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## The Future of Presidential Clemency Decision-Making

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ARTICLE

THE FUTURE OF PRESIDENTIAL CLEMENCY  
DECISION-MAKING

PAUL J. LARKIN, JR.\*

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Clemency is a subject of great intellectual, professional, and personal interest to me. Intellectual, because clemency, like sentencing, is part of the law of remedies in criminal cases, which asks what do we do when we, like the dog, finally catch up to the car we've been chasing. Professional, because I know people who might have been technically guilty but who should never have been prosecuted and, therefore, should receive a pardon. Personal, because I almost gave up the law a decade ago to become a hospital or hospice chaplain, and working on clemency is perhaps as close as a lawyer can come to that line of work. Symposia like this one offer people like me the opportunity to stretch their minds by addressing new subjects that grow out of old ones. I relish that chance at bat.

The University of St. Thomas School of Law and Law Journal deserve kudos for their willingness to contribute to the debate over the clemency

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\* John, Barbara & Victoria Rumpel senior legal research fellow, The Heritage Foundation; MPP, George Washington University, 2010; JD, Stanford Law School, 1980; BA. Washington & Lee University, 1977. The views expressed in this article are the author's own and should not be construed as representing any official position of The Heritage Foundation. I am grateful to Rachel E. Barkow, Jeffrey Crouch, John G. Malcolm, Ellen S. Podgor, and Shon Hopwood for invaluable comments on an earlier iteration of this article. I also want to thank the participants in the 2019 clemency symposium at the University of St. Thomas School of Law and the members of the University of St. Thomas Law Journal for helpful discussions and comments regarding the subjects addressed in this article. Any errors are mine. In the interest of full disclosure, I was one of the lawyers who represented the United States in two cases cited below: *Mistretta v. United States*, 488 U.S. 361 (1989), and *Stinson v. United States*, 508 U.S. 36 (1993).

process.<sup>1</sup> The subject matter of this symposium is the future of clemency in this century.<sup>2</sup> To further the journal's efforts in this ongoing discussion, I will offer the following preliminary thoughts on whether it is time for the president to leave the clemency process to someone else.

Part I will discuss the importance of improving the clemency process. Part II will summarize the criticisms that have been levied against the current clemency architecture. Part III will discuss the question of whether the president should exit the clemency business altogether and leave early release decisions to someone else. There are at least three options being discussed: (1) resurrecting the once widespread, but now moribund, practice of parole, (2) adopting the ostensibly new mechanism of "second-look" resentencing (which is markedly similar to parole), or (3) having district courts resentence offenders under a provision in a recently enacted statute, the First Step Act of 2018 ("First Step Act").<sup>3</sup> Part III will discuss these options and whether they are likely to replace the need for presidential clemency.

## I. THE IMPORTANCE OF IMPROVING THE CLEMENCY PROCESS

People and organizations from across the political spectrum<sup>4</sup> have argued that the criminal justice system is fundamentally broken and needs serious repair.<sup>5</sup> Some commentators have focused their attack on the mas-

1. This Symposium is not the first one that they have devoted to this topic. Symposium, *Clemency*, 12 U. ST. THOMAS L.J. 411 (2016); Symposium, *Sentence Commutations and the Executive Pardon Power*, 9 U. ST. THOMAS L.J. 665 (2012).

2. Symposium, *Clemency: A Constitutional Power Moves into the Future*, 16 U. ST. THOMAS L.J. (forthcoming 2020).

3. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 519 (2018).

4. See, e.g., Zach Dillon, *Foreword: Symposium on Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 525, 525 (2012) ("Overcriminalization is one of those rare topics where both the political right and political left come together. The Heritage Foundation and the American Civil Liberties Union joined forces to cosponsor our live Symposium and send the unified message that whether you are liberal, moderate, or conservative, overcriminalization is an issue that can no longer be ignored. Yet, despite this bipartisan support, the tendency to overcriminalize continues to grow stronger.").

5. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. ii (2015). Some go a step further and say that the criminal justice system is irredeemably racist and is tantamount to a new version of Jim Crow, as seen by the imprisonment of a large number of black offenders for nonviolent drug crimes. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2012). Some politicians have made that claim as part of an appeal to the worst devils of our nature. See Bill Barrow & Chevel Johnson, *Warren at Black University: Criminal Justice System 'Racist,' AP NEWS: U.S. NEWS & WORLD REP.* (Aug. 3, 2018, 9:54 PM), <https://www.usnews.com/news/politics/articles/2018-08-03/warren-at-black-college-criminal-justice-system-racist> ("Speaking Friday at a historically black university, potential Democratic presidential candidate Elizabeth Warren delivered what she called 'the hard truth about our criminal justice system: It's racist . . . I mean front to back.'"). The issue is a complicated one, and a complete answer to that argument is beyond the scope of this article because there is much that could be said in response. See, e.g., DAN M. KAHAN & TRACEY L. MEARES, *URGENT TIMES:*

sive growth in the size of the penal code over the last fifty years.<sup>6</sup> Congress's readiness to address societal problems by using penal laws and the criminal justice system rather than civil or administrative remedies created the phenomenon of "overcriminalization": viz., the use of the criminal law to punish morally blameless conduct.<sup>7</sup> Those observers maintain that there are far too many criminal laws, in the form of both statutes and agency rules<sup>8</sup>—so many that an unknowing, and therefore morally blameless, individual can trip over a criminal law that no reasonable person would have

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POLICING AND RIGHTS IN INNER-CITY COMMUNITIES (1999); BARRY LATZER, *THE RISE AND FALL OF VIOLENT CRIME IN AMERICA* (2016); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014); JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL'Y 241 (2014) [hereinafter Larkin, *Crack Cocaine*]; Michael Barone, *Black Lives Matter's Agenda Is Costing Black Lives*, NAT'L REV. (Sept. 8, 2015 8:00 AM), <https://www.nationalreview.com/2015/09/black-lives-matter-murder-crime-rate>; Barry Latzer, *Michelle Alexander Is Wrong about Mass Incarceration*, NAT'L REV. (Apr. 4, 2019, 11:41 AM), <https://www.nationalreview.com/magazine/2019/04/22/michelle-alexander-is-wrong-about-mass-incarceration>; Rich Lowry, *Bill Clinton Was Right*, NAT'L REV. (Apr. 12, 2019, 4:00 AM), <https://www.nationalreview.com/2016/04/bill-clintons-philadelphia-rally-speech-was-right>. Here, it suffices to say that the proponents of the claim overstate their case. They also do not offer an honest assessment of, for example, why the interests of the victims of crime should not count or why, if the entire criminal justice system is racist, so many black police officers, federal agents, prosecutors, judges, and probation or parole officers work for the government in that system. Even Professor Michelle Alexander—whose 2010 book *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* became the bible for critics of "mass incarceration"—recently acknowledged that a majority of the prisoners held in prisons and jails are violent criminals. See Michelle Alexander, *Reckoning with Violence*, N.Y. TIMES (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html>; see also, e.g., DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

6. See, e.g., Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 724–26 (2013) ("Over the last fifty years, legislatures have become offense factories that churn out new statutes each week . . . Today, there are approximately 3,300 federal criminal statutes. Moreover, those statutes are not limited to the ones listed in Title 18, the federal penal code. Federal criminal laws are interspersed across the fifty-one titles and 27,000 pages that make up the United States Code. There are so many federal criminal laws that no one, including the Justice Department, the principal federal law enforcement agency, knows the actual number of crimes.") (footnote and internal punctuation omitted) [hereinafter Larkin, *Overcriminalization*].

7. *Id.* at 719.

8. See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3–4 (2007); ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY (Paul Rosenzweig & Brian W. Walsh eds., 2010); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

known existed.<sup>9</sup> The result is that bad luck, not evil intent, decides who is charged and convicted.<sup>10</sup>

Other scholars have focused on the operation of the criminal justice system. They have argued that it is nearly impossible for a defendant to receive a fair trial—particularly on a misdemeanor charge<sup>11</sup>—given the raft of procedural flaws in the pretrial and trial processes. Among them are the use of cash bail, the government’s failure to disclose exculpatory evidence to the defendant before a plea or guilty verdict, admission of inaccurate eyewitness identifications, reliance on inherently unreliable jailhouse “snitches,” use of untrustworthy confessions, and representation by grossly overworked and underpaid public defenders—all atop the fact that some innocent defendants will plead guilty just to avoid the risk of receiving inhumanely long terms of imprisonment if convicted.<sup>12</sup> The criminal justice system, some critics say, treats defendants like cars on an assembly line:

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9. See, e.g., Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335 (2018); Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 107–08 (2013) (“[A]ny reasonable observer would have to conclude that actual knowledge of all applicable criminal laws and regulations is impossible, especially when those regulations frequently depart from any intuitive sense of what ‘ought’ to be legal or illegal. Perhaps placing citizens at risk in this regard constitutes a due process violation; expecting people to do (or know) the impossible certainly sounds like one.”); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000) (“Ordinary people do not have the time or training to learn the contents of criminal codes; indeed, even criminal law professors rarely know much about what conduct is and isn’t criminal in their jurisdictions.”).

10. Larkin, *Overcriminalization*, *supra* note 6, at 750 (“When we know that everyone could be found guilty of something because there is no activity that the criminal law does not reach, we may look at a defendant as being unlucky, not immoral. There, but for the grace of God, go I.”) (footnote omitted). That fear is especially justified when the government creates strict liability offenses or rests liability on negligence grounds. See, e.g., Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065, 1079–1101 (2014); John F. Wood, *Jailing CEOs to Please the Masses*, WALL ST. J. (Apr. 21, 2019, 3:05 PM), <https://www.wsj.com/articles/jailing-ceos-to-please-the-masses-11555873501?>

11. See, e.g., ISLA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018).

12. See, e.g., *Banks v. Dretke*, 540 U.S. 668, 675, 705–06 (2004); Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court’s Order, *In Re* Special Proceedings, 842 F. Supp. 2d 232 (2012) (Misc. No. 09-0198 (EGS)); TERRY LABER ET AL., *RELIABILITY ASSESSMENT OF CURRENT METHODS IN BLOODSTAIN PATTERN ANALYSIS: FINAL REPORT FOR THE NAT’L INST. OF JUSTICE* (2016); MONICA LYNCH, *HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT* (2016); ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (2011); BARRY SCHECK ET AL., *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (2003); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty>. See generally Kozinski, *supra* note 5.

something to be processed efficiently, rather than persons whose futures are at stake.<sup>13</sup>

Yet another group of critics focuses on sentencing. Expressing the fear that the criminal justice system overpunishes even guilty offenders, their work has been the driving force behind the movement to end “mass incarceration.”<sup>14</sup> The cause, those scholars say, is attributable to overly aggressive prosecution of several particular chapters in the federal code. Over the last three decades, the federal government has aggressively charged offenders with violations of the federal drug and firearms laws, and those statutes require district courts to impose sentences that, particularly when ordered to run consecutively, can result in decades of imprisonment.<sup>15</sup> This leads to long-term imprisonment of offenders well beyond their “crime prone years” or even for life.<sup>16</sup>

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13. See, e.g., Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

14. See, e.g., ALEXANDER, *supra* note 5; RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019); TODD CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES COMMUNITIES WORSE* (2007); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2016).

15. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 2307 (codified at 21 U.S.C. § 841 (2016)) (amended 2010 & 2018), imposes a sentence based on the amount of the controlled substance at issue in the case, even if that sentence exceeds the recommended Sentencing Guidelines range. See, e.g., *Neal v. United States*, 518 U.S. 284 (1996); *Chapman v. United States*, 500 U.S. 453 (1991). Congress passed that law in response to the development of a new, cheap form of cocaine, colloquially known by the slang term “crack” (due to the sound it makes when smoked), which Congress feared would wreak havoc on urban black communities. See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 301, 371–72 (1997); Larkin, *Crack Cocaine*, *supra* note 5, at 241–42, 251. The statute imposed particularly lengthy sentences on crack cocaine trafficking, and, according to some critics of the law, led to what is popularly known as “mass incarceration.” See, e.g., ALEXANDER, *supra* note 5. The federal firearms laws also imposed mandatory minimum penalties on offenders who used a firearm in the course of committing a crime, including a drug trafficking offense. See 18 U.S.C. § 924 (2012) (amended 2018); *Bailey v. United States*, 516 U.S. 137 (1995). In addition, prosecutors can often charge multiple violations of the same statute for a series of criminal episodes—a practice known in the lingo as “stacking.” See *Deal v. United States*, 508 U.S. 129 (1993). Because drugs and guns go together like peanut butter and jelly, see Glenn Fry VEO, *Glenn Fry - Smuggler's Blues*, YOUTUBE (May 10, 2018), <https://www.youtube.com/watch?v=LSXKyHM133c>, drug offenders can wind up with sentences like the one imposed on Edmond Dantès.

16. For the story of one such offender, see ALICE MARIE JOHNSON, *AFTER LIFE: MY JOURNEY FROM INCARCERATION TO FREEDOM* (2019). The lengthy sentences imposed on drug traffickers have troubled numerous commentators and at least one very important former government official: our forty-fourth President Barack Obama. See Barack Obama, *Commentary, The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 835–38 (2017). Believing that the federal drug laws had the effect of throwing away a large number of offenders, he directed the Justice Department to establish the Clemency Initiative 2014 to review commutation applications and forward cases to him where an unduly long sentence was unjust. Before he left office, Obama commuted the sentences of more than 1,700 prisoners. For descriptions of the Clemency Initiative 2014, see OFF. OF THE INSPECTOR GEN'L, U.S. DEP'T OF JUSTICE, *REVIEW OF THE DEPARTMENT'S CLEMENCY INITIATIVE* (Aug. 2018); U.S. SENT'G COMM'N, *AN ANALYSIS OF THE IMPLEMENTATION OF THE CLEMENCY INITIATIVE 2014* (Sept. 2017); Paul J. Larkin, Jr., *Delegating Clemency*, 29 FED. SENT'G REP. 267 (2017) [hereinafter Larkin, *Delegating Clemency*]; Margaret Colgate Love, *Obama's Clemency Legacy: An Assessment*, 29 FED. SENT'G REP. 271 (2017).

To date, Congress has not responded to criticisms of the substantive criminal law or the operation of the criminal process. Yet, Congress recently responded to the last criticism, the one focusing on sentencing. Passed in the closing days of the 115th Congress, the First Step Act slightly amended the drug and firearms statutes to soften some of the penalties that they require.<sup>17</sup> Those revisions, however, were only of the “molar to molecular” variety;<sup>18</sup> the act did not reduce to a *de minimis* level every punishment authorized by drug and firearms laws, to say nothing about the remainder of the federal criminal code. The act’s supporters took a victory lap after it became law,<sup>19</sup> but the statute actually was far closer to a baby step than a broad jump. Accordingly, presidents will continue to face commutation pleas, as well as requests for pardons. The clemency issues discussed in this symposium are still important and will be for quite some time.

## II. IMPROVING THE ARCHITECTURE OF THE CLEMENCY PROCESS

Most commentators have analyzed the architecture of the clemency system and the process for reviewing individual petitions, principally in the federal system.<sup>20</sup> Focusing on the structural and procedural aspects of any decision-making process comes naturally to lawyers. Members of the academy and other criminal justice commentators often take their lead from the rulings of the Supreme Court of the United States. The court has displayed far greater willingness to evaluate the fairness of the procedures that the

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Some commutation recipients left prison immediately; others are still incarcerated but might leave prison somewhat earlier than their original sentence required. Larkin, *Delegating Clemency*, *supra*, at 269–70.

17. For an excellent discussion of the process that led to the enactment of that law, see Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. FORUM 791 (2019) [hereinafter Hopwood, *First Step*].

18. *So. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

19. *See, e.g., Remarks by President Trump at 2019 Prison Reform Summit and FIRST STEP Act Celebration*, THE WHITE HOUSE (Apr. 1, 2019, 6:38 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-2019-prison-reform-summit-first-step-act-celebration>.

20. *See, e.g., Rachel E. Barkow & Mark Osler, Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015); Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561 (2001); Joanna M. Huang, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE L.J. 131 (2010); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991); Margaret Colgate Love, *Justice Department Administration of the President’s Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89 (2015); Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL’Y REV. 447 (2009); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593 (2012); Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse?*, 13 FED. SENT. REP. 177 (2000–2001); Mark Strasser, *Some Reflections on the President’s Pardon Power*, 31 CAP. U. L. REV. 143 (2003); Gregory Craig, Counsel to President Obama (2008–2009), Remarks at the American Constitution Society Conference on Pardons (May 10, 2012), <http://www.propublica.org/documents/item/356129-greg-craigs-remarks-at-the-acs-conference-on>.

government uses when it affects an individual's life, liberty, or property than to second-guess the substantive decisions that the government makes on how to allocate the benefits and burdens of contemporary society.<sup>21</sup>

That scenario applies with even greater force in the case of executive clemency. Not only has the Supreme Court generally refused to impose substantive restraints on the president's exercise of clemency—in fact, the court has described the president's clemency power as “unlimited”<sup>22</sup>—but it also has declined to subject clemency decision-making to any type of procedural requirements or judicial scrutiny, let alone the type that the court has demanded that the government follow when it sentences an offender or revokes his status as a probationer or parolee.<sup>23</sup> The result is that the president's clemency power is about as close to a royal prerogative as our Constitution allows.<sup>24</sup>

Nonetheless, there is a flaw in the current system.<sup>25</sup> The Justice Department suffers from an actual or apparent conflict of interest because it prosecuted every federal clemency applicant. Aggravating that problem is

21. Compare, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (rejecting the adequacy of a state's procedures for terminating welfare benefits), with, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970) (refusing to second-guess a state's decision to limit welfare payments to indigent families regardless of their size).

22. *Ex parte Garland*, 71 U.S. 333, 380 (1866) (“The power thus conferred is unlimited, with the exception [for impeachment] stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.”).

23. Compare, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 480–89 (1972) (ruling that a parolee is entitled to certain minimal procedural rights (such as written notice of the charges and a hearing at which he can be present) before his parole can be revoked), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (same, for a probationer), with, e.g., *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981), and *Solesbee v. Balkcom*, 339 U.S. 9 (1950), *abrogated on other grounds by Ford v. Wainwright*, 477 U.S. 399 (1986) (declining to impose procedural requirements on a governor's clemency decisionmaking).

24. See *United States v. Klein*, 80 U.S. 128, 147 (1872) (“To the executive alone is intrusted the power of pardon; and it is granted without limit.”). The Framers trusted the president with this broad, unreviewable power for two apparent reasons. One is that clemency can only reduce the severity of a punishment, not increase it. See *Schick v. Reed*, 419 U.S. 256, 266 (1974) (“The plain purpose of the broad power conferred by [the Pardon Clause] was to allow plenary authority in the President to ‘forgive’ the convicted person in part entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable.”); *id.* at 267 (“the President may not aggravate punishment”). The other is that the Framers assumed that any president would exercise his authority with “scrupulousness and caution.” *Id.* at 265. As Chief Justice (and former President) William Howard Taft once wrote for the Court, “[o]ur Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.” *Ex parte Grossman*, 267 U.S. 87, 121 (1925); see also, e.g., THE FEDERALIST No. 74, at 473 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”); Joanna M. Huang, *supra* note 20, at 133 (“Executive clemency[’s] . . . flexible and broad nature allows the president and state governors to pardon or commute sentences at will . . .”).

25. See, e.g., 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, 239–53 (2017) [hereinafter Larkin, *Vice President and Clemency*]; Paul J. Larkin, Jr., *Revitalizing*



that the pardon attorney reports to the deputy attorney general, who is responsible for managing the Justice Department's criminal prosecutions, whether they are conducted by one of the Justice Department divisions with criminal law enforcement responsibility (criminal, tax, antitrust, etc.) or by a US Attorney's Office.<sup>26</sup> People do not like to admit that they made a mistake, and prosecutors are people, so department officials are not wont to admit that they goofed.<sup>27</sup> Giving the Justice Department a monopoly over the processing of clemency petitions effectively allows the department to strangle an application in the cradle. That might serve a particular division's or US attorney's short-term interests, but it does not necessarily serve the short or long term interests of the president or the public, to say nothing of the clemency applicant.

Presidents traditionally have relied on the advice offered by officials at the Justice Department, particularly the pardon attorney, when making clemency decisions.<sup>28</sup> In fact, with some recent exceptions, presidents generally have not acted on a clemency petition unless, and until, the Justice Department has evaluated it, conducted any necessary additional investigation, and prepared a formal recommendation giving a "thumbs up" or "thumbs down."<sup>29</sup> In theory, that process should work smoothly. The career lawyers at the Justice Department, including the ones at the Office of the Pardon Attorney, which is responsible for processing clemency applications, are experienced professionals, and their civil service status should protect them against the political back-and-forth that follows each change of administration. Nonetheless, there is a consensus that the current federal system needs improvement because the current process is systematically biased against clemency applicants.

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*the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 900–01 (2016) [hereinafter Larkin, *Revitalizing Clemency*].

26. See 28 U.S.C. §§ 506–507A (2018) (authorizing the president to appoint a deputy attorney general, an associate attorney general, and thirteen assistant attorneys general); *id.* § 5641 (authorizing the president to appoint a U.S. Attorney for every judicial district, ninety-three in all).

27. See Rosenzweig, *supra* note 20, at 608 (“[P]rosecutors, relishing their discretion, are poorly positioned to second-guess their own exercise of that power th[r]ough the mechanism of clemency—if you give the prosecutor broad authority to make decisions, you cannot be surprised when he is impressed with his own rectitude.”).

28. For an excellent succinct discussion of the operation of the federal clemency process, see Mark Osler, *Clementia, Obama, and Deborah Leff*, 28 FED. SENT'G REP. 309, 309 (2016). For an excellent longer discussion, see Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465 (2017). For an exhaustive historical view, see Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1172–1204 (2010) [hereinafter Love, *Twilight*].

29. Presidents Bill Clinton, George W. Bush, and Donald Trump are the notable exceptions to that rule. They allowed private parties to perform an end run around the Justice Department, relied on recommendations from others in the White House, or took the law into their own hands. See, e.g., Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131 (2010).

To remedy that problem, I have urged President Donald Trump to create a new Office of Executive Clemency as part of the Executive Office of the President, to use an informal group of advisors to evaluate clemency petitions, and to designate Vice President Mike Pence as his consigliere for clemency.<sup>30</sup> That would avoid a conflict of interest and allow the president to obtain the views of a range of people. Other commentators, including Professor Mark Osler, the host of this symposium, have recommended different structural remedies, such as a formal independent congressionally established clemency commission created along the lines of the US Sentencing Commission.<sup>31</sup> So far, President Trump has shown no serious inclination to change the current system. Time will tell what, if anything, he does with those recommendations.

The threshold question for the president, however, is not whether or how he should reform the clemency process, with or without Congress. No, the question is whether he should make clemency decisions *at all*. It is not obvious that the president should play a hands-on role in prisoner release decisions in this century. The last section will address that issue.

### III. SHOULD THE PRESIDENT MAKE CLEMENCY DECISIONS AT ALL?

The Framers gave the president the clemency power when fewer than four million people lived in only thirteen states abutting or close to the Atlantic coastline; 3,000 miles of water protected the nation against Europe's travails and potential interference; there were no political parties to speak of; and the federal government was in its infancy.<sup>32</sup> Compared to today (especially from a political standpoint), the job of president in 1790 more closely resembled being caretaker for the Elysian fields than being leader of the free world. Starting the world's first constitutional republic from scratch was hardly a cakewalk, but George Washington likely faced only a fraction of the issues that confront Donald Trump. The latter has far more problems and decisions on his plate than did the former, and the number of hours in the day has not increased to keep pace with the workload. The time necessary to make clemency decisions alone, even if done properly (and it has not always been done that way) could keep a large number of aides busy full time, let alone exhaust a chief executive troubled by the

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30. See Larkin, *Vice President and Clemency*, *supra* note 25, at 239–53; Larkin, *Revitalizing Clemency*, *supra* note 25, at 903–06.

31. See Barkow & Osler, *supra* note 20; see also, e.g., Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730, 751–54 (2012); Mark Osler & Matthew Fass, *The Ford Approach and Real Fairness for Crack Convicts*, 23 FED. SENT'G REP. 228 (2011); Rosenzweig, *supra* note 20, at 609–11.

32. See RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* (1970); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012); *History: 1790 Overview*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/through\\_the\\_decades/overview/1790.html](https://www.census.gov/history/www/through_the_decades/overview/1790.html) (last visited Dec. 6, 2019).

prospect that too many innocent people are rotting in prison or that too many people have been sentenced to the slow death of unnecessarily long terms of incarceration.

Consider what former president Barack Obama did with the Clemency Initiative 2014. Obama ostensibly made thousands of commutation decisions. The evidence strongly suggests, however, that Obama simply delegated decision-making to subordinate officials at the Justice Department and in the White House Counsel's Office.<sup>33</sup> Obama might have actually signed commutation warrants (or directed someone else to use his autopen), but that does not mean he independently evaluated clemency petitions. He likely just went along with the recommendations he received from others, perhaps without any deliberation or review.<sup>34</sup> That is not, however, what the framers had in mind when they vested the president with the clemency power.<sup>35</sup>

33.

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? 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.

Larkin, *Delegating Clemency*, *supra* note 16, at 267.

34.

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 thirty years to thirty years' imprisonment. 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. 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.

*Id.* at 268 (footnotes omitted).

35.

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. 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

President Trump seems to have gone in the opposite direction. From all that appears, he has not relied on formal recommendations by Justice Department officials in the Office of the Pardon Attorney, which historically has supervised the clemency process for the government.<sup>36</sup> Instead, he has relied on private recommendations of family members, celebrities, or other individuals he knows personally or has heard about. He commuted the life-imprisonment sentence of Alice Marie Johnson at the behest of Kim Kardashian West, his daughter, Ivanka, and his son-in-law and presidential advisor Jared Kushner.<sup>37</sup> Agreeing with the views of two White House advisors, Stephen Bannon and Stephen Miller, Trump pardoned former Arizona sheriff Joe Arpaio, who had been convicted of criminal contempt of court for defying a federal district court order limiting his ability to detain suspected illegal immigrants.<sup>38</sup> After Sylvester Stallone interceded on behalf of deceased heavyweight boxing champion Jack Johnson, Trump pardoned Johnson who had violated the Mann Act by transporting his girlfriend across state lines.<sup>39</sup> Trump pardoned Scooter Libby, formerly the chief of staff for Vice President Dick Cheney, who had been prosecuted by the Justice Department for perjury and obstruction of justice, perhaps because of the intervention of two lawyers Trump had sought to hire as his counsel in the Mueller investigation.<sup>40</sup> Granting clemency because someone

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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. It may be the case, however, that Obama did just that.

*Id.* (footnotes omitted).

36. See Alschuler, *supra* note 29 (collecting authorities discussing the federal pardon process).

37. See Brian Bennett, *How Unlikely Allies Got Prison Reform Done—With an Assist from Kim Kardashian West*, TIME (Dec. 21, 2018), <http://time.com/5486560/prison-reform-jared-kushner-kim-kardashian-west>.

38. See Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html>.

39. See John Eligon & Michael D. Shear, *Trump Pardons Jack Johnson, Heavyweight Boxing Champion*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/sports/jack-johnson-pardon-trump.html>. The Mann Act, 18 U.S.C. §§ 2421–2424 (2018), makes it a federal crime to transport a woman in interstate commerce for prostitution or “any other immoral purpose.” Johnson was black; his girlfriend, white.

40. See Peter Baker, *Trump Pardons Scooter Libby in a Case That Mirrors His Own*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/us/politics/trump-pardon-scooter->

has an “in” at the White House is cronyism, not justice, and not mercy. That is not the way to run this railroad.<sup>41</sup>

A better approach might be for the president to leave clemency decisions to others, particularly ones who are professionals at sentencing. For most of the twentieth century, the criminal justice system left imprisonment decisions to trial judges and parole boards.<sup>42</sup> Rehabilitation was the governing penological theory. The question of whether a particular offender had reformed his errant ways, like the question of whether a particular patient had been cured of a disease, was left to experts under the vaguest of guidelines.<sup>43</sup> Over time, parole became a fixture in the correctional process. As the Supreme Court put it, “[r]ather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals” and an “integral part of the penological system.”<sup>44</sup> Beginning in the 1960s, however, critics on the right and the left attacked parole as being ineffective and unjust.<sup>45</sup> Combined with a dramatic increase in the crime rate, those attacks ultimately succeeded and persuaded legislatures to adopt determinate sentencing systems.<sup>46</sup> The justification for punishment changed almost immediately from a rehabilitation-oriented approach to one based on the deterrent and incapacitating effect of imprisonment. With prompting and funding from the federal government, states adopted determinate, truth-in-sentencing laws, which require a prisoner to serve at least 85 percent of his sentence. The federal and state governments also passed statutes imposing mandatory minimum terms of imprisonment for drug and firearms of-

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libby.html (“Victoria Toensing, a lawyer and friend of Mr. Libby’s, said on Friday that she brought his case to the attention of the White House Counsel’s Office over the summer. Ms. Toensing and her husband and law partner, Joseph diGenova, were briefly set to work for Mr. Trump as private lawyers last month until they backed out, citing a client conflict.”).

41.

It would be bad enough if presidents had made a conscious choice not to pardon at all or to make only occasional symbolic use of their constitutional power. But what makes current federal pardoning practice intolerable is that as the official route to clemency has all but closed, the back-door route has opened wide. In the two administrations that preceded Obama’s, petitioners with personal or political connections to the presidency bypassed the pardon bureaucracy in the Department of Justice, disregarded its regulations, and obtained clemency by means (and sometimes on grounds) not available to the less privileged. The Department of Justice invited these end runs by refusing to take seriously its responsibilities as presidential advisor in clemency matters, by exposing President Clinton to charges of cronyism, and then President Bush to charges of incompetence. The two presidents are also at fault: in confirming popular beliefs about pardon’s irregularity and unfairness, they disserved both the institution of the presidency and their own legacies.

Love, *Twilight*, *supra* note 28, at 1171–72; *see also* STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 24 (2012) (“Presidential clemency is criticized as a perk for the rich and powerful, ranging from vice-presidential aide I. Lewis Libby to fugitive commodities trader Marc Rich.”).

42. *See* Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 *AM. CRIM. L. REV.* 303, 306–15 (2013) [hereinafter Larkin, *Parole*].

43. *Id.* at 309–10.

44. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972).

45. *See* Larkin, *Parole*, *supra* note 42, at 313–15.

46. *Id.* at 315–16.

fenses, along with recidivist laws.<sup>47</sup> In many states, parole withered and died.<sup>48</sup> Congress replaced the federal parole system with sentencing guidelines designed to regulate the front end of the correctional process.<sup>49</sup>

Distinguished commentators have argued that we should revisit the federal parole system and reconsider some type of review mechanism to reassess sentences after some period of imprisonment has elapsed. Some have suggested reinstating some form of parole.<sup>50</sup> Yet, I think that we will not see a rebirth of parole any time soon.<sup>51</sup> The criticisms that persuaded Congress to abandon parole in the Sentencing Reform Act of 1984 have not disappeared or lost their force.<sup>52</sup> Proof can be seen in the fact that, during the debate over the First Step Act, neither the House of Representatives nor the Senate seriously considered reinstating parole to address the overcrowding of federal prisons over the last decade-plus.<sup>53</sup>

A host of commentators has suggested that the federal government adopt a slightly different mechanism, a so-called “second-look” approach for that task.<sup>54</sup> Rather than have parole or prison officials, or someone else

47. *Id.*; Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J. L. & PUB. POL’Y 1, 9–10 (2013) [hereinafter Larkin, *Early Release*].

48. Larkin, *Parole*, *supra* note 42, at 315–16.

49. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, Ch. II, 98 Stat. 2031 (codified as amended at 18 U.S.C. § 351 and 28 U.S.C. §§ 991–98 (2018)); *Mistretta v. United States*, 488 U.S. 361 (1989). *But see* Larkin, *Parole*, *supra* note 42. The Sentencing Reform Act of 1984 was Chapter II, § 211 of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified, as amended at 18 U.S.C. § 3551 *et seq.* (2012) and 28 U.S.C. §§ 991–98 (2012)), which in turn, was Title II of an appropriations act for Fiscal Year 1985, Joint Resolution, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

50. *See, e.g.*, MICHAEL JACOBSON, *DOWNIZING PRISONS* 158–72 (2005); Joan Petersilia, *Community Corrections*, in *CRIME: PUBLIC POLICIES FOR CRIME CONTROL* 497–507 (James Q. Wilson & Joan Petersilia eds., 2002).

51. *See* Larkin, *Early Release*, *supra* note 47, at 37–38. In an earlier article, I took the position that the federal parole laws sprang back into life as a matter of law once the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005), held that the mandatory U.S. Sentencing Guidelines system is unconstitutional. *See* Larkin, *Parole*, *supra* note 42, at 321–36. The reason is that Congress would not have abolished parole if the guidelines were only advisory, as they have been since *Booker*. *See, e.g.*, *Kimbrough v. United States*, 552 U.S. 85, 100–10 (2007). A cynic might say that anyone who believes that the federal parole laws are in effect calls to mind the Japanese soldiers who refused to surrender at the end of World War II because they believed that the war was still ongoing. *See Japan’s ‘Holdout Soldier’ Dies at 91*, CNN (Jan. 17, 2014), <http://www.cnn.com/video/data/2.0/video/world/2014/01/17/japan-soldier-hiroo-onoda-dies.cnn.html> (reporting the death of a Japanese soldier who refused to surrender in the Philippines for more than thirty years after Japan itself surrendered). I still believe what I wrote in 2013, so I won’t argue over the comparison.

52. Of course, the same could be said about the virtues of socialism as a sound economic policy, which some people born after (or even before) the fall of the Berlin Wall posit is a good idea.

53. Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 106–07 (2019) [hereinafter Hopwood, *Second Looks*]. *See generally* Hopwood, *First Step*, *supra* note 17.

54. *See, e.g.*, Douglas E. Berman, *Encouraging (and Even Requiring) Prosecutors to be Second-Look Sentencers*, 19 TEMP. POL. & CIV. RTS. L. REV. 429, 435 (2010); Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT’G REP. 194

in the executive branch, make release decisions, most second-look proposals would place that decision in the hands of the judiciary.

Whatever form that vehicle should take, commentators have offered several rationales for a sentencing reevaluation.<sup>55</sup> Societal attitudes toward the appropriate length of terms of imprisonment are cyclical. Sometimes they favor long prison terms; other times, the reverse is true. No prisoner should be confined past the time that society today considers unjust. Moreover, we should have humility about our ability to make long-term remedial judgments, especially regarding the appropriateness of sentences of imprisonment that span generations. No one has the wisdom or foresight to know what an offender necessarily will be like ten, fifteen, or twenty years down the road. After all, some prisoners will become rehabilitated, and most will age out of their crime-prone years. Aside from the inefficiency of confining prisoners for periods that make no measurable contribution to retribution, deterrence, or incapacitation, at some point continuing to imprison a now harmless offender betokens cruelty more than concern for public safety. Atop that, some prisoners, even ones incarcerated according to the US Sentencing Guidelines, rather than by virtue of a mandatory minimum term of confinement required by statute, will have received terms of imprisonment that no reasonable person would consider just.<sup>56</sup> Some sentence reconsideration mechanism, they maintain, would be a valuable addition to the penological system. “Underlying that position is a fundamental, longstanding belief in the possibility of redemption and a desire to give everyone a sec-

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(2009); Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010); Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149 (2015); Sarah French Russell, *A “Second Look” at Lifetime Incarceration: Narratives of Rehabilitation and Juvenile Offenders*, 31 QUINNIPIAC L. REV. 489 (2013); Stephen R. Sady & Lynn Defferbach, *Second Look Resentencing Under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies that Result in Overincarceration*, 21 FED. SENT’G REP. 167 (2009). Georgetown Law Center Professor Shon Hopwood argues that Congress already accomplished that result via the First Step Act because it empowers a federal district court to grant a prisoner an early “compassionate release” if there are “extraordinary and compelling reasons” for reducing his sentence. Hopwood, *Second Looks*, *supra* note 53, at 106–11. Former Pardon Attorney Margaret Colgate Love has been a particular advocate for a second-look scheme. See JORGE RENAUD, PRISON POL’Y INITIATIVE, EIGHT KEYS TO MERCY: HOW TO SHORTEN EXCESSIVE PRISON SENTENCES 4 (2018); Margaret Colgate 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 Colgate Love, *Taking a Serious Look at “Second Look” Sentencing Reforms*, 21 FED. SENT’G REP. 149 (2009); Margaret Colgate Love, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 FED. SENT’G REP. 211 (2009). For a discussion of how one state undertakes that process, see Stephen Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. BALT. L. REV. 1 (2004).

55. See, e.g., Frase, *supra* note 54, at 196–99; Ryan, *supra* note 54, at 159–60.

56. Congress intended the Sentencing Guidelines to be mandatory, and the Supreme Court upheld a mandatory system against various separation of powers challenges in *Mistretta v. United States*, 488 U.S. 361 (1989). Now, however, the guidelines are discretionary. See *discussion supra* note 51. Even advisory guidelines do not guarantee short sentences.

ond chance. F. Scott Fitzgerald once said that “[t]here are no second acts in American lives.’ Maybe, but perhaps there’s room for a second-look.”<sup>57</sup>

There are different ways to structure a second-look system. Devising an appropriate option, however, would require Congress and the president to resolve a host of substantive and procedural issues. For example, who would perform the second look—the original sentencing judge, other Article III judges, Bureau of Prisons officials, an independent commission appointed for this purpose, or someone else?<sup>58</sup> What standard(s) would the second-look decisionmaker apply to decide whether a sentence is too long and what, instead, would be a just punishment? Must the original sentence be “shocking to the conscience,” clearly unjust, simply unjust, or merely erroneous? Should a court give any weight to the president’s decision to reject a commutation petition? Would every prisoner be eligible for a second look or only ones serving longer than a particular term (say, ten years) or past a certain age (say, sixty-five)? Does every prisoner merit a second look or are there some crimes or offenders that do not? If the latter, which ones—espionage, violent crimes, sexual offenses, crimes against minors or the elderly, repeat offenders, and so forth? Could a second look modify a mandatory minimum sentence? What if that sentence is life imprisonment, the only sentence other than the death sentence for some federal crimes, such as murder in the first degree?<sup>59</sup> How often could a prisoner apply for relief? Why limit a prisoner to only one shot? Should there be exceptions for remarkable acts in prison—say, saving a guard’s life, or donating a kidney—after a prisoner’s first application failed? Should a prisoner denied relief be allowed to appeal that decision? Should the government be able to appeal a reduction in a prisoner’s sentence? If so, what would be the standard of appellate review—clear error, abuse of discretion, or *de novo*? Would there be some form of postrelease supervision similar to parole or supervised release? Can the decisionmaker impose conditions on the released prisoner? If so, what conditions? Suppose a released prisoner reoffends or violates a condition of his release. Can, should, or must the decisionmaker revoke his release? If not, the second-look mechanism is better than parole for prisoners, but not for the government, so why should the public be willing to go along with it? If yes, what is the difference between

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57. Larkin, *Early Release*, *supra* note 47, at 32 (footnote omitted).

58. Using U.S. Magistrates would appear to be out of the question, perhaps for legal but certainly for institutional reasons. Magistrates are neither Article III judges nor Article II executive branch officials, so there might be a constitutional problem with having magistrates revise sentences imposed by the former. *See* *United States v. Benz*, 282 U.S. 304, 311 (1931) (“To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.”). In any event, Article III judges would likely throw a hissy fit if magistrates could second-guess their sentences.

59. *See* 18 U.S.C. § 1111(b) (2018).



a second look and parole? I see none. If there is no distinction, why the charade? I could add more questions, but you get the point.

It is not obvious how to answer those questions. Criminal justice scholars would disagree; politicians, even more so. Working out those disagreements is likely to take quite some time. It took Congress more than a decade to adopt the Sentencing Reform Act of 1984 (“SRA”)<sup>60</sup> and more than two decades to revise the federal drug laws.<sup>61</sup> The suggestion that Congress reinstitute some type of second-look mechanism would be scorned in some quarters as the attempted resurrection of parole under an alias.<sup>62</sup> Indeed, Congress’s most recent attempt to address this issue—the First Step Act—approached the problem from the back end of the correctional process through the use of a good-time and earned-time credit system, informed by risk-needs assessments,<sup>63</sup> rather than using parole or a formal second-look mechanism to decide whether and when to release prisoners.<sup>64</sup>

There might be another option. The First Step Act modified the SRA to give prisoners a limited opportunity to apply in federal district court for an early release. Perhaps, that new statute will provide the sought-after second look. If so, why not wait to see how it works out?

That possibility merits consideration. During the first four months after the First Step Act went into effect, more than 1,000 prisoners received sentence reductions.<sup>65</sup> Application of that statute reduced sentences by an average of seventy-three months, or 29.4 percent of the prisoner’s sentence. Perhaps the First Step Act will reduce the number of people sentenced to unduly long terms of imprisonment for drug crimes. Nonetheless, the First Step Act might not satisfy those commentators that support a second-look approach. Part of the reason is that the First Step Act does not expressly provide what a second-look approach should contain and how it should work.

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60. See *Mistretta*, 488 U.S. at 364–67 (describing the historical background to the Sentencing Reform Act of 1984).

61. See Larkin, *Vice President and Clemency*, *supra* note 25, at 237 n.3. Compare Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841 (2018)) (adopting a 100:1 sentencing ratio for the distribution of crack vs. powder cocaine), with Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended at 21 U.S.C. § 841 (2018)) (reducing that ratio to 18:1 but only prospectively), and First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 519 (2018) (applying the 18:1 ratio retroactively).

62. See Larkin, *Early Release*, *supra* note 47, at 36.

63. See Paul J. Larkin, Jr., *Managing Prisons by the Numbers: Using the Good-Time Laws and Risk-Needs Assessments to Manage the Federal Prison Population*, 1 HARV. J.L. & PUB. POL’Y: FEDERALIST 1 (2014).

64. As predicted. See Larkin, *Early Release*, *supra* note 47, at 40–43.

65. See TCR Staff, *First Step Act Cuts Sentences for 1,051 Fed Prisoners in Four Months: Report*, THE CRIME REP. (June 10, 2019), <https://thecrimereport.org/2019/06/10/first-step-act-cuts-sentences-for-1051-fed-prisoners-in-four-months-report>.

At common law, a trial judge could revise a sentence only during the same term of court in which the judge imposed it.<sup>66</sup> The SRA eliminated that rule. It made all sentences final and not subject to revision by a district court.<sup>67</sup> Nonetheless, Congress gave district courts limited authority to shorten a prisoner's sentence at a later time if "extraordinary and compelling reasons" warranted a reduction.<sup>68</sup> Neither the text of the SRA nor the accompanying Senate report (which the Supreme Court has said illuminates its terms)<sup>69</sup> defined the justifications for an early release, but the report did supply an example. The report explained that this provision was designed to enable the Federal Bureau of Prisons ("BOP") to release a prisoner suffering from a terminal illness so that he would not have to die within prison walls.<sup>70</sup> Release in those circumstances had been a longstanding justification for releasing an offender from prison via clemency or parole.<sup>71</sup> The SRA gave a district court the same authority.

But there was a catch. The SRA made clear that a district court could not grant a prisoner relief *unless* the BOP filed a motion in federal district court asking the court to reduce his sentence.<sup>72</sup> The effect was to make the BOP the gatekeeper for compassionate release, in all likelihood to avoid a

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66. See *United States v. Benz*, 282 U.S. 304, 306–07 (1931) ("The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be 'in the breast of the court' making them, and subject to be amended, modified, or vacated by that court."); *Basset v. United States*, 76 U.S. 38, 41 (1869) ("This control of the court over its own judgment during the term is of every-day practice.") (footnote omitted).

67. See 18 U.S.C. § 3582(b)–(c) (2018).

68. See *id.* § 3582(c)(1)(A)(i).

69. See *Mistretta v. United States*, 488 U.S. 361, 366 (1989) ("Helpful in our consideration and analysis of the statute is the Senate Report on the 1984 legislation, S. Rep. No. 98-225 (1983).").

70. See S. REP. NO. 98-225, at 121 (1983) (stating that the provision would enable a district court to shorten a prisoner's term of confinement, "regardless of the length of [the prisoner's] sentence," in the "unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner").

71. See James D. Barnett, *The Grounds of Pardon*, 61 AM. L. REV. 694, 733–34 (1927) ("There is a sort of prevailing notion among the people, or some classes of them, that any prisoner ought not to die in prison, but that he should be released whenever his illness is believed to be fatal. Such people argue that the public interests cannot suffer if the prisoner should be allowed to die outside of the prison walls, and that the dictates of humanity require that himself and his friends should be spared the alleged disgrace of such an ending of his life.") (footnote omitted) (quoting New York Governor David Hill).

72. See 18 U.S.C. § 3582(c)(1)(A)(i); *Fernandez v. United States*, 941 F.2d 1488, 1493 (11th Cir. 1991); *Turner v. U.S. Parole Comm'n*, 810 F.2d 612, 618 (7th Cir. 1987); William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 866 (2009) ("Federal courts have uniformly rejected attempts to appeal the denial of a motion for compassionate release. In fact, there is no published case granting compassionate release reduction outside of a motion by the Director. Instead, the cases stand for the proposition that a district court does not have jurisdiction to address a sentence reduction motion under Section 3582(c)(1)(A) in the absence of a motion by the Director.").

flood of such requests.<sup>73</sup> Perhaps, because it feared the public backlash that would result from releasing a prisoner who “miraculously recovered” or who committed a postrelease crime,<sup>74</sup> the BOP rarely opened the gate. In fact, as the inspector general of the Justice Department noted in a 2013 report, twenty-eight prisoners died between 2006 and 2011 before the BOP resolved their compassionate release petitions.<sup>75</sup>

In the First Step Act, Congress decided that the BOP had abused its gatekeeper role and gave prisoners an opportunity to seek relief in court without the BOP’s approval. Section 603(b) of that law authorizes a prisoner to apply for relief after exhausting his administrative remedies or thirty days after the warden receives his petition.<sup>76</sup> District courts are no longer barred from ruling on a prisoner’s compassionate relief request when the BOP disagrees.

Will section 603(b) of the First Step Act serve as the basis for reconsidering unduly onerous sentences of imprisonment? There is no doubt that federal prisoners will seek to use that option in precisely that way. The issue has only started to arise in the reported cases.<sup>77</sup> It is only a matter of

73. See Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse than the Disease?*, 3 WIDENER J. PUB. L. 799, 816 (1994) (“There is a federal statutory provision for compassionate release, but it is a tool for the Bureau of Prisons to use and not an alternative available to the prisoner himself.”).

74. It has happened. See Timothy Curtin, Note, *The Continuing Problem of America’s Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 473, 499–500 (2007) (describing the case of a sixty-five or sixty-six-year old double amputee confined to a wheelchair who, within three weeks of receiving a compassionate release, along with two accomplices used a sawed-off shotgun to rob a bank); cf. TINA CHIU, VERA INST., IT’S ABOUT TIME, AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 8 (2010) (“A commonly cited reservation [about expanding compassionate release] is that offenders placed in nursing homes may prey upon an already vulnerable population.”).

75. OFFICE OF THE INSPECTOR GEN’L, U.S. DEP’T OF JUSTICE, THE FEDERAL BUREAU OF PRISONS COMPASSIONATE RELEASE PROGRAM iii, 34–35, 40 (2013). See also Berry, *supra* note 72, at 868; Larkin, *Revitalizing Clemency*, *supra* note 25, at 907–12, nn.267–69.

76. 18 U.S.C. § 3582(c)(1)(A)(i).

77. Several district courts already have resolved traditional requests for compassionate relief filed under the First Step Act of 2018. A majority of district courts have granted relief in cases involving either a classic claim for “compassionate release”—viz., a severely ill prisoner approaching the end of life—or a prisoner who is seriously ill and effectively incapable of functioning by himself in prison, but is not yet at death’s door. Compare, e.g., United States v. Wong Chi Fai, 93-CR-1340 (RJD), 2019 WL 3428504 (E.D.N.Y. July 30, 2019) (granting relief), United States v. Bellamy, Civil No. 15-165(8) (JRT/LIB), 2019 WL 3340699 (D. Minn. July 25, 2019) (same), United States v. York, Nos. 3:11-CR-76; 3:12-CR-145, 2019 WL 3241166 (E.D. Tenn. July 18, 2019) (same), United States v. Beck, 1:13-CR-186-6, 2019 WL 2716505 (M.D.N.C. June 28, 2019) (same), United States v. Johns, No. CR 91-392-TUC-CKJ, 2019 WL 2646663 (D. Ariz. June 27, 2019) (same), United States v. Cantu, Criminal Action No. 1:05-CR-458-12019, WL 2498923 (W.D. Tex. June 17, 2019) (same), and United States v. McGraw, No. 2:02-CR-00018-LJM-CMM, 2019 WL 2059488 (S.D. Ind. May 9, 2019) (same), with, e.g., United States v. Rivernider, Case No. 3:10-CR-222 (RNC), 2019 WL 3816671 (D. Conn. Aug. 14, 2019) (considering but denying motion for compassionate release under the First Step Act of 2018), United States v. Lynn, Criminal No. 89-0072-WS, 2019 WL 3082202 (S.D. Ala. July 15, 2019) (same), supplemented on denial of motion for reconsideration, 2019 WL 3805349 (Aug. 13, 2019), United States v. Fox, Criminal No. 2:14-CR-03-DBH, 2019 WL 3046086 (D. Me. July 11, 2019) (same),

time, however, before someone will seek relief merely on the ground that his sentence is unduly long. Given the number of federal judges on the district and circuit courts, it is likely that some federal courts will accept that argument. Only time will tell how the Supreme Court will interpret section 603(b). I doubt, however, that the court will treat that provision as authority for federal courts to undertake a general reconsideration of sentences. I doubt that because the best reading of section 603(b) is that it does not create a general second-look mechanism.<sup>78</sup>

The purpose of the original version of this section of the SRA was to enable a prisoner to cross the River Styx in the company of whatever family and friends he might have on the outside or, if he had none, at least to die a free man.<sup>79</sup> Congress revised that component of the SRA because the BOP had flubbed its gate-keeping responsibility, intentionally or otherwise. Section 603(b) of the First Step Act, however, gives little indication that it adopts a broad-scale second-look mechanism under the guise of eliminating the SRA's requirement that a court may entertain a compassionate release motion only if the BOP filed it. What the text of section 603 clearly says is that the BOP failed to exercise the judgment and compassion that Congress expected it would exercise when Congress passed the SRA in 1984.<sup>80</sup> What

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United States v. Heromin, Case No.: 8:11-CR-550-T-33SPF2019 WL 2411311 (M.D. Fla. June 7, 2019) (same), United States v. White, 378 F. Supp. 3d 784 (W.D. Mo. 2019) (same), United States v. Casey, Case No. 1:06CR00071, 2019 WL 1987311 (W.D. Va. May 6, 2019) (same), United States v. Overcash, 3:15-CR-263-FDW-1, 2019 WL 1472104 (W.D.N.C. Apr. 3, 2019) (same), United States v. Gutierrez, No. CR 05-0217 RB, 2019 WL1472320 (D.N.M. Apr. 3, 2019) (same), United States v. Perez-Asencio, Case No. 18CR3611-H, 2019 WL 626175 (S.D. Cal. Feb. 14, 2019) (same), and United States v. Curry, Criminal Action No. 6:06-082-DCR, 2019 WL 508067 (E.D. Ky. Feb. 8, 2019) (same). The First Step Act of 2018 does not, however, allow a court to alter the place of a prisoner's confinement. That is in the hands of the U.S. Attorney General and the Bureau of Prisons. *See, e.g.*, 18 U.S.C. § 3621(b) (2018); 34 U.S.C. § 60541 (2018); *Tapia v. United States*, 564 U.S. 319, 331 (2011); *Perez-Asencio*, 2019 WL 626175, at \*4.

78. The issue is largely a matter of statutory interpretation, and, broadly speaking, there are two very different approaches to that type of task. The majority and dissenting opinions in *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019), nicely illustrate the two approaches. The question in *Allina Health* was whether the Medicare laws required the government to offer the public the opportunity to preview and comment on a new policy that dramatically—and retroactively—reduced payments to hospitals serving low-income patients. Writing for the majority, Justice Neil Gorsuch followed what I would call the “Lyrics Approach” to statutory interpretation. He painstakingly worked through the mind-numbingly intricate (and boring) details of the Medicare laws and the Administrative Procedure Act in concluding that the government erred by not using a notice-and-comment process before adopting the new policy. By contrast, in dissent Justice Breyer followed what I would call the “Music Approach.” He read the relevant statutes and legislative history as addressing a particular type of rule—a “legislative” rule, not an “interpretive” one—and concluded that the government's new policy was best viewed as an example of the latter. The two approaches might lead to different answers to the question whether section 603(b) of the First Step Act of 2018 creates a general second-look mechanism.

79. *See* Larkin, *Revitalizing Clemency*, *supra* note 25, at 907–12.

80. Numerous components of section 603(b) make it clear that the sentencing revision authority it contains addresses only the type of end-of-life issues that the BOP had mishandled since 1984. Section 603(b) defines the term “terminal illness” as “a disease or condition with an end-of-life trajectory.” It directs the BOP no later than seventy-two hours after a prisoner is “diagnosed

that text does not say—and sometimes that is probative too<sup>81</sup>—is that the federal district courts are now open for the business of resentencing offenders and answering for themselves all of the questions that we would have expected Congress to answer—or even just to debate or acknowledge—were it to have completely jettisoned the finality that sentences ordinarily receive under the SRA. Together, what Congress did and did not say powerfully militates against transforming section 603(b) into a broad remedial resentencing statute.

It is dubious in the extreme that Congress snuck a second-look provision into a revision of the compassionate relief section of the SRA without addressing any of the issues noted above that one would expect Congress to discuss before throwing open final judgments to amendment. Yet, that is precisely what some people claim Congress did. According to former Justice Department Pardon Attorney Margaret Colgate Love, section 603(b) is “the hidden, magical trapdoor in the First Step Act that has yet to come to everyone’s attention” that can be used as a second-look vehicle.<sup>82</sup> How likely is it that Congress intended to create a “hidden, magical trapdoor” that would allow every prisoner to claim that his sentence is unduly long? Nil. Does that matter? Yes. As Justice Scalia once put it, “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide ele-

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with a terminal illness” to notify his “attorney, partner, and family members that they” may ask a district court to modify the prisoner’s sentence. It requires the BOP no later than seven days after a prisoner is diagnosed with a terminal illness to “provide the [prisoner’s] partner and family members (including extended family) with an opportunity to visit the [offender] in prison.” Section 603(b) also instructs the BOP to process “the request” for relief submitted on behalf of a prisoner “who is physically or mentally unable to submit a request for sentence reduction” by the prisoner’s “attorney, partner, or family member.” It demands that the BOP “regularly and visibly post” in prisoner handbooks, other publications, and “medical and hospice facilities” information regarding the availability of relief. Section 603(b) also instructs the BOP to prepare an annual report for the Senate and House Judiciary Committees detailing a variety of information regarding the BOP’s implementation of those requirements, including “for each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence.” Finally, section 603(b) requires the BOP to inform Congress annually regarding the number of notifications and visits that occurred regarding “a terminally ill [prisoner],” and the number of occasions in which the BOP denied “visits to terminally ill prisoners” for security or other reasons.

81. See *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (in the course of ruling that section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, applies to the election of state court judges, noting that “Congress’ silence in this regard can be likened to the dog that did not bark.” (quoting A. Doyle, *Silver Blaze*, in *The Complete Sherlock Holmes* 335 (1927))); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (“In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.”).

82. RJ Vogt, *How Courts Could Ease the White House’s Clemency Backlog*, LAW360 (Aug. 25, 2019), <https://www.law360.com/access-to-justice/articles/1191991/how-courts-could-ease-the-white-house-s-clemency-backlog>.

phants in mouseholes.”<sup>83</sup> That proposition is equally appropriate in the case of the First Step Act.

Nevertheless, section 603(b) of that law does provide room to craft the argument that the US Sentencing Commission now has the power to formulate second-look guidance for district courts when they receive prisoner petitions for sentencing relief.<sup>84</sup> The argument would go as follows: A provision in the SRA instructs the US Sentencing Commission to “promulgat[e] general policy statements regarding the sentencing modification provisions in” the SRA that Congress enacted in 1984 and that section 603(b) recently modified.<sup>85</sup> Those policy statements “shall describe what should be considered extraordinary and compelling reasons for sentence reduction,” and must include “criteria to be applied and a list of specific examples.”<sup>86</sup> Congress made it clear that “[r]ehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason.”<sup>87</sup> Nonetheless, the argument will go, the original SRA provision empowers the Sentencing Commission to define “extraordinary and compelling” justifications that, *atop* proof of rehabilitation, permit a district court to grant a prisoner an early release.<sup>88</sup>

In 2007, the Sentencing Commission issued a policy statement and application notes that address the case of a terminally ill prisoner.<sup>89</sup> The Sentencing Commission went on, however, to address other scenarios too. The Sentencing Commission’s policy statement allows for relief where a prisoner is age seventy, has served at least thirty years in prison, and poses no danger to the community. The Sentencing Commission’s application notes go further. They embrace circumstances where the caregiver for the prisoner’s children has died or become incapacitated. In 2016, the Sentencing Commission went further still by creating four different categories of “extraordinary and compelling reasons” justifying early release. The Sentencing Commission focused on a prisoner’s medical condition, age, and family circumstances, but also established a catchall category for “other reasons.”<sup>90</sup>

The Sentencing Commission’s 2007 and 2016 amendments reveal that it has decided to take up the burden of designing its own second-look system. Consider this: the first category would impose no outer boundary for

83. *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 468 (2001).

84. *See* Hopwood, *Second Looks*, *supra* note 53, at 99–111.

85. 28 U.S.C. § 994(t) (2018).

86. *Id.*

87. *Id.* (emphasis added).

88. *See generally* Hopwood, *First Step*, *supra* note 17; Hopwood, *Second Looks*, *supra* note 53, at 101–02.

89. U.S. SENTENCING GUIDELINES MANUAL § 1B1.13, Policy Statement and Application Notes (U.S. SENTENCING COMM’N 2018).

90. U.S. SENTENCING COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES 1–3 (2016) [hereinafter SENTENCING COMM’N 2016 AMENDMENTS].

the terminal outcome of a disease.<sup>91</sup> It would apply to a prisoner with six months, a year, or more to live. The Sentencing Commission reasoned that, “while an end-of-life trajectory may be determined by medical professionals with some certainty, it is extremely difficult to determine death within a specific time period.”<sup>92</sup> That conclusion (to be kind) is dubious. The US Department of Health and Human Services, which presumably knows more about terminal illnesses than the US Sentencing Commission, believes that physicians can determine whether a patient has only six months or less to live.<sup>93</sup> So too does at least one state that authorizes euthanasia for terminally ill patients.<sup>94</sup> The medical-justification category also extends beyond prisoners with a terminal disease and includes offenders with “a debilitating condition.” In theory, that term would include suffering from imprisonment-induced depression, since incarceration is hardly a life-affirming experience. The result would be to allow district courts to release almost every prisoner.<sup>95</sup> The last three categories—the prisoner’s age or family circumstances, as well as the miscellaneous “other reasons” category—are even more remote from the foundational concern that the original SRA compassionate release provision addressed. They partake more of the type of “major question” judgments regarding sentence finality that legislators ordinarily make themselves, rather than the “interstitial,” fill-in-the-details task ordinarily left for agencies.<sup>96</sup> Perhaps the Sentencing Commission just grew tired of waiting for Congress to act and hoped that the BOP would step up to the plate.

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91. *Id.* at 2.

92. *Id.*

93. A physician cannot certify that someone is eligible for hospice care unless he can make that finding. *See* 42 C.F.R. §§ 418.20, 418.22(a)–(b)(3) (2019). Physicians can make renewed findings, but no later finding can last for more than ninety days. 42 C.F.R. §§ 418.21, 418.22(a).

94. *See* *Gonzales v. Oregon*, 546 U.S. 243, 251–52 (2006) (describing the Oregon Death with Dignity Act).

95. The Sentencing Commission would recognize “three broad criteria to include defendants who are (i) suffering from a serious condition, (ii) suffering from a serious functional or cognitive impairment, or (iii) experiencing deteriorating health because of the aging process, for whom the medical condition substantially diminishes the defendant’s ability to provide self-care within a correctional facility and from which he or she is not expected to recover.” SENTENCING COMM’N 2016 AMENDMENTS, *supra* note 90, at 2. That category includes any prisoner suffering from “a serious functional or cognitive impairment” to ensure that it reaches “a wide variety of permanent, serious impairments and disabilities, whether functional or cognitive, that make life in prison overly difficult for certain inmates.” *Id.* Qualifying conditions would appear to include not just prisoners suffering from old-fashioned disabilities—that is, ones who are blind, deaf, or lame—but anything that makes prison life “overly difficult,” a category that could reach anyone.

96. *See* *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (discussing the “major questions” exception to the rule of statutory interpretation that would afford deference to an agency’s interpretation of its governing statute); *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000) (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (“Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s day administration.”)).

How far the Sentencing Commission may stray from the classic case of a dying prisoner remains to be seen, both as a matter of statutory interpretation and administrative law. That is particularly true given that the Sentencing Commission adopted its Policy Statement and Application Notes *years before* Congress revised the SRA compassionate release section via the First Step Act, at a time when only the BOP could file a motion for compassionate release. Maybe the Sentencing Commission would not be so adventurous now that BOP is no longer the gatekeeper. Even if it is, however, Congress did not envision that allowing dying prisoners to ask a district court for compassionate release would also enable prisoners serving long sentences to be released early.<sup>97</sup>

Where does that leave us? In the short run, we are unlikely to see Congress address the clemency process in any significant way. The First Step Act became law only because of bipartisan support in Congress, supported by a broad spectrum of people and organizations interested in criminal justice reform.<sup>98</sup> Even then, however, no one was confident that the members of Congress would come together to pass that law.<sup>99</sup> Today, with a presidential election just around the corner, the Senate and House of Representatives now in the hands of different political parties, and a degree and type of political polarization that some have said matches what existed before the Civil War, we are not likely to see a Second Step Act of 2020. The upshot is that President Trump will need to use his clemency power to correct what he believes are unjust convictions and sentences.

The next subject, then, is when and how the president should make those decisions. How should he decide whether and when to forgive someone and extend mercy? Those questions, however, are very complicated, and their answers are beyond the scope of this article. They will be the subject of a future work.

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97. A case that the Supreme Court recently decided, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), speaks to the administrative law issues posed by the Sentencing Commission's actions. The issue in *Kisor* involved the weight missibly given to an agency's interpretation of an agency rule. In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), the Supreme Court held that federal courts must defer to an agency's interpretation of its own vague or ambiguous rules (a proposition that the Court reaffirmed in *Auer v. Robbins*, 519 U.S. 452 (1997)), and in *Stinson v. United States*, 508 U.S. 36 (1993), the Court decided that the *Seminole Rock* holding applies to the Sentencing Commission's interpretation of its own guidelines. In *Kisor*, the Court substituted the deference standard adopted in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), for the one set forth in *Seminole Rock*. In *King v. Burwell*, the Court adopted a so-called "major questions" exception to *Chevron*, meaning that Congress will not be assumed to have delegated to an agency questions of major importance. 135 S. Ct. at 2488–89. As explained above, *see supra* text accompanying notes 78–82, Congress did not intend to delegate to the U.S. Sentencing Commission the authority to adopt a general "second look" resentencing program. Congress only wanted to allow prisoners to be able to die outside of prison walls.

98. *See* Hopwood, *First Step*, *supra* note 17, at 801–02.

99. *Id.* at 794–95, 798–99.



#### IV. CONCLUSION

The Framers vested in the president the authority to forgive offenders or extend them mercy for wrongdoing. There is still a need for someone or some entity to correct errors in the criminal justice system or to moderate sentences that prove too severe. For decades, parole served part of that function, but Congress decided to go in a different direction in 1984 and 2018. Commentators have argued that Congress should resurrect parole or use a similar mechanism, called a second look, to substitute for parole. In the short run, at least, we are not likely to see Congress adopt either alternative. The bottom line is this: clemency will remain an integral part of the criminal justice system in the twenty-first century for the foreseeable future.