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We are now on the far side of one of the most compelling modern movements in criminal law: The Obama administration's clemency initiative, which represented the first broad, principled use of the Constitution's Pardon Power in four decades.

In electing to use the tool of clemency to address what he saw as the over-sentencing of non-violent narcotics offenders, President Obama invited controversy and brought to the surface many of the central conflicts in contemporary sentencing. For that brief historical moment from June 2014 through January 2017, major newspapers and magazines reported on clemency regularly, and editorial pages featured strong opinions about the interplay between mercy and mass incarceration. Not all moments are equal, and this issue of the *Federal Sentencing Reporter* is focused on looking back at this fascinating time while the memories are still fresh.

Obama's clemency project started with great ambitions. After doing almost nothing with the Pardon Power for the first six years of his administration,<sup>1</sup> the project began in June of 2014 with the announcement that all federal prisoners would receive a survey regarding the possibility of clemency.<sup>2</sup> The survey had a predictable effect: within 18 months, over 33,000 inmates returned the surveys to the new entity—Clemency Project 2014—which was established to connect inmates with attorneys and review cases.<sup>3</sup> Expectations were high. No less an authority than Attorney General Eric Holder speculated that as many as 10,000 prisoners might be freed.<sup>4</sup>

Such hopes went largely unfulfilled. In the end, Obama granted 1715 petitions for commutation. At the same time, he denied or closed out another 23,041, for a grant rate of about 7 percent on the petitions for which a decision was reached.<sup>5</sup> It was a significant result, especially for each of those 1715 people for whom freedom was at least closer. There were at least four lingering problems, though.

First, a lot of petitions were left over—some 9,296 clemency petitions rolled over to the Trump administration, which has subsequently received hundreds more.<sup>6</sup> It is unknown when these were received or what their value might be, but it does mean that a new administration that seems at best unenthusiastic about clemency finds itself with a historically large pile of prisoner petitions.

Second, the results of the project struck many observers as remarkably uneven, and some lawyers were left stumped as to why some—but not others—of their clients received relief.<sup>7</sup>

Third, a significant number of the commutations, particularly toward the end of Obama's second term, did not allow for an immediate release but instead allowed for a release years in the future.<sup>8</sup> For example, David Barren was serving a life term for cocaine trafficking that was imposed in 2010. His sentence was commuted to 30 years—allowing for release in 2040.<sup>9</sup>

Finally, the Obama administration trumpeted the results in a way that hid the full outcome. At the end of the term, an administration press release proudly announced that Obama had “granted more commutations than any president in this nation's history,”<sup>10</sup> but the truth is that he had also denied far more commutation petitions than any of his predecessors. In fact, his grant rate for commutations, 7 percent, was not particularly remarkable. Even Ronald Reagan had an overall clemency grant rate of 12 percent. Moreover, he ignored predecessors, like Gerald Ford, who had dealt with a great many more cases (in Ford's case, over 13,000) by using pardons rather than commutations.<sup>11</sup>

It's a complex story, and a deeply human one from all perspectives. The failures of the Obama project don't alter the fact that many in the administration were deeply committed to it and worked very hard to get to the numbers they did achieve. Deputy Attorney General Sally Yates, for example, told the *Washington Post* about taking hundreds of files home to look at over Christmas.<sup>12</sup> The combination of great effort and uneven results usually indicates a problem with process and resources, of course.



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Many of the writers in this issue were deeply enmeshed in the nuts-and-bolts of the clemency mechanism that was cobbled together beginning in 2014. My goal in assembling these articles is to preserve first-person accounts of those who were close to the action, yet remained outsiders as they organized, advocated, educated, or analyzed what was happening in those two short years. I hope you find their stories as compelling as I do.

We start with the first mover on all of this, Nkechi Taifa, who over the course of ten years led the two most successful reform movements in federal criminal law: first, to reform the 100-to-1 ratio between crack and powder cocaine, and then to inspire a broad and significant clemency program. Serving as the Advocacy Director for Criminal Justice at the Open Society Foundations, Taifa was unique in her consistent ability to marshal advocates and create change. In her article here, she describes the clemency effort from start to finish—and she is perhaps the only person who can do so.

The next group of articles comes from some of the advocates that Taifa rallied and organized. Amy Povah stands out not only for her passion and prose, but because she is a clemency recipient herself, having been released from a 24-year narcotics conspiracy sentence by President Clinton. Brittany K. Barnett's mother was incarcerated for eight years, which inspired Barnett as a lawyer to become a leading advocate who obtained freedom for clients including Sharanda Jones, who was serving a life sentence.

Following the set of articles from advocates is a group of reflections from educators. Over 30 law schools took to the task of representing clemency petitioners during the second Obama term, an exercise that merged theory and the grittiness of crim law reality. Sandy Ogilvy of Catholic University was one of the leaders of that movement, and in his article here lays out its trajectory. Judith Miller, in turn, writes about the distinctive approach she took at the University of Chicago, where a “public defender ethos” was applied to the clemency cases they took on and won. Erin Collins follows, describing her work as the Executive Director of the Clemency Resource Center at New York University, a one year “pop-up” law firm that won freedom for nearly a hundred clients.

We are fortunate to have two of America's most astute analysts of clemency tie things together in our last two articles. Paul J. Larkin, Jr., Senior Legal Research Fellow at the Heritage Foundation, weighs in on President Obama's delegation of the task of reviewing clemency petitions, and the problems inherent in the large number processed in his final months in office. Finally, Margaret Colgate Love—a former Pardon Attorney and the most widely respected authority on the topic of clemency—provides a report card on the clemency initiative.

I am a student of sentencing because of the influence of one of the *Federal Sentencing Reporter's* founders, Prof. Daniel J. Freed. One of the things he told me about the *Reporter* is that he hoped that at times it would include the voices of practitioners and others who were close to the ground on sentencing issues. I hope that this issue moves us toward that worthwhile goal.

## Notes

- <sup>1</sup> *Clemency Statistics*, U.S. Dep't Just. (Mar. 3, 2017), <https://www.justice.gov/pardon/clemency-statistics>; Dafna Linzer, *Obama Has Granted Clemency More Rarely Than Any Modern President*, Propublica (Mar. 4, 2013), <https://www.propublica.org/article/obama-has-granted-clemency-more-rarely-than-any-modern-president>.
- <sup>2</sup> Justice News, U.S. Dep't Just., *Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants* (Apr. 23, 2014), <https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new>, Sari Horwitz, *Justice Department Announces Criteria for Clemency to Nonviolent Prison Inmates*, Wash. Post (Apr. 23, 2014), [https://www.washingtonpost.com/world/national-security/justice-department-outlines-criteria-for-clemency-to-nonviolent-prison-inmates/2014/04/23/1c5e9932-cad7-11e3-95f7-7ecdde72d2ea\\_story.html?utm\\_term=.d05bfaa5af06](https://www.washingtonpost.com/world/national-security/justice-department-outlines-criteria-for-clemency-to-nonviolent-prison-inmates/2014/04/23/1c5e9932-cad7-11e3-95f7-7ecdde72d2ea_story.html?utm_term=.d05bfaa5af06).
- <sup>3</sup> Bill Keller, *The Bureaucracy of Mercy*, Marshall Project (Dec. 14, 2015), <https://www.themarshallproject.org/2015/12/13/the-bureaucracy-of-mercy#.MAfzbjB1t>.
- <sup>4</sup> Dara Lind, *President Obama Was Supposed to Shorten 10,000 Prison Sentences. What Happened?*, Vox.Com (Mar. 29, 2016), <http://www.vox.com/2016/3/29/11325502/obama-pardon-clemency-leff>.
- <sup>5</sup> *Clemency Statistics*, *supra* note 1.
- <sup>6</sup> *Id.*
- <sup>7</sup> Gregory Korte, *Two Brothers, Two Petitions for Clemency, Two Different Outcomes*, USA Today (Jan. 9, 2017), <http://www.usatoday.com/story/news/politics/2017/01/09/two-brothers-two-petitions-clemency-two-different-outcomes/96297020/>; Sean Nuttall, *Inside the Clemency Lottery*, The Marshall Project (Jan. 26, 2017), [https://www.themarshallproject.org/2017/01/26/inside-the-clemency-lottery?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20170127-681#.G7SOYsLCd](https://www.themarshallproject.org/2017/01/26/inside-the-clemency-lottery?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20170127-681#.G7SOYsLCd).
- <sup>8</sup> *Commutations Granted by President Barack Obama*, U.S. Dep't Just. (Jan. 19, 2017), <https://www.justice.gov/pardon/obama-commutations>.
- <sup>9</sup> *Id.*
- <sup>10</sup> White House Press Release, *President Obama has now granted more commutations than any President in this nation's history* (Jan. 17, 2017), <https://obamawhitehouse.archives.gov/blog/2017/01/17/president-obama-has-now-granted-more-commutations-any-president-nations-history>.

- <sup>11</sup> Abby Rapoport, *Why Obama Should Take a Cue from Gerald Ford on Crack Pardons*, Am. Prospect (Feb. 6, 2014), <http://prospect.org/article/why-obama-should-take-cue-gerald-ford-crack-pardons>.
- <sup>12</sup> Sari Horwitz, *Obama to Commute Hundreds of Federal Drug Sentences in Final Grants of Clemency*, Wash. Post (Jan. 16, 2017), [https://www.washingtonpost.com/world/national-security/obama-to-commute-hundreds-of-federal-drug-sentences-in-final-grants-of-clemency/2017/01/16/c99b4ba6-da5e-11e6-b8b2-cb5164beba6b\\_story.html?hpid=hp\\_hp-banner-low\\_criminal-justice-240pm%3Ahomepage%2Fstory&utm\\_term=.75d5a3672387](https://www.washingtonpost.com/world/national-security/obama-to-commute-hundreds-of-federal-drug-sentences-in-final-grants-of-clemency/2017/01/16/c99b4ba6-da5e-11e6-b8b2-cb5164beba6b_story.html?hpid=hp_hp-banner-low_criminal-justice-240pm%3Ahomepage%2Fstory&utm_term=.75d5a3672387).