

Delegating Clemency

At noon on January 20, 2017, President Barack Obama became private citizen Barack Obama when Donald Trump was sworn in as the nation's 45th President. Since then, policymakers, historians, and academics began the process of conducting post-mortems of the various programs and policies that Obama saw implemented during his eight years in office, such as his Title IX policy regarding campus sexual assault,¹ his decision to change immigration policy by altering the nation's enforcement practices rather than by revising the immigration statutes,² and, most importantly, Obamacare.³ One of the programs that will be the subject of analysis and debate is the Clemency Project 2014.⁴

On April 23, 2014, then-Deputy Attorney General James Cole announced the administration's clemency initiative and the role of five groups: the American Bar Association, the American Civil Liberties Union, Families Against Mandatory Minimums, the Federal Defenders, and the National Association of Criminal Defense Lawyers, which formed the Clemency Project 2014.⁵ Four factors, however, soon overwhelmed the process: more than 35,000 federal prisoners submitted clemency applications; the volunteer attorneys were largely inexperienced in federal sentencing law; the Federal Defenders wound up ineligible to participate; and the review process, both before and after a prisoner's application was submitted to the Pardon Attorney, was quite bureaucratic. The result was that the initiative was moving in slow motion. By the end of 2015, Obama had commuted very few sentences.⁶

The initiative underwent a wholesale revision in January 2016. Pardon Attorney Deborah Leff resigned, perhaps in part because the Attorney General had allocated her woefully inadequate resources to manage the vast number of petitions.⁷ The following month Robert Zauzmer became the new Pardon Attorney, and, from all that appears, he devised a procedure to process thousands of clemency applications without needing additional resources within his own office. It seems that Zauzmer sent the petitions to the U.S. Attorney's Offices in the districts where each prisoner was sentenced, accompanied by a list of questions to be answered, one of which asked what sentence the government would seek if the offender were resentenced today. Assistant U.S. Attorneys reviewed each application and sent their responses to Zauzmer. After reviewing each prisoner's file, he submitted a recommendation to Deputy Attorney General Sally Yates, who forwarded the Justice Department's official position to White House Counsel Neil Eggleston for eventual submission to Obama.

The new procedure still did not generate a large number of commutations over the next few months, but by the summer of 2016 it went into hyperdrive. By the time that Obama left office, the Justice Department had offered recommendations on approximately 16,776 petitions filed by drug offenders. Obama had the following clemency record: He granted 212 pardons and issued 1715 commutations, he denied 1708 pardon applications and 18,749 clemency petitions, and more than 4700 clemency applications were denied without presidential action (508 pardon applications, and 4252 commutation petitions).⁸ The initiative was slow coming out of the starting blocks, but it was accelerating as it crossed the finish line.

Is there anything noteworthy about that process and those numbers?⁹ Yes. Obama acted on more than 27,000 clemency petitions during his presidency. In how many cases did he make what amounts to a resentencing decision himself, rather than delegate those decisions to others down the clemency food chain?¹⁰

Consider the clemency data for October 2016 through January 20, 2017. Obama granted 1043 commutations, denied 4864 commutation petitions, and granted 221 pardons. That amounts to 6128 clemency decisions, approximately 1532 petitions per month or 51 each day. If you count just the grants, that comes to about 9.3 each day. Does anyone really think that Obama read 9 clemency memoranda, let alone *files*, each day during that four-month period? I doubt it. Of course, maybe a four-month period is too short. If so, let's put the starting date back to January 2016, when a new lawyer became the Pardon Attorney. The number of days to make 6128 clemency decisions now becomes 385, which reduces the daily number to just below 16, or 2.7 if we count only commutation cases. Does anyone really think that Obama read 2 to 3 clemency memoranda (or files) each day during that near thirteen-month period, let alone 16? I doubt that too.

The conclusion seems inescapable that, after effectively assuming the role of "Resentencer-in-Chief," Obama delegated decision-making authority to others below him in the clemency process. At best, he merely relied on memoranda prepared for him by others, taking action without ever considering the files in the cases before him. Perhaps, all he did was check a box for "Commutation" without giving any thought to the matter, let alone the same amount of consideration that a district court gives to a matter before imposing sentence. Either way, we are entitled to ask the



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question, “Is that how we want the clemency process to work?” In my opinion, the answer is, “No.”

The Framers granted the president the power to grant clemency in Article II because they believed that one person, the nation’s chief executive, should be responsible for making that decision.¹¹ The president’s clemency power is found in the same part of Article II as his Commander-in-Chief power and the power to demand opinions from his principal lieutenants, neither of which is subject to review by Congress or any other official. By contrast, the president’s powers to make treaties and to appoint ambassadors, consuls, and other federal officers are subject to the “advice and consent” of the Senate. That is important because it signals that *he* is to make those decisions, not someone else.

The flip side of the fact that the president’s clemency power is his *alone* to exercise is that it is *his* alone to exercise. *The president* must make that decision—not the Attorney General, not the Deputy Attorney General (to whom Attorney General Griffin Bell delegated final decision-making responsibility for the Justice Department), not the Pardon Attorney, not a U.S. Attorney, and not an Assistant U.S. Attorney. It is difficult to believe that the Framers would have approved a president’s decision to delegate his Commander-in-Chief power to a subordinate civilian official or military officer. If the nation were to prosecute a war, the one person responsible for its outcome was to be the one person whom the entire nation elected to office. If so, the Framers must have decided to treat the president’s clemency power in the same manner because it is found in the same section and paragraph of Article II. If the nation were to admit a mistake or bestow mercy, it should be the one person who could speak for the nation. And if that is true, then the president cannot delegate his clemency power to someone below him in the chain-of-command.¹² It may be the case, however, that Obama did just that.

The problem is not that Obama did not review the file in each case; unless a case is extraordinary, no president would review an entire applicant’s file, which could include the clemency petition, FBI interview reports, comments from various parties inside the Justice Department (e.g., the Pardon Attorney’s recommendation) and outside it (e.g., letters from private parties attesting to an applicant’s remorse and reformation). My criticism is not that Obama did not review even the final memorandum that reached the Oval Office; if everyone in the Justice Department and White House Counsel’s Office urged him to grant clemency, Obama would not have acted unreasonably in relying on the unanimous view of the people that he trusted (some of whom he may have appointed). At bottom, my gripe is with Obama’s decision to become Resentencer-in-Chief and then to delegate that decision to Justice Department subordinates. That is not an appropriate role for the president.

The president has the power to revise every sentence imposed in federal district court; the Pardon Clause does

not cap the number of commutations that a president may grant. But it would be a mistake to act in that manner. Obama’s decision to do so exposed what, as a practical matter, happened in that scenario: He delegated his clemency power to subordinates, perhaps even Assistant U.S. Attorneys. Evidence for that conclusion can be seen in the fact that offenders did not always receive a “Get Out of Jail Free” card along with their commutation. A goodly number simply had some portion of their sentence shaved off—say, from life imprisonment plus 30 years to 30 years’ imprisonment.¹³ It is difficult to believe that Obama made those decisions himself. If that is how Obama wanted release decisions to be made, there was another vehicle for him to use. He could have directed the Federal Bureau of Prisons to ask district court judges to reconsider a prisoner’s sentence under a federal statute authorizing such “second looks” in some circumstances, as former Pardon Attorney Margaret Love has argued.¹⁴ At a minimum, that approach would have had the virtue of honesty. It also would have relied on the experience of people who sentence offenders for a living.

The resentencing process was also a mistake even if we assume that Obama himself made thousands of commutation decisions based on his independent review. For a president to become Resentencer-in-Chief is a most unwise use of his limited, invaluable time. The number of pressing issues for the president to decide dealing with foreign or domestic policy (putting criminal justice issues aside for the moment) is ever increasing, as is the number of agencies and personnel he must supervise. Either of those subjects alone would exhaust the time that even the most indefatigable chief executive could devote to the nation’s business. If Obama were right that numerous aspects of our criminal justice system are deathly in need of repair, a president could spend his entire day discovering what is wrong, learning how to fix those defects, explaining to the public why our system has to be overhauled, and working with Congress to restructure and underwrite how we investigate, prosecute, and defend criminal accusations. To also take on the job of resentencing every offender in a particular category of crimes, even where he believes that there are a massive number of prisoners subject to disproportionate, unjust terms of imprisonment, would inevitably lead to one of two outcomes: either the president will get little else done for a significant period of each day, or he will delegate decision making to others. My bet is that Obama chose the latter route. It is likely that he let others—people unseen by and unknown to the public—decide how a very large number of prisoners should be resentenced.¹⁵ But if he did choose the former, he squandered time that he should have spent on other matters. That is not the way to run this railroad.

President Trump has not yet announced what his clemency policy and practice will be. Part of making that decision is learning from the mistakes of others. The Obama administration’s clemency initiative illustrates some of those mistakes. President Trump would be wise not to repeat them.

Notes

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- ¹ For discussions of that policy, see, for example, K.C. Johnson & Stuart Taylor, Jr., *the Campus Rape Frenzy: The Attack on Due Process at America's Universities* (2017); Katie Roiphe, *the Morning After: Sex, Fear, and Feminism* (1994); Heather MacDonald, *An Assault on Common Sense*, the Weekly Standard (Nov. 2, 2015), <http://www.weeklystandard.com/an-assault-on-common-sense/article/1051200>; Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 126 Yale L.J. 1940 (2016).
- ² For a discussion of the Obama immigration policy change, see David Bernstein, *Lawless: The Obama Administration's Assault on the Rule of Law* (2015); Paul J. Larkin, Jr., *A New Approach to the Texas v. United States Immigration Case: Discretion, Dispensation, Suspension, and Pardon—The Four Horsemen of Article II*, the Heritage Foundation, Legal Memorandum No. 181 (Apr. 15, 2016), <http://www.heritage.org/immigration/report/new-approach-the-texas-v-united-states-immigration-case-discretion-dispensation>.
- ³ Which has already been the subject of four decisions by the Supreme Court of the United States. See *Zubick v. Burwell*, 136 S. Ct. 1557 (2016); *King v. Burwell*, 135 S. Ct. 2480 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *NFIB v. Sebelius*, 567 U.S. 519 (2012).
- ⁴ Professor Mark Osler has described the workings of the Clemency Initiative 2014 in Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System* 22–26 (Sept. 10, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835668; see also Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. Chi. L. Rev. 1, 2–3 (2015); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 Harv. J.L. & Pub. Pol'y 833, 886–88 (2016) (hereafter Larkin, *Revitalizing Clemency*); Bill Keller, *The Bureaucracy of Mercy*, the Marshall Project (Dec. 14, 2015), <https://www.themarshallproject.org/2015/12/13/the-bureaucracy-of-mercy#.z1dz5VdVx>. I have also relied on what I learned from conversations with former Pardon Attorney Margaret Love.
- ⁵ See Paul J. Larkin, Jr., *Essay: A Proposal to Restructure the Clemency Process—The Vice President as Head of a White House Clemency Office*, 40 Harv. J. L. & Pub. Pol'y 237, 237 & n.3 (2017).
- ⁶ See Douglas A. Berman, *Nearly a year into clemency initiative, turkeys remain more likely to get Prez Obama pardon than people*, Sentencing Law & Policy (Nov. 26, 2014) (“At the risk of being a holiday party pooper, I cannot help but note that it has now been a full 10 months since the Obama Administration publicly announced . . . that it was eager to identify low-level, nonviolent drug offenders for possible clemency relief. Since that time, however, the President has granted clemency to a grand total of one prisoner and now to two turkeys.”), http://sentencing.typepad.com/sentencing_law_and_policy/2014/11/nearly-a-year-into-clemency-initiative-turkeys-remain-more-likely-to-get-prez-obama-pardon-than-peop.html (last visited Apr. 23, 2017); see also NACDL, *Press Release: Clemency Project 2014 Welcomes Commutation of 95 Federal Prison Sentences*, News and the Champion (Dec. 18, 2015), https://www.nacdl.org/clemency_95/; Douglas A. Berman, *Circa mid-2015, Clemency Project 2014 will go down as an abject failure if it does not submit more petitions before 2016*, Sentencing Law & Policy (June 25, 2015), http://sentencing.typepad.com/sentencing_law_and_policy/2015/06/noting-circa-2015-how-clemency-project-2014-is-failing-to-get-the-job-done-fast-enough-.html; Keller, *supra* note 1.
- ⁷ See Sari Horwitz, *Attorney overseeing clemency initiative leaving in frustration*, Wash. Post (Jan. 19, 2016), https://www.washingtonpost.com/world/national-security/attorney-overseeing-clemency-initiative-leaving-in-frustration/2016/01/19/903ee75a-bec6-11e5-bcda-62a36b394160_story.html [<https://perma.cc/4WBR-CCWN>].
- ⁸ Off. of the Pardon Attorney, U.S. Dep't of Justice, *Clemency Statistics*, Mar. 3, 2017, <https://www.justice.gov/pardon/clemency-statistics>.
- ⁹ University of Chicago Law Professor William Baude recently posed the question whether Obama wrote the law review article that I mentioned at the outset of this article. Will Baude, *President Obama's New Harvard Law Review Article*, the Volokh Conspiracy, Wash. Post, Jan. 5, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/05/president-obamas-new-harvard-law-review-article/?utm_term=.c89c14ea6a7b. Responding to his own question, “Did he write it, and should we care?,” he said, “I did not see a note about ‘Additional Contributions’ of research assistance or other outside feedback, but I do not know whether the president had time to type up the whole thing himself.” He also quoted a message from a colleague Eric Posner that there was “0 prob[ability]” that Obama wrote the article himself, which, if true, Posner noted, would amount to “academic fraud” if Obama had been a professor. Perhaps, it is not surprising that the question law professors would pose is whether Obama actually wrote an article lionizing himself for his visionary approach to criminal justice. The principal mission for law professors is to publish high-quality scholarship, so maybe it is natural for them to toss around the question whether Obama fraudulently claimed to be the sole author of his commentary. For me, however, the important question is quite different, as explained in the text.
- ¹⁰ For the argument that Obama should have issued one amnesty-like commutation order for all offenders convicted under the 1986 drug law and allowed the district courts to decide what specific term of incarceration each offender should have, see Paul J. Larkin, Jr., *“A Day Late and A Dollar Short”: President Obama's Clemency Initiative 2014*, 16 Geo. J.L. & Pub. Pol'y (forthcoming 2017).
- ¹¹ See the Pardon Clause, U.S. Const. art. II, § 2, cl. 1 (“The President . . . shall have power to grant Reprieves and pardons for Offenses against the United States, except in Cases of Impeachment.”).
- ¹² The Supreme Court may have refused to place restrictions on how much law-making or law-applying power Congress may delegate to a federal agency, but that line of decisions has no bearing on this issue. The Constitution does not grant Congress clemency authority, so Congress cannot delegate to anyone a power it lacks.
- ¹³ See C. J. Ciaramella, *This Inmate Received Clemency from Obama. He Still Might Die in Prison*, Reason.Com, Jan. 27, 2017 (“There is a public perception that the 1,715 federal inmates who received commuted sentences under Obama's record-setting clemency initiative were being immediately released from prison. . . . But many of them are not walking the streets. While some of those commutations were delayed so the inmates could complete drug treatment and other reentry programs prior to being released back into society, clemency lawyers say there was a notable shift in the final months of the program—possibly due to influence from U.S. Attorneys involved in the process—that resulted in commutations similar to [David] Barren's, where some inmates' sentences were dropped from life in prison to 30 years.”), <http://reason.com/>

blog/2017/01/27/this-inmate-received-clemency-from-obama.

- ¹⁴ See Margaret Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code Sentencing Revision*, 42 U. Tol. L. Rev. 859 (2011); Margaret Love, *Taking a Serious Look at "Second Look" Sentencing Reforms*, 21 Fed. Sent'g Rep. 149, 150 (2009). Section 3582(c) provides in part as follows:

Modification of an imposed term of imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—(1) in any case—(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in

section 3553(a) to the extent that they are applicable, if it finds that—(i) extraordinary and compelling reasons warrant such a reduction; or (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g); and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

- ¹⁵ It may well be that, in some instances, Obama read the underlying memoranda, reviewed a portion of the file, and discussed the matter with his staff and Justice Department lawyers. The Bradley/Chelsea Manning case may have been one of those instances.