

# Obama's Clemency Legacy: An Assessment

Shortly before the end of his term, President Obama published an article in the *Harvard Law Review* discussing his efforts to promote criminal justice reform. In it he described an ambitious approach to pardoning in terms that hark back to a time in our history when this presidential power played a routine operational role in a primitive federal justice system. He said he had wanted to “reinvigorate” the power by “shifting the narrative to the way clemency can be used to correct injustices in the system,” and “reminding people of the value of second chances.” He said he had hoped “to set a precedent that will make it easier for future Presidents, governors, and other public officials to use it for good.” While acknowledging that clemency is “no substitute for achieving lasting changes to federal sentencing law through legislation,” he described it as “a way to restore a degree of justice, fairness, and proportionality to the system.”<sup>1</sup>

This essay is a very preliminary assessment of the Obama clemency legacy in terms of his own stated goals. Was he right about the proper role of pardon in the justice system, and did he accomplish his objectives in using his power? I confess that I do not entirely subscribe to the justice-enhancing view of the constitutional power announced in the *Harvard* article, preferring one grounded more securely in mercy.<sup>2</sup> Although the Framers may have suggested that pardon should be regularly available to compensate for flaws in the legal system,<sup>3</sup> this expansive view of the pardon power is hard to square with a system of checks and balances.<sup>4</sup> Of greater practical concern, it carries with it an expectation of procedural and substantive fairness that may be hard to deliver on.

At the same time, I fully subscribe to President Obama's belief that federal drug sentences have produced widespread injustice, and appreciate his determination to try to do something about it once it became clear, late in his second term, that Congress would not. For this he deserves high marks. But the means he chose to accomplish his goals were fated to fall short, and his neglect of other less-fraught “second chance” clemency opportunities throughout his tenure may have made it harder rather than easier for his successor to use the power. In the end, by some measures he left the pardon power in a worse condition than he found it.

## I. The Final Tally

It is undeniable that President Obama commuted a prodigious number of prison sentences during his final two

years in office. Statistics posted on the website of the Office of the Pardon Attorney (OPA) indicate that more than 14,000 petitions for sentence reduction were submitted to the President for action in the 30 months between April 2014 and December 2016. Most of these petitions were denied, but more than 1700, or about 13 percent of the total disposed of during this period, resulted in favorable presidential action. Overall, Obama granted relief in 8 percent of the commutation cases decided by him during his eight years in office, the highest percentage of favorable decisions on commutation applications processed through OPA since the presidency of Lyndon Johnson.<sup>5</sup>

Over 80 percent of President Obama's commutations came in the final six months of his term, reflecting the remarkable productivity of OPA under the leadership of veteran federal prosecutor Robert Zauzmer. Seeing what OPA was able to accomplish in this relatively short time, I must revise my earlier conclusion that “the problem of unjust sentences is simply too large and too pervasive to deal with through the clemency mechanism.”<sup>6</sup> However, questions of case-processing efficiency aside, there were substantial fairness questions raised by the way commutation cases were selected for relief. The last-minute rush to decide as many commutation cases as possible resulted in considerable unevenness in applying the six criteria announced at the beginning of the initiative.<sup>7</sup>

Moreover, the laser focus on processing commutation petitions from drug offenders during the final 30 months of Obama's tenure left the rest of the pardon program in disarray. At the end of President Obama's tenure, more than 8000 commutation petitions were left to be decided, about half of which had been filed by drug offenders after the initiative's deadline in September 2016, and the rest filed by prisoners serving time for other crimes. In addition, more than 2000 petitions for full pardon were pending for decision, of which more than half had been filed in the final 12 months of Obama's term.

## II. Issues of Fairness

Given the President's determination to use the pardon power to “correct injustices in our system,” it should not have been too much to expect some greater attention in the pardon process to justice-based principles of decision making. Yet each new list of grants in the final six months of 2016 presented troubling issues of procedural and substantive fairness. Relief was granted in dozens of cases that evidently did not satisfy the eligibility criteria announced at



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*Federal Sentencing Reporter*, Vol. 29, No. 5, pp. 271–277, ISSN 1053-9867, electronic ISSN 1533-8363.  
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the outside of the project, most frequently because the petitioner had not served a full 10 years of his sentence or because he was not “low-level.”<sup>8</sup> This meant that prisoners whose cases had been denied support by Clemency Project 2014 (CP2014)<sup>9</sup> because they had served fewer than 10 years or had a management role in the offense, saw relief granted in cases that were evidently even further from the eligibility heartland.<sup>10</sup>

At the same time, many prisoners whose cases did meet the eligibility criteria were inexplicably denied relief, based on anecdotal accounts of lawyers with disappointed clients and on press accounts,<sup>11</sup> as well as on data from CP2014. Any petition that survived CP2014’s stiff vetting process might be assumed to have merit, and yet almost two thirds of the 2600 petitions it supported over the life of the project were not granted.<sup>12</sup> As one advocate who represented several prisoners in the process put it, “the difference between the freed and the left-behind was often luck.”<sup>13</sup>

To be fair to Mr. Zauzmer, he was brought in by the political leadership of the Justice Department to lead the clemency effort less than a year before the end of President Obama’s term, after the official originally tasked with managing the initiative unexpectedly resigned in frustration over issues of resources and authority.<sup>14</sup> Zauzmer inherited a dysfunctional system of reviewing cases that had produced few grants and attracted considerable criticism, in the legal community and in the press.<sup>15</sup> With marching orders to deliver a recommendation to the President in the thousands of cases then pending in the Department,<sup>16</sup> and a skeleton crew of lawyers in OPA, the new Pardon Attorney seems to have done the only thing he could at that point to get the job done: turn clemency staffing over to the community of federal prosecutors where he had spent most of his professional life, reverting to the decentralized clemency process employed in the late nineteenth and early twentieth century.<sup>17</sup> Whereas the Justice Department’s clemency rules have always contemplated a key role for federal prosecutors in recommending for or against favorable action, the decisive role prosecutors appear to have played in the final months of the Obama administration was qualitatively different from what had gone before.

To some extent my conclusions about how the process operated in the final year of Obama’s tenure are guesswork, since no one officially involved would talk to me on the record. But the role played by the U.S. Attorneys is clearly evidenced by the highly unusual use of the power to remake sentences, and the number of grants that left the petitioner with a substantial amount of prison time still to serve.<sup>18</sup> A template sent by OPA to the U.S. Attorney’s Offices with every commutation petition invited a recommendation as to the sentence they now thought appropriate, in effect giving federal prosecutors an opportunity to resentence defendants convicted years before.<sup>19</sup> Although undeniably efficient, the transfer of power to the U.S. Attorneys sacrificed the promise of consistency represented by a centralized pardon process.

### III. Collateral Damage

President Obama’s focused interest in commuting drug sentences meant that the ordinary clemency caseload, notably applications for full pardon, was largely neglected after the beginning of 2014. Indeed, the person initially hand-picked to manage the commutation initiative claimed to have been “directed,” presumably by the political appointees in the Department, to “set aside” the pardon caseload in favor of the commutation applications from drug offenders.<sup>20</sup> Pardon petitions filed after the initiative commenced were not investigated, and in many cases not even acknowledged. Only when the President was questioned at a press conference in August 2016 about his abysmal record on granting pardons<sup>21</sup> did the processing of pardon applications resume.<sup>22</sup>

The 142 pardons granted in the final weeks of his term, more than twice the total number granted in the previous seven-plus years, enabled Obama to avoid being labeled the stingiest full-term president in history. They did not, however, make much of a dent in the backlog of pardon cases. That pardon remained sought-after relief despite Obama’s evident lack of interest in that aspect of the clemency caseload is reflected in the more than 1200 new pardon applications filed in calendar year 2016, more than double the number filed in any single year since clemency statistics began to be published in the nineteenth century.

The prodigious and largely successful effort to dispose of thousands of commutation petitions from drug offenders in the final months of the Obama term left behind a management nightmare. On January 20, 2017, more than 9000 commutation petitions and 2000 pardon petitions remained pending for decision by the new president, with more applications of both sorts continuing to be filed.<sup>23</sup>

The clemency initiative had taken its toll on OPA in other ways, notably in how the office communicated with the public. Correspondence from the office was no longer signed by any individual, new filings were not acknowledged, and lawyers for applicants were warned not to inquire about case status. What had been an efficient and responsive FOIA process came to a virtual halt. If the pardon process has to some extent always been a “black box,”<sup>24</sup> by the beginning of the Trump Administration it had become a dead zone.

### IV. A Report Card on the Initiative

There were many beneficiaries of the Obama clemency initiative, including some whose cases are described in this volume. In addition to the successful petitioners themselves, their families and communities also benefitted, as did the lawyers who filed petitions in their behalf. Many in the private bar learned about federal sentencing for the first time, and many federal prosecutors had an opportunity to consider the consequences of savage sentencing laws from another perspective. The public benefitted by seeing the pardon power used in an apparently regular and respectable way, to remedy sentences widely regarded as unjust. President Obama’s own reputation for generosity of spirit and

the courage of his convictions also benefitted from the scale of his accomplishment.

But the costs exacted by the initiative were also great, and they are largely attributable to the management missteps that marred its first two years.<sup>15</sup> Because of those missteps, fewer prisoners benefitted from the initiative than could have, had a different administrative model been chosen in the first instance. The public's expectation of fairness also took a beating, at least that segment of it who saw how many deserving applicants would not benefit. Because the President had set out to use the power of his office "to correct injustices in the system," a reasonable expectation was that justice-based principles of procedural and substantive fairness would apply.

Those who urged the President to use a commission model at the beginning of the initiative were prescient, and it is a shame that their urgings were not heeded.<sup>25</sup> In a single year, President Ford was able to pardon many thousands of convicted deserters and draft violators through the efficient board he established, using hundreds of government lawyers to staff the cases, and there is no reason why Obama could not have done likewise with the drug cases. One is tempted to think that the Justice Department resisted this approach because it wanted to maintain control over the initiative, to contain it.<sup>26</sup> It would not be hard to persuade a cynic familiar with the Department's clemency record in the last three presidencies, that its institutional prerogatives once again trumped presidential ones.<sup>27</sup>

But greater efficiency and fairness could have been achieved even without departing from the existing case processing model. Had the Obama Administration given

someone of Robert Zauzmer's skill and stature 30 months to do the job instead of 10, had it relied on Bureau of Prisons staff to identify prisoners suitable for release,<sup>28</sup> and had it been willing to supplement the clemency effort with existing statutory sentence reduction mechanisms,<sup>29</sup> it might have been able to deal efficiently with the particular problem that concerned the President without putting the entire pardon process at risk. If it had not been for its original decision to rely on a quasi-private process for selecting cases instead of the Justice Department's own ample staff resources, and additional administrative snafus as the initiative progressed, the Administration might have been able to address and deliver relief in all eligible cases over the life of the project. As it was, mismanagement in the first two years of the initiative compelled the Administration to sacrifice fairness and consistency in the final one.

Perhaps the single most unfortunate result of Obama's clemency initiative is the legacy it left his successors. If the President's goal was to "reinvigorate the clemency power" to "make it easier for future Presidents . . . to use it for good,"<sup>30</sup> he left the process for administering it in shambles. The Justice Department's pardon process has not served the presidency well since the 1980s, but the Obama clemency initiative tied it more closely than ever to the agenda of federal prosecutors, and resulted in the neglect of the ordinary clemency caseload. Whatever a president's inclinations about pardoning may otherwise be, the power will wither or become corrupted without a reliable administrative process to inform and guide his discretion. There is no evidence that anyone in the Obama Administration, including the President, gave much thought to what would come after them where the pardon power was concerned.

**Appendix. Clemency Response Template**

Template sent to the United States Attorney from the Office of the Pardon Attorney seeking comments and recommendations on commutation petitions.

<b>[Name of petitioner], [OPA No. xxx]</b>
<b>[Name], United States Attorney, [District]</b>
<p style="text-align: center;"><b>Introduction and Instructions</b></p> <p>The Office of the Pardon Attorney (OPA) appreciates your assistance in evaluating this petition for commutation of sentence. Your views will carry considerable weight as OPA formulates its recommendation to the President.</p> <p>Commutation of sentence is a form of executive clemency that reduces the sentence to be served. Sentence reduction may be to time served, which typically includes a standard transition period of four months in community confinement, or to a term that will expire in the future but is shorter than the current sentence. Such executive clemency does not in any way alter the fact of conviction or absolve the petitioner of guilt.</p> <p>The petition is being assessed pursuant to the Department’s Clemency Initiative, which considers the following factors: whether the petitioner (1) is currently serving a federal sentence that, by operation of law, would likely be substantially lower if he/she were convicted of the same offense today; (2) is a nonviolent, low-level offender without significant ties to large-scale criminal organizations, gangs, or cartels; (3) has served at least 10 years of his/her sentence; (4) does not have a significant criminal history; (5) has demonstrated good conduct in prison; and (6) has no history of violence prior to or during his/her current term of imprisonment. These factors are guidelines, not hard-and-fast requirements for consideration, and the merits of every petition will be evaluated under a totality of the circumstances approach.</p> <p>Please complete the sections below in a succinct manner. Please return this form in Word format to <a href="mailto:USPardon.Attorney@usdoj.gov">USPardon.Attorney@usdoj.gov</a>.</p>
<b><i>Summarize the offense and prosecution, highlighting in particular any information not included in the PSR:</i></b>
<b><i>Explain the calculation of the sentence imposed and any subsequent reduction (rely on the final sentencing transcript or appellate record if the court made a determination different from that recommended in the PSR):</i></b>
<b><i>Explain the calculation of the sentence likely under current law and policy (please focus on questions such as: Would the sentence be lower today due to the Fair Sentencing Act or changes in the Sentencing Guidelines? Would the sentence likely be lower today due to application of Booker? Would the case be charged differently today in light of the Department’s current policies, including policies regarding charging mandatory minimum offenses and § 851 recidivist enhancements?):</i></b>

<b><i>Summarize any post-conviction litigation:</i></b>
<b><i>Describe other equitable factors (e.g., age, serious illness, unrewarded government assistance, sentence disparity with similarly situated codefendants):</i></b>
<b><i>Recommendation based on totality of the circumstances:</i></b>
<b><i>Judge's recommendation (please state whether or not you sought the recommendation of the sentencing judge, and explain that recommendation if known):</i></b>
<b><i>If petitioner requests remission of fine or restitution, please state your view regarding that request:</i></b>
<b><i>Please provide the email address and phone number of an attorney who may be contacted with any further questions about this matter:</i></b>

**Notes**

- \* Law Office of Margaret Love, 15 7th Street, N.E., Washington, D.C. 20002, [www.pardonlaw.com](http://www.pardonlaw.com). The writer served as U.S. Pardon Attorney from 1990 to 1997, and currently represents applicants for executive clemency.
- <sup>1</sup> Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 838 (2017).
- <sup>2</sup> See Margaret Love, *Of Pardons, Politics and Collar Buttons, Reflections on the President's Duty to be Merciful*, 27 Ford. Urban L.J. 1483, 1500–09 (2000) (discussing president's duty to pardon as one of "public mercy").
- <sup>3</sup> See, e.g., Alexander Hamilton, the Federalist No. 74, at 446 (Clinton Rossiter ed., 1961) ("the criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.").
- <sup>4</sup> See Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 Fed. Sent'g Rep. 119, 124 (2001) ("Wherever a rule can be structured to guide the discretion of judges or administrative agencies in determining—with reasons—whether to mitigate the sentences of similarly situated offenders, we think such a system should ordinarily be accorded priority over one that relies exclusively upon the unstructured, unexplained discretion of a president to grant or deny individual pardons or commutations."); Douglas Hay, *Property, Authority and the Criminal Law*, in Douglas Hay et al., *Albion's Fatal Tree: Crime and Society in 18th Century England* 44 (1975) (Pardon "moderated the barbarity of the criminal law in the interests of humanity. It was erratic and capricious, but a useful palliative until Parliament reformed the law in the nineteenth century."); Cesare Bonesana, *Marchese Beccaria, an Essay on Crimes and Punishments* 158–59 (Edward D. Ingraham trans., 2d Am. ed. 1819) ("Clemency is a virtue which belongs to the legislator, and not to the executor

- of the laws; a virtue which ought to shine in the code, and not in private judgment.").
- <sup>5</sup> The absolute number of President Obama's commutations was also record-breaking, at least when measured against statistics published on the website of the Pardon Attorney. However, these statistics include only petitions processed through OPA, and do not include grants pursuant to recommendations from commissions like President Ford's Clemency Board. That Board reviewed approximately 21,500 applications over a period of 12 months, and submitted a total of 14,514 recommendations for clemency to the President, most of which were granted. See Osler and Fass, *The Ford Approach and Real Fairness for Crack Convicts*, 23 Fed. Sent'g Rep. 228 (2011).
- <sup>6</sup> Margaret Love, *Clemency Is Not the Answer*, the Crime Report, July 13, 2015, <http://pardonlaw.com/wp-content/uploads/2015/08/Clemency-is-not-the-answer.pdf>. If the President had chosen the Commission model recommended to him by some at the outset of his initiative, many more cases might have been processed in a more regular manner under consistent standards, avoiding the substantive unfairness and procedural irregularity that marred the effort administered through the Office of the Pardon Attorney. See, e.g., Rachel Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. Chi. L. Rev. 1, 13–15, 18–19 (2015).
- <sup>7</sup> The six criteria announced by Deputy Attorney General James Cole on April 23, 2014, are described in official Justice Department documents as establishing "priorities" for case selection, but they were interpreted and applied as defining eligibility for consideration by Clemency Project 2014 (CP2014), the consortium of private organizations convened by the Justice Department to "quickly and effectively identify appropriate candidates for the initiative." See

<https://www.justice.gov/pardon/clemency-initiative>.

At least in the initiative's first 18 months, cases that did not satisfy each of the six criteria were rejected for support by CP2014, and prisoners advised that they could file petitions directly with the Pardon Attorney.

<sup>8</sup> For example, the final two sets of grants issued in January 2017 include dozens of cases in which the grantee had been sentenced in 2009 or later, strong evidence that the prisoner had served considerably fewer than 10 years when he applied. Thirteen of the grants in these two final batches went to individuals sentenced under the Continuing Criminal Enterprise statute, revealing then to have been managers of substantial trafficking organizations. These individuals would have been approved under the eligibility criteria announced by the Justice Department in April 2014, criteria still posted on the Pardon Attorney's website. Many hundreds of individuals who accepted the invitation to apply to Clemency Project 2014 for pro bono counsel were turned away based on a failure to meet the criteria relating to length of service and role in the offense. It is not clear how many of these individuals took up the suggestion that they apply independently and uncounseled to the Office of the Pardon Attorney, or how many were ultimately granted.

<sup>9</sup> Clemency Project 2014 is described on the Pardon Attorney's website as "a non-government affiliated organization composed of the American Bar Association, the National Association of Criminal Defense Lawyers, the Federal Defenders, the American Civil Liberties Union, and Families Against Mandatory Minimums, as well as individuals active within those organizations [established] to quickly and effectively identify appropriate candidates for the initiative." One of the primary functions of CP2014 was to secure pro bono counsel for prisoners meeting the eligibility criteria.

<sup>10</sup> The lists of grants posted on the Pardon Attorney's website generally include the date a grantee was initially sentenced, and indicate whether he or she was sentenced as a "kingpin" under the Continuing Criminal Enterprise statute, and whether a grantee was also convicted for possessing or using a firearm in connection with the offense. Either of the last-mentioned factors could be grounds for rejection under the Justice Department eligibility criteria.

<sup>11</sup> See, e.g., Sean Nutall, *Inside the Clemency Lottery*, the Marshall Project (Jan. 26, 2017), <https://www.themarshallproject.org/2017/01/26/inside-the-clemency-lottery#.txdToYO6k>; Greg Korte, *Two brothers, two petitions for clemency, two different outcomes*, *USA Today* (Jan. 9, 2017), <https://www.usatoday.com/story/news/politics/2017/01/09/two-brothers-two-petitions-clemency-two-different-outcomes/96297020/>; Xiaonan "April" Hu & Theo Torres, *Dear President Obama, Before You Leave Office These People Need Your Help*, *Mic* (Dec. 30, 2016), <https://mic.com/articles/163584/dear-president-obama-before-you-leave-office-these-people-need-your-help#.KDJJMcPdj>.

<sup>12</sup> See Ezra Dunkle-Polier, *NACDL News: President Obama Caps Final Week in Office with 539 More Commutations*, *The Champion*, March 2017 at 12, <https://www.nacdl.org/Champion.aspx?id=45723>; see also Norman L. Reimer, *Inside NACDL, The Forgotten Souls*, *The Champion*, March 17, 2017 at 11, <https://www.nacdl.org/Champion.aspx?id=45722> (recounting how all of President Obama's 1715 commutation grants went to U.S. citizens).

<sup>13</sup> See Nuttall, *supra* note 11.

<sup>14</sup> See 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>15</sup> See, e.g. Bill Keller, *The Bureaucracy of Mercy*, the Marshall Project (Dec. 13), 2015, <https://www.themarshallproject.org/2015/12/13/the-bureaucracy-of-mercy#.LJWe0Pjm>; Collateral Consequences Resource Center, *Clemency Process Reportedly More Backlogged than Ever* (June 1, 2015), <http://ccresourcecenter.org/2015/06/01/obama-clemency-process-reportedly-more-backlogged-than-ever/>.

<sup>16</sup> See Carrie Johnson, *New pardon chief in Obama Justice Department inherits a huge backlog*, *NPR* (Feb. 3, 2016), <http://www.npr.org/2016/02/03/465429779/new-pardon-chief-in-obama-justice-department-inherits-host-of-problems>.

<sup>17</sup> See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 *J. Crim. L. & Criminology* 1169, 1181 (2010). The first formal clemency rules promulgated by President McKinley in 1898 provided that all petitions submitted to the attorney general would be sent by the pardon attorney promptly to the relevant U.S. Attorney, who was also responsible for contacting the sentencing judge. Without a favorable recommendation from both the prosecutor and judge, petitions could be denied by the pardon attorney without being sent to the president. It may be surprising to learn that between 1900 and 1936, more than half of the applications filed were sent forward to the White House with a favorable recommendation. See W. H. Humbert, *The Pardoning Power of the President* 108 (1941).

<sup>18</sup> See Gregory Korte, *For Obama, A Shift in Clemency Strategy*, *USA Today* (Sept. 15, 2016), <https://www.usatoday.com/story/news/politics/2016/09/15/obama-shift-clemency-strategy/90255992/> (noting that 39% of the 324 grants issued during August 2016 fell into the category of what the author styled "long-tail" grants). The final set of 330 grants issued on January 19, 2017, included 103 in which the sentence had been commuted to a term of years that left the prisoner with a substantial number of years yet to serve, in many cases substantially more than a decade. In a few cases, prisoners who had served only a brief portion of their sentence were faced with more than twenty years left to serve. Until this time, commutations in modern times routinely reduced a sentence to time served, with a few additional months to prepare the prisoner for reentry.

<sup>19</sup> One of the questions on the template asked the U.S. Attorney to "explain the calculation of the sentence likely under current law and policy," and to make a recommendation "based on [the] totality of the circumstances." The template is attached as an appendix to this article.

<sup>20</sup> See Deborah Leff's letter resigning from the office as Pardon Attorney, reprinted at 28 *Fed. Sent'g Rep.* 312 (June 2016).

<sup>21</sup> See Steven Nelson, *Obama Says He Will Catch Up on Pardons, But He's Far Behind*, *U.S. News* (Aug. 4, 2016), <https://www.usnews.com/news/articles/2016-08-04/obama-says-he-will-catch-up-on-pardons-but-hes-far-behind>.

<sup>22</sup> This account of the processing of pardon cases is based on my personal experience with 17 petitions for full pardon I filed for clients between January 1, 2014, and June 1, 2016.

<sup>23</sup> That federal prisoners remain hopeful for presidential mercy even under President Trump is indicated by the 666 commutation petitions filed in the new president's first six weeks in office.

<sup>24</sup> See, e.g., Molly M. Gill, *Into the Bottomless Black Box: The Prisoner's Perspective on the Commutation Process*, 20 *Fed. Sent'g Rep.* 16 (2007).

<sup>25</sup> See *supra* note 6. It would have been politically challenging but surely not impossible to put together a bipartisan commission staffed by federal prosecutors and federal defenders to identify and make recommendations on specific cases, using the model of the Ford Clemency Board. See Gerald R. Ford, "Executive Order 11803—Establishing a Clemency Board . . .," Sept. 16, 1974, online at the American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=23895>.

<sup>26</sup> In her letter to Deputy Attorney General Sally Yates resigning as Pardon Attorney, see *supra* note 20, Deborah Leff cited as one reason for her decision the fact that many of her office's favorable recommendations had been withheld from the White House:

I have been deeply troubled by the decision to deny the Pardon Attorney all access to the Office of White House Counsel, even to share the reasons for our determinations in the increasing number of cases where you have reversed our recommendations. I believe that prior to making the serious and complex decisions underlying clemency, it is important for the President to have a full set of views. For that reason, I am encouraged by the commitment now to share the Pardon Attorney's recommendations and rationale with White House Counsel. This will be important for my staff, who have considerable expertise on clemency matters; for my successor; and most important, for the integrity of the decision-making process.

<sup>27</sup> See Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional*

*Conflict of Interest*, 47 U. Toledo L. Rev. 89 (2015). In a forthcoming article summing up the Obama Administration's overall criminal justice record, Rachel Barkow and Mark Osler argue that President Obama's "failure to accomplish more substantial reform, even in those areas that did not require congressional action, was largely rooted in an unfortunate deference to the Department of Justice." See *Designed to Fail: The President's deference to the Department of Justice in advancing criminal justice reform*, 59 Wm. & Mary L. Rev. \_\_\_ (2017) (forthcoming).

<sup>28</sup> See Love, *Clemency Is Not the Answer*, *supra* note 6.

<sup>29</sup> Ironically, even as the right hand of the Justice Department was churning out recommendations that the President reduce the sentences of serious drug traffickers, its left hand was reiterating an adamant opposition to expanding its policy of bringing back to court prisoners whose age and infirmity made them appealing candidates for sentence reduction under the "compassionate release" authority. See 18 U.S.C. 3582(c)(1). See also Love, *Clemency Is Not the Answer*, *supra* note 6.

<sup>30</sup> See Obama, *supra* note 1, at 838.