/RachelBarkow/status/922615631614300160>.

<sup>6</sup> *NYU Law Report*, *supra* note 5, at 32.

did not envision the initiative as a permanent reform of the existing clemency process.<sup>7</sup> Instead, the Obama administration viewed the initiative as a limited, time-specific remedy to help alleviate a particular unfairness: inmates serving excessively long sentences based on the date they were sentenced. Despite early fanfare and rhetoric touting the possibility of releasing thousands of inmates,<sup>8</sup> the White House and Deputy Attorney General (the “DAG”) had a clear understanding of the total number of people who would likely receive commutations.<sup>9</sup> At the same time, the administration tried to make it clear to the public that these were individualized remedies and would be difficult for recipients to obtain.<sup>10</sup> In this context, the very aspects of the Clemency Initiative that Barkow, Osler, and others criticized were not bugs in the system or oversights. They were features necessary for the initiative’s success as the administration defined success.

Resolving some of these disagreements and misunderstandings is important for a variety of reasons. First, there is the question of President Obama’s legacy. Can the Clemency Initiative be considered a successful program, and how is “success” being defined? Second, there is the issue

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<sup>7</sup> Telephone Interview with Joshua Friedman, former Associate Counsel to the President (Mar. 29, 2019) [hereinafter *Friedman Interview*]; Telephone Interview with Kathryn Ruemmler, former White House Counsel (Mar. 25, 2019) [hereinafter *Ruemmler Interview*]; Telephone Interview with Robert A. Zauzmer, former Acting Pardon Attorney and Assistant United States Attorney (Feb. 26, 2019) [hereinafter *Zauzmer Interview*].

<sup>8</sup> See Douglas A. Blackmon, *An Interview with Eric Holder on Mass Incarceration*, Wash. Monthly (Feb. 11, 2014), <https://washingtonmonthly.com/2014/02/11/an-interview-with-eric-holder-on-mass-incarceration/>.

<sup>9</sup> Interview with James M. Cole, Former Deputy Att’y Gen. (Mar. 8, 2019) [hereinafter *Cole Interview*]; Telephone Interview with Neil Eggleston, Former White House Counsel (July 2, 2019) [hereinafter *Eggleston Interview*]; see also *Ruemmler Interview*, *supra* note 7.

<sup>10</sup> See Neil Eggleston, *President Obama Commutes the Sentences of 214 Additional People*, The White House Blog (Aug. 3, 2016) (“In each of these cases, the President examines the application on its individual merits. As a result, the relief afforded is tailored specifically to each applicant’s case.”), <https://obamawhitehouse.archives.gov/blog/2016/08/03/president-obama-commutes-sentences-214-additional-people>; see also Neil Eggleston, *President Obama Grants 153 Commutations and 78 Pardons to Individuals Deserving of a Second Chance*, The White House Blog (Dec. 19, 2016, 3:00 PM) (“[W]e must remember that clemency is a tool of last resort and that only Congress can achieve the broader reforms needed to ensure over the long run that our criminal justice system operates more fairly and effectively in the service of public safety.”), <https://obamawhitehouse.archives.gov/blog/2016/12/19/president-obama-grants-153-commutations-and-78-pardons-individuals-deserving-second>.

of how persons who were not granted clemency through this initiative should be defined. Were they “left behind”<sup>11</sup> or did they fall outside of the initiative’s parameters? Finally, there is the question of how future presidents will use their clemency power. Given both its limited goals and the political reality at the time of its implementation, can the Clemency Initiative be considered a model that future presidents should replicate?

The body of this article contains three parts. First, it identifies the executive clemency power and outlines how it has historically functioned. Second, it places the Clemency Initiative in the context of the political and policy environment facing President Obama. It then proceeds to describe how the initiative was conceived, the goals of those who crafted it, and how the initiative was implemented. And third, it outlines specific criticisms and attempts to square them with this new contextualization and interpretation of the initiative, chiefly that it was conceived of as a more limited endeavor than has been portrayed where the default position was not necessarily to grant clemency. Ultimately, this article concludes that the Clemency Initiative, while a success according to the criteria of the Obama administration, is emblematic of feelings of missed opportunities mixed with concrete gains that are associated with President Obama’s tenure while offering recommendations to future administrations.

### I. THE SCOPE AND CATEGORIES OF EXECUTIVE CLEMENCY

Today, there are five categories of federal clemency: pardon, amnesty, reprieve, remission of fines, and commutation.<sup>12</sup> While the Clemency Initiative itself dealt exclusively in commutations, this section will briefly examine the origin of the clemency power as well as each category of commutation in order to provide a glimpse at the vast scope of what Alexander Hamilton called the “benign prerogative.”<sup>13</sup>

The president’s clemency power originated in 5<sup>th</sup> and 6<sup>th</sup> centuries England. It was later incorporated into the Codes of William the Conqueror following the successful Norman Invasion of the British Isles. And, by the time of the 1787 Constitutional Convention, it had evolved into a tool the monarch could use to lower social and political tension, and

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<sup>11</sup> See *NYU Law Report*, *supra* note 5, at 29.

<sup>12</sup> James N. Jorgensen, *Federal Executive Clemency Power: The President’s Prerogative to Escape Accountability*, 27 U. Rich. L. Rev. 345, 348 (1993).

<sup>13</sup> “Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.” The Federalist No. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

to decrease the severity of an inflexible penal code.<sup>14</sup> That is how it was sold to the public following the convention, where there was little debate over the clemency power.<sup>15</sup>

Hamilton, executive clemency's chief promoter, argued for a virtually unchecked power to grant clemency by the person of the president as a means of softening overly harsh statutes passed by Congress as well as means of diffusing social internal tensions.<sup>16</sup> In Hamilton's view, the executive was in a unique position "that the fate of a fellow-creature depended on his sole fiat," and would discharge the power with "scrupulousness and caution" lest he be accused of "weakness or connivance."<sup>17</sup> He believed that the president's power to grant clemency is naturally limited by political considerations: too little use would make a president appear heartless while too much would make them appear weak or corrupt.<sup>18</sup>

The president's power to grant clemency begins the moment the alleged criminal act is committed.<sup>19</sup> There is no need for a formal charge or conviction for an offer or grant of clemency.<sup>20</sup> The president may modify or delay sentences, erase guilt, confer civil and political rights, or require conditions on the part of the recipient in exchange for clemency.<sup>21</sup> Each category of clemency confers different forms of forgiveness on recipients and promotes different policy objectives.

The pardon is the most comprehensive form of clemency. While a pardon does not signify innocence and does not erase a person's criminal record, it does facilitate the removal of legal disabilities imposed because

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<sup>14</sup> William F. Duker, *The President Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476-77, 501-03 (1977), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2444&context=wmlr>.

<sup>15</sup> The single most contentious issue was over Edmund Randolph's proposal of an amendment that would have included the crime of "treason" among those crimes that a president was restricted from granting clemency for without the consent of the Senate. He lost on both counts, with a majority of delegates appearing to have been persuaded that legislatures were ill-equipped to exercise clemency powers. Debates In The Federal Convention Of 1787, at 136, 612 (Madison's Notes, Jun. 19, 1787) (statement of Edmund Randolph) (James McClellan and M. E. Bradford ed., 1989).

<sup>16</sup> The Federalist No. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 810 (2015) (citing Akhil Reed Amar, *America's Constitution: A Biography* 189 (2005)).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 811-12.

of the conviction for the pardoned offense.<sup>22</sup> Presidents may choose to impose conditions that may prove to be as harsh or harsher than those that the sentence originally imposed.<sup>23</sup> However, the president's power to pardon is not absolute; it may be rejected by the recipient.<sup>24</sup> Amnesty is arguably no different than a pardon.<sup>25</sup> However, unlike an individual pardon, amnesty traditionally extends to whole classes and communities,

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<sup>22</sup> The DOJ offers the following definition of a pardon:

A pardon is an expression of the President's forgiveness and ordinarily is granted in recognition of the applicant's acceptance of responsibility for the crime and established good conduct for a significant period of time after conviction or completion of sentence. It does not signify innocence. It does, however, remove civil disabilities – e.g., restrictions on the right to vote, hold state or local office, or sit on a jury – imposed because of the conviction for which pardon is sought, and should lessen the stigma arising from the conviction. It may also be helpful in obtaining licenses, bonding, or employment. Under some – but not all – circumstances, a pardon will eliminate the legal basis for removal or deportation from the United States. Pursuant to the Rules Governing Petitions for Executive Clemency, which are available on this website, a person is not eligible to apply for a presidential pardon until a minimum of five years has elapsed since his release from any form of confinement imposed upon him as part of a sentence for his most recent criminal conviction, whether or not that is the conviction for which he is seeking the pardon.

U.S. Dep't of Justice, Office of the Pardon Attorney, Frequently Asked Questions (last accessed Feb. 26, 2020), <https://www.justice.gov/pardon/frequently-asked-questions>.

<sup>23</sup> *United States v. Wilson*, 32 U.S. 150, 161 (1833) (“A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment.”).

<sup>24</sup> *Id.* at 162 (“If a man has character of pardon from the king, he ought to plead it, in indictment; and if he pleads not guilty, he waives his pardon.”); see also *Burdick v. United States*, 236 U.S. 79, 95 (1915) (holding that *Wilson* applies in context of an individual wishing to reject a pardon to claim a right against self-incrimination).

<sup>25</sup> In 1877, the Court recognized the difference between the two as being a matter of scale in *Knote v. United States*:

The proclamation of the President extended unconditionally and without reservation a full pardon and amnesty for the offence of treason against the United States, or of giving aid and comfort to their enemies, to all persons who had directly or indirectly participated in the rebellion, with a restoration of all rights, privileges, and immunities under the Constitution and the laws made in pursuance thereof. Some distinction has been made, or attempted to be made, between pardon and amnesty. It is sometimes said that the latter operates as an extinction of the offence of which it is the object, causing it to be forgotten, so far as the public interests are concerned, whilst the former only operates to remove the penalties of the offence. This distinction is not, however, recognized in our law. The Constitution does not use the word ‘amnesty;’ and except that the term is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance.

95 U.S. 149, 152-53 (1877).

particularly in post-war periods.<sup>26</sup>

Two more limited forms of clemency include reprieves and remissions of fines. A reprieve is a temporary and limited form of clemency.<sup>27</sup> These grants do not eliminate guilt nor lessen a sentence.<sup>28</sup> Rather, they postpone sentences for a discrete period of time.<sup>29</sup> A remission of fines gives persons the ability to recoup property seized by the government so long as such property has not been sold or stored in the Treasury.<sup>30</sup>

A commutation is the lightening of a sentence that has been imposed upon someone found guilty and sentenced.<sup>31</sup> Unlike pardons, commutations do not remove the legal disabilities attached to convictions such as restrictions on civil or political rights.<sup>32</sup> Presidents may impose conditions that may later and unforeseeably prove more burdensome than the original punishment.<sup>33</sup> Additionally, unlike pardons, potential recipients cannot turn down a commutation so long as the terms are more lenient than the sentence that was originally imposed.<sup>34</sup> The Clemency Initiative exclusively dealt with commutations.<sup>35</sup>

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<sup>26</sup> *Id.*; see also Murray Illson, *At Least 12 Presidents Involved In Pardons or Amnesty Moves*, N.Y. Times (Jan. 22, 1977), <https://www.nytimes.com/1977/01/22/archives/at-least-12-presidents-involved-in-pardon-or-amnesty-moves.html>.

<sup>27</sup> Jorgensen, *supra* note 12, at 348–49.

<sup>28</sup> Barkow, *supra* note 19, at 810–11.

<sup>29</sup> *Id.* at 810.

<sup>30</sup> *Knote*, 95 U.S. at 154 (“However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers, – it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress.”).

<sup>31</sup> Ducker, *supra* note 14, at 520–21.

<sup>32</sup> See Sarah Wheaton, *Obama flexes his pardon power*, Politico (Dec. 19, 2016) (“‘The fact of it is that getting out of prison only ends some of the punishment,’ [Margaret Colgate Love] said. There are a “regime of restrictions and limitations” for people with a criminal record that can make it harder to get a job or housing. It also limits rights like voting and gun ownership.”), <https://www.politico.com/story/2016/12/obama-pardon-prisoners-232830>.

<sup>33</sup> *Schick v. Reed*, 419 U.S. 256, 267–68 (1974) (holding that the terms of President Eisenhower’s commutation of a death sentence on condition that the recipient would be ineligible for parole remained valid despite the Court’s moratorium on death sentences 18 years later).

<sup>34</sup> *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (“Just as the original punishment would be imposed without regard to the prisoner’s consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done.”).

<sup>35</sup> U.S. Dep’t of Justice, Office of the Pardon Attorney, *Clemency Initiative* (last accessed Apr. 2, 2019), <https://www.justice.gov/pardon/clemency-initiative> [hereinafter DOJ CLEMENCY INITIATIVE].



With few exceptions,<sup>36</sup> the Court has ruled that the president has total discretion as to whom to grant clemency.<sup>37</sup> In one of the Court's earliest cases on clemency, Chief Justice John Marshall linked the King of England's clemency powers to those enumerated in the Constitution for the president.<sup>38</sup> This, in Marshall's estimation, made the president's clemency power, like that possessed by the King, a private "act of grace."<sup>39</sup> This grace-based understanding of the clemency power held firm until 1927, when the Court redefined clemency as a tool for promoting the "public welfare."<sup>40</sup> However, despite this different understanding by the Court, presidents, commentators, and justices continue to speak of clemency with grace-based language.<sup>41</sup>

Presidents were quite liberal with their use of clemency, particularly in commutations, throughout the 19<sup>th</sup> and early 20<sup>th</sup> centuries. During that time, clemency functioned as "an efficient adjunct to the justice

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<sup>36</sup> While this article has focused almost entirely on the clemency power in its relationship with the office of the President, it should be noted that the Court held that individuals have a right to seek and petition for clemency, but they do not possess a right to receive or be considered for clemency. *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981). Justice Sandra Day O'Connor suggested that there might be circumstances where a clemency review process would be so random and arbitrary that it would warrant judicial review. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring) ("Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."). However, as of the publication of this article, the Court has not brought up a case where it claimed that such intervention was warranted.

<sup>37</sup> Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 *Harv. L. Rev.* 811, 835 (2017).

<sup>38</sup> *United States v. Wilson*, 32 U.S. 150, 160 (1833) ("As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.").

<sup>39</sup> *Id.*

<sup>40</sup> *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

<sup>41</sup> See Anthony M. Kennedy, Speech at the American Association Annual Meeting (Aug. 9, 2003), [https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp\\_08-09-03](https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03); see also Telephone Interview with James E. Felman, former Chair of the Criminal Justice Section of the ABA (Feb. 8, 2019) [hereinafter *Felman Interview*].

system.”<sup>42</sup> However, the use of the clemency power evolved when Congress created a formalized system of parole in 1930.<sup>43</sup> This system gave imprisoned people, after serving a period of a sentence, the right to petition an independent parole board for early, conditional release.<sup>44</sup> Almost immediately following the enactment of parole, presidents began to exercise their clemency power differently: between 1910 and 1929, presidents granted more commutations than pardons; between 1930 and 1936, presidents granted more pardons than commutations.<sup>45</sup> Parole had long overtaken commutation as the preferred vehicle for early release of federal inmates until passage of the Comprehensive Crime Control Act of 1984 (the “CCCA”), which eliminated federal parole.<sup>46</sup>

Congress abolished the federal parole system in favor of “truth in sentencing” as part of the CCCA.<sup>47</sup> There is some evidence that proponents of abolishing parole believed that future presidents would be more willing to grant commutations and that federal criminal sentences would be shortened.<sup>48</sup> Neither expectation was met. Post-World War II presidents prior to Ronald Reagan regularly granted over 1,000 clemency petitions during their tenure, or were on track to do so if they did not serve full two terms in office.<sup>49</sup> Presidents Ronald Reagan, William Clinton, and George W. Bush averaged only 355 grants.<sup>50</sup> At the same time, federal criminal sentences *increased* in the years following the passage of the

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<sup>42</sup> Margaret Colgate Love, *Reinvigorating the Federal Pardon Power*, 9 U. St. Thomas L.J. 730, 737 (2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2283979](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2283979).

<sup>43</sup> U.S. Dep’t of Justice, U.S. Parole Commission, *History of the Federal Parole System* 7 (2003), <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf>.

<sup>44</sup> *See id.* at 11–12.

<sup>45</sup> U.S. Dep’t of Justice, Office of the Pardon Attorney, *Clemency Statistics* (last visited Apr. 14, 2019) [hereinafter *Clemency Statistics*], <https://www.justice.gov/pardon/clemency-statistics>.

<sup>46</sup> Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. Crim. L. & Criminology 1169, 1189 (2010), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=7372&context=jclc>.

<sup>47</sup> *See* Obama, *supra* note 37, at 836.

<sup>48</sup> Rachel Barkow, *Clemency And The Unitary Executive* (N.Y.U Public Law & Legal Theory Research Paper No. 14-38) 13–14 (2014), <https://www.law.nyu.edu/sites/default/files/Clemency%20and%20the%20Unitary%20Executive.pdf>; *see also* *At Last, a Major Crime Bill*, Wash. Post (Oct. 8, 1984) (“Parole will be abolished, but it expected that realistic, shorter but certain sentences would be imposed.”), [https://www.washingtonpost.com/archive/politics/1984/10/08/at-last-a-major-crime-bill/beebfb60-411f-4a15-9165-b8fccb9c17fa/?utm\\_term=.14023e50b441](https://www.washingtonpost.com/archive/politics/1984/10/08/at-last-a-major-crime-bill/beebfb60-411f-4a15-9165-b8fccb9c17fa/?utm_term=.14023e50b441).

<sup>49</sup> *Clemency Statistics*, *supra* note 45.

<sup>50</sup> *Id.*

CCCA.<sup>51</sup>

The combination of harsher penalties, fewer clemency grants, and no parole predictably resulted in stiffer criminal sentences without a functioning safety valve. In 1985, there were approximately 40,000 federal inmates.<sup>52</sup> That number more than doubled by 1994, reaching approximately 95,000.<sup>53</sup> The federal prison population continued growing each year, so that by the time Barack Obama finished his first year in office in 2009, the total number of federal inmates reached 208,000, a roughly 500 percent increase from 1984.<sup>54</sup>

## II. WHAT LED TO THE CLEMENCY INITIATIVE?

### A. President Obama's Unique Commitment to Clemency

According to former White House Counsel, Kathy Ruemmler, President Obama began thinking about ways to use his clemency power even before she joined his staff as counsel in 2011.<sup>55</sup> This was a significant departure from his immediate predecessors, who tended to wait until the final months of their second term before they seriously considered using executive clemency power.<sup>56</sup> Obama's mindset also deviated from trends of presidents seeking to highlight their tough-on-crime records.<sup>57</sup> As a result, the President and the White House Counsel's Office had more time to identify and overcome the inherent institutional resistance to a more aggressive use of clemency than their predecessors. Over a three-

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<sup>51</sup> See Carrie Johnson, *20 Years Later, Parts of Major Crime Bill Viewed As Terrible Mistake*, NPR (Sept. 12, 2014), <https://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake>; see also Jeffrey A. Eisenach, *From George Bush, A Convincing Declaration Of War On Drugs*, The Heritage Found. (Sept. 14, 1989), <https://www.heritage.org/civil-society/report/george-bush-convincing-declaration-war-drugs>.

<sup>52</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 1994* (Aug. 1995), <https://www.bjs.gov/content/pub/pdf/Pi94.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2009* (revised Oct. 27, 2011), <https://www.bjs.gov/content/pub/pdf/p09.pdf>.

<sup>55</sup> See Ruemmler Interview, *supra* note 7.

<sup>56</sup> See Love, *supra* note 46, at 1196–1200; Margaret Colgate Love, *Final Report Card on Pardoning by George W. Bush* (Mar. 13, 2009), <http://pardonlaw.com/wp-content/uploads/pardonlawimport/FinalReportCard.3.13.09.pdf>.

<sup>57</sup> Apart from Jimmy Carter, every President since Nixon oversaw an increase in the federal prison population until Barack Obama. See Obama, *supra* note 37, at 824 n. 51.

year period, President Obama and the White House Counsel's office prodded otherwise reluctant prosecutors and DOJ officials.<sup>58</sup>

There are two principal reasons why President Obama's efforts on criminal justice reform, and clemency in particular, were peculiar. First, the politics of criminal justice reform was, as late as 2014, considered "dangerous" by some White House officials.<sup>59</sup> Many politicians were still worried about being tagged with being 'soft on crime' and most federal politicians in the mid to late aughts did not face constituency pressure on the issue of the federal government's burgeoning prison population.<sup>60</sup> When criminal justice reform was brought up, it was typically focused on dealing with decreasing the disparity between crack and powder cocaine in sentencing. For instance, in 2008, then-candidate Obama ran on a platform favoring decreasing or ending sentencing disparities between crack and powder cocaine offenses. However, nowhere did his platform address what to do about the already large population of federal inmates.<sup>61</sup> Second, President Obama was handed a dysfunctional clemency process that required time and effort to get into working order. Presidents Clinton and W. Bush largely ignored the clemency power until the last months of their second terms.<sup>62</sup> The results of this neglect were as predictable as they were uninspiring. Clinton and Bush both left office disappointed in the clemency process for its inability to produce results while subjecting both

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<sup>58</sup> These efforts went as far as to include a Fall 2013 meeting at the White House with every U.S. Attorney, where President Obama made it clear that he expected them to take clemency petitions more seriously than they had been up to that point. *Ruemmler Interview*, *supra* note 7.

<sup>59</sup> See *St. Thomas Law Symposium*, *supra* note 3 (playing remarks by Roy Austin at 25:00).

<sup>60</sup> This is reflected to some degree in the fact that in 2008 and 2012, neither the Democratic nor Republican Party platforms addressed criminal justice reform as it pertained to already incarcerated persons. See *2008 Democratic Party Platform: Renewing America's Promise*, Am. Presidency Project (last visited Feb. 28, 2020), <https://www.presidency.ucsb.edu/documents/2008-democratic-party-platform>; *2008 Republican Party Platform*, Am. Presidency Project (last visited Feb. 28, 2020), <https://www.presidency.ucsb.edu/documents/2008-republican-party-platform>; *Moving America Forward: 2012 Democratic Party Platform*, Am. Presidency Project (last visited Feb. 28, 2020), <https://www.presidency.ucsb.edu/documents/2012-democratic-party-platform>; *2012 Republican Party Platform*, Am. Presidency Project (last visited Feb. 28, 2020), <https://www.presidency.ucsb.edu/documents/2012-republican-party-platform>.

<sup>61</sup> See Obama, *supra* note 37, at 812–13; see also Obama For Am., *The Blueprint for Change: Obama and Biden's Plan for America* 49 (2007), <https://my.ofa.us/page/-/Action%20Center/ObamaBlueprintForChange.pdf>.

<sup>62</sup> See Rachel E. Barkow & Mark Osler, *Restructuring Clemency*, 82 U. Chi. L. Rev. 1, 13 (2015).

to allegations of favoritism.<sup>63</sup>

Rather than bowing to the same political risks and incentives that led his predecessors to procrastinate on the issue of clemency until little could be done, President Obama chose to get ahead of the issue relatively early in his administration. This included seriously considering an aggressive use of the clemency power as early 2011.<sup>64</sup> While the mere act of starting something may appear minimal (and has been criticized as such<sup>65</sup>), doing so was a significant departure from the administrations of Bush Sr., Clinton, and Bush Jr. And, as described below, it also gave the Obama administration the breathing space to make mistakes and learn from unanticipated obstacles.

### **B. The Fair Sentencing Act of 2010 and Retroactive Sentences**

One of the Obama administration's legislative achievements in the realm of criminal justice reform was the Fair Sentencing Act of 2010 (the "FSA").<sup>66</sup> Prior to the FSA, Congress imposed mandatory minimum sentencing based on the amount of certain drugs in the defendant's possession.<sup>67</sup> Different types of drugs triggered these mandatory sentences at different quantities, resulting in often stark and seemingly unjustifiable disparities.<sup>68</sup> The most notorious of these disparities was between powder and crack cocaine.<sup>69</sup> Under pre-FSA sentencing requirements, 5 grams of crack carried a minimum 5-year sentence versus the required 500 grams

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<sup>63</sup> *Id.* at 19; See David Johnston, *Walsh Implies Bush Used Pardons to Avoid Testifying*, N.Y. Times (Feb. 9, 1993), <https://www.nytimes.com/1993/02/09/us/walsh-implies-bush-used-pardons-to-avoid-testifying.html>; see Mark Joseph Stern, *The George W. Bush Advice Obama Should Have Taken*, Slate (Jan. 5, 2017), <https://slate.com/news-and-politics/2017/01/obama-didnt-follow-bushs-pardon-advice-bad-move.html>; Laura M. Holson, *'No One Could Believe It': When Ford Pardoned Nixon Four Decades Ago*, N.Y. Times (Sept. 8, 2018), <https://www.nytimes.com/2018/09/08/us/politics/nixon-ford-pardon-watergate.html>; see also George W. Bush, *Decision Points* 104-05 (2010).

<sup>64</sup> *Ruemmler Interview*, *supra* note 7.

<sup>65</sup> See, e.g., Paul J. Larkin, Jr., "A Day Late and a Dollar Short" – President Obama's Clemency Initiative 2014, 16 *Geo. J.L. & Pub. Pol'y* 147, 149 (2018).

<sup>66</sup> See *Fair Sentencing Act*, Am. Civil Liberties Union (last visited Apr. 2, 2020), <https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act>.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

of powder cocaine required to trigger the same sentence, a 100:1 disparity.<sup>70</sup> The FSA reduced that disparity to 18:1 and eliminated the mandatory minimum sentence for simple possession of crack cocaine.<sup>71</sup>

The problem with the FSA was that only some of the changes relating to sentencing were retroactive.<sup>72</sup> This left a large population in the federal prison system who had been sentenced under the old disparities and would have otherwise received much lighter sentences in the post-FSA sentencing regime. According to Cole, this created a group of clemency petitioners who “got screwed,” as distinguished from the prototypical successful clemency petitioner who he categorized as “Mother Theresa” types.<sup>73</sup> The injustice of the situation was apparent even to career prosecutors like former acting Pardon Attorney Robert Zauzmer.<sup>74</sup>

### C. Budgetary Considerations

Cole and Ruemmler had their eyes on practical matters: the DOJ’s budget.<sup>75</sup> Between 2009 and 2013, the Bureau of Prisons (the “BoP”) was consuming a third of the DOJ’s annual budget.<sup>76</sup> Cole stated that the administration tackled some of the front-end issues with incarceration, such as sentencing and charging decisions with the FSA and former Attorney General Eric Holder’s Smart on Crime Initiative. However, these reforms did not do enough to address the incumbent federal prison population that the BoP estimated would continue to grow as much as 10 percent a year.<sup>77</sup>

In the months before his speech to the New York Bar Association, Cole sat down with consultants from organizations that had previously helped states reduce their prison populations. They identified two critical elements of success as 1) a willing partner in the legislature, and 2) greater use of parole. Cole had neither. Instead, he was working with a President

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<sup>70</sup> Am. Civil Liberties Union, *Cracks in the System: 20 years of Federal Crack Cocaine Law i*, (Oct. 2006), <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law>.

<sup>71</sup> Obama, *supra* note 37, at 826–27; *see also Fair Sentencing Act*, *supra* note 66.

<sup>72</sup> , *Frequently Asked Questions: 2011 Retroactive Crack Cocaine Guideline Amendment*, U.S. Sentencing Comm’n (last visited Apr. 2, 2020), <https://www.ussc.gov/policy-making/amendments/frequently-asked-questions-2011-retroactive-crack-cocaine-guideline-amendment#NaN>.

<sup>73</sup> Cole Interview, *supra* note 9.

<sup>74</sup> Zauzmer Interview, *supra* note 7.

<sup>75</sup> Cole Interview, *supra* note 9.

<sup>76</sup> *Id.*; *see also* Matt Apuzzo, *Justice Dept. Starts Quest for Inmates to Be Freed*, N.Y. Times (Jan. 30, 2014), <https://www.nytimes.com/2014/01/31/us/politics/white-house-seeks-drug-clemency-candidates.html>.

<sup>77</sup> Cole Interview, *supra* note 9.

who wanted to exercise his clemency power to fix this perceived injustice, and a large category of federal inmates whom he felt were unlucky.<sup>78</sup>

### III. GOALS

The Clemency Initiative was never intended to circumvent Congressional reform or overturn legitimate convictions and sentences based on President Obama's desire to be merciful. It was implemented to correct what was viewed as a particular injustice against a particular category of non-violent inmates who would have received substantially shorter sentences had they been convicted under post-FSA sentencing guidelines.<sup>79</sup> According to Eggleston, the guiding principle throughout the process was not to maximize leniency. "The President," he said, "thought about it as more fairness than pure leniency."<sup>80</sup>

The concept of fairness is difficult to define, particularly so in the context of executive clemency, because various interested parties have goals that often diverge and conflict. Obama administration officials consistently sought a balance—for example, executive versus legislative power in criminal justice, the victims of an individual's offense versus disproportionate sentences for that offenses, and potential actions of the current administration versus the potential damage those actions could have on the ability of future administrations to act—during the initiative's planning and implementation phases. As a result, the administration settled on a narrower application of clemency than some expected, or were led to believe, in the months immediately following Cole's announcement of the Initiative. The proceeding section will attempt to outline the interests that appear to have taken priority for those tasked with crafting the Initiative, and how the administration's desire to respect those interests likely limited the scope of the initiative.

#### A. Democratic Legitimacy

In last days of his administration, President Obama wrote in the *Harvard Law Review* that he did not want the public or members of Congress to view the initiative as a substitute for broader criminal justice legislation.<sup>81</sup> This was not a hidden sentiment during the initiative's implementation. The White House Communications Office and Counsel's

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Eggleston Interview, supra* note 9.

<sup>81</sup> Obama, *supra* note 37, at 838 ("These actions are no substitute for achieving lasting changes to federal sentencing law through legislation . . .").

Office made this point in numerous public comments and press releases throughout the duration of the initiative.<sup>82</sup> The reasons for this were both philosophical and practical.

Philosophically, the White House did not believe it was its place to unilaterally vacate valid applications of federal criminal law without congressional approval.<sup>83</sup> Ruemmler expressed concern that any widespread use of clemency that vacated criminal statutes, as was recommended by some in the criminal justice community, would go against basic democratic principles.<sup>84</sup> Because Congress passes criminal statutes, Ruemmler believed it would be improper for a president to use an unchecked power like clemency to effectively abolish laws he or she does not approve of at the time.<sup>85</sup> Other members of the Counsel's office held similar views with regards to the clemency power, believing it would be arrogant for a president to cavalierly overturn convictions that the State had spent time, energy, and resources to obtain, unless those convictions were illegitimate.<sup>86</sup> These officials believed that the clemency power was so extraordinary and unchecked that it was incumbent upon them and the President not to abuse and, in the process, potentially tarnish it.<sup>87</sup>

The White House and DOJ also wanted to avoid provoking Congress. Cole believed that anything too broad, or a process that resulted in a diminished sense of public safety, would result in Congress cutting the DOJ's budget.<sup>88</sup> Both Cole and Ruemmler believed that congressional opponents of President Obama would be in a weaker position to attack the Clemency Initiative if it was built around established and, more importantly, funded institutions.<sup>89</sup>

There was also the context of the moment. Much of this played

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<sup>82</sup> White House spokesperson and Assistant Press Secretary Brandi Hoffine stated that “[t]he clemency process alone . . . will not address the vast injustices in the criminal justice system resulting from years of unduly harsh and outdated sentencing policies. That is why we continue to support bipartisan criminal justice reform legislation.” William Wan, *Obama is running out of time on his clemency goal, advocates say*, Wash. Post (June 21, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/06/21/obama-is-running-out-of-time-on-his-clemency-goal-advocates-say/?utm\\_term=.3db46fee45ed](https://www.washingtonpost.com/news/post-nation/wp/2016/06/21/obama-is-running-out-of-time-on-his-clemency-goal-advocates-say/?utm_term=.3db46fee45ed).

<sup>83</sup> *Ruemmler Interview*, *supra* note 7; *Friedman Interview*, *supra* note 7.

<sup>84</sup> *Ruemmler Interview*, *supra* note 7.

<sup>85</sup> *Id.*

<sup>86</sup> *See Friedman Interview*, *supra* note 7.

<sup>87</sup> *See Id.*

<sup>88</sup> *Cole Interview*, *supra* note 9.

<sup>89</sup> *Id.*; *Ruemmler Interview*, *supra* note 7.



out at a time when many within the White House, DOJ, and broader criminal justice reform community believed that Congress would pass criminal justice reform legislation.<sup>90</sup> Such hopes were not outlandish. The Smarter Sentencing Act—which, among other things, would have made the FSA retroactive—advanced out of the Senate Judiciary Committee with the support of Senators Mike Lee (R-UT) and Ted Cruz (R-TX).<sup>91</sup> Senators Cory Booker (D-NJ) and Rand Paul (R-KY) introduced the REDEEM Act in mid-2014.<sup>92</sup> As late as 2015, with Republicans in control of both Houses of Congress and in the midst a presidential election cycle, Republican Senators Paul, Cruz, and Lee were described as working to end mass incarceration.<sup>93</sup> While it became clear to many in the administration that Congress was unlikely to take up such legislation in order to deprive President Obama of a legislative “win,” they still modeled the administration’s actions on criminal justice reform, including the Clemency Initiative, around the hope that Congress would eventually act.<sup>94</sup>

### B. Administrability

It was important to the White House, and Kathy Ruemmler, that the Clemency Initiative be manageable. They felt that a rush of applicants would inevitably strain an already understaffed system. To streamline the process for administrators of the initiative, Ruemmler, the White House Counsel’s Office, and the DAG drew up a list of criteria to determine eligibility for commutation under the Clemency Initiative.<sup>95</sup>

The administration settled on six factors to determine eligibility:

1. Be 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(s) today;
2. Be non-violent, low-level offenders without significant ties to large scale criminal organizations, gangs or cartels;
3. Have served at least 10 years of their prison sentence;

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<sup>90</sup> See *Friedman Interview*, supra note 7.

<sup>91</sup> Obama, supra note 37, at 827.

<sup>92</sup> Ed O’Keefe, *Cory Booker, Rand Paul team up on sentencing reform bill*, Wash. Post (Jul. 8, 2014), [https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/cory-booker-rand-paul-team-up-on-sentencing-reform-bill/?utm\\_term=.e4bf1ee2400f](https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/cory-booker-rand-paul-team-up-on-sentencing-reform-bill/?utm_term=.e4bf1ee2400f).

<sup>93</sup> See Dara Lind, *Rand Paul is serious about ending mass incarceration*, Vox (Apr. 7, 2015), <https://www.vox.com/2015/4/7/8360047/rand-paul-president-reform-justice>.

<sup>94</sup> See *Friedman Interview*, supra note 7.

<sup>95</sup> See *Ruemmler Interview*, supra note 7.

4. 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.<sup>96</sup>

These factors do not, and did not to the White House Counsel's office, represent values or legal principles.<sup>97</sup> Instead, the authors of this criteria viewed each factor merely as a tool for shrinking the population of inmates eligible for clemency. Additionally, the criteria reflected the White House and DOJ's position that this initiative was not about leniency or giving otherwise guiltless people a second chance. Rather, the Clemency Initiative was designed to correct an injustice—the failure of Congress to make the FSA retroactive—in a manner that would not endanger the public, harm the clemency power, or substitute broader legislation for unilateral executive action.<sup>98</sup> Obtaining a commutation was designed to be difficult.<sup>99</sup>

The factors sought to accomplish what its authors believed was realistic.<sup>100</sup> In that sense, they arguably worked as intended. However, as is explained in more detail below, the fact that the six factors were not rooted in any principle beyond resource conservation made it easier for the White House to adjust the factors as time went on. Factors were privately weighted and re-weighted by the DOJ and White House, and additional criteria were included by, and solely applied by, President Obama. While many of these changes made it easier to move petitions to the President, it also resulted in confusion among attorneys tasked with vetting clemency petitioners who were not privy to the thinking of senior officials, making it difficult to predict what details in a petitioner's file the DOJ and White House were looking for.<sup>101</sup>

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<sup>96</sup> *DOJ Clemency Initiative*, *supra* note 35.

<sup>97</sup> Public safety could be an underlying principle given that violence is directly referenced in two of the six and not being a repeat offender is referenced in another. This is supported somewhat by Eggleston's later pre-occupation with limiting the chances of recidivism among clemency recipients. *See Eggleston Interview*, *supra* note 9. However, this principle was not brought up as an implicit or explicit value during the crafting of the six factors. *See Ruemmler Interview*, *supra* note 7.

<sup>98</sup> *See Ruemmler Interview*, *supra* note 7;

<sup>99</sup> *See id.*; *see also* Eggleston, *supra* note 9.

<sup>100</sup> After finalizing the six factors, Cole estimated through pure guesswork that as many as 1,200 people would end up receiving a commutation. *Cole Interview*, *supra* note 9. Ruemmler's estimates were similar. *Ruemmler Interview*, *supra* note 7.

<sup>101</sup> *See* Telephone Interview with Erin R. Collins, Assistant Professor of Law at University of Richmond School of Law and former Executive Director of the Clemency Resource Center (Jan. 28, 2019) [hereinafter *Collins Interview*]; *Eggleston Interview*, *supra*

### C. Reinvigorating Clemency

President Obama also wished to reinvigorate the clemency power. In his January 2017 *Harvard Law Review* article, President Obama makes clear that he understood the recent history of executive clemency and its dormancy in the preceding 50 years.<sup>102</sup> He wanted to “set a precedent” that would “make it easier for future Presidents, governors, and other public officials to use it for good.”<sup>103</sup> However, President Obama’s desire to “set a precedent” also inherently limited his options.

Members of the White House Counsel’s Office believed that any perceived failure of the Clemency Initiative by the public could set a precedent for future administrations to be even more conservative with clemency than was already the case.<sup>104</sup> As a result, the White House and DAG went about identifying potential risks of a more robust and systematic use of the clemency power.<sup>105</sup> The two obvious dangers identified were perceptions of favoritism and recidivism.<sup>106</sup> This made sense. Of the previous six presidencies, two contained scandals involving the granting of clemency to high-profile members of the sitting president’s political party (President Gerald Ford’s pardon of former President Richard Nixon<sup>107</sup> and President George H.W. Bush’s pardon of former Defense Secretary Caspar Weinberger and others implicated in the Iran-Contra scandal<sup>108</sup>) and one with allegations of personal impropriety (President William Clinton’s pardon of Mark Rich<sup>109</sup>). Additionally, publicized cases of individuals being released from prison early or for a short period of time going on to commit heinous acts cast a shadow. The White House feared another Willie Horton. Horton had raped a woman after escaping from

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note 9; *Cole Interview*, *supra* note 9; *Zauzmer Interview*, *supra* note 7.

<sup>102</sup> See Obama, *supra* note 37, at 835–36.

<sup>103</sup> *Id.* at 838.

<sup>104</sup> See *Freidman Interview*, *supra* note 7; see also *Ruemmler Interview*, *supra* note 7.

<sup>105</sup> See *Freidman Interview*, *supra* note 8; *Cole Interview*, *supra* note 9; see also *Ruemmler Interview*, *supra* note 7 (discussing the risks of perceived favoritism).

<sup>106</sup> *Cole Interview*, *supra* note 9; *Ruemmler Interview*, *supra* note 8; see also *Friedman Interview*, *supra* note 7.

<sup>107</sup> See Holson, *supra* note 63.

<sup>108</sup> See David Johnson, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails ‘Cover Up’*, N.Y. Times (Dec. 25, 1992), <https://archive.nytimes.com/www.nytimes.com/books/97/06/29/reviews/iran-pardon.html>.

<sup>109</sup> See Eric Lichtblau and Davan Maharaj, *Clinton pardon of Rich a saga of power, money*, L.A. Times (Feb. 18, 2001), <https://www.chicagotribune.com/sns-clinton-pardons-analysis-story.html>

prison while on a weekend furlough from a Massachusetts prison; the incident was used to attack then-democratic candidate and Massachusetts Governor Michael Dukakis during his 1988 presidential bid.<sup>110</sup> As will be outlined below, both the White House and the DAG established procedures designed to mitigate these risks.

#### IV. THE PROCESS

The Clemency Initiative employed a sequential set of procedures: a successful petition first made its way through Clemency Project 2014's ("CP 14")<sup>111</sup> process, followed by the DOJ's, followed by the White House's.<sup>112</sup> No group was completely independent of the other.<sup>113</sup> For instance, the DOJ told their contacts in the White House Counsel's office the resources they needed to meet the President's expectations, and both the White House and DOJ informed the leadership of CP 14 what was expected of them, particularly when it came to meeting deadlines.<sup>114</sup> However, the internal processes at the White House, DOJ, and CP 14 ran independent of any direct interference by any of the other two bodies.<sup>115</sup>

While the processes described below may appear to be excessive, it is important to remember that obtaining a commutation through this initiative was not designed to be easy.<sup>116</sup> Recipients of clemency through this process were understood to represent what a more generous use of executive clemency—without endangering the public—could look like.<sup>117</sup> Given these stakes, a longer, more arduous, and more thorough

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<sup>110</sup> See Maureen Down, *Bush Says Dukakis's Desperation Prompted Accusations of Racism*, N.Y. Times (Oct. 25, 1988), <https://www.nytimes.com/1988/10/25/us/bush-says-dukkakis-s-desperation-prompted-accusations-of-racism.html>.

<sup>111</sup> CP 14 was a large, privately run pro bono project tasked with identifying meritorious petitioners. *Clemency Project 2014*, Nat'l Ass'n of Criminal Defense Lawyers (last accessed Apr. 15, 2019), <https://www.nacdl.org/cp2014/>.

<sup>112</sup> See U.S. Dep't of Justice, Office of the Inspector Gen., Review of the Department's Clemency Initiative 24 (2018) [hereinafter *OIG CLEMENCY REPORT*], <https://oig.justice.gov/reports/2018/e1804.pdf>.

<sup>113</sup> As will be explained below, CP 14 coordinated with officials at the White House and DOJ. See *Cole Interview*, *supra* note 9; *Eggleston Interview*, *supra* note 9; *Felman Interview*, *supra* note 41. Likewise, the DOJ coordinated with and received oversight from officials at the White House. See *Ruemmler Interview*, *supra* note 8; *Eggleston Interview*, *supra* note 9.

<sup>114</sup> See *Cole Interview*, *supra* note 9; *Zauzmer Interview*, *supra* note 7.

<sup>115</sup> See *Cole Interview*, *supra* note 9; *Friedman Interview*, *supra* note 8; *Felman Interview*, *supra* note 41.

<sup>116</sup> See *Cole Interview*, *supra* note 9.

<sup>117</sup> See Obama, *supra* note 37, at 838 ("By shifting the narrative to the way clemency can

process was preferred.<sup>118</sup>

### A. Clemency Project 2014

CP 14, the makeshift organization developed by private attorneys and legal activists to help the government evaluate and filter potential beneficiaries of the Clemency Initiative, was one of the more complex aspects of the initiative. The effort was organized by five organizations: the National Association of Criminal Defense Lawyers (“NACDL”), the American Bar Association (“ABA”), Families Against Mandatory Minimums (“FAMM”), the American Civil Liberties Union (“ACLU”), and Federal and Public Community Defenders (“FPCD”).<sup>119</sup> These organizations were recruited by Cole prior to his January 2014 announcement because he did not believe DOJ had the capacity to filter clemency petitioners.<sup>120</sup> They would, together, “build the army of lawyers” believed to be needed.<sup>121</sup> In an effort to help build this army and keep its participants motivated, the private effort was named Clemency Project 2014 to “give [the effort] a sense of urgency.”<sup>122</sup>

Each organization brought its own expertise and resources. The ACLU contributed to most of the funding early on, FAMM knew the issues, the federal public defenders committed to taking up the bulk of the cases, and NACDL provided CP 14 infrastructure to build a database for collected clemency petitions.<sup>123</sup> In mid-2014, Cynthia Roseberry, a federal public defender based in Georgia, was tapped to serve as CP 14’s

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be used to correct injustices in the system — and reminding people of the value of second chances — I worked to reinvigorate the clemency power and to set a precedent that will make it easier for future Presidents, governors, and other public officials to use it for good.”); *see also* Eggleston, *supra* note 9.

<sup>118</sup> *See Cole Interview, supra* note 9.

<sup>119</sup> *Clemency Project 2014, supra* note 111.

<sup>120</sup> *See Cole Interview, supra* note 9. According to Felman, he and representatives of a variety of different organizations in the criminal justice arena were invited to a meeting with Cole prior to the New York Bar Association speech announcing the initiative. *See Felman Interview, supra* note 41. During this meeting, Cole told the group the basic outline of the Clemency Initiative but said that the administration had yet to determine the criteria that would be used to assess petitions and that the DOJ was going to need help from the private bar to represent the petitioners. *See id.*

<sup>121</sup> *Felman Interview, supra* note 41.

<sup>122</sup> *Id.*

<sup>123</sup> According to Felman, the ABA contributed warm bodies and lawyers early and later contributed financial resources to the CP 14 effort. *See id.*

Project Manager.<sup>124</sup> Taking on the job necessitated that she move to D.C. for several years and take a pay cut.<sup>125</sup> But Roseberry, whose mantra during her time at CP 14 was “let my people go,” believed the project was worth the personal cost.<sup>126</sup>

CP 14 had a difficult time obtaining the cooperation of the federal judiciary’s bureaucracy.<sup>127</sup> For instance, the Administrative Office of the U.S. Courts (the “AUCUS”) initially did not permit the Bureau of Prisons to release petitioners’ pre-sentence investigative reports (“PSR”s) to CP 14.<sup>128</sup> PSRs are all-encompassing documents that cover each inmates’ life story, including prior convictions, medical records, and family history.<sup>129</sup> Without the reports, CP 14 could not provide full assessments on petitioners to the DOJ.<sup>130</sup> Despite their importance, the issue over access to PSRs was not resolved until July 2015 – over a year after CP 14 was formed.<sup>131</sup> According to Deputy Pardon Attorney Lawrence Kupers, the failure to obtain PSRs caused significant delays in Office of Pardon Attorney (the “OPA”) OPA receiving clemency petitions.<sup>132</sup> Eggleston also believes that the PSR issue, and its resolution, had a significant impact on

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<sup>124</sup> Telephone Interview with Cynthia W. Roseberry, former Project Manager of Clemency Project 2014 (Jan. 25, 2019) [hereinafter *Roseberry Interview*].

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Having to navigate an unaccommodating judicial system also impeded CP 14’s efforts to recruit attorneys experienced in criminal sentencing law. Felman described how the Administrative Office of the U.S. Courts’ initial decision to bar federal public defenders from participating in the Initiative slowed down CP 14 in the beginning, as it had been assumed that the federal defenders would do much of the work. Excluding them forced CP 14 to rely on private sector attorneys, many of whom did not possess backgrounds in criminal or sentencing law, who would be working for CP 14 pro bono. *See Felman Interview, supra* note 41.

<sup>128</sup> According to the OIG, the Office of the Deputy Attorney General (“ODAG”) did not become aware of the issue until June 2014, following the Criminal Law Committee of the Judicial Conference’s determination not to permit CP 14 access to PSRs from BOP. OIG CLEMENCY REPORT, *supra* note 112, at 25.

<sup>129</sup> *Id.*

<sup>130</sup> *See Felman Interview, supra* note 41.

<sup>131</sup> According to the OIG, CP 14 was able to convince the courts that CP 14 could be trusted with PSRs and that BOP had to ensure that the transfer of this information was secure, including by updating BOP procedures to provide PSRs to CP 14. *See* OIG CLEMENCY REPORT, *supra* note 112, at 25. Felman also told the author that the deal he brokered included having CP 14 attorneys provide judges with notice that “unless you object in the next two weeks, the BOP will send the PSR.” *Felman Interview, supra* note 41. According to Felman, most judges did not object. *Id.*

<sup>132</sup> OIG CLEMENCY REPORT, *supra* note 112, at 26.

the volume of petitions that made their way to the President for determination.<sup>133</sup> These assessments are supported by OPA estimates that show petition submissions from CP 14 to OPA increased by over 430 percent between July 2015 and December 2015 compared to the previous six months.<sup>134</sup>

CP 14 was further handicapped by a policy issued by the Administrative Conference that barred participation by the federal public defenders.<sup>135</sup> Because CP 14 had originally planned on utilizing the expertise of the federal public defenders, their exclusion forced CP 14 to rely on pro bono attorneys from the private bar, many of whom did not have experience in matters of criminal law and could only work on petitions on a part-time basis.<sup>136</sup>

Another barrier was that the law firms that employed these attorneys wanted to limit their liability.<sup>137</sup> In response to their concerns, CP 14 drew up procedures for vetting clemency petitions; the procedures were considered excessively stringent by outside observers.<sup>138</sup> For instance, in order for a petition to be forwarded to the OPA it needed to be vetted by a CP 14 pro bono attorney and two separate committees at different points in the vetting process.<sup>139</sup> These two committees, the Screening and Steering Committees, each had exactly five members—one representative from each of the five organizations—that all had the power to veto a petition.<sup>140</sup>

The Screening and Steering Committees reviewed petitions submitted by participating attorneys and would either approve, reject, or return petitions and ask for more information.<sup>141</sup> They also operated sequentially. First, pro-bono attorneys were assigned cases and the contact information of two members of the Screening Committee by CP 14.<sup>142</sup> The attorney then reviewed the case and submitted an executive summary

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<sup>133</sup> See *Eggleston Interview*, *supra* note 9.

<sup>134</sup> OIG CLEMENCY REPORT, *supra* note 112, at 26 (Figure 5).

<sup>135</sup> See Alia Malek & Evan Hill, *Federal defenders barred from massive clemency drive*, Al Jazeera Am. (Aug. 1, 2014), <http://america.aljazeera.com/articles/2014/8/1/drugs-clemency-attorneys.html>.

<sup>136</sup> See *Felman Interview*, *supra* note 41; *Roseberry Interview*, *supra* note 124.

<sup>137</sup> *Eggleston Interview*, *supra* note 9.

<sup>138</sup> See *Felman Interview*, *supra* note 41.

<sup>139</sup> OIG CLEMENCY REPORT, *supra* note 112, at 22–24.

<sup>140</sup> *Id.* at 23.

<sup>141</sup> *Felman Interview*, *supra* note 41.

<sup>142</sup> OIG CLEMENCY REPORT, *supra* note 112, at 24.

to the Screening Committee.<sup>143</sup> This committee met once a week to review executive summaries.<sup>144</sup> If the executive summary received a favorable review by the Screening Committee, it would be submitted to the Steering Committee—which also met at least once a week for further review.<sup>145</sup> If, finally, the Steering Committee gave the petition a green light, the petition would be submitted to the OPA.<sup>146</sup>

On the one hand, these procedures helped pro-bono attorneys and their law firms feel more comfortable working with CP 14, and it also gave them the means to work through complex and unfamiliar aspects of federal criminal and sentencing law.<sup>147</sup> On the other hand, given that many pro-bono attorneys were already inexperienced and sometimes unreliable, the added procedures created such a sluggish pace for vetting petitions that Eggleston, Cole, and Yates (Cole's successor as DAG) frequently chided CP 14 leadership for not getting more petitions to the DOJ.<sup>148</sup>

While Cole has since expressed some skepticism over CP 14's extensive processes, he did not think his input or evaluation of CP 14 processes was of great importance.<sup>149</sup> Because leniency was not the original purpose of the initiative, Cole was fine with CP 14 adding layers to the process.<sup>150</sup> What was important to Cole was that the petitions filtered by CP 14 objectively met each of the six factors, and that this was separate from any additional analysis or opinion on how to read the facts of their files – a task he did not believe CP 14 effectively did during his time as DAG.<sup>151</sup>

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<sup>143</sup> *Id.* (fig. 5).

<sup>144</sup> *Felman Interview*, *supra* note 41.

<sup>145</sup> *Id.*; OIG CLEMENCY REPORT, *supra* note 112, at 24.

<sup>146</sup> OIG CLEMENCY REPORT, *supra* note 112, at 24.

<sup>147</sup> *Felman Interview*, *supra* note 41, at 812–13.

<sup>148</sup> OIG CLEMENCY REPORT, *supra* note 112, at 23 (“Yates believed that CP 14’s review process caused delays and that ‘bureaucracy may have bogged things down.’”).

<sup>149</sup> In his discussion with the author, Cole suggested that many of CP 14’s layers were redundant and unnecessary. *Cole Interview*, *supra* note 9.

<sup>150</sup> The interpretation of fairness, and how to judge what exactly is fair, changed over time. As will be explained below, Eggleston suggested that while there was not a change in the view that the purpose of the initiative was fairness and not leniency, there was a different conceptualization of what fairness meant and what the initiative could mean between himself, Yates, and Zauzmer versus the concepts held by Ruemmler and Cole. *See id.*; *Eggleston Interview*, *supra* note 9.

<sup>151</sup> *Cole Interview*, *supra* note 9.



## B. Department of Justice

Unlike CP 14 and the White House, the DOJ's role in the Clemency Initiative needs to be divided into two eras: the Ronald Rodgers/Deborah Leff Era (approximately January 2014–February 2016)<sup>152</sup> and the Bob Zauzmer Era (approximately February 2016–January 2017).<sup>153</sup> While the goals of the Clemency Initiative and the factors used to evaluate petitioners officially remained the same, these two eras at the DOJ were blatantly different in terms of the resources dedicated to the effort and the volume of petitions that made their way to the White House.<sup>154</sup> Though many of the differences between these eras have been documented by the DOJ's Office of the Inspector General,<sup>155</sup> this article will try to add further context to the DOJ and OPA's internal processes, how they developed, and why they developed the way they did.

### 1. *The Rodgers/Leff Era (January 2014–February 2016)*

The DOJ had two separate tracks for clemency review over the course of the Initiative: petitions filed through the Clemency Initiative and petitions filed via the usual method, forms, and criteria applied by

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<sup>152</sup> These dates correspond with Ronald Rodgers and Deborah Leff's tenure as Pardon Attorney during the Clemency Initiative. Dafna Linzer, *Justice finally comes to the pardons office and perhaps to many inmates*, MSNBC (Apr. 23, 2014), <http://www.msnbc.com/msnbc/justice-finally-comes-the-pardons-office>. Despite requests by the author, Ms. Leff chose not to participate in this article. As such, many of the events and circumstances of her tenure, and any insights that might be derived from them, will be missing from this article. However, shortly after her resignation, Greg Korte, a journalist at USA TODAY, reported on her resignation letter and the circumstances that, Leff claims, led to her resignation. Gregory Korte, *Former administration pardon attorney suggests broken system in resignation letter*, USA TODAY (Mar. 28, 2016), <https://www.usatoday.com/story/news/politics/2016/03/28/former-administration-pardon-attorney-suggests-broken-system-resignation-letter-obama/82168254/>.

<sup>153</sup> These dates correspond with Zauzmer's tenure as acting-Pardon Attorney. *Justice Department Announced New Acting Pardon Attorney*, U.S. Dep't of Justice (Feb. 3, 2016), <https://www.justice.gov/opa/pr/justice-department-announces-new-acting-pardon-attorney>.

<sup>154</sup> While the dates are demarcated by the tenures of two Pardon Attorneys—Leff and Zauzmer—the differences between the eras could just as easily have been the Cole-Leff era and the Yates-Zauzmer era. However, based on the overlap of many of the officials in the earlier era with those of the second, government reports on the impact of Leff's resignation and replacement by Zauzmer, as well as conversations with other officials, the author believes it is safer to place the line at Zauzmer's appointment as acting Pardon Attorney in February 2016.

<sup>155</sup> See generally OIG CLEMENCY REPORT, *supra* note 112.

OPA.<sup>156</sup> Inmates could apply for consideration under both tracks, but the two had different criteria and received different levels of attention.<sup>157</sup> This resulted in conflicts between Cole and OPA, first led by Ronald Rodgers until April 2014 and then led by Deborah Leff, on the grounds that this was unfair to clemency petitioners who were not eligible under the Clemency Initiative and would effectively be pushed to the back of the line.<sup>158</sup> The conflict over priorities at OPA became so intense that Cole felt it necessary to cut out OPA entirely from the planning stages of the initiative.<sup>159</sup> According to Rodgers, because Cole did not consult OPA, he did not have a clear understanding of OPA's resource limitations.<sup>160</sup> It also resulted in frustration between Rodgers's successor, Leff, and Cole. For instance, upon assuming the role of Pardon Attorney, Leff asked Cole for a large staff increase that Cole did not have the funds to provide.<sup>161</sup> According to a report authored by the DOJ's Office of the Inspector General (the "OIG"), the ongoing philosophical disagreement between the DAG and OPA harmed OPA's ability to manage its role in the initiative.<sup>162</sup>

Cole wanted the initiative's process for reviewing petitions to be an "objective exercise."<sup>163</sup> This meant that anyone applying for commutations within the Clemency Initiative had to meet all six criteria, and he wanted CP 14 to tell the DOJ if petitioners fell "within the criteria or not."<sup>164</sup> Cole assessed each factor stringently, and failing to meet even one meant the candidate's petition would not receive a favorable recommendation from his office.<sup>165</sup> According to the Office of the Inspector General, this particular style of review came to be known as "hard-and-fast": each petition would receive a hard look and a fast determination based on whether it met each of the six criteria.<sup>166</sup> Cole believed that such

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<sup>156</sup> A more thorough overview of the DOJ's normal clemency petition and review process can be found in the OIG CLEMENCY REPORT. *Id.* at 2–3.

<sup>157</sup> *Id.* at 34; see also *Cole Interview*, *supra* note 9; *Zauzmer Interview*, *supra* note 7.

<sup>158</sup> OIG CLEMENCY REPORT, *supra* note 112, at 24.

<sup>159</sup> *Cole Interview*, *supra* note 9; see also OIG CLEMENCY REPORT, *supra* note 112, at 12.

<sup>160</sup> OIG CLEMENCY REPORT, *supra* note 112, at 11–12.

<sup>161</sup> *Cole Interview*, *supra* note 9.

<sup>162</sup> OIG CLEMENCY REPORT, *supra* note 112, at 12.

<sup>163</sup> Cole further added that he "did not want the private bar to become the private advocates." *Cole Interview*, *supra* note 9.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> OIG CLEMENCY REPORT, *supra* note 112, at 24.

an approach would be an efficient way for CP 14 and OPA to locate meritorious petitions.<sup>167</sup>

Cole added two factors to the six public factors for evaluating petitions that remained in effect during his time as DAG. First, he did not want any offenses involving firearms in the initial batches of petitions or where the circumstances surrounding the petitioner's offense painted them in a less than sympathetic light.<sup>168</sup> Cole believed that opponents of President Obama would look for ways to kill the initiative prematurely, so he wanted time to get the public used to regular batches of commutations.<sup>169</sup> Including, early on, persons with firearms-related offenses or whose records contained other blemishes.<sup>170</sup> Second, petitioners needed to have no other means of shortening their sentences. In Cole's view, the Clemency Initiative was a special and extraordinary opportunity for inmates who had no other means of relief; if they could still appeal or obtain early release through good time served without receiving a commutation, he felt they should pursue those avenues instead.<sup>171</sup>

The hard-and-fast approach led to friction and confusion between Cole, OPA, and CP 14. In the case of CP 14, Cole felt that pro bono attorneys were advocating for petitioners regardless of whether or not they fell within his narrow definition of the factors, and he occasionally chastised their leadership.<sup>172</sup> There were also concerns later on that CP 14 was not doing enough to get petitions to the DOJ within previously articulated time limits.<sup>173</sup> CP 14 leadership publicly recognized these concerns and made efforts to address them.<sup>174</sup>

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<sup>167</sup> *Cole Interview, supra* note 9.

<sup>168</sup> *Id.* While one could try to develop a standard for what "in a less sympathetic light" might look like, the truth is that it may well just be guesses for how one might think the media and the public will react to the information.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> OIG CLEMENCY REPORT, *supra* note 112, at 24.

<sup>174</sup> See Gregory Korte, 'The clock is running' on Obama clemency initiative, USA Today (Jun. 24, 2015), <https://www.usatoday.com/story/news/politics/2015/06/24/clemency-initiative-clock-is-running/29128091/>.

[Jim] Felman said lawyers also need to understand that they're asking the president for mercy, and so need to be forthright about the strengths and weaknesses of the case. "Aggressive lawyering is not necessarily going to pay off," he said. The cases don't have to be perfect. Felman said the Justice Department has signaled a willingness to consider cases that don't meet all of the criteria. "Some of the criteria are less definite than others. Like, for example, a clean record in prison. Nobody has a perfect record in prison," he said.

## 2. *The Zauzmer Era (Feb. 2016–Jan. 2017)*

Deborah Leff resigned as Pardon Attorney in February 2016.<sup>175</sup> Yates and Zauzmer, who replaced Leff following her resignation in February 2016, took a more flexible view of the six factors than Cole.<sup>176</sup> However, Zauzmer and his staff viewed failure to satisfy either of the first two factors—1) no violent history and 2) would receive a significant sentencing reduction if convicted of the same offense today—as deal breakers.<sup>177</sup> The White House Counsel’s Office under Eggleston also gradually began taking a more lenient view of the factors.<sup>178</sup> In the interest of fairness, shortly after being named acting Pardon Attorney, Zauzmer gave a second look at petitions that received unfavorable recommendations under Cole’s more rigid interpretation.<sup>179</sup> The vast majority of these petitions did not receive a favorable recommendation, but certain ones did.<sup>180</sup>

There is some question as to why this occurred. In Eggleston’s opinion, he, Yates, and Zauzmer, developed a broader view of how the initiative could become a beacon for future criminal justice reform as the initiative progressed over time.<sup>181</sup> However, Zauzmer never expressed that view, nor did there appear to be any sharp disagreement over the initiative’s goals when the author spoke with others.<sup>182</sup>

Other reasons that have been outlined publicly or to the author—such as an increase in OPA’s staffing,<sup>183</sup> Zauzmer’s own managerial competence,<sup>184</sup> and bringing OPA, the DAG, and the White House in sync

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*Id.*

<sup>175</sup> Korte, *supra* note 143.

<sup>176</sup> OIG CLEMENCY REPORT, *supra* note 112, at 31.

<sup>177</sup> Zauzmer Interview, *supra* note 7.

<sup>178</sup> Eggleston Interview, *supra* note 9.

<sup>179</sup> See Zauzmer Interview, *supra* note 7; Cole Interview, *supra* note 9. When asked about Zauzmer’s interpretation of the factors versus his own, Cole expressed no opposition and stated that it was always his intention to loosen the interpretation of the factors once the public had time to adjust. Cole Interview, *supra* note 9.

<sup>180</sup> Eggleston Interview, *supra* note 9.

<sup>181</sup> *Id.*

<sup>182</sup> See Zauzmer Interview, *supra* note 7; Ruemmler Interview, *supra* note 7; Cole Interview, *supra* note 9. It is possible that Yates, whose tenure as DAG lasted from January 2015 to January 2017, shares this view. However, Yates did not respond to requests by the author to participate in this project.

<sup>183</sup> OIG CLEMENCY REPORT, *supra* note 112, at 11.

<sup>184</sup> Zauzmer received praise in every interview the author had where his role was discussed. See Felman Interview, *supra* note 41; see also Eggleston Interview, *supra* note 9. Readers should review the OIG’s report for a more complete overview of specific mana-

over the initiative's importance—may have each contributed to the increasing volume of clemency petitions the President received in the Clemency Initiative's final year. Regardless, the increased number of favorable determinations for clemency petitions from February 2016 to the initiative's completion in January 2017, made it clear that something changed after Zauzmer took over OPA.<sup>185</sup> For Zauzmer—who volunteered to lead OPA following Leff's resignation—the animating cause of the initiative was clear. “The political leaders thought it was necessary to adjust the sentencing policies from the 90s,” he said. “And for me it was a matter of fairness.”<sup>186</sup> Zauzmer further noted that the initiative was itself a special form of relief that was not necessarily replicable in the future. “The hope,” he said, “is you rarely have to undertake a project like this. The Clemency Initiative was unusual due to the unusual legal circumstances where the law changes and sentences are reduced over time.”<sup>187</sup>

### C. The White House

Neil Eggleston, President Obama's White House Counsel from May 2014 through the end of the administration, consistently kept one thing in mind when managing the White House's process: the only person with any constitutional power or responsibility was President Obama.<sup>188</sup> While Eggleston believed that he and others could play an advisory role, the President had to make the final decision.<sup>189</sup> The processes the White House subsequently developed reflected that belief. In order to evaluate the White House's role in the Clemency Initiative, it is necessary to outline what choices and preferences President Obama made and why.<sup>190</sup>

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gerial and process changes Zauzmer and Yates implemented beyond the six factor criteria. *See generally* OIG CLEMENCY REPORT, *supra* note 112.

<sup>185</sup> According to OIG estimates, DOJ provided recommendations to the White House on 1,755 petitions by the end of 2015 compared with 13,892 recommendations by the initiative's end in January 2017. OIG CLEMENCY REPORT, *supra* note 112, at ii.

<sup>186</sup> Zauzmer Interview, *supra* note 7.

<sup>187</sup> *Id.*

<sup>188</sup> Eggleston Interview, *supra* note 9.

<sup>189</sup> *Id.*

<sup>190</sup> As will be outlined later, one of the criticisms of the Clemency Initiative stems, in part, from the critique that the over-personalized nature of the way it was conducted resulted in subjective, uneven, and unfair outcomes for petitioners. While this criticism is well taken, it should be recognized that the Constitution makes such subjectivity inherent in the exercise of the clemency power. Unlike executive branch agencies whose rule making procedures generally require a degree of rationality and opportunity for public comment, the clemency power is not subject to any limitations or review beyond what any one individual President subjectively imposes upon himself or herself.

President Obama, Ruemmler, and Eggleston wanted the clemency review process to be individualized.<sup>191</sup> According to Eggleston, this was because President Obama believed that, regardless of whatever procedural safeguards he put in place, each grant of clemency would be a political and public safety risk.<sup>192</sup> As a result, he gave each petition a personal and individualized look to reassure himself, the public, and future presidents that he was taking full responsibility.<sup>193</sup> The decision to individualize the clemency review process was ultimately reflected in every level of the petition vetting process at the White House, which frequently meant sacrificing a literal reading of each of the six factors.

In establishing procedures at the White House, Ruemmler was aware of past scandals surrounding clemency.<sup>194</sup> This helped her team identify favoritism and recidivism as the two principal risks.<sup>195</sup> In mid-2014, Ruemmler assigned her office's nominations vetting team to take the lead in reviewing Clemency Initiative petitions because of their experience and bandwidth.<sup>196</sup> The vetting team's responsibilities in managing the White House process grew as political circumstances and administration priorities changed.<sup>197</sup> After the Democratic Party lost its Senate majority in the 2014 midterm elections, Eggleston, who had by then replaced Ruemmler, increased the vetting team's responsibility in running the White House's processes because their job—ushering nominees through the Senate confirmation process—was essentially over. The White House did not believe that a GOP Senate Majority would confirm its nominees.<sup>198</sup> According to Josh Friedman, a member of the Counsel's vetting team, those assigned to clemency spoke with Ruemmler and her deputy, Jonathan Su, on multiple occasions in order to get a handle on the historical foundations of the clemency power and processes already in place at

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<sup>191</sup> *Ruemmler Interview, supra note 7; see also Eggleston Interview, supra note 9.*

<sup>192</sup> *Eggleston Interview, supra note 9* (“[President Obama and I] wanted to do this individually because he thought, ‘I’m taking a risk and if I take a risk and there’s not much blowback, other presidents will be more likely to take the risk.’”).

<sup>193</sup> *Id.*

<sup>194</sup> *Ruemmler Interview, supra note 7.*

<sup>195</sup> *See id.; see also Friedman Interview, supra note 7.*

<sup>196</sup> *Friedman Interview, supra note 7.*

<sup>197</sup> *Eggleston Interview, supra note 9.*

<sup>198</sup> According to Eggleston, the calculation that the Senate would be unlikely to confirm any nominees remained unchanged following the death of Justice Antonin Scalia in February 2016. *Id.* Rather than reassign the vetting team, Eggleston largely assigned other attorneys in his office to vet potential Supreme Court nominees and kept the vetting team mainly focused on the Clemency Initiative. *Id.; see also Friedman Interview, supra note 7.*

the DOJ and the White House.<sup>199</sup>

It became apparent early on in Eggleston's tenure that strict adherence to the six factors was not going to provide the administration with an objective or useful formula when evaluating petitions.<sup>200</sup> The actual evaluation of petitions and pre-sentence reports drove home to the vetting team that "different conduct is different," and that "good behavior in prison does not mean no infractions."<sup>201</sup> As a result, while the White House did what it could to ensure that the process was as objective as possible, there was at least an implicit recognition early on that it would be impossible to keep out all subjective standards when evaluating a petition.<sup>202</sup> This was particularly the case in terms of evaluating a petitioner's likelihood of recidivism.<sup>203</sup> Attorneys evaluated each petitioner's file which included, but was not limited to, the circumstances of the arrest, an overview of their time in prison, the recommendations of DAG and OPA, and any possible connections they might have to the President. Some aspects of these investigations were conducted by Researchers in the White House Communications Office. In particular, these researchers compiled news articles concerning petitioners, the contexts of their arrests as they were reported at the time, as well as any findings of ties to President Obama. However, these addendums to the overall files were purely exploratory in nature and had no bearing on the ultimate success or failure of an individual petition.<sup>204</sup>

All petitions reviewed by the vetting team, whether they received a favorable or unfavorable recommendation, were forwarded to Eggleston who reviewed each petition and gave his own recommendation.<sup>205</sup> Following Eggleston's review, a memo containing the recommendations from the White House and DOJ were placed into binders that were handed

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<sup>199</sup> *Friedman Interview, supra* note 7.

<sup>200</sup> According to Friedman, this realization came as the White House actually began to receive petitions to evaluate. *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> According to Friedman, the vetting team did "everything in our power to be objective and not arbitrary." *Id.* However, he also stated that there was no way to be entirely objective given the wording of the some of the factors. *Id.* For instance, there would inevitably be a degree of subjectivity in determining what constitutes a history of criminal behavior. *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* As is noted in the acknowledgements, the author of this article was a member of the Research staff during this period.

<sup>205</sup> Eggleston states that he was able to review each petition on Saturdays in his office while "listening to classical music." *Eggleston Interview, supra* note 9.

to the President for his final determination.<sup>206</sup> The President liked to receive this information in paper form in order to give himself time to think through the information that was being put before him.<sup>207</sup> After receiving and reviewing these binders, the President's assistant almost always called Eggleston to come speak with the President. During these meetings, the President would go through individual petitions and ask about why a particular recommendation was made and what a particular point in the general file meant. Sometimes, the President would request more specific background information that the Counsel's office would then collect and deliver for his review. Each memo contained a decision line outlining the President's determination to grant or not grant clemency, as well as the timing for release of the petitioner. This final review by the President was, according to Eggleston, the ultimate "quality control" in the Clemency Initiative and lasted until the very end of the administration.<sup>208</sup>

President Obama was consistently concerned with public safety. According to Eggleston, the President "didn't care" about the politics, but he did believe that a clemency recipient committing a "heinous crime" following release could stop the Clemency Initiative in its tracks.<sup>209</sup> Eggleston believed that the initiative was a "fragile program" due to the inherent risk that recipients could go on to commit well-publicized crimes after receiving clemency.<sup>210</sup> As a result, Obama, Eggleston, and the White House Counsel's vetting team tried to look for characteristics that might be associated with higher risks of recidivism and violence. Certain

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<sup>206</sup> Unlike other officials involved in the initiative, the President did not have the luxury to devote nearly all of his time to evaluating clemency petitions. As a result, he would review petitions whenever he had the time and not at regular intervals. *Id.*

<sup>207</sup> Eggleston stated that President Obama had a general preference for paper documents, not specific to clemency petitions. *Id.*

<sup>208</sup> In a story conveyed by Eggleston to the author, Eggleston delivered a binder to President Obama on or around Friday January 13, 2017. The President, thinking this was the final binder, exclaimed that he was "glad this is over." Eggleston then informed the President that he had another binder coming to the President the following Monday. *Id.*

<sup>209</sup> This concern was expressed shortly after the Initiative's rollout. *Id.* Scott Burns, then-Executive Director of the National District Attorneys Association, stated, "[p]rosecutors' fears . . . are that our low level of serious crime in America will begin to rise — and nobody will monitor the cost of re-arresting and re-prosecuting offenders when they commit new crimes." Liz Halloran, *A Path Out Of Prison For Low-Level, Nonviolent Drug Offenders*, NPR (Apr. 23, 2014), <https://www.npr.org/sections/itsallpolitics/2014/04/23/306158891/a-path-out-of-prison-for-low-level-nonviolent-drug-offenders>.

<sup>210</sup> *Eggleston Interview*, *supra* note 9.



characteristics that were sought in a petition were obvious: the petitioner's record in prison, the original crime, whether law enforcement was hurt, whether someone was killed, and whether they were members of a crime ring with violence at its core.<sup>211</sup> But other characteristics that the White House used in their evaluations were less obvious. One example of this was ties to the outside world and whether petitioners kept in touch with their families while incarcerated. According to Eggleston, the White House tried to determine whether petitioners were in a position to be ready to re-enter society and actually take full advantage of a second chance.<sup>212</sup> Having intangible things, like a family with whom a petitioner maintained contact, were seen as signs that the petitioner would, if granted a commutation, find it easier to re-integrate into society.

Beyond vetting, the White House also undertook a series of steps to ensure that those who actually did receive clemency went on to live law abiding lives. Perhaps the greatest example of this was the letter each recipient received from President Obama.<sup>213</sup> These letters congratulated the recipient, outlined hard truths on what may lie ahead, and ended with the President expressing his belief in the recipient's potential to change their lives for the better.<sup>214</sup> "I am granting your application because you

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> One such letter—whose recipient's name has been left out for their privacy—reads:

"Dear [Clemency Recipient],

I wanted to personally inform you that I am granting your application for commutation.

The power to grant pardons and clemency is one of the most profound authorities granted to the President of the United States. It embodies the basic belief in our democracy that people deserve a second chance after having made a mistake in their lives that led to a conviction under our laws. Thousands of individuals have applied for commutation, and only a fraction of these applications are approved.

I am granting your application because you have demonstrated the potential to turn your life around. Now it is up to you to make the most of this opportunity. It will not be easy, and you will confront many who doubt people with criminal records can change. Perhaps even you are unsure of how you will adjust to your new circumstances.

But remember that you have the capacity to make good choices. By doing so, you will affect not only your own life, but those close to you. You will also influence, through your example, the possibility that others in your circumstances get their own second chance in the future.

I believe in your ability to prove the doubters wrong, and change your life for the better. So good luck, and Godspeed.

Sincerely,

have demonstrated the potential to turn your life around,” he wrote. “I believe in your ability to prove the doubters wrong, and change your life for the better.”<sup>215</sup> Such letters are not only heartwarming but a calculated attempt by the White House and the President to minimize the likelihood that clemency recipients would go back to engaging in criminal activity.<sup>216</sup>

## V. CRITICISMS

By January 20, 2017, President Obama commuted the sentences of just under 1,700 persons through the Clemency Initiative, more than any other president in history.<sup>217</sup> Despite these numbers, the initiative itself has not received universal acclaim and remains controversial among some legal scholars favorable to criminal justice reform.<sup>218</sup> In the context of the overall federal prison population—there were an estimated 81,900 federal inmates serving time for a drug offense—1,700 may seem modest.<sup>219</sup> Additionally, some of the criticism brought by scholars like Barkow and Osler towards the Obama administration appear harsh given the limited criticism, and even praise, directed at the Trump administration’s relatively meager efforts—as of this writing, President Trump has commuted 21 sentences<sup>220</sup>—in the area of clemency.<sup>221</sup>

Much of the scrutiny directed at the Clemency Initiative may be tactical and, as a result, exaggerated. For instance, Osler explained that

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Barack Obama”

Letter from Barack Obama, U.S. President, to Clemency Recipient (Aug. 3, 2016).

<sup>215</sup> *Id.*

<sup>216</sup> *Eggleston Interview*, *supra* note 9.

<sup>217</sup> Gregory Korte, *Obama grants 330 more commutations, bringing record 1,715*, USA TODAY (Jan. 19, 2017), <https://www.usatoday.com/story/news/politics/2017/01/19/obama-grants-330-more-commutations-bringing-total-record-1715/96791186/>.

<sup>218</sup> Larkin, *supra* note 65, at 149 (“It did not fall as far short of expectations as did ‘New Coke,’ but it could have accomplished far more than it did.”); *see also* Love, *supra* note 3.

<sup>219</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, Prisoners in 2016 (Aug. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

<sup>220</sup> U.S. Dep’t of Justice, Office of the Pardon Attorney, Clemency Statistics (last visited Mar. 1, 2020) [hereinafter CLEMENCY STATISTICS], <https://www.justice.gov/pardon/clemency-statistics>.

<sup>221</sup> *See generally* Rachel Barkow, Mark Holden, and Mark Osler, *The Clemency Process Is Broken. Trump Can Fix It.*, The Atlantic (Jan. 15, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enoughwe-need-clemency-reform/580300/>.

during President Obama's second term, he and Barkow hired a former Justice Department spokesperson to assess how best to advocate for clemency process reform. According to Osler, they were told that they should not be shy with their public criticisms of the initiative because the Obama administration, while annoyed, would still internalize the criticisms and make changes accordingly.<sup>222</sup> However, while such tactics might yield positive results under one administration, it is not difficult to imagine how those same tactics might yield negative results under another, resulting in warped perceptions of success and failure.

Regardless of the reasons, it is important to take the criticisms seriously on their own merits. For instance, Barkow and Osler disagree with how the initiative was conducted at the institutional and process level.<sup>223</sup> They, as well as others who worked with petitioners, argue that what the initiative delivered did not live up to its promise.<sup>224</sup> This section will attempt to outline and address these critiques and try to reconcile some of these criticisms with the Clemency Initiative's goals and results. While the points of controversy outlined below are not exhaustive, they are some of the most substantive and persistent questions that have arisen concerning the initiative.<sup>225</sup>

#### A. The CP 14 Process Was Too Cumbersome

One line of criticism directed towards the initiative was its layered processes. According to Osler, successive administrations have added

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<sup>222</sup> Interview with Mark W. Osler, Professor and Robert and Marion Short Distinguished Chair in Law at the University of St. Thomas School of Law (Jan. 18, 2019) [hereinafter *Osler Interview*].

<sup>223</sup> Barkow, Holden and Osler, *supra* note 4; *see also* Osler, *supra* note 4.

<sup>224</sup> *See Collins Interview, supra* note 101; *Osler Interview, supra* note 222; Larkin, *supra* note 65.

<sup>225</sup> An example of a controversy that is not outlined in detail, though is considered important and persistent by the author, concerns the Obama administration's decision not to grant clemency to non-citizens. It does not appear to the author that the President's decision to not include non-citizens was in response to philosophical objections from the DOJ. This assessment is based on the author's interviews with Felman, who told the author that "Sally Yates looked me in the eye and said non-citizens would be included." Felman also hypothesized that "Obama saw this as an act of grace to be conferred upon citizens." *Felman Interview, supra* note 41. However, there is another possibility hinted by Cole when he told the OIG that he believed the DOJ "should channel its limited resources to inmates who, if granted clemency, would be returning to U.S. communities as opposed to non-citizen inmates, who would instead be immediately deported." OIG CLEMENCY REPORT, *supra* note 112, at 32. This hypothesis seems consistent with the President and the White House's non-public criteria—outlined above—concerning a petitioner's likelihood of recidivism and being able to use a second chance.

layers to the clemency review process since the tenure of President Lincoln.<sup>226</sup> Whereas a petitioner, or representative of a petitioner, in the mid-19<sup>th</sup> century could reasonably expect to meet directly with a sitting president to plead their case, a petitioner in 2013 had as many as 7 levels of review before receiving a final determination by the President, each adding complexity and decreasing the chances of a successful outcome for the petitioner. According to Osler, pre-Clemency Initiative layers of review included:

1. Submitted to the staff of the Pardon Attorney, and then reviewed by that staff;
2. Reviewed by the Pardon Attorney;
3. Reviewed by the staff of the Deputy Attorney General;
4. Reviewed by the Deputy Attorney General;
5. Reviewed by the staff of the White House Counsel;
6. Reviewed by the White House Counsel; and
7. Sent to the President for consideration.<sup>227</sup>

Critics assert that rather than decrease the number of layers between a petitioner and the president, CP 14 created as many as 5 new layers to the clemency review process, all of which unnecessarily hampered President Obama's ability to take up a large number of clemency petitions.<sup>228</sup>

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<sup>226</sup> Osler uses the story of the family member of a condemned soldier going directly to the White House and pleading directly to President Lincoln to make the point that few barriers—if any—existed between a petitioner and the president. Mark Osler, *Fewer Hands, More Mercy: A Plea For A Better Federal Clemency System*, 41 VT. L. REV. 465, 466–67 (2017), <http://lawreview.vermontlaw.edu/wp-content/uploads/2017/05/03-Osler.pdf>.

<sup>227</sup> *Id.* at 468.

<sup>228</sup> The five additional layers Osler identified include:

- 1) Screened by a CP 14 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; and
- 5) Returned to the lawyer, then returned to and reviewed by CP 14 as a petition.

*Id.* Osler explicitly argues that the root of why the Obama administration was, in his opinion, “so slow to take up a significant number of clemency cases . . . lies in the layers of redundant bureaucracy” in place before CP 14 and added by CP 14. *See id.* at 484–85.

This is not an isolated view. Cole, Zauzmer,<sup>229</sup> and Eggleston<sup>230</sup> all expressed some frustration that CP 14 did not adequately meet their needs. All three cited the cumbersome processes that CP 14 put in place to some degree or another, though the emphasis each has placed differs depending on where they were in the life of the initiative.<sup>231</sup>

There is an equally likely view that the bottleneck at the CP 14 level came as a result of decisions by the administrative courts. This is a view held by Jim Felman, the ABA's representative on CP 14's Steering Committee. In his opinion, CP 14 was "rusty at the beginning" because it was receiving "raw data."<sup>232</sup> Felman cites the decision by the U.S. administrative courts to bar federal public defenders from helping the Clemency Initiative, the difficulty pro bono attorneys had with obtaining petitioner's PSRs, and the failure of some pro bono attorneys to complete assigned work as the primary causes of CP 14's slow pace.<sup>233</sup>

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<sup>229</sup> According to the OIG, Zauzmer believed that CP 14 was being too cavalier with the initiative's deadlines. OIG CLEMENCY REPORT, *supra* note 112, at 24. The deadline OPA originally gave CP 14 for submitting petitions was August 31 2016. *Id.* at 24. Even still, CP 14 continued to submit petitions to OPA as late as January 2017. *Id.* at 24. The fact that pro bono attorneys were submitting petitions as late as they were left Zauzmer "shocked." *Id.*

<sup>230</sup> In Eggleston's view, the desire by CP 14 to insulate their pro-bono attorneys from liability was both misplaced and a reflection of their failure to understand their role in the clemency process. In his view, large law firms assign attorneys to pro-bono cases all the time without the kind of processes and institutions built within CP 14 for evaluating petitions. On top of that, Eggleston pointed out that while a poorly written petition sent to the President had maybe a lower chance of success than a perfectly written petition, a petition that was never received by the President had a "less than zero percent" chance of success. He further believed it was the job of CP 14, and the DOJ, to get petitions to the White House and the President, not to make the petitions perfect. On multiple occasions, Eggleston told CP 14 officials not to make petitions "works of art. Just write it up and get it to us because the President is the only person who is going to decide." *Eggleston Interview, supra* note 9.

DAGs Jim Cole and Sally Yates gave CP 14 similar instructions. According to the OIG, both Cole and Yates told CP 14:

"(1) to prioritize drug offenders with lengthy sentences who had good conduct in prison; (2) to submit those petitions as soon as possible, even if the petition was not as perfect or detailed as the lawyer likes; (3) that the President would not be able to act on petitions submitted only a few months before January 2017 so that time was of the essence; and (4) that CP 14 attorneys did not need perfect information to submit petitions."

OIG CLEMENCY REPORT, *supra* note 112, at 23.

<sup>231</sup> OIG CLEMENCY REPORT, *supra* note 112, at 23.

<sup>232</sup> *Felman Interview, supra* note 41.

<sup>233</sup> *Id.*

This is certainly possible. The decision to grant CP 14 attorneys access to PSRs as well as to bar federal public defenders has been cited by others as being major obstacles.<sup>234</sup> Regardless, if one assumes that the layers did slow the process and excessively weed out petitions, it is not clear that this ran counter to the initiative's limited goals to correct a particular injustice. In the individualized system that the President, Ruemmler, and Eggleston wanted, clemency is not necessarily obtained easily. However, the individualized process sought by the initiative's architects was one where the President, and not CP 14's Steering Committee, gave the individualized look.<sup>235</sup> The confusion over this point, and perhaps the result of limited resources, bureaucratic obstacles, and lack of time, may explain some of the delays.

### B. Obama Missed an Opportunity for Structural Reform

Another criticism focuses on the Obama administration's decision to operate the initiative through traditional DOJ and Office of Pardon Attorney structures.<sup>236</sup> In Osler and Barkow's view, an institution like the DOJ is inherently biased against the very people it originally prosecuted because its primary purpose is to prosecute.<sup>237</sup> The traditional process also places multiple veto gates between a petition's start and end points.<sup>238</sup> Rather than reduce the number of veto gates, the Clemency Initiative arguably created more in the form of CP 14.<sup>239</sup> Osler and Barkow advocate for various reforms to the clemency review process that would take it out of the DOJ and eliminate various veto gates that petitioners currently need to overcome before arriving on the President's desk.<sup>240</sup> The most cited institutional reform they (and others) have suggested is establishing a

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<sup>234</sup> Eggleston believes that the decision to grant CP 14 access to PSRs was a turning point in CP 14's efforts to get petitions to the DOJ. *Eggleston Interview, supra* note 9. Friedman stated that he believed that the decision to bar the federal public defenders hampered CP 14's efforts. *Friedman Interview, supra* note 7.

<sup>235</sup> Eggleston states that he frequently told CP 14's leadership that the only person with any power to decide was the President, and that he—the President—did not require perfect petitions to decide on a particular petition. *Eggleston Interview, supra* note 9.

<sup>236</sup> Barkow and Osler, *supra* note 62.

<sup>237</sup> Barkow, Holden, and Osler, *supra* note 4, at 145 (2019); and Osler, *supra* note 4.

<sup>238</sup> Osler, *supra* note 226, at 466.

<sup>239</sup> *Id.* at 468.

<sup>240</sup> See Barkow and Osler, *supra* note 62; see also Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 Fed. Sent. Rptr. 5, 11 (2007), <https://www.jstor.org/stable/pdf/10.1525/fsr.2007.20.1.5.pdf?refreqid=excelsior%3A8f71b87f055ebfcc590ea3c8bf378dca>.

clemency review commission which would, independent of the DOJ, make clemency recommendations to the President.<sup>241</sup> However, the heart of the institutional reform is the creation of a clemency review process that would be more categorical—focusing more on a category of offenses over individualized subjective criteria—than the personal look approach used by President Obama.<sup>242</sup>

The Obama administration was not unaware of these arguments.<sup>243</sup> In fact, they were rejected by Ruemmler during the formation of the initiative and later by Eggleston during its implementation.<sup>244</sup> The rejection of a formal commission, as well as the White House and DOJ's choice to use existing institutions, centered around practical realities as well as philosophical considerations. Administration officials kept in mind funding and staff limitations, the possibility of congressional meddling, and the limited time they had before the end of the Obama Presidency when thinking through the workings of the initiative. Additionally, President Obama did not believe that it was his place to overrule the will of congress with sweeping categorical grants of clemency and decided early on that he would instead examine each individual petition.

### 1. *Practical Objections*

First among the practical realities facing the administration was Congress. While it has no authority over the executive's use of clemency, it does write criminal statutes and allocate funds to government agencies. Republican control of the House of Representatives in January 2011, and eventual control of the Senate in January 2015, meant that President Obama's political opponents had a say in how far the administration could go in reforming statutes as well as how federal dollars could be allocated

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<sup>241</sup> Barkow and Osler, *supra* note 51, at 5 (“[R]eview of clemency petitions should be entrusted to a commission that has a diverse, standing membership that includes key conservative representatives who are particularly sensitive to victim interests and public-safety concerns.”); see also Margaret Colgate Love, *Clemency Is Not The Answer*, *The Crime Reporter* (Jul. 13, 2015), <http://pardonlaw.com/wp-content/uploads/2015/08/Clemency-is-not-the-answer.pdf>; Love, *supra* note 3, at 273.

<sup>242</sup> See generally U.S. SENTENCING COMM’N REPORT, *supra* note 2.

<sup>243</sup> According to Osler, a proposal to reform the clemency system along the lines of what he advocated was supported by officials in the White House Counsel's office when it was led by Greg Craig in 2009. While subsequent advocacy by Craig supports this, I have been unable to obtain independently confirm Osler's claim. Osler Interview, *supra* note 222.

<sup>244</sup> Ruemmler Interview, *supra* note 8; Eggleston Interview, *supra* note 9.

and spent.<sup>245</sup>

According to Cole, a dynamic emerged where the administration “came up with great ideas, and then [because of Republican control of the House] we did it through executive action.”<sup>246</sup> In the context of the Clemency Initiative, this led Cole to conclude that the administration should “get the tools we had that were legal” to avoid sabotage by congressional opponents of the President.<sup>247</sup> To the regret of advocates of a clemency commission, it was felt that no such tools existed with a congressionally approved source of funding in January 2014.<sup>248</sup>

Second, the wording of the criteria decided on by the White House and DOJ limited the ability of the administration to grant categorical commutations. As was outlined above, members of the vetting team in the Counsel’s Office recognized early on that several of the six criteria—such as not “having a significant criminal history”—are inherently subjective.<sup>249</sup> Further, it became evident to the White House and OPA that the circumstances surrounding each criminal defendant was different.<sup>250</sup> While the White House and DOJ could implement processes for ironing out how to objectively evaluate this subjective criteria and non-public information, there was a recognition that a purely objective and categorical decision making process was not only philosophically undesirable (see below), but practically impossible to implement.

Third, Eggleston believed that there was not enough time to set up a commission even if this was more in line with the President’s objectives. According to Eggleston, former White House Counsel, Greg Craig, and deputy Counsel, Cliff Sloan, broached the idea of a clemency commission in the Fall of 2014 over lunch at the White House Mess—the room in the West Wing where senior White House staff are able to eat more private lunches. Eggleston told both Craig and Sloan that the time

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<sup>245</sup> Republican control of Congress was raised by both Kathy Ruemmler and Jim Cole as a limitation on how the initiative could move forward, but not a limitation on whether the initiative could move forward. *Ruemmler Interview, supra* note 8; *see also Cole Interview, supra* note 9.

<sup>246</sup> *Cole Interview, supra* note 9.

<sup>247</sup> *Id.*

<sup>248</sup> Osler recognized this conundrum during his interview with the author. However, he maintained that locating the source of such funding would not have been difficult to locate because he believed that it would ultimately save the federal government money and thus pay for itself. *Osler Interview, supra* note 222. Whether or not that is either fiscally or politically correct is outside the scope of this article.

<sup>249</sup> *Friedman Interview, supra* note 7.

<sup>250</sup> *See id.*; *see also Zauzmer Interview, supra* note 7.



to implement such a board was during Craig's tenure in 2009 at the beginning of the administration, not during his own tenure at the end of the administration.<sup>251</sup> In Eggleston's opinion, the amount of time it would have taken to get such a commission up and running—which he guessed could take as long as a year—was not feasible that late in the administration.<sup>252</sup> So while the merits of whether a commission would be a better vehicle for evaluating clemency petitions may be strong, they were not something that was under any serious consideration by the White House in 2014.<sup>253</sup>

Finally, some have questioned whether a clemency commission would have worked any differently, or better, than what was already in place.<sup>254</sup> According to Zauzmer, the DOJ acts as “an expert agency” that works to carry out the president's policies fairly and without bias. In Zauzmer's view, any commission or board would, in practice, “just look like the Pardon Attorney's office after a short period of time.”<sup>255</sup>

## 2. *Philosophical Objections*

While the practical concerns are still significant, much of the criticism around the Clemency Initiative not implementing a commission-style process are rooted in philosophical differences, or misconceptions, over whether the administration adhered to the initiative's goals. For instance, a question has been raised as to whether or not inmates that were otherwise eligible for clemency under the six factors but were not granted commutations were, as one report on the initiative suggested, “left behind.”<sup>256</sup>

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<sup>251</sup> *Eggleston Interview, supra* note 9.

<sup>252</sup> *Id.*

<sup>253</sup> While a commission was not under serious consideration by the Obama administration in 2014, Mark Osler stated that Craig tried to push reforms of the clemency process that would have included a clemency review commission during his tenure in 2009. However, the author was unable to confirm this. *Osler Interview, supra* note 222.

<sup>254</sup> The OPA outlines the procedures and requirements for traditional clemency petitioners. Dep't of Justice, Office of the Pardon Attorney, Standards for Consideration of Clemency Petitioners (last visited Mar. 1, 2020), <https://www.justice.gov/pardon/about-office-0>.

<sup>255</sup> *Zauzmer Interview, supra* note 7.

<sup>256</sup> In fact, a NYU report explicitly makes this point, asking proactively in the title of its first section “Who Got Left Behind?” NYU CLEMENCY REPORT, *supra* note 5, at 6. In 2017, the U.S. Sentencing Commission estimated that “there were 2,595 offenders incarcerated when the Clemency Initiative was announced who appear to have met all the factors for clemency under the Initiative at the end of President Obama's term in office but who did not obtain relief.” U.S. Sentencing Comm'n REPORT, *supra* note 2, at 34.

Despite such concerns, interviewees from the White House and DOJ almost unanimously rejected such criticism.<sup>257</sup> The White House was very open about the fact that this would be an individualized process. President Obama decided that he would undertake an individually tailored process in which each petitioner would get a look and evaluation by OPA, DAG, the White House Counsel, and, eventually, himself.<sup>258</sup> The individualized process was rooted in both the President's understanding of clemency—an act of grace to be conferred upon citizens by the president<sup>259</sup>—and of his responsibility to keep the public safe. According to Eggleston, the President believed that the only thing that could stop the Clemency Initiative was a former inmate committing a “heinous crime” after being released from prison.<sup>260</sup> No commission, however independent, could truly insulate presidents from blame—by the public or by himself—for a commutation recipient committing a criminal offense.<sup>261</sup>

President Obama and White House Counsel also believed that categorical clemency would be undemocratic. Ruemmler was well aware that, for all its benefits, the clemency power is not, in practice or origin, democratic. According to Ruemmler, there is nothing to stop a President from invalidating an entire class of criminal, including those accused and/or convicted of federal sex crimes, if the president so wished. Further, such an act would be rightfully criticized as vacating a popular criminal statute.<sup>262</sup>

This preference for legislation over commutations was not a secret. Eggleston and President Obama made clear that clemency was “no substitute for achieving lasting changes to federal sentencing law through legislation.”<sup>263</sup> This a sentiment was even shared by Mary Price, the general counsel of FAMM, who stated in 2014 that “commutation isn't the

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However, within what was actually taking place on the ground at the time, the OIG has a smaller, and potentially more troubling number. According to the OIG, there were 83 inmates who Zauzmer deemed to be “tough cases” and did not receive any decision by President Obama. Of these 83 inmates, approximately 20 received a favorable recommendation from both the OPA and DAG. OIG CLEMENCY REPORT, *supra* note 112, at 41.

<sup>257</sup> See *Eggleston Interview*, *supra* note 9; *Ruemmler Interview*, *supra* note 8; *Cole Interview*, *supra* note 9.

<sup>258</sup> *Eggleston Interview*, *supra* note 9.

<sup>259</sup> See *Felman Interview*, *supra* note 41.

<sup>260</sup> *Eggleston Interview*, *supra* note 9.

<sup>261</sup> *Id.*

<sup>262</sup> *Ruemmler Interview*, *supra* note 7.

<sup>263</sup> Obama, *supra* note 37, at 838; see also Neil Eggleston, *President Obama Grants Another 98 Commutations in the Month of October*, The White House Blog (Oct. 27, 2016) (“The President’s clemency authority is a powerful tool being used to powerful effect,

way to fix the system.”<sup>264</sup> Instead, she believed that “[w]e need to change these laws so they’re fair for everybody.”<sup>265</sup>

### C. The Obama Administration Set Unreasonably High Expectations

The strongest criticism leveled against the initiative is that it failed to meet the expectations it raised among inmates and the public generally. According to Roseberry, the Clemency Initiative’s announcement was met with a “tremendous response” by inmates and their families, some of whom were so desperate for relief that they “showed up on NACDL’s doorstep.”<sup>266</sup> Erin Collins, who headed the Open Society-funded Clemency Resource Center out of New York University, stated that in the early months inmates were “energized” and “on edge.”<sup>267</sup> This excitement is reflected in the increased number of clemency petitions in the months and years following the announcement, reaching as high as 11,028 in 2016, up from a low of 1,806 in 2009.<sup>268</sup>

Unfortunately, relatively few of these petitioners received clemency. During his eight years in office, Obama denied 18,749 commutation petitions and left 4,252 petitions closed without action.<sup>269</sup> Collins, whose center helped vet and shepherded clemency petitions through CP 14’s processes, saw firsthand how the hopes of dozens of inmates and

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but the individualized nature of the relief granted today also highlights the urgent need for bipartisan criminal justice reform legislation. Only Congress can achieve the broader reforms needed to ensure our federal sentencing system operates more fairly and effectively in the service of public safety.”), <https://obamawhitehouse.archives.gov/blog/2016/10/27/president-obama-grants-another-98-commutations-month-october>.

<sup>264</sup> Carrie Johnson, *Justice Dept. Asks For Help Finding Prisoners Who Deserve Clemency*, NPR (July 18, 2014), <https://www.npr.org/sections/thetwo-way/2014/02/18/279287682/justice-dept-asks-for-help-finding-prisoners-who-deserve-clemency>.

<sup>265</sup> *Id.* Many of those changes were embodied in the First Step Act, signed by President Trump in 2018. Among other changes, the act made the sentencing reductions described above in the Fair Sentencing Act of 2010 retroactive. This affected as many as 2,600 federal inmates, 900 more than received a commutation from President Obama. German Lopez, *The First Step Act, explained*, Vox (Feb. 5, 2019), <https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform>.

<sup>266</sup> *Roseberry Interview*, *supra* note 96.

<sup>267</sup> *See Collins Interview*, *supra* note 101.

<sup>268</sup> DOJ CLEMENCY INITIATIVE, *supra* note 35.

<sup>269</sup> *Id.*

their families were raised and then dashed.<sup>270</sup> It is hard not to take this critique as a serious and credible indictment of the Clemency Initiative. Even some who worked on the initiative at the White House acknowledge the mismatch between expectations and reality.<sup>271</sup>

Collins believes that much of the disappointment stemmed from a lack of clarity around the meaning of the six factors. As stated above, the six factors were that a petitioner:

1. Be 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(s) today;
2. Be non-violent, low-level offenders without significant ties to large scale criminal organizations, gangs or cartels;
3. Have served at least 10 years of their prison sentence;
4. 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.<sup>272</sup>

That the administration and DOJ did not clarify the meaning of these factors ultimately led, in her view, to unnecessary delays, and inmates and their attorneys erroneously believing that specific petitions fit within the initiative's criteria.<sup>273</sup>

There is truth behind this criticism. Attorneys like Collins never received clear guidance as to which details in any petition would be considered deal breakers—i.e. those that would result in an automatic recommendation that clemency should *not* be granted—and which were not.<sup>274</sup> What's more, these concerns were not limited to pro-bono attorneys. Officials at the DOJ expressed similar sentiments.<sup>275</sup> The lack of feedback left some guessing as to what criteria was being used to decide whether a particular petition should be accepted or not.<sup>276</sup>

There is also the possibility that the White House, the DOJ, and

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<sup>270</sup> *Collins Interview*, *supra* note 101.

<sup>271</sup> *Friedman Interview*, *supra* note 7.

<sup>272</sup> U.S. Dep't of Justice, Office of the Pardon Attorney, Clemency Initiative (last visited Apr. 16, 2019), <https://www.justice.gov/pardon/clemency-initiative>.

<sup>273</sup> *St. Thomas Symposium*, *supra* note 3 (Remarks by Erin Collins at 40:00).

<sup>274</sup> *Id.*

<sup>275</sup> OIG CLEMENCY REPORT, *supra* note 112, at 31.

<sup>276</sup> *Collins Interview*, *supra* note 101.

CP 14 may have allowed expectations to rise beyond the goals of the initiative because it was easier to mobilize people with high expectations. Neither the DAG nor the White House Counsel's Office knew whether a future administration—even a Democratic one—would continue the Clemency Initiative.<sup>277</sup> They knew they had limited time and they wanted to use it.<sup>278</sup> So when the *New York Times* covered Cole's January 2014 speech announcing the initiative as the start of a "quest for inmates to be freed,"<sup>279</sup> or when then-Attorney General, Eric Holder, publicly stated that as many as 10,000 inmates<sup>280</sup> could receive relief from the initiative<sup>281</sup> (despite the fact that DAG Cole and the White House Counsel's Office did not believe this possible at the time), there was little public pushback by the administration.<sup>282</sup> Even CP 14 got caught up in trying to heighten the stakes. According to Felman, the "2014" portion was included specifically to create a sense of urgency.<sup>283</sup>

This public sense that big things were possible may have helped get things moving. As those who were involved in crafting the initiative were well aware, organizing the largest pro bono effort in legal history and overcoming institutional resistance within such a short, three-year period, is difficult work.<sup>284</sup> And the effects were not entirely unnoticed. According to Eggleston, White House and administration staff reached out to him and his office, asking for ways to help the effort, and thanking

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<sup>277</sup> *Eggleston Interview, supra note 9; Friedman Interview, supra note 7; Cole Interview, supra note 9; see also Ruemmler Interview, supra note 7.*

<sup>278</sup> *See Eggleston Interview, supra note 9; see also Friedman Interview, supra note 7; Cole Interview, supra note 9.*

<sup>279</sup> Apuzzo, *supra note 76.*

<sup>280</sup> While it is unclear where this number came from, Eggleston has posited that Holder may have been counting people whose sentences were retroactively reduced by the U.S. Sentencing Commission, and thus would not have been covered by the Initiative. *Eggleston Interview, supra note 9.*

<sup>281</sup> Sari Horwitz, *Struggling To Fix A Broken System*, Wash. Post (Dec. 5, 2015), [https://www.washingtonpost.com/sf/national/2015/12/05/holderobama/?utm\\_term=.b89785712555](https://www.washingtonpost.com/sf/national/2015/12/05/holderobama/?utm_term=.b89785712555).

<sup>282</sup> Eggleston stated that he privately told Holder on several occasions to correct his statement that 10,000 inmates could receive relief because people kept quoting it and using it as evidence of how the Initiative was not meeting expectations. In Eggleston's retelling, he told Holder that both he and Holder knew that there was no way the administration was going to grant 10,000 commutations through the initiative and they both knew the infrastructure was not there. However, despite Eggleston's requests that Holder clarify the number, Holder failed to do so. *Eggleston Interview, supra note 9; see also Cole Interview, supra note 9.*

<sup>283</sup> *Felman Interview, supra note 41.*

<sup>284</sup> *See Friedman Interview, supra note 7.*

him for the privilege to do so, roughly until the end of the administration.<sup>285</sup> Such efforts by otherwise swamped public servants are moving.

That being said, the costs of such expectations—the families that falsely thought they would see their loved one released from prison soon—were very real.<sup>286</sup> It is true that the administration later tried to limit these costs by lowering expectations.<sup>287</sup> However, as Cole acknowledged, the damage from initially heightened expectations could not be completely undone.<sup>288</sup>

### CONCLUSION

The Clemency Initiative is, in many ways, analogous to President Obama's time as both a candidate and as a President. Despite his administration's tremendous accomplishments, many of President Obama's supporters believed that more was promised than was delivered.<sup>289</sup> The same can be said about the Clemency Initiative. With expectations tempered by reality, many observers and participants were left defining and debating what the initiative was even about.

This unsatisfactory and confusing ending of the initiative is understandable. Prior to President Obama, no post-World War II president attempted such a bold and broad use of the clemency power. This entails some process of trial and error. According to Eggleston, the administration was “learning as we were going.”<sup>290</sup> Furthermore, the contradictory goals of the initiative—to serve a limited tool to partially correct for a specific injustice while protecting public safety and the democratic prerogatives of Congress—may seem too limited for such an historic endeavor.

Yet for all its failures, perceived and real, there is something to be

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<sup>285</sup> *Eggleston Interview, supra* note 9.

<sup>286</sup> See Steve Nelson, *Alice Johnson recalls 'felling of betrayal' from Obama, urges working with Trump*, Wash. Examiner (Jul. 25, 2018) (““From what everyone was saying, the Obama administration would be the one that would set you free, but I was still not set free. So to put your faith in a man was not a good thing to do,” Johnson said . . . ‘And not only was I left behind, but many others were left behind also,’ Johnson said . . . ‘There was a feeling of betrayal because I had so much hope that I was going to come out.’”), <https://www.washingtonexaminer.com/news/white-house/alice-johnson-recalls-feeling-of-betrayal-from-obama-urges-working-with-trump>.

<sup>287</sup> See *Eggleston Interview, supra* note 9.

<sup>288</sup> *Cole Interview, supra* note 9.

<sup>289</sup> See generally Eric Bates, *Beyond Hope*, *The New Republic* (Dec. 13, 2016), <https://newrepublic.com/article/138951/beyond-hope-barack-obama-legacy-age-trump>.

<sup>290</sup> *Eggleston Interview, supra* note 9.

said for showing the public that the federal government could free nearly 1,700 people, many of whom were convicted of serious criminal offenses, and not experience a public backlash. It is true that the Clemency Initiative was not perfect. However, its successes were also very real. Through this experiment, one hopes that future administrations can learn the following lessons.

First, future administrations should begin to think about clemency early. That President Obama focused on this topic three years into his first administration and had the time to think through the clemency processes and goals is an underrated aspect of the initiative. Moving early leaves time to correct for errors and unanticipated roadblocks, like the administrative court decision denying CP 14 access to PSRs. Had the Obama administration waited until its final year to roll out the initiative, such a decision may have been fatal. Instead, the administration and CP 14 had time to address the issue.

Second, presidents should seek to leave the clemency power in a stronger place than where they found it. President Obama and his White House Counsel's Office took seriously the potential that the Clemency Initiative could result in the clemency power's further diminishment, seen as either as a power grab by the executive branch or as an endeavor whose implementation put some of the public in danger. As a result, the Obama administration put in place vetting procedures aimed at protecting the public and the clemency power's future legitimacy, while limiting its goals to something it believed would receive minimal opposition in Congress.

Finally, administrations should take stock of the resources they have and think about how best to maximize their utility. Unable to get funding from Congress, the Obama administration had to work with the resources already at its disposal, using the channels at the DOJ and the White House, while seeking out advocacy organizations and private attorneys to donate their time and energy. While unwieldy at times, CP 14, OPA, and the White House Counsel's Office were able to process several thousand clemency applications and grant nearly 1,700 commutations. Future administrations may have these bare-bones resources that require improvisation and creativity or, with favorable congressional majorities, the funding necessary to craft more ambitious clemency goals than did the Obama administration.

In any case, the bar for what is possible with an administration willing to use clemency has been reset. Future presidents will not neces-

sarily be able to say that they were hampered by time, institutional barriers, or Congress. While the circumstances that led to the initiative were unique and cannot be perfectly replicated, it remains the case that it set out what a president willing to seriously grapple with clemency can do within the current institutions and without additional funding. That is itself, combined with the 1,696 individuals and families whose lives the initiative altered, a successful part of President Obama's legacy that he can and should be proud of.