

Clemency and the Administration of Hope

In 2014, President Obama announced his intention to “restor[e] fundamental ideals of justice and fairness” to the criminal justice system by exercising his executive clemency power to commute sentences of those who had “already served their time and paid their debt to society.”¹ Soon thereafter, the Department of Justice (DOJ) specified six criteria it would use to prioritize applications.² The primary targets of these criteria were the casualties of the war on drugs: people sentenced to draconian sentences for nonviolent drug offenses, some of which involved less than a handful of narcotics. Most of these individuals had exhausted any available appeals years ago and resigned themselves to spending the majority or all of their lives in prison. With his 2014 announcement, President Obama unsettled their expectations and revived their long-abandoned hope that they would leave prison while their parents were still alive, in time to see their children graduate from high school or college, or, as many conveyed, in anything other than a box.

This was not a surprising initiative from this President; hope had been a central theme of his campaign and administration. What was surprising is what my experience working within this initiative for a year quickly revealed: he lacked a realistic plan for how the petitions would make their way to his desk under an expedited time line, or a consistent vision for how broadly the initiative would extend. And he seemed to miss completely that identifying broad, largely subjective criteria that appeared to include many, but ultimately excluded most, would have its own casualties. He did not, in short, anticipate what it meant to actually administer this hope-inspiring initiative.

This lack of clarity and foresight raised many questions for clemency applicants and the attorneys who represented them, including the staff of the Clemency Resource Center at NYU School of Law. The Clemency Resource Center (CRC) was a temporary, one-year “pop up legal services office.”³ We were a small office with a big mission: we were to be a “factory of justice,”⁴ the only law office in the country dedicated solely to crafting clemency petitions targeted at President Obama’s initiative. We were a team of eight; I was the Executive Director, and supervised seven ambitious and passionate lawyers and law graduates, most of whom had been out of law school for less than a year.⁵ This essay reflects on our experience, which revealed significant planning gaps in President Obama’s well-intentioned, but poorly executed, initiative, and the consequences of those oversights.

The very need for a dedicated office like the CRC revealed an early, obvious challenge: who would have the time, skill, and persistence to navigate the convoluted clemency process, learn the relevant federal sentencing law, and draft meritorious clemency petitions for the President’s review—all within a narrow and unforgiving timeframe. The President could have followed the suggestion of clemency scholars and redesigned the clemency process to expedite it and remove it from the DOJ—the very department that prosecuted the individuals seeking relief.⁶ Instead, he opted to adhere to the conventional process, which involves seven levels of internal review⁷ and traditionally takes about four years from application to decision. In fact, the process developed to meet this initiative increased, rather than decreased, the bureaucracy: petitions were subjected to two additional rounds of review by Clemency Project 2014 (CP2014),⁸ an independent organization that essentially acted as a link between clemency applicants, volunteer lawyers, and the Administration.

Simultaneous with the announcement of the clemency initiative, Deputy Attorney General James Cole promised that individuals who appeared to meet the clemency criteria would be “offered the assistance of an experienced pro bono attorney” to prepare a clemency application.⁹ The initial vision had been simple: CP2014 would recruit and train volunteer attorneys, and this “army of pro bono lawyers” would represent all eligible clemency applicants.¹⁰ It soon became clear that this “army” was making little headway,¹¹ which prompted law professors Rachel Barkow and Mark Osler to secure funding for the Clemency Resource Center.¹² The CRC worked closely with CP2014 to identify applicants who met the DOJ’s criteria and file petitions on their behalf.

We quickly learned that the only predictable aspect of this process was its unpredictability, and the CRC would have to remain flexible, persistent, and creative. The clemency initiative, which lasted less than three years, spanned two Attorneys General,¹³ two Deputy Attorneys General,¹⁴ and two Pardon Attorneys.¹⁵ And CP2014 repeatedly changed its procedures for assigning cases, obtaining documents, and reviewing petitions.

We knew we had a lot to accomplish in a limited amount of time. But even ascertaining precisely how much time we had proved elusive. Periodically CP2014 or the Office of the Pardon Attorney would notify us that a deadline was approaching, and if we did not meet that deadline, our clients’ petitions may not be reviewed. The first rumored



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deadline was around November 2015, and every other month or so we would hear of a new deadline. Yet, each of those deadlines—even those that came directly from Administration officials—proved to be unreliable.¹⁶

There were many obstacles to making quick work of this big task, despite our enthusiasm and dedication. Some of these obstacles resulted from bureaucratic issues that were somewhat inevitable, but that could have been overcome more quickly with assistance from Administration officials. For example, all of our clients were within the control of the DOJ's Bureau of Prisons. The most efficient means of communicating confidentially with our clients was a phone call arranged by the client's prison counselor.¹⁷ The DOJ, as part of its effort to "quickly and effectively identify appropriate candidates" for clemency,¹⁸ could have implemented policies to ensure clemency applicants could talk with their attorneys quickly and confidentially. Instead, it was not uncommon for CRC attorneys to make multiple calls a day to the same facility, many days in a row, before someone would answer the phone and agree to arrange a confidential call.

Moreover, we could not meaningfully review the viability of a potential client's clemency petition until we obtained the presentence investigation report (PSR). The PSR is a confidential document prepared for the sentencing judge by a probation officer and retained by the Bureau of Prisons. It contains a description of the offense and related conduct, a computation of the sentencing guidelines score, and other information pertinent to the judge's sentencing decision. Under the processes in place when the CRC opened, obtaining the PSR could take months. It was not until the summer of 2015 that the federal judiciary implemented an expedited procedure with the Bureau of Prisons to disclose the PSR to an attorney in connection with a possible clemency petition. Under this new process, PSRs were often produced in a few weeks.

Once we finally established communication with potential clients and obtained the relevant documents, we could begin our review in earnest. Given our ever-narrowing window of opportunity and demanding mandate, we sought to prioritize representing individuals who most embodied the spirit of the initiative, as judged by the DOJ's criteria. And here is where we faced our biggest challenges, and those that the Administration had the most power to address: interpreting the clemency criteria.

We were entering an uncharted territory. Clemency is a completely discretionary power; there is no "clemency law," no precedent we could use to interpret the criteria. The Administration could have announced demanding, firm criteria that perhaps required skilled legal analysis to address but, if satisfied, would essentially ensure the granting of an applicant's petition. Alternatively, it could have offered more malleable, subjective criteria that rendered many individuals possibly eligible, but perhaps did not require the assistance of an attorney. Instead, it offered a mixture of complex, technical criteria that required legal analysis and subjective criteria that could be interpreted to

include many, without any guidance as to what the criteria meant or whether individuals who satisfied all or most of the criteria could expect relief. It was the worst of both worlds: it left us unable to easily determine how to focus our limited time and resources, and it raised the hopes and expectations of many whose applications would, ultimately, be denied.

Two of the six criteria were seemingly objective: first, that the individual had served at least 10 years of his or her federal sentence,¹⁹ and second, that his or her sentence would be substantially lower today due to a change in law or policy. This second factor was arguably the most important and undoubtedly the trickiest to analyze. It required a detailed knowledge of current and past federal drug sentencing statutes and guidelines, Supreme Court jurisprudence regarding the sentencing guidelines, and changing DOJ charging policies regarding mandatory minimums and recidivist enhancements.

The remaining criteria, in contrast, were frustratingly subjective, and confounded more than they clarified. One could rack up enough criminal history points to receive a middle or upper-range criminal history score with just a few prior, low-level drug offenses. Would this history be deemed "significant"? Would a single high-level offense that occurred decades ago be disqualifying? We faced similar questions in discerning whether an individual would be deemed to have a "history of violence." A number of potential clients had been involved with the drug trade since their youth and, unsurprisingly, had been implicated in violent offenses in their late teens. Yet these same people were now decades older, and many had impressively avoided incurring *any* disciplinary infractions, violent or otherwise, during the intervening years. Would they continue to be defined by their serious, but youthful, infractions? And who, precisely, would be considered a "low-level offender"?

Of course, our clients had been pondering all of these questions for the sixteen months between when the initiative was announced and when the CRC opened. Unfortunately, we did not have the answers. The resultant ambiguity about the criteria and the process itself had immense consequences: a wave of anxiety flooded the federal prison system as people who had settled into their lengthy, draconian sentences began to wonder if they may be eligible for clemency, if their term may end in months instead of decades. Both clients and prison counselors described the anxiety as palpable and conveyed that many people were on edge as they tried to discern whether their lives were about to change dramatically. And for some clients, this anxiety seemed to be particularly disruptive: a few suddenly accrued disciplinary infractions, after years without incident.

Such anxiety was perfectly understandable. The strongest clemency candidates were those who were serving very long sentences for very minor offenses, and who had demonstrated that they nevertheless accepted their fate, as evidenced by a clean disciplinary record and a history of

successful prison programming. Many conveyed that, in order to persist, they had stopped hoping, stopped dreaming about the possibility of life beyond the prison walls, until this initiative was announced.

Despite all of the obstacles recounted above, the Clemency Resource Center achieved a lot. We screened approximately 700 cases to identify applicants for CP2014 who appeared to meet the criteria and should be assigned a lawyer. We represented 189 individuals and submitted clemency petitions on their behalf, and the CRC team had the honor of reporting to 83 clients and their family members that their petitions had been granted.

Yet, the results of our efforts were as erratic and unpredictable as the process itself, leading many to aptly describe the process as a “lottery.”²⁰ The vast majority of our 189 clients had similar stories: they had sold relatively small amounts of crack cocaine or played a minor role in a more substantial drug distribution conspiracy, had a criminal history comprised primarily of a smattering of drug-related offenses, had received sentences in the range of about 20 years to life in prison, and had maintained impressive prison records. Any violence in their record had occurred long ago. They had families who loved them and people in the community who offered them emotional and material support, including housing and a job. Given these striking similarities, why were barely 40 percent granted relief?²¹ This result was all the more confounding because some of the CRC clients who received clemency strayed from this narrative in significant ways. One of the first CRC clients to receive clemency was William Dekle, who was serving two life sentences for flying planeloads of marijuana into the United States.²² Yet, the petition of Ferrell Scott, who was also serving a life sentence for a marijuana offense, and who had accrued only a single, non-violent disciplinary infraction (for being 30 minutes late to his work assignment),²³ was denied.²⁴ Such inconsistent results were not limited to CRC; others have reported similarly perplexing outcomes.²⁵

Looking back, it is clear that part of this unpredictability resulted from what we suspected but has now been confirmed: Administration officials often made decisions about petitions based on off-the-record facts we could and would never know, let alone be able to address in our petitions. Former White House Counsel Neil Eggleston recently explained, “I had more information about [clemency applicants] than others did, including, frankly, their lawyers. . . . when people say there was arbitrariness [in the outcome of clemency petitions] it’s because they didn’t know factors that I knew.”²⁶ This candid admission raises significant questions about the role of advocacy in the clemency process. For example, how could advocates gauge the viability of applications without full information? Moreover, if the Administration was going to consider secret, but apparently dispositive, information, what was the point of the extensive application process?

The inconsistent results were also likely influenced by the fact that the very goal and purpose of the initiative

seemed to shift over time. Attorney General Holder’s early prediction that approximately 10,000 individuals²⁷ would receive clemency signaled the initiative was originally envisioned as a broad systemic correction, an attempt to right the wrongs of the draconian drug sentencing laws. The recent reflections of former White House Counsel Neil Eggleston suggest that this purpose shifted over time. He conveyed that President Obama believed that “[i]t wasn’t enough that the person had just gotten too lengthy a sentence. . . . He felt strongly that this was a gift, and the gift had to be earned.” In other words, a grossly outsized sentence—decades in prison, for example, for an offense involving a handful of crack cocaine—was necessary, but not sufficient, for the candidate’s application. Applicants needed to demonstrate not only that they had been subjected to a grave systemic injustice, but also that they deserved an exercise of mercy. From this perspective, a few significant, but remote, offenses on a criminal history or prison disciplinary record likely were deemed disqualifying. And the numbers bore this out: instead of 10,000 petitions, President Obama granted less than 2000. Ultimately the initiative did not correct broad systemic wrongs, but rather sparingly parceled out mercy.

Most members of the CRC team were less than a year out of law school. They had to learn, quickly, how to instill confidence in our clients about our expertise and skill while being frank about the uncertainty of the process. To craft a strong petition, they had to encourage their clients to plan for a future they had abandoned. They then had to have devastating conversations with these same clients, whose hopes President Obama had unexpectedly raised, when their revived hopes and dreams were just as unexpectedly crushed by the denial of their petitions. In short, it fell to the CRC team and other attorneys to actually administer the hope this initiative inspired, and to address and manage the emotional fallout from the abysmally managed clemency initiative.

Notes

- * Assistant Professor, University of Richmond School of Law. Former Executive Director of the Clemency Resource Center. Many thanks to Rachel Barkow, Mark Osler, and Mary Kelly Tate for their helpful comments and conversations.
- ¹ See U.S. Dept. of Justice, *Remarks as Prepared for Delivery by Deputy Attorney General James M. Cole at the Press Conference Announcing the Clemency Initiative* (Apr. 24, 2014) [hereinafter *Remarks*].
- ² The DOJ said it would “prioritize” applications from individuals who (1) have served at least 10 years of a federal sentence that (2) would likely be substantially lower today due to a change in law or policy, (3) are non-violent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels, (4) without a significant criminal history or (5) a history of violence but (6) have demonstrated good conduct in prison. See U.S. Dept. of Justice, *Clemency Initiative*, <https://www.justice.gov/pardon/clemency-initiative> [hereinafter *Clemency Initiative*].
- ³ See *Clemency Resource Center*, <http://www.law.nyu.edu/centers/adminofcriminallaw/clemency>. The CRC opened in July 2015, and closed in August 2016. It was housed within

New York University School of Law's Center on the Administration of Criminal Law. *Id.* Any cases that were outstanding as of August 2016 were handled by the NYU Center on the Administration of Criminal Law.

⁴ *Id.*

⁵ I was joined at CRC by Andre Brewster, Eric Hylok, Stephanie Kozic, Alyssa Pronley, Caitlin Naidoff, Sean Nuttall, and Jamie Waldon.

⁶ See, e.g. Rachel E. Barkow & Mark Osler, *Restructuring Clemency*, 82 U. Chi. L. Rev. 1, 18–25 (2015).

⁷ See Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 13–21 (Sept. 6, 2016) available at <https://ssrn.com/abstract=2835668> or <http://dx.doi.org/10.2139/ssrn.2835668> (describing the clemency review process).

⁸ See Nat'l Ass'n Crim. Defense Lawyers, *Clemency Project Overview and FAQs* (n.d.), <https://www.nacdl.org/clemencyproject/> See *Remarks*, *supra* note 1.

⁹ See *Remarks*, *supra* note 1.

¹⁰ Sari Horowitz, *U.S. clemency effort, slow to start, will rely on an army of pro bono lawyers*, Wash. Post (Feb. 28, 2015).

¹¹ *Id.*

¹² The CRC was generously funded by the Open Society Institute. Loretta Lynch replaced Eric Holder as Attorney General on April 27, 2015.

¹³ Sally Yates replaced James Cole as Deputy Attorney General on January 10, 2015.

¹⁴ Deborah Leff resigned in February 2015, apparently due to her frustration with how the clemency initiative was run. See Sari Horowitz, *Lack of resources, bureaucratic tangles have bogged down Obama's clemency efforts*, Wash. Post (May 6, 2016), https://www.washingtonpost.com/politics/courts_law/lack-of-resources-bureaucratic-tangles-have-bogged-down-obamas-clemency-efforts/2016/05/06/9271a73a-1202-11e6-93ae-50921721165d_story.html?utm_term=.7bb1769b02b7. She was replaced by Robert Zauzmer.

¹⁵ For example, in March 2016, the Pardon Attorney announced that “time was of the essence” and suggested “unless petitions were submitted very soon full consideration could not be assured.” DOJ, *Clemency Initiative*, *supra* note 2, at n.1. The Administration continued to accept petitions and then, in August 2016, suggested petitions received through September would be reviewed, only to announce subsequently that

only petitions received by August 30, 2016, would be guaranteed review. See Sean Nuttall, *Inside the Clemency Lottery*, The Marshall Project (Jan. 26, 2017), <https://www.themarshallproject.org/2017/01/26/inside-the-clemency-lottery#>.

¹⁷ The fastest methods of communication—email through Corr-Links and client-initiated calls from facility payphones—are monitored and therefore not confidential. Postal mail is confidential, but often slow. Moreover, some of our clients were not literate and therefore unable to communicate effectively in writing.

¹⁸ *Remarks*, *supra* note 1.

¹⁹ It turned out that even the seemingly straightforward 10-year requirement was somewhat subjective. We received guidance early on that it was not required that the applicants have already served 10 years before they submitted their petition, but rather that they have served approximately 10 years by the end of President Obama's term.

²⁰ See, e.g. Sari Horowitz, *Obama's clemency list brings joy to the lucky and anguish to the disappointed*, Wash. Post (Dec. 23, 2015) (quoting Amy Povah, former inmate and director of clemency advocacy group, describing the process as a “lottery”). See also Nuttall, *supra* note 16.

²¹ A handful of the petitions the CRC filed were neither granted or denied, but rather were still pending at the end of President Obama's term. See Nuttall, *supra* note 16.

²² ACLU, *A Living Death: Life Without Parole for Nonviolent Offenses*, 165 (Nov. 2013) <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf> (describing case of William Dekle).

²³ CAN-DO, *Ferrell Scott*, <http://www.candoclemency.com/ferrell-scott-life/>.

²⁴ Tana Ganeva, *He got life without parole for pot. And he was just denied clemency*, Wash. Post (Dec. 2, 2016).

²⁵ See, e.g. Gregory Korte, *Two Brothers, Two Petitions for Clemency, Two Different Outcomes*, USA Today (Jan. 9, 2017).

²⁶ See Maurice Chammah, *The Man Who Ran Obama's Clemency Machine*, The Marshall Project (Feb. 14, 2017), <https://www.themarshallproject.org/2017/02/14/inside-obama-s-clemency-machine#>.

²⁷ See Sari Horowitz, *Struggling to Fix a “Broken” System*, Wash. Post (Dec. 5, 2015).