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Preparing the Pardon Power for the 21st Century

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ARTICLE

PREPARING THE PARDON POWER FOR THE 21ST CENTURY

P.S. RUCKMAN JR.*

I. INTRODUCTION

In the following pages, I aim to review what the literature of political science has to say about the topic of reform of state and federal clemency processes. I then share what I would like to see change with respect to federal executive clemency. Admittedly, much of my thinking is influenced by the views of predecessors in my discipline. I then identify what I believe should be explicit goals and baselines for future assessment of the pardon power.

As a contextual matter, it is important to note that, at the time this article was written, Barack Obama was well into the seventh year of his presidency. At the close of 2015, his sixty-four pardons (which simply restored civil rights) and eighty-nine commutations (which reduced the length of prison sentences) render his administration one of the least merciful in history. Most of the very few (eight) presidents who have exercised clemency less than Obama have either served a single term or died before completing one.¹ In addition, President Obama has denied a record 9,007 clemency applications,² and 2,841 more have been “closed without presidential action.”³

* Professor of Political Science, Rock Valley College, Rockford, IL. Editor, *Pardon Power Blog*. Any errors of fact or interpretation herein are my own.

1. P.S. Ruckman Jr., *Obama to Blaze Past Franklin Pierce*, PARDON POWER BLOG (July 13, 2015), <http://www.pardonpower.com/2015/07/obama-to-blaze-past-franklin-pierce.html>. The only presidents who have granted fewer pardons are W.H. Harrison, 1841 (3); James Garfield, 1881 (5); George Washington, 1789–1797 (31); John Adams, 1797–1801 (37); Zachary Taylor, 1849–1950 (43); George H.W. Bush, 1988–1992 (77); Thomas Jefferson, 1801–1809 (129); and Franklin Pierce 1853–1857 (146). William H. Harrison died on April 4, 1841, only a month after stepping into the Office of the Presidency. James Garfield was assassinated after serving only four months. Zachary Taylor died of food poisoning after serving only sixteen months in office.

2. Office of the Pardon Attorney, *Clemency Statistics: Barack Obama*, DEP'T OF JUST., <http://www.justice.gov/pardon/clemency-statistics> (last visited Mar. 24, 2016) (noting 1,629 applications for pardons and 7,378 for commutations of sentence as of the end of 2015).

3. *Id.* (listing 467 applications for pardons and 2,374 for commutations of sentence).

Despite the grim nature of these data, on July 13, 2015, White House Press Secretary Josh Earnest suggested President Obama had taken a “historic step” because of “bold action” in the matter of sentence commutations.⁴ Earlier in the day, it had been announced that forty-six had been granted, and the White House clumsily guessed it was the “largest number” of commutations “issued by a president on a single day dating back to at least the Johnson administration.”⁵ Earnest then attempted to press his point by arguing that President Obama’s total number of commutations (eighty-nine) was “more than the number of commutations issued by the four previous presidents combined.”⁶

The Press Secretary’s comments seemed not well thought out or far too reliant upon low levels of knowledge in his audience. While it was true that President Obama’s eighty-nine commutations were higher than the combined total for the four previous presidents, it was also true that, together, those presidents granted eighty-eight. So, President Obama had “beaten” them by a grand total of one. The point of comparison was all the more awkward because the four previous presidents received a total of 16,104 sentence commutation applications, whereas President Obama, by that point, had received 17,156. In other words, he had received over a thousand more applications than the previous four presidents yet granted only one more commutation. Furthermore, President Obama had granted 988 fewer pardons than his four predecessors combined, each one of them topping his mere sixty-four pardons.⁷

Regardless, it is safe to say that many have been looking to the president to do far more with respect to pardons and commutations than just a *little* better than recent presidents—most of whom were notoriously neglectful of the pardon power. It is disheartening to think that anyone would even think to use them as a benchmark for much of anything related to clemency (except failure).

At present, the good news is that there is palpable expectation that, in the closing months of his administration, President Obama will grant more commutations. Some see the potential for a hundred or so. Some see the possibility of literally thousands.⁸ For whatever reason, the President’s

4. Press Briefing by Josh Earnest, White House Press Secretary (July 13, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/13/press-briefing-press-secretary-josh-earnest-7132015>.

5. *Id.* In fact, it was the highest number of individual commutations of sentence granted since July 26, 1935, when Franklin D. Roosevelt granted 151 (many of which were for persons who violated federal narcotics laws).

6. *Id.*

7. See Office of the Pardon Attorney, *supra* note 2.

8. In February 2015, the *Washington Post* reported that thirty-five thousand federal inmates had “applied to have their sentences shortened.” Sari Horwitz, *U.S. Clemency Effort, Slow to Start, Will Rely on an Army of Pro Bono Lawyers*, WASH. POST (Feb. 28, 2015), https://www.washingtonpost.com/world/national-security/us-clemency-effort-slow-to-start-will-rely-on-an-army-of-pro-bono-lawyers/2015/02/28/2ba8c6bc-bc42-11e4-8668-4e7ba8439ca6_story.html.

inexplicably parsimonious use of pardons does not seem to be on anyone's radar screen of concern.

If the President is—at last—going to show more than casual interest in clemency, it is hoped that he will do it sooner than later. A steady stream of commutations (and pardons) from now until the end of the term would be more ideal, for a variety of reasons. President Clinton's last-minute antics did very little positive for the pardon power (see further discussion below), and the nation does not need or deserve another stunt like his.

The saving grace is that, whether President Obama exercises clemency a few dozen times, several hundred times, or a thousand times between now and the end of the term, none of the thoughts and suggestions outlined below would require significant modification. Like several others who have given the clemency process serious thought over the years, I hold, as a basic premise, that there are a variety of systematic problems that can only be addressed by dramatic reorganization of the clemency process and reevaluation of the purposes and goals of the pardon power. These problems were around long before President Obama came to Washington. Hopefully they will not hang around much longer.

II. THE LITERATURE OF POLITICAL SCIENCE AND REFORM

For many years now, it has been somewhat of a tradition for political scientists and academics in the legal profession to pass each other like ships in the night when writing about the pardon power. Even when focusing on the same events, ideas, and concerns, there has been precious little cross-pollination. Consequently, there has been little of the benefit derived from rigorous examination of the topic from a variety of perspectives, each with their particular strengths and insights. When the University of St. Thomas invited political scientists to its symposium on "Sentence Commutations and Executive Pardon Power" in April 2012, and in the pages of its *Law Journal*,⁹ it took a bold, refreshing, progressive step. The 2015 symposium, "Reviewing Clemency in a Time of Change" and this issue of the *Law Journal* represent nothing less.

That being said, this section will focus on what political scientists have had to say about the topic of reforming clemency processes. In volume nine of this *Review*, I reviewed and assessed the literature appearing in the journals of political science and/or written by those in the discipline.¹⁰ Readers of that piece are certainly cognizant of the fact that this vast literature has not been blind to concerns for the need for change, adaptation, and sometimes reform.

9. P.S. Ruckman Jr., *The Study of Mercy: What Political Scientists Know (and Don't Know) About the Pardon Power*, 9 U. ST. THOMAS L.J. 783 (2012).

10. *Id.*

A. *Early Critiques and the Progressive Movement*

Francis Lieber's *On Civil Liberty and Self-Government* featured a "paper on the abuse of the pardoning power" as a second appendix.¹¹ After enumerating nine "disastrous consequences" of the "arbitrary use" of pardons,¹² Lieber suggested those consequences had "shown themselves" to "an alarming degree" in the United States and that "in many parts of the country," were "on the increase."¹³

But Lieber argued public confidence could be regained if each state created a "Board of Pardon" with members appointed by the legislature.¹⁴ He further recommended that pardons should only be issued by the governor when recommended by the board,¹⁵ and that decisions to grant clemency should be published in advance of the actual grants, as well as the reasons for each decision.¹⁶ Lieber predicted that if such boards were established, "a series of fair principles and rules" would, "in a short time," be "settled by practice, and the pardon [power] would be far less exposed to arbitrary action."¹⁷ Fourteen years later, when he wrote about proposed amendments to the New York Constitution,¹⁸ Lieber remained convinced that there was "[n]o better way of moderating the pardoning power" than by establishing a pardon board to work "in conjunction with the executive power."¹⁹

Theodore Roosevelt echoed Lieber's positions in a 1913 piece written for the *Annals of the American Academy of Political and Social Science* (henceforth "*The Annals*"). Roosevelt described the pardon power as "one of the most objectionable points" in our criminal justice system²⁰ and pointed to a *New York Times* article which reported many governors complained about having little time for clemency decisions. Thus, they "advocated" the creation of pardon boards in their respective states.²¹ Roosevelt thought such boards should be composed of governors and appointed "non-

11. FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF GOVERNMENT* 390 (Phila., Lippincott, Grambo & Co., 1853).

12. *Id.* at 395–96.

13. *Id.* at 396.

14. *Id.* at 405.

15. *Id.* Lieber also suggested that governors be forced to grant clemency if a board recommends such a second time.

16. *Id.*

17. LIEBER, *supra* note 11, at 406.

18. FRANCIS LIEBER, *Reflections on the Changes Which May Seem Necessary in the Present Constitution of the State of New York*, in 2 *THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER: CONTRIBUTIONS TO POLITICAL SCIENCE* 181, 185 (Daniel Gilman ed., 1881).

19. *Id.* at 189.

20. Theodore Roosevelt, *The New Penology*, 46 *ANNALS AM. ACAD. POL. & SOC. SCI.* 4, 4 (1913).

21. See *Governors Discuss the Granting of Pardons*, *N.Y. TIMES*, Jan. 19, 1913, at SM11 (detailing numerous interviews with various governors in regards to the pardoning power).

political” persons of “high integrity and sound judgment” equipped with their own “secretary and office staff.”²²

In the same year, *The Annals* featured an article by Herbert S. Hadley, the Governor of Missouri, who also felt governors needed to “be relieved from the burden and responsibility of dealing with [pardon applications].”²³ He felt this was especially so because governors were “peculiarly subject to and liable to unwarranted and malicious attacks by sensational and unscrupulous newspapers for granting executive clemency,” and because it was easy “to mislead and to prejudice the public” against “a proper policy of executive clemency.”²⁴ Hadley guessed, however, that if pardons were administered by a board, decisions “would assume something of the form of a judgment of a court” and “better and more complete investigation[s]” would be possible.²⁵ Hadley also thought such boards would be largely insulated from “unwarranted attacks and misrepresentations.”²⁶

By 1914, William W. Smithers of the Philadelphia Bar asserted it was “generally conceded” that “some advisory board should hear [clemency] applications and make recommendations” to governors for the sake of “regularity, publicity and careful consideration.”²⁷ In his view, governors were not using the pardon power enough, even though an executive’s “oath to ‘take care that the laws be faithfully executed’ include[d] the declaration that he will maintain the constitution which confers upon him the pardoning power.”²⁸ As far as Smithers was concerned, withholding a pardon in a “proper case” was no more acceptable than refusing to “call out the militia when the preservation of public peace demand[ed] it.”²⁹

Smithers suggested, however, that governors were reluctant to pardon because of the “fallacy of the traditional, vindictive punishment of criminals” and “futile” nature of attempts to “diminish crime by statutes fixing a definite penalty for a specified offense.”³⁰ He thus encouraged executives not to “shrink from exercising the pardoning power”³¹ because there was a measure of “abuse” in the “failure” to act. Indeed, prisons were packed with individuals incarcerated “years ago” under “rigid impersonal and mechanical criminal laws” and “many inmates . . . could and ought to be free.”³² Thus, Smithers advised executives to do more than simply re-

22. Roosevelt, *supra* note 20, at 5.

23. Herbert S. Hadley, *New Theory as to Punishment of Crime*, 46 ANNALS AM. ACAD. POL. & SOC. SCI. 40, 43 (1913).

24. *Id.*

25. *Id.*

26. *Id.*

27. William W. Smithers, *The Use of the Pardoning Power*, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 61, 63 (1914).

28. *Id.*

29. *Id.* at 62–63.

30. *Id.*

31. *Id.* at 64.

32. *Id.* at 65.

spond more agreeably to clemency applications because they were not “bound to wait” until pardon applications were filed.³³

President Warren Harding, Secretary of Commerce Herbert Hoover, and Chief Justice William Howard Taft all attended the semi-annual meeting of the Academy of Political Science at the Hotel Astor in May 1921. There, Frederick A. Cleveland presented a paper on the “reorganization” of the federal government.³⁴ Cleveland “questioned whether the [federal] ‘pardons’ process should be [housed] in the ‘prosecuting’ department” (the Department of Justice).³⁵ In his mind, the prosecution should be “kept out,” or placed “very far in the background,” when it came to assessing clemency applications.³⁶ Instead, this “public function” should be “transferred” to some “group” that had, as a primary purpose, an “outworking of the problem of social reconstruction.”³⁷ More specifically, Cleveland suggested the creation of a Bureau of Parole, Probation, and Pardons that would be housed under the Assistant Secretary for Public Welfare.³⁸ Ten years later, Clair Wilcox wrote that the pardon power had been “frequently abused by governors because they “yielded to political pressure.”³⁹ But he also believed pardons placed an “unfairly heavy burden” on governors who did not actually “have the time” to “properly” consider applications—which is why some states had created agencies and boards to advise and assist with the process.⁴⁰

B. Humbert’s Assessments of the Pardon Power

Like Frederick Cleveland before him, W.H. Humbert expressed both general and specific concerns about federal executive clemency. His analysis of the topic was unique, however, because of its exceptional emphasis on empirical data. The 1941 masterpiece, *The Pardoning Power of the President*,⁴¹ analyzed data from a record book kept by the U.S. Attorney

33. Smithers, *supra* note 27, at 65.

34. Frederick A. Cleveland, *The Reorganization of the Federal Government: An Alternative Proposal*, PROC. OF THE ACAD. OF POL. SCI. IN THE CITY OF N.Y. 31, 31 (1921).

35. *Id.* at 40.

36. *Id.*

37. *Id.*

38. Almost a century later, a *Washington Post* editorial would recommend that “clemency reviews be moved out of the Justice Department and put in the Department of Health and Human Services.” It further argued, the “Justice Department’s role should be limited to comments, the same as other stakeholders. The department that prosecuted a case and advocated for a sentence is not the appropriate one to conduct a neutral clemency review.” Dennis Couchon, *Mr. President, You’re Doing Clemency Wrong. It’s Not About Law, It’s About Mercy*, WASH. POST (July 17, 2015), https://www.washingtonpost.com/opinions/obama-is-wrong-granting-clemency-isnt-a-legal-decision/2015/07/17/234612f0-2bf9-11e5-bd33-395c05608059_story.html.

39. Clair Wilcox, *The Open Door*, 157 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 104 (1931).

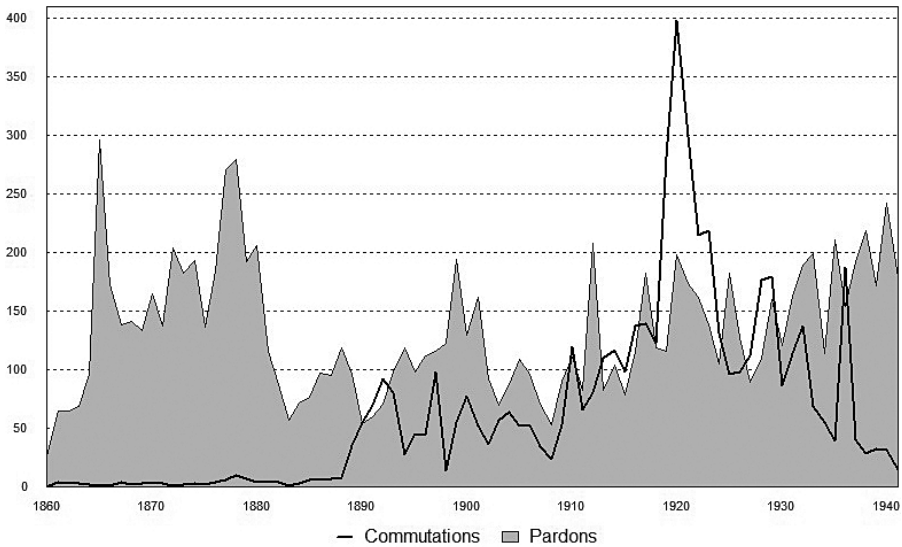
40. *Id.*

41. W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* (1941).

General or his assistant from 1860 to 1884⁴² and data from the Attorney General's *Annual Reports* from 1884 to 1936.⁴³

Humbert observed commutations were quite common for the better part of five decades (1860–1941, *see* Figure 1). Without presenting any data on the matter, he guessed that the apparent dominance of pardons from 1860 to 1884 may actually have been the result of “a failure to name properly in every case the form of clemency granted.”⁴⁴ Pardons that terminated sentences and restored civil rights were recorded in an identical fashion to pardons that simply restored civil rights.⁴⁵

FIGURE 1
Humbert Pardons v. Commutations of Sentence, 1860–1941



SOURCE: W.H. Humbert, *The Pardoning Power of the President* (1941, pp. 96-8), *Annual Report of the Attorney General* (1937-1941).

This guess seems reasonable given what is now known about clemency practices in even earlier administrations. Zachary Taylor (1849–1850), for example, signed thirty-eight clemency warrants. But eight of his pardons and eight of his remissions also included “discharge” of a prisoner from custody. The word “commutation” simply was not used in the warrants, or in official record keeping.⁴⁶ Similarly, almost half of 268 clemency

42. *Id.* at 95. The “record book” actually extended back to 1854, but Humbert found the first six years of records not to be accurate.

43. *Id.* The data were gathered by calendar years from 1860–1884, and for fiscal years from 1885–1936. *Id.* at 95 n.4.

44. *Id.* at 100.

45. *Id.* at 100 n.5.

46. National Archives, *Clemency Warrants, Dep’t of State, Vols. 5, 6 (1836–1857)*. Data gathered by the author in the National Archives in College Park, Md.

warrants signed by James K. Polk (1845–1849) involved the “discharge” of prisoners, without any mention whatsoever of “commutations of sentence.”⁴⁷ It was not until the late 1800s that clemency warrants began to regularly use the label “commutation” when the length of prison sentences, or the amount of fines, were reduced (as is the consistent practice today). In sum, it seems safe to say that commutations of sentence (in the modern sense of the language) were probably much more common than the left side of Figure 1 indicates.

Humbert also observed a second trend that began in 1895: “[T]he President disclosed consistently and impressively” an “inclination toward” granting “pardons to restore civil rights.”⁴⁸ In the first three decades of the data, less than 10 percent of the annual grants of clemency involved mere restoration of rights.⁴⁹ By 1905, however, the percentage had crossed the 50 percent mark.⁵⁰ By 1935, 66 percent of the annual grants were pardons to restore rights.⁵¹

When looking at Figure 1, it is also worth remembering that while Humbert’s data extended to 1936, his book was actually published in 1941. Thus, it is certain that he was aware of the continuing nosedive in commutations of sentence from 1937–1940 (the far right of the chart). Consequently, Humbert observed that, after the opening of the twentieth century, presidents “largely departed” from “the most beneficial forms of clemency” (commutations of sentence) and gravitated to forms which did not “disturb as drastically the original sentence of the courts” (pardons to restore civil rights).⁵²

In a separate chart,⁵³ Humbert presented data on the total number of pardon applications in comparison with the number of grants and denials in each year. For purposes of consistency, these data have also been extended to 1941 (see Figure 2). Figure 2 is striking both for the manner in which it reflects current trends (as will be shown) and the manner in which it reflects an inclination toward mercy that has long since passed. Across the eight decades of data, in almost every year represented, presidents granted more pardons than they denied. This generosity is, of course, dwarfed by the increasing number of clemency applications that were being filed. Year to year, applications were not being addressed at all, so pending applications combined with incoming applications to create quite a mess. One would guess that this backlog—in and of itself—might have attracted some atten-

47. *Id.*

48. Humbert, *supra* note 41, at 101.

49. *Id.*

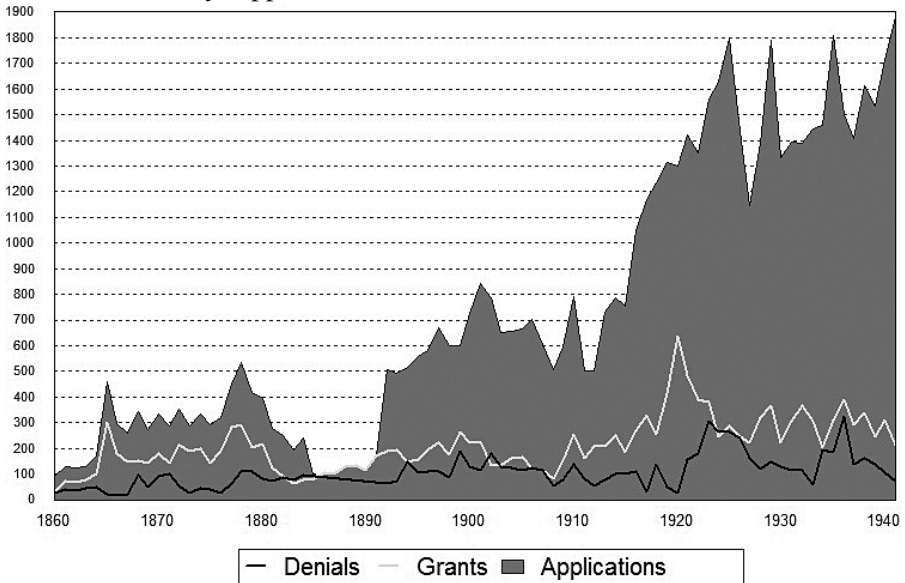
50. *Id.*

51. *Id.*

52. *Id.* at 102.

53. *Id.* at 105, chart III.

FIGURE 2
Clemency Applications v. Grants and Denials: 1860–1941



SOURCE: W.H. Humbert, *The Pardoning Power of the President* (1941, pp. 96-8), *Annual Report of the Attorney General* (1937-1941).

tion: for example, a call for reform, reorganization, or restructuring from within (and/or outside of) government. Humbert blandly observed:

If the inability of the President to consider every request for clemency was not apparent in the early days of the government, it became evident with the increase in clemency cases [from 1910–1936]. . . . As a consequence, acts of clemency increased in number but the growth did not keep pace with the increase of requests for executive clemency.⁵⁴

Humbert's work perhaps remains the most pertinent and compelling today for several reasons. First, his writing and analysis exhibited greater depth than most before and after him. Second, his work is—quite impressively—data-driven. Finally, as will be seen, the problems Humbert identified in his data remain to this day. They are only more exaggerated. Hence, his prescriptions for the pardon power remain well worth additional consideration.

The Pardoning Power of the President concluded with a discussion regarding potential reforms.⁵⁵ Echoing Cleveland, twenty years earlier, Humbert wrote:

54. Humbert, *supra* note 41, at 106, 109.

55. *Id.* at 134–42.

Recommendations on applications for clemency of United States Judges and Attorneys should not be relied upon to as great an extent in the future as in the past in deciding what should be done with applications for clemency. . . . Because of the nature of the information which a judge receives on a case, because of the danger of partiality which the experiences of a judge in criminal cases engender, and because of insufficient time to collect facts relevant to a decision in clemency cases, the United States Judge's recommendations should be critically examined. The judges imposed the sentence and they are loathe to admit any error in the original sentence. Secondly, if developments following the imposition of the sentence show the desirability of a pardon, the judges may not be in a position to appreciate the subsequent factors demanding clemency

This last objection applies with equal force to the practice of relying upon the recommendations of the United States Attorneys. The United States Attorneys who frequently reach their offices because of political preferment, are often fired with a zeal to make a record by numerous convictions in order to secure further promotion. Their ardor may bring about a great number of convictions, some of which were unwarranted. But will these men be willing, afterwards, to recommend clemency in the cases in which over-zealousness brought about a wrongful conviction or too severe a sentence?⁵⁶

Humbert also presented a second line of recommendations aimed at "better results" in the use of the pardoning power.⁵⁷ He saw, for example, a need for "impartial studies of detailed data on each applicant for clemency, including the data submitted by the United States Attorneys and Judges" ⁵⁸ Humbert argued "accurate, impartial, and scientific" information of this kind would ensure more reasonable decisions by the executive branch without the assistance of others and "greater uniformity of treatment."⁵⁹ Finally, he suggested that a "small board" should be created and equipped with a staff to conduct these "impartial studies."⁶⁰

C. *Post-Watergate Analyses*

In 1989, David Gray Adler concluded the pardon power had, "on the whole," been "judiciously administered, and so the country has been well served."⁶¹ But pre-conviction pardons (such as that of Richard Nixon) convinced him there was reason enough to "rethink the constitutional structure

56. *Id.* at 139–40.

57. *Id.* at 140.

58. *Id.*

59. *Id.* at 141.

60. Humbert, *supra* note 41, at 140.

61. David Gray Adler, *The President's Pardon Power*, in *INVENTING THE AMERICAN PRESIDENCY* 209, 230 (Thomas Cronin ed., 1989).

governing the pardon power.”⁶² Adler found “merit” in then-Senator Walter Mondale’s 1974 proposal to allow two-thirds of Congress to “disapprove of [a] pardon within 180 days of issuance.”⁶³ Over a decade later, Michael Genovese and Kristine Almquist agreed with Adler’s assessment of Mondale’s proposal.⁶⁴

Christopher E. Smith and Scott P. Johnson also agreed that “the appropriate scope” of the pardon power deserved “examination and reassessment” in light of the possibility that presidents “could halt criminal proceedings in order to suppress information about his own misdeeds.”⁶⁵ In their view, the “most desirable” protection would be to disallow pardons before trial.⁶⁶ A reasonable “alternative approach,” however, would be a “requirement that the President specify charges when issuing a pardon” so that “unspecified charges would remain fair targets for prosecution.”⁶⁷

Finally, in 2003, John Dinan analyzed clemency practices in the states as a vehicle for discussion of reform of federal executive clemency.⁶⁸ Dinan reviewed the records of more than 230 state constitutional conventions and “examine[d] the distinctive conceptions of the pardon power that had prevailed at the state level.”⁶⁹ The data revealed most states chose to “deviate” from the federal model, by the creation of advisory boards, councils, or some body of persons that shared the power with the governor.⁷⁰ Many states required “advance notice that a pardon [was] being considered.”⁷¹ Others “demand[ed] that pardons be accompanied by reasons for their issuance,”⁷² and most states explicitly prohibited pre-conviction pardons.⁷³

As for the question of whether federal practice should be informed by developments in the states, Dinan guessed presidents might not be as personally involved in the pardon process as governors, so many of the concerns behind the need for independent decision-making bodies might not apply.⁷⁴ In addition, presidents already have the Office of the Pardon Attorney in the Department of Justice to process applications and make recom-

62. *Id.*

63. S.J. Res. 241, 93rd Cong. (1974); *see also* Walter Mondale, *Harnessing the President’s Pardon Power*, 61 A.B.A. J. 1, 107–08 (Jan. 1975).

64. Michael A. Genovese & Kristine Almquist, *The Pardon Power Under Clinton: Tested but Intact*, in *THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY* 75, 86 (David Gray Adler & Michael A. Genovese eds., 2002).

65. Christopher E. Smith & Scott P. Johnson, *Presidential Pardons and Accountability in the Executive Branch*, 35 WAYNE L. REV. 1113, 1115 (1989).

66. *Id.* at 1124.

67. *Id.* at 1125.

68. John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 POLITY 389 (2003).

69. *Id.* at 392.

70. *Id.* at 403.

71. *Id.* at 411.

72. *Id.*

73. *Id.*

74. Dinan, *supra* note 68, at 412–13.

mendations. Yet Dinan also worried “contemporary presidents” have become “more susceptible . . . to entreaties from pardon applicants and their friends and families.”⁷⁵ One possible solution might be an executive order by each incoming president creating an advisory body.

III. THE CURRENT LANDSCAPE

As the previous sections document, political scientists have long held an interest in executive clemency reform. The general themes most prominent in the literature are clear: clemency is (or should be) an important part of the business of the state and federal executives. Where it is clear that clemency systems are broken or dysfunctional, an obvious solution is to create a separate body to assist with the processing of applications and decision-making. That body should not usurp the executive’s power but simply assist in the administration of clemency.

Is the federal clemency process working today? Is it functioning properly? Figure 3 represents an update of Humbert’s initial concerns regarding the granting of pardons (to merely restore civil rights) and commutations of sentence. As can be seen, commutations of sentence have become a kind of freakish rarity, every now and then disappearing altogether from the landscape of the data.⁷⁶ Figure 3 constitutes cause for celebration if every person that has been tried has been tried fairly, every person that has been convicted was truly guilty, every plea-bargained sentence has been fair, every mandatory sentence has perfectly fit the crime, every person imprisoned has committed the very worst of crimes, every person has not served an acceptable amount of time, and no one has exhibited any signs whatsoever of remorse or rehabilitation. In that case, the American system of criminal justice has been a phenomenal success. However, it is easy enough to guess that the situation has been otherwise.

In a 2009 letter to Mariano-Florentino Cuéllar, Special Assistant to the President for Justice and Regulatory Policy, Samuel Morison, a criminal defense attorney in Washington, D.C., and former staff attorney at the Office of the Pardon Attorney (for thirteen years) wrote:

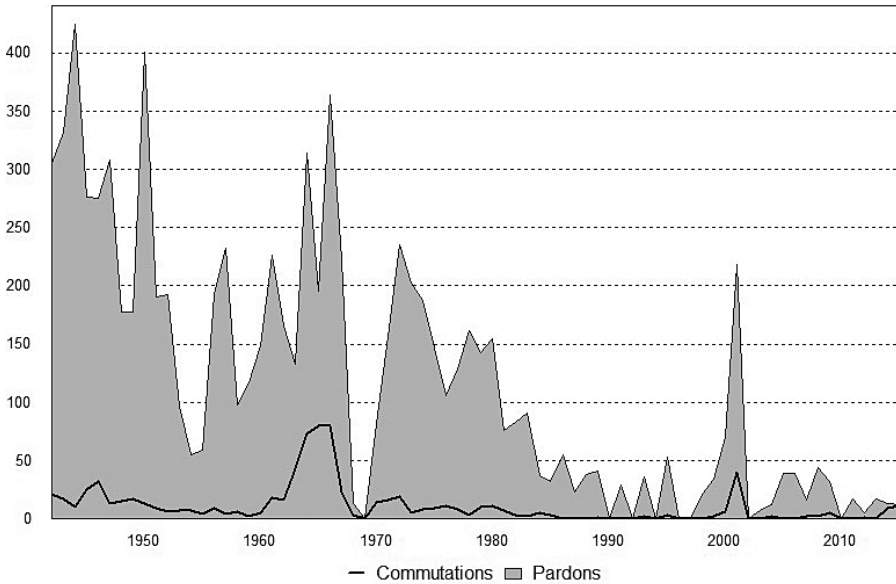
With a burgeoning federal prison population of over 200,000 persons and the receipt of about 8,500 commutation requests in eight years, this advisory record amounts to the assertion that the system is essentially perfect – injustices never occur, sentences are never excessive, circumstances never change, and mercy is never appropriate. No reasonable person really believes that.⁷⁷

75. *Id.* at 413.

76. Apologies to Edward R. Tufte.

77. Letter by Samuel T. Morison to Mariano-Florentino Cuéllar, <https://herculesandtheumpire.files.wordpress.com/2014/04/cuellar-letter-1.pdf> (last visited Oct. 12, 2015).

FIGURE 3
Pardons v. Commutations of Sentence, 1942–2015



SOURCE: Office of the Pardon Attorney, Department of Justice

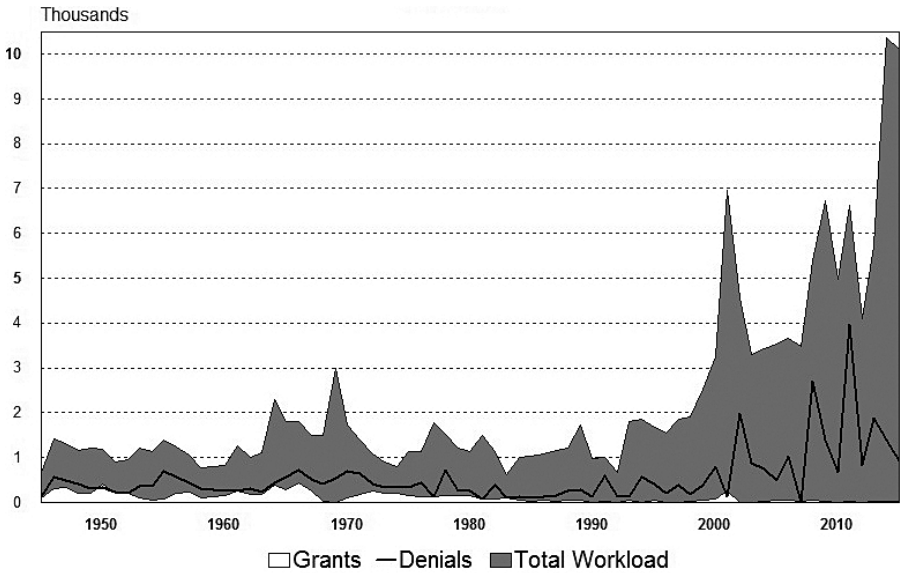
Before moving to Humbert’s second area of concern, it is also worthy to note that even the overall number of pardons has been in decline for some time. There may be a variety of explanations for short-term trends across the chart (see discussion below), but the long-term trend is also worthy of our attention. Many discussions entirely omit, for example, the very legitimate argument that there has been increasingly less justification or need for pardoning, especially commutations of sentence. After all, in the 1700s and 1800s, pardons were often used to look into places and corners where “the law” was blind, making distinctions where judges and juries were strictly unable to do so (for example, between adult and juvenile offenders, first- and second-degree murder and manslaughter, the sane and the insane, degrees of culpability based on stress and duress and/or the manipulating influence of others, etc.). Today, our laws are more sophisticated, refined, and specific to any number of distinctions.

In the early 1900s, the creation of federal alternative release mechanisms, probation and parole, reduced the need for prisoners to go through all of the hoops to seek commutations of sentence from the president—and the need for the presidents to grant them. Surely analyses that fail to take such institutional changes into consideration are deeply flawed.

Finally, the criminal process itself was radically transformed in the time period covered by the data in Figure 3. Critical decisions by the United States Supreme Court announced and applied the exclusionary rule, first to

the states,⁷⁸ then to federal law enforcement offices.⁷⁹ The Court also issued landmark decisions regarding legal representation,⁸⁰ juvenile defendants,⁸¹ plea bargaining,⁸² and cruel and unusual punishment.⁸³ Consequently, today's pre-trial criminal processes are more elaborate (and rights-oriented) than criminal trials were in the 1800s, where a trial, jury deliberation, and sentencing might all be completed in a single hour!⁸⁴ The possibility of human error remains, to be sure, but the elaborate nature of rights-oriented pre-trial criminal processes has—without doubt—had an impact, limiting presidential opportunities to make many due-process-type judgments once commonly made via the pardon power.

FIGURE 4
OPA Workload (Pending & New Applications)
v. Denials and Grants
FY 1945–2015e



SOURCE : Office of the Pardon Attorney, Department of Justice.

Figure 4 charts the total workload of the Office of the Pardon Attorney (pending applications plus new applications for each fiscal year) against the

78. See *Weeks v. United States*, 232 U.S. 383 (1914).

79. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

80. See *Gideon v. Wainwright*, 372 U.S. 33 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).

81. See *In re Gault*, 387 U.S. 1 (1967).

82. See *Santobello v. New York*, 404 U.S. 257 (1971).

83. See *Gregg v. Georgia*, 428 U.S. 153 (1976); see also *Furman v. Georgia*, 408 U.S. 238 (1972).

84. Malcolm M. Feely, *Plea Bargaining and the Structure of the Criminal Process*, 7 *Just. Sys. J.* 338, 345 (1982).

number of requests that have been granted and the number that have been denied. In 1941, Humbert expressed concern that clemency applications were not being processed nearly as quickly as they were coming in. That situation has only gotten much worse. Across eight decades of Humbert's data, presidents just about always granted more pardons than they denied. Across the seven decades in Figure 4, denials are just about always more common than grants, so much so that for a considerable part of the last three decades, grants are barely visible on the chart. Were it not for three massive waves of denials toward the right side of the chart (2002, 2008, and 2011), the figures for pending cases would have probably been much higher.

IV. EXPLANATIONS FOR THE DECLINE OF CLEMENCY

Why do presidents today deny many more pardons than they grant? Why are commutations of sentence so freakishly rare? If the bureaucracy created to facilitate the pardon process is slow, plodding, and just about always denies the applications that it receives, is it really working as it should?

A. *The 1960s and Nixonian Politics*

Many have argued that the “Law and Order” campaigns of Richard Nixon—in combination with (if not prompted by) public concern about crime as a major problem facing the nation⁸⁵—ushered in a kind of hardline emphasis on retribution in the criminal justice system, which remains dominant to this day, especially in the hearts and minds of state and federal prosecutors and in the halls of the Department of Justice. In this punitive environment, to grant pardons is to be “soft on crime” and to set oneself up for negative electoral consequences. A variety of statistical analyses have shown some support for this view.⁸⁶

Anecdotally, Lyndon Johnson was criticized for “opening prison doors” and “coddling criminals” when he commuted the prison sentence of an organized crime figure from Cleveland, Ohio, John Alfred Gay. In 1967, the *Cleveland Plain Dealer* ran a thirteen-part series on Gay's case and discovered the commutation was granted over the objection of the U.S. At-

85. An interesting body of scholarship makes the case that public concern about crime in this era was not nearly as high as commentators and pundits have asserted. See Dennis D. Loo & Ruth-Ellen M. Grimes, *Polls, Politics and Crime: The 'Law and Order' Issues of the 1960s*, 5 W. CRIMINOLOGY REV. 50 (2004); see also Dennis Loo, *The Moral Panic That Wasn't: The Sixties Crime Issue in the US*, in FEAR OF CRIME: CRITICAL VOICES IN AN AGE OF ANXIETY 12 (Murray Lee, & Steven Farrall eds., 2008).

86. P.S. Ruckman & Bradley M. Jones, *Federal Executive Clemency, 1934–2013: A Literature-Based, Empirical Assessment*, Paper Presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL (Apr. 2014); P.S. Ruckman, *President-centered and Presidency-centered Explanations of Federal Clemency Policy*, Paper Presented at the Annual Meeting of the Southern Political Science Association, Atlanta, GA (Oct. 1998).

torney's Office. The U.S. Pardon Attorney then admitted that none of the references in Gay's clemency application were "checked." Johnson, who had averaged about seventy commutations of sentence a year to that point, just about dropped them altogether. The next eighteen months of his administration featured a mere five commutations,⁸⁷ and they have not reemerged as a regular part of presidential business since.

But, again, the general argument is that rhetoric and concerns about crime ushered in a new age of hyper-emphasis on retributive justice. Other classic goals in sentencing (rehabilitation, reform, restoration, etc.) simply fell to the wayside.

B. *Ford's Pardon of Nixon*

With no small amount of irony, on September 8, 1974, Gerald Ford found himself granting a full and unconditional pardon to Richard Nixon. Gallup found 53 percent of Americans disagreed with the pardon, and only 38 percent supported it.⁸⁸ Ford, who began the term with approval ratings above 70 percent, saw his numbers drop twenty points by the end of the month.⁸⁹ By the end of the year, his approval rating fell to 42 percent and he averaged only 44 percent for the remainder of the term.⁹⁰ Research has since verified what pundits and almost every casual observer assumed at the time: Ford's pardon of Nixon went a long way toward Jimmy Carter winning the presidency.⁹¹ The concern over the potential connection between pardons and electoral politics was strengthened.

C. *Structural Changes in the Carter Administration*

Some have attributed the recent decline in pardoning to a factor far less prone to dramatization: institutional change in the Department of Justice. Jimmy Carter's attorney general, Griffin Bell, informally passed his "clemency tasks and overseeing responsibilities" to the deputy attorney general.⁹² Attorneys general have since followed suit. Consequently, the task of advising the president on pardons was assumed by "lower-ranking" officials who were, in a sense, more distant from the president and "more

87. P.S. Ruckman Jr., *How the Media Killed the Commutation*, PARDON POWER BLOG (Mar. 29, 2010), <http://www.pardonpower.com/2010/03/how-media-killed-commutation.html>.

88. Frank Newport & Joseph Carroll, *Americans Generally Negative on Recent Presidential Pardons*, Gallup.com (Mar. 9, 2007), <http://www.gallup.com/poll/26830/americans-generally-negative-recent-presidential-pardons.aspx>. Interestingly, by 1986, Gallup found 54 percent of Americans saying the pardon was the right thing to do.

89. *Id.*

90. *Id.*

91. See MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN ELECTIONS* (1981); Eric M. Uslaner & M. Margaret Conway, *The Responsible Congressional Electorate: Watergate, the Economy, and Vote Choice in 1974*, 79 AM. POL. SCI. REV. 788 (1985).

92. JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* 93 (Univ. of Kansas Press, 2009).

concerned with punishment than mercy” (or the retributive justice model discussed above).⁹³

D. *The “Willie Horton” Effect*

In a Democratic primary debate during the 1988 presidential election, Senator Al Gore took issue with a Massachusetts furlough program in an attempt to score political points off of an opponent, Governor Michael Dukakis. The *Los Angeles Times* reported:

Gore went after Dukakis again when, given the opportunity to question him directly, he brought up a prison reform program that Dukakis had sponsored in Massachusetts, which granted weekend passes to prisoners, including some serving life sentences for murder. As Gore noted, 11 of these convicts failed to return, and two committed murders. . . . “If you were elected President, would you advocate a similar program for federal penitentiaries?” Gore asked to hoots and laughter from the audience.⁹⁴

When Governor Dukakis eventually became the Democratic Party’s nominee, George H.W. Bush began referring to the same program in public speeches and to one beneficiary in particular.⁹⁵ Willie Horton committed a particularly brutal murder in 1974 and, over a decade later, was released on the weekend furlough program in question while serving a life sentence without the possibility of parole.⁹⁶ After ten such releases, however, Horton did not return to prison. As a fugitive, he raped a woman twice, violently assaulted a friend of the victim, and stole an automobile.⁹⁷

In September 1988, a Republican-leaning political action committee ran a thirty-second ad comparing the views of Bush and Dukakis on the death penalty and referred to the weekend furlough program.⁹⁸ It noted first-degree murderers had been granted such “weekend passes” and

93. *Id.* at 93–94. It should be noted that a large portion of this section in Prof. Crouch’s work violates the non-cross-pollination tradition discussed above, referencing the work of Margaret Colgate Love, a former U.S. pardon attorney. See Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT’G REP. 125, 126 (2001) (discussing the tension present in the pardon power that emerges from the duty to balance law enforcement with mercy).

94. Robert Shogan, *Gore, Dukakis Tangle During N.Y. Debate*, L.A. TIMES (Apr. 13, 1988), http://articles.latimes.com/1988-04-13/news/mn-1028_1_dukakis-administration; see also Sidney Blumenthal, *Gore Opened the Issue of Dukakis on Crime*, ST. LOUIS POST-DISPATCH, Oct. 30, 1988, at 14A.

95. Kenneth J. Cooper, *Furlough Plan Haunts Dukakis Bush Invokes Name of Killer on Loose*, MIAMI HERALD, June 26, 1988, at 17A.

96. Kevin Merida, *Dukakis Challenged on Crime*, DALLAS MORNING NEWS, July 3, 1988, at 12A.

97. *Id.*

98. Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJECT (May 13, 2015, 6:37 PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited#.zsgHee3Mg>.

showed a mug shot of Horton.⁹⁹ The following month, the Bush campaign produced its own ad, which did not mention Horton by name but once again referred to the “Dukakis furlough program.”¹⁰⁰ Critics attempted to blunt any potential effectiveness of the ads by claiming their content was unacceptably “racial,” if not outright racist.¹⁰¹

While additional details could certainly be recounted here, the pardon power had nothing whatsoever to do with the core facts. Dukakis did *not* pardon Horton. No one else pardoned Horton. No one has *ever* pardoned Horton. He remains in prison.¹⁰²

A conventional wisdom developed, however, among many journalists, commentators, and scholars, which suggests governors have since shied away from the exercise of the pardon power (especially commutations of sentence) for fear that some recipient might turn out to be “the next Willie Horton.” The “Willie Horton effect” has been utilized to explain the decline in presidential pardoning as well. Governors and presidents can hardly expect any electoral advantage as a result of pardoning, but the potential for negative consequences (if not outright disaster) when the “next Willie Horton” shows up is enormous. As the explanation goes, the conclusion of the calculus is straightforward enough: it is just better and smarter to err on the side of caution by doing as little as possible or nothing at all.¹⁰³

99. *Id.*

100. 1988 *Bush v. Dukakis*, MUSEUM OF THE MOVING IMAGE: THE LIVING CANDIDATE, PRESIDENTIAL CAMPAIGN COMMERCIALS, 1952–2012, <http://www.livingroomcandidate.org/commercials/1988/revolving-door> (last visited Jan. 17, 2016).

101. Robert S. Boyd, *Jackson Accuses Bush Campaign of Stirring Up Racist Fears*, MIAMI HERALD, Oct. 24, 1988, at 7A; Philip J. Trounstine, *Dukakis Agrees Bush's TV Ads Tinged with Bias*, SAN JOSE MERCURY NEWS, Oct. 25, 1988, at 1A.

102. Schwartzapfel & Keller, *supra* note 98.

103. Wisconsin's Scott Walker is perhaps the best example of a governor (and presidential hopeful) who has driven this strategy over the cliff wildly. After his inauguration on January 3, 2011, Walker created a Pardon Advisory Board by executive order, then refused to appoint anyone to it. By November, he had granted no pardons and a spokesperson clumsily said he had no “plans” to grant pardons because he believed those “decisions” should “be left up to the courts.” Walker announced his policy more explicitly in May 2012, saying, “I’m not issuing pardons on anything. Period.” Six months later, form letters informed applicants the governor had “suspended” the pardon process “indefinitely.” No further explanation was provided. In January 2013, Walker told reporters that he had actually *not* suspended the state’s pardon process, but he just wasn’t issuing any. He added that pardons “undermine the criminal justice system.” Two months later, over 1,400 applications had been filed, but Walker explained that pardons were not “really” what he “campaign[ed] on” or “talked about.” Since the only people seeking pardons were “guilty of a crime” he would not be “undermining the actions” of juries and courts. In December 2014, the Walker administration proposed eliminating the Pardon Advisory Board altogether. See The Associated Press, *Walker Has No Plans for Granting Pardons*, MILWAUKEE JOURNAL SENTINEL (Nov. 28, 2011), <http://www.jsonline.com/news/statepolitics/walker-has-no-plans-for-granting-pardons-j837jvk-134584228.html>; Mike Johnson, Jason Stein & Patrick Marley, *Turnout for Recall Election Expected to Exceed 2010 Race*, MILWAUKEE J. SENTINEL (May 29, 2012), <http://www.jsonline.com/news/statepolitics/walker-says-he-wont-pardon-former-aides-hits-barrett-on-crime-ib5jbv2-155403115.html>; P.S. Ruckman Jr., *Wisconsin: Walker Suspends Justice “Indefinitely”*, PARDON POWER BLOG (Nov. 16, 2012), <http://www.pardonpower.com/2012/11/wisconsin-walker-suspends-justice.html>; Greg Neumann, *Gov. Walker Says Pardons Undermine*

E. Clinton's Clemency Caper

President Clinton's last-minute pardons generated a level of public controversy that brought comparisons with the aftermath of Gerald Ford's pardon of Richard Nixon.¹⁰⁴ CNN reported the "vast majority" of the individuals pardoned were "unknown to the public."¹⁰⁵ But the list did include former Housing and Urban Development Secretary Henry Cisneros, John Fife Symington (former Governor of Arizona), Patricia Hearst, Whitewater figure Susan McDougal, former CIA Director John Deutch, and Democratic Congressman Mel Reynolds. The list of clemency recipients also included the president's brother, Roger Clinton, and one of the FBI's top-ten "most wanted" fugitives from justice, Marc Rich.

USA Today noted the applications for several of Clinton's "last-minute" pardons were supported by a "Who's Who of America's rich, famous and influential" including rock star Don Henley, historian Arthur Schlesinger Jr., veteran newscaster Walter Cronkite, Lady Bird Johnson, the Reverend Jesse Jackson, and former Presidents Carter and Ford.¹⁰⁶ Democratic Congressmen Earl Hilliard (AL), Charles Rangel (NY), Dale E. Kildee (MI), Patrick Kennedy (RI), Xavier Becerra (CA), Danny Davis (IL), and Maxine Waters (CA) supported clemency applications, as did Republicans Orrin Hatch (UT), Jim Ramstad (MN), and Fred Thompson (TN).¹⁰⁷ *MSNBC* also focused on the efforts of Henley and noted the co-founder of "The Eagles" donated \$180,000 in soft money to Democratic political committees in 1996, \$2,000 to Hillary Clinton's Senate campaign and \$2,000 to Al Gore.¹⁰⁸ The *New York Times* linked clemency decisions to the influence of television producer Harry Thomason, Democratic Fundraiser Terry McAuliffe, Hugh Rodham (the First Lady's brother), Jack Quinn (former White House Counsel), the president and editor of the *Las*

Criminal Justice System, WKOW (Jan. 3, 2013, 12:27 PM), <http://www.wkow.com/story/20495823/2013/01/03/gov>.

104. On January 20, with only a few hours left in his presidency, Clinton granted 140 pardons and 36 commutations of sentence. Office of the Pardon Attorney, *Pardons Granted by President William J. Clinton (1993–2001)*, DEP'T OF JUST., http://www.justice.gov/pardon/clintonpardon_grants.htm (last visited Jan. 17, 2016); Office of the Pardon Attorney, *Commutations, Remissions, and Reprieves Granted by President William J. Clinton (1993–2001)*, DEP'T OF JUST., http://www.justice.gov/pardon/clinton_comm.htm (last visited Jan. 17, 2016).

105. Associated Press & Reuters, *In One of His Last Acts as President, Clinton Grants 140 Pardons*, CNN (Jan. 20, 2001, 12:38 PM), <https://web.archive.org/web/20011206120827/http://www.cnn.com/2001/ALLPOLITICS/stories/01/20/clinton.pardon/>.

106. Associated Press, *Celebrities Asked Clinton to Grant Pardons*, USA TODAY (Mar. 8, 2001, 6:03 PM), <http://usatoday30.usatoday.com/news/politics/2001-03-08-famouspardons.htm>.

107. *Congressmen, Senators Weighed in on Pardons*, USA TODAY (Mar. 9, 2001, 1:54 AM), <http://usatoday30.usatoday.com/news/politics/2001-03-08-pardonlist.htm>.

108. Jim Popkin, *Don Henley Lobbied Clinton for Commutation for Bookie*, MSNBC (Mar. 6, 2001, 9:05 PM), <https://web.archive.org/web/20010818094152/http://www.freerepublic.com/forum/a3aa66a586ccb.htm>.

Vegas Sun, and a former roommate and classmate of former President Clinton while attending Oxford University and Yale Law School.¹⁰⁹

The investigative functions of the House Government Reform Committee and the Senate Judiciary Committee powered up¹¹⁰ and, in the minds of some, pardoning, for still yet another reason, became a high-wire maneuver without a net. Indeed, Clinton's successor, George W. Bush, waited longer than any other president in history (699 days) before granting the first pardon of his administration.¹¹¹ Eight years later, when he left office, Bush granted less than half as many pardons and commutations as Clinton.¹¹²

Readers may find any (or all) of the above explanations lurking when writers and commentators focus on why we are where we are with respect to the pardon power. They are all plausible and informative, but disentangling their individual effects in any rigorous manner would be a difficult task. Moreover, many times, it is difficult enough to simply understand and explain what happens (or does not happen) within a single administration.

V. PRESIDENT OBAMA'S DISAPPOINTING RECORD

Consider President Obama and his promise of "Hope and Change."¹¹³ During the campaign, he specifically addressed highly relevant hot-button criminal justice issues, like mandatory minimum sentences,¹¹⁴ the disparate impact of laws on African Americans,¹¹⁵ and his belief that America is a place where people should be given second chances.¹¹⁶ The very clear expectation of many was that he would use the pardon power like no other

109. Don Van Natta Jr. & Marc Lacey, *Access Proved Vital in Last-Minute Race for Clinton Pardons*, N.Y. TIMES (Feb. 25, 2001), <http://www.nytimes.com/2001/02/25/us/access-proved-vital-in-last-minute-race-for-clinton-pardons.html?pagewanted=all>.

110. See JUSTICE UNDONE: CLEMENCY DECISIONS IN THE CLINTON WHITE HOUSE, H.R. REP. NO. 107-454, vol. 1 (Mar. 14, 2002).

111. P.S. Ruckman Jr., *The Significance of the Lardner Warrant*, PARDON POWER BLOG (Nov. 24, 2010), <http://www.pardonpower.com/2010/11/significance-of-lardner-warrant.html#more>.

112. See Office of the Pardon Attorney, *supra* note 2.

113. Katie Zezima, *Obama's New Approach: Keep 'Hope and Change' Alive*, WASH. POST (July 25, 2014), https://www.washingtonpost.com/politics/obamas-new-approach-keep-hope-and-change-alive/2014/07/25/72bc7522-0eae-11e4-8341-b8072b1e7348_story.html.

114. *Obama @ Howard: Attack is the New Black*, NEW REPUBLIC (Sept. 28, 2007), <https://newrepublic.com/article/33356/obama-howard-attack-the-new-black>.

115. In a speech delivered on January 20, 2008, Obama mentioned "Jena justice," a reference to six black teenagers convicted in the beating/hospitalization of a white high school student in Jena, Louisiana. Five were sentenced to seven days' unsupervised probation. The sixth defendant was given an 18-month prison sentence. Barack Obama, *Remarks in Atlanta: "The Great Need of the Hour"*, THE AMERICAN PRESIDENCY PROJECT (Jan. 20, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=77027>; see also Miami Hall, *Convict Petitions Obama to Reduce Crack Penalty*, USA TODAY (Apr. 27, 2010, 2:00 AM), http://usatoday30.usatoday.com/news/washington/2010-04-27-clemency_N.htm.

116. P.S. Ruckman Jr., *Obama on Second Chances*, PARDON POWER BLOG (Jan. 24, 2010), <http://www.pardonpower.com/2010/01/obama-on-second-chances.html>; see also Yunji De Nies & Z. Byron Wolf, *President Obama Touches Nerve, Praising Michael Vick's Second Chance*, ABC

president in recent history. Instead, at present, the only “change” that is evident is that he has used the power even less than George W. Bush. What explains this?

One might consider the President’s decision to appoint Eric Holder as attorney general. Mr. Holder brought quite a bit of baggage with him regarding pardons, as he was Bill Clinton’s deputy attorney general,¹¹⁷ and it is easy to imagine he had little enthusiasm for such. Later, it became obvious that President Obama was going to retain George W. Bush’s pardon attorney, Ronald Rodgers. That certainly did not strike anyone as an impressive display of interest in change, at least not with respect to pardons.¹¹⁸

As record numbers of applications came in, and few grants were coming out, some wondered if the staff in the Office of the Pardon Attorney was up to the task. In 2009, a former U.S. pardon attorney openly offered that it was “hard to see how the small staff of the OPA (5 lawyers for most of Bush’s tenure) could have given many of the cases denied [the] full review they deserved.”¹¹⁹ In the same year, a former staff attorney in that Office wrote:

The disintegration of the clemency advisory system is not simply a matter of applying an unduly strict standard of review but, rather, the abandonment of the review process altogether in many cases. Since June 2008, the current Pardon Attorney has transmitted more than 2,200 clemency cases to the Deputy Attorney Gen-

NEWS (Dec. 27, 2010), <http://abcnews.go.com/Politics/president-obama-praises-chances-michael-vick-eagles-owner/story?id=12487824>.

117. P.S. Ruckman Jr., *Holder Disqualified*, PARDON POWER BLOG (Nov. 26, 2008), <http://www.pardonpower.com/2008/11/holder-disqualified.html#more>.

118. Eventually, Obama selected his own Pardon Attorney, Debra Leff, but not without considerable drama. In December 2012, Rodgers was the subject of a 21-page OIG Report which said the following in the matter of the clemency application of a 23-year old, first time offender who received three life sentences in a drug conspiracy case:

Rodgers did not represent [U.S. Attorney] Rhodes’s views accurately to the White House in his e-mail on December 3, 2008. We believe that Rodgers’ characterization of Rhodes’s position was colored by his concern . . . that the White House might grant Aaron ‘clemency presently’ and his desire that this not happen. . . . [It] was not an accurate characterization of what Rhodes wrote. . . . Rodgers should not have characterized it as he did. He should have acknowledged the ambiguity in his email and relied on his own arguments, instead of indicating inaccurately that Rhodes agreed with him that the petition was ‘about 10 years premature’ and should be denied. . . . We also believe that Rodgers’s choice of words in the emails to describe Judge Butler’s position ran the risk of misleading the White House about the sentencing judge’s position. . . . In sum, we concluded that Pardon Attorney Rodgers did not accurately represent the views of U.S. Attorney Deborah Rhodes . . . and his conduct fell substantially short of the high standards to be expected of Department of Justice employees and of the duty that he owed to the President of the United States.

OFF. OF THE INSPECTOR GEN.: OVERSIGHT AND REV. DIV., U.S. DEP’T OF JUST., A REV. OF THE PARDON ATT’Y’S RECONSIDERATION OF CLARENCE AARON’S PETITION FOR CLEMENCY 15–17, 21 (Dec. 2012).

119. Margaret Colgate Love, *Final Report Card on Pardoning by George W. Bush* (July 27, 2009, rev. Mar. 13, 2009), <http://pardonlaw.com/wp-content/uploads/pardonlawimport/FinalReportCard.3.13.09.pdf>.

eral's Office without conducting a meaningful review of a single one of these petitions. Instead, he has support staff prepare lists of names with basic sentencing information and attaches them to a cover memorandum, which asserts in boilerplate language that "a review of the contents of each petition establishes that none has merit." On this basis, he asserts that "there is no reason to conduct a further investigation by this office"

While this reporting format has been used in the past in limited circumstances, it has never been thought appropriate to indiscriminately clear out a backlog of pending cases in this fashion. Given the sheer volume of cases involved, it is not physically possible that each petition was reviewed by OPA's small professional staff. In fact, none of these cases was even assigned to an attorney. Accordingly, there is little basis for asserting that each one is necessarily without merit. Moreover, even on the assumption that all of these cases would have ended up being denied anyway, in my view, this sort of superficial treatment invariably undermines the integrity of the advisory process¹²⁰

These concerns, of course, became even more relevant when President Obama received record numbers of clemency applications, especially for commutation of sentence.¹²¹

Along the way, the notion was also floated (perhaps in desperation) that the President was just too busy with other things that were much more important: health care, war, national security, etc. This explanation was notably unconvincing for a number of reasons. In the 2008 campaign, when Senator John McCain proposed postponing a presidential debate in order to meet with congressional leaders to address the nation's financial crisis, Obama offered a terse rebuke:

Presidents are going to have to deal with more than one thing at a time. . . . It's not necessary for us to think that we can do only one thing, and suspend everything else.¹²²

Although Obama may have been right, the days of presidents plowing through pardon applications are long gone. There is a considerable (and not inexpensive) bureaucracy that is supposed to do that. It is the job of that bureaucracy to forward recommendations to the president. If that bureaucracy is functioning properly, a steady flow of recommendations (and, yes, grants) should be expected, *regardless* of what the presidential calendar looks like.¹²³ And, in fact, for most of our nation's history, that was exactly

120. Morison, *supra* note 77.

121. See Office of the Pardon Attorney, *supra* note 2.

122. *Presidential Debate Still Pending*, CBS NEWS (Sept. 25, 2008, 6:15 AM), <http://www.cbsnews.com/news/presidential-debate-still-pending/>.

123. In a March 2013 column, Debra Saunders observed sequestration cuts might force the Department of Justice "to cut \$338 million from the prison budget, which could lead to the furlough of 37,000 prison employees for two weeks and lockdowns to reduce violence." Saunders called this "nonsense," arguing, "[t]he Department of Justice has staff members whose job is to

the case. Pardons and commutations were granted at a steady pace, regardless of the wildest variety of circumstances in which presidents have found themselves, because the bureaucracy functioned properly doing what it was supposed to do.¹²⁴

Abraham Lincoln granted pardons not only in the aftermath of the disastrous showing of Federal troops in the Battle of the First Bull Run while his eleven-year-old son, Willie, was suffering from typhoid fever.¹²⁵ He also granted pardons during the week of the Battle of Gettysburg.¹²⁶ Grover Cleveland granted thirty-two pardons during the Pullman Strike.¹²⁷ Woodrow Wilson granted pardons on the day the United States declared war on Germany and in the following week.¹²⁸ He also granted thirty plus pardons while the Senate Foreign Relations Committee considered entrance into the League of Nations (Wilson's own creation) and over 300 while the League languished in the Senate. Wilson even granted nineteen pardons in October of 1919, just after suffering a massive debilitating stroke.¹²⁹

Herbert Hoover granted six pardons the week following the great stock market crash of 1929.¹³⁰ Franklin Roosevelt granted eleven pardons in the week following the attack on Pearl Harbor and thirty-eight pardons in the three days following the Normandy Invasion.¹³¹ Harry Truman granted nineteen pardons in August 1945, when the atomic bombs were dropped on Hiroshima and Nagasaki.¹³² In June 1950, as the Korean War escalated to the point of Chinese involvement, Truman found time to grant twenty-four pardons.¹³³ Truman also granted forty-seven pardons from April 8 to June 2, 1952, which was the period of time he had seized the steel mills of Youngstown, Ohio, in order to avoid a general strike.¹³⁴

review clemency applications. It is their job to vet petitions and recommend commutations for worthy inmates. If they do their job right and save their recommendations for inmates with no violent history and good prison records, there is little political downside. But if the President doesn't want to take any risk in the exercise of mercy, he should be honest and furlough the pardon staff permanently. Then, at least, the President could spare federal prosecutors and counterterrorism operatives from furloughs." Debra J. Saunders, *Obama the Merciless*, SFGATE (Mar. 4, 2013, 5:04 PM), <http://www.sfgate.com/opinion/saunders/article/Obama-the-merciless-4327652.php>.

124. In contrast, presidents since Eisenhower have gone twenty, thirty, even forty months in a row without granting a single pardon or commutation of sentence. P.S. Ruckman Jr., *Obama: More Dubious Pardon-Making History*, PARDON POWER BLOG (Jan. 24, 2013), <http://www.pardonpower.com/2013/01/obama-more-dubious-pardon-history-making.html>.

125. P.S. Ruckman Jr., *Obama 2012: Too Busy for Pardons*, PARDON POWER BLOG (Jan. 1, 2013), <http://www.pardonpower.com/2013/01/obama-2012-too-busy-for-pardons.html#more>.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Ruckman, *supra* note 125.

132. *Id.*

133. *Id.*

134. *Id.*

Today, however, presidents will go many months without granting a single pardon or commutation of sentence. The time has come for change. Federal executive clemency is in dire need of reform. *No one* who is familiar with the current process defends it with any degree of enthusiasm, much less argues that it is effective, beneficial, and fair.

VI. STEPS TO REFORM

When all is said and done, the pardoning power is ultimately a presidential power. If the president is not concerned about, or at least mindful of, the critical necessity of mercy, then it really does not matter how much reorganizing and shuffling results from any reform-minded effort. On the other hand, the reforms suggested below might very well increase presidential interest in the prerogative of mercy because the changes suggested would have the net effect of regularizing the clemency process and encouraging more systematic consideration of applications. These changes would go a long way toward educating the public and restoring confidence in the pardon power. The existence of a more informed public would in turn dull the impact of hyperbolic and/or unfair criticism of pardons—long held to be a primary factor in executive hesitance to show mercy.

A. *Relocate the Administration of Clemency*

Frederick A. Cleveland was correct, in 1921, to suggest that the bureaucratic apparatus associated with the processing of clemency applications and forwarding recommendations to the president should be moved, by executive order, out of the Department of Justice. The creation of the Office of the Pardon Attorney was an outstanding idea for its time.¹³⁵ Presidents are busy, applications are many, and the specifics of requests are likely to be complex. It made perfect sense, as we transitioned to the modern presidency, to delegate authority to professional bureaucrats who could assist the president with recommendations¹³⁶ resulting from painstaking, deliberative processes guided by articulated goals, routinized behavior, the development of systemized norms, and—most of all—*fairness*.

135. Former U.S. Pardon Attorney John R. Stanish summarizes the bureaucratic history as follows:

Prior to 1850 the preliminary and advisory duties in pardon cases were performed by the Attorney General and the Secretary of State, jointly. About 1850 all the preliminary and advisory work was transferred to the Attorney General. However, warrants of pardon continued to be issued through the Department of State until 1893 when President Cleveland by Executive Order transferred that responsibility also to the Attorney General. The Act of March 3, 1865 created the Office of Pardon Clerk in the Office of the Attorney General. By the Act of March 3, 1891 an Attorney in charge of pardons was substituted for the Pardon Clerk. Thus the Office of the Pardon Attorney originated prior to the creation of the Department of Justice in 1870.

See John R. Stanish, *The Effects of a Presidential Pardon*, 42 FED. PROBATION 3 (1978).

136. Rather than shut down and/or grossly retard the clemency process.

But both Cleveland, in the 1920s, and Humbert, in the 1940s, saw the handwriting on the wall. Nesting the pardon power in the bureaucracy of the Department of Justice provided too much of an opportunity for the influence of judges and federal prosecutors—while certainly noteworthy, and important—to have lopsided impact on the bureaucratic development of the clemency process and, eventually, the application of the pardon power itself. Toss in a cubic ton or two of inflexible, heavy-handed punitive decision-making and the retributive justice model. Then, sprinkle in modern telecommunications, the contemporary news cycle, and the ability for a story to be reported, manipulated, and styled in any number of ways to shock readers, spark debate, and set decision-makers back on their heels. Before you know it, the pardon power is no longer a relevant, plausible, and serious executive check on either the legislative or judicial branches. It seems clear enough that this is exactly the situation we are in. The pardon process needs to be moved closer to the president, perhaps in the Executive Office of the President.¹³⁷

Samuel Morison, again, a former staff attorney at the Office of the Pardon Attorney (for thirteen years) has written:

Whatever utility [the] arrangement once had, the structural deficiencies in the existing [pardon] advisory system have rendered it dysfunctional. Under the circumstances, I submit that the President has a constitutional obligation to remove the advisory role from the Justice Department, and reconstitute it within the Executive Office of the President, where it can operate without the burden of an entrenched conflict of interest.¹³⁸

B. Adjust the U.S. Pardon Attorney's Tenure

The tenure of U.S. pardon attorneys should be changed to coincide with the arrival and departure of each president. The pardon attorney should not be a nameless, faceless bureaucrat held over from years past and perhaps even appointed by a president of a different political party. The position should reflect, as nearly as possible, the views and opinions of the president it is supposed to assist in clemency decision-making. If presidents want to outsource the actual selection process (as they do with lower federal court positions), so be it. Even the pretense of interest—by forcing the ne-

137. “To provide the President with the support that he or she needs to govern effectively, the Executive Office of the President (EOP) was created in 1939 by President Franklin D. Roosevelt. The EOP has responsibility for tasks ranging from communicating the President’s message to the American people to promoting our trade interests abroad. Overseen by the White House Chief of Staff, the EOP has traditionally been home to many of the President’s closest advisors.” Executive Office of the President, *The Administration*, THE WHITE HOUSE, <https://www.whitehouse.gov/administration/eop> (last visited Jan. 17, 2016).

138. Samuel Morison, *Saving Grace: Salvaging the Pardon Advisory System*, AM. CONSTITUTION SOC’Y BLOG (Dec. 12, 2011), <http://www.acslaw.org/acsblog/saving-grace-salvaging-the-pardon-advisory-system>.

cessity of a timely appointment—would be an improvement over the current circumstance.

C. Create a Clemency Board / Commission

As the discussion of the literature of political science documents, Lieber, Roosevelt, Hadley, Smithers, Cleveland, and Wilcox all saw the wisdom in the creation of a special board or commission to assist executives with clemency processes. While it is true that most of them were focusing on governors in the states, the logic of their arguments seems quite applicable to the presidents of today. The states, of course, have often operated as laboratories of democracy,¹³⁹ where ideas and policies have been tested. The literature on “policy diffusion” in political science and public administration has established that governments can—and do—learn from each other.¹⁴⁰

As of December 2015, six states administer the pardon power by independent boards¹⁴¹ and an additional twenty states have created advisory boards.¹⁴² It is noteworthy that in eleven of the fifteen states where pardoning occurs most frequently today, the power is administered by such boards. On the other hand, a recent analysis notes that in the twenty-four states where the pardon power is almost completely centralized into the hands of the governor, the output in twenty of those states can be best described with words like “infrequent,” “sparing,” and “rare.”¹⁴³

From today’s standpoint, Gerald Ford’s Presidential Clemency Board (created to handle thousands of cases of draft evasion) appears to be both a logical step in the development and evolution of thinking about the pardon power and an idea ahead of its time.¹⁴⁴ Today, it is apparent that it would be useful to create a permanent board or commission—again, outside of the Department of Justice—to assist the president with decision making on

139. Justice Louis Brandeis famously wrote: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

140. Charles R. Shipan & Craig Volden, *Policy Diffusion: Seven Lessons for Scholars and Practitioners*, 72 PUB. ADMIN. REV. 788, 790 (2012).

141. Margaret Colgate Love, *Chart # 3 – Characteristics of Pardon Authorities*, NACDL RESTORATION OF RIGHTS PROJECT (Dec. 2015), https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Characteristics_of_Pardon_Authorities.pdf (the five states are AL, CT, GA, ID, SC, and UT).

142. *Id.* (the twenty states are AK, AZ, AR, DE, FL, KS, LA, MA, MI, MN, MO, MT, NE, NV, NH, OH, OK, PA, RI, TX).

143. *Id.*

144. Mark Osler & Matthew Fass, *The Ford Approach and Real Fairness for Crack Convicts*, 23 FED. SENT’G REP. 228, 229 (2011); Mark Osler & P.S. Ruckman Jr., *Obama Would Do Well to Follow General Ford’s Example of Clemency*, WACO TRIB. (Nov. 26, 2013), http://www.wacotrib.com/opinion/columns/board_of_contributors/mark-osler-p-s-ruckman-jr-guest-columnists-obama-would/article_42ad0969-f285-54a8-84e4-cc92b403ca6a.html.

clemency applications.¹⁴⁵ Such a board should not limit, or be able to limit, the president's power in any way shape or form. It should only *assist* the president. "Assistance," however, should mean more than mere existence. The creation of such an institution should be accompanied by a clear set of baseline expectations.

While the number of persons serving on the board might be a point of contention, a more important issue would be its composition or makeup. It would be horribly wrong to stack it with (or require members to have experience as) prosecutors and judges (who are often former prosecutors). A more intelligent route would be to *allow* such persons to serve (especially prosecutors and judges who have recommended clemency on behalf of applicants in the past) and include the pardon attorney, as well as one advisor assistant from the Office of the Pardon Attorney.¹⁴⁶ When filling positions, however, primary emphasis should be placed on finding persons with experience on the defense side of the criminal justice equation, probation and parole officers, sentencing experts, prison officials, scholars who have researched and written about clemency, attorneys who have successfully represented clemency applicants, and persons who can demonstrate at least some minimal interest in matters related to criminal justice, especially the post-conviction universe.

D. Produce, Track, and Publish Relevant Data

Remarkably, a former U.S. Pardon Attorney has described the Justice Department's clemency program as "hard to understand and even harder to penetrate, operating in secret and accountable to no one."¹⁴⁷ The clemency board proposed here would present an annual report (separate from the *Annual Report* of the attorney general—see comments below) that sheds considerable light on what it has done and how it has done it. The report should provide elaborate, useful data that allow for intelligent assessment of the efficiency of the processing of applications. This kind of information should not be the by-product of a special, expensive study funded by federal grant money.¹⁴⁸ It should be the *daily* work product of the clemency board.

145. See Rachel E. Barkow & Mark Osler, *The President's Idle Executive Power: Pardoning*, WASH. POST (Nov. 26, 2014), https://www.washingtonpost.com/opinions/the-presidents-idle-executive-power-pardoning/2014/11/26/3934ab1c-71aa-11e4-8808-afaa1e3a33ef_story.html.

146. The later might rotate on an annual, or biannual basis, between other attorney advisors in that Office.

147. Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, AM. CONST. SOC'Y 22 (Jan. 2013), https://www.acslaw.org/sites/default/files/Love_-_Reinvigorating_the_Federal_Pardon_Process_0.pdf.

148. One such effort observed that, while the Office of the Pardon Attorney utilized "few written policies and procedures for processing clemency applications," on average, it took almost two years to process an application resulting in positive grants. The figure for pardons was 3.27 years and 1.57 years for commutations of sentence. But "a significant cause" of delay in processing applications was due to the fact that "the entities receiving referrals [from the OPA] did not always respond [within] the period of time required by the entities' internal guidelines or the

For example, the number of recommendations forwarded to the president should be tabulated by month. The amount of time that it takes the board to make such recommendations should be meticulously monitored as well. A series of Freedom of Information Act (FOIA) requests once uncovered the adventures of an application filed in September 1998. A pardon was granted fourteen years later, in March 2013, after the application went through the Office of the Pardon Attorney four times, the Office of the Deputy Attorney General five times, and the White House three times.¹⁴⁹ It is safe to assume this was an extraordinary, exceptional circumstance. But that is *exactly* the point. No one should *have* to assume anything. There should be a clear, specific, regular public accounting.¹⁵⁰ Finally, the board should not be able to simply report that hundreds (or thousands) of applications are “closed without presidential action” without further elaboration.¹⁵¹ Tables in an annual report should provide more specific information on the broadest categories encompassed by that language.¹⁵²

period of time requested by the OPA.” These “entities” would include: the ATF, Bureau of Prisons (BOP) Headquarters and Wardens, the DEA, the FBI, United States Attorney’s Offices, Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, and the Tax Division. The BOP had an established response timeframe of fifteen days, but averaged 105 days. The United States Attorney’s Offices had a time frame of thirty days, but averaged 153. The established timeframe for the DOJ’s Civil Rights Division and Criminal Division was thirty days. But they averaged 263 days and 489 days respectively. Meanwhile, petitions were “at the White House,” on average, for 9.4 months, before a decision was made. U.S. DEP’T OF JUSTICE, OFF. OF THE INSPECTOR GEN. AUDIT DIV., AUDIT REP. 11-45, AUDIT OF THE DEPARTMENT OF JUSTICE PROCESSING OF CLEMENCY PETITIONS (2011), at xii–xiii, xvi.

149. P.S. Ruckman Jr., *A 14-year Pardon Application Process?*, PARDON POWER BLOG (Mar. 6, 2013), <http://www.pardonpower.com/2013/03/a-14-year-pardon-application-process.html>.

150. Perhaps there should even be an “administrative inefficiency” or—as is used in little league baseball and adult league softball games around the nation, “skunk”—rule. Maybe any application that is not properly addressed within five or ten years should be automatically granted?

151. See Office of the Pardon Attorney, *supra* note 2 (focusing on far right side of columns in Department of Justice data).

152. In response to a personal e-mail dated May 10, 2013, U.S. Pardon Attorney Ronald Rodgers explained the aggregation of data in this category as follows:

You have asked whether we are able to ‘provide any insights on how one might go about disaggregating the data for the category labeled ‘petitions denied or closed without presidential action’ from 1945 to 1977, in order to bring it into line with data from 1978 forward.’ Unfortunately, we are unable to provide you with any information as to how the data can be subdivided . . . denial and closure actions have been reported in different formats at different times since 1900. Although statistics for clemency actions from the McKinley Administration through the end of the Franklin Roosevelt Administration differentiate between petitions denied and petitions closed without presidential action, these categories were not further subdivided by the type of clemency involved—*i.e.*, pardon or commutation. After President Truman took office in 1945 and continuing through the end of the Ford Administration in 1977, denials and closures without presidential action were reported together as one category; midway through the Lyndon Johnson Administration, these unsuccessful petitions were subdivided by the type of clemency requested and were reported as pardon petitions denied or closed and commutation petitions denied or closed . . . it was not until the Carter Administration that statistics of unsuccessful clemency applications were further subdivided and reported separately for both the form of clemency requested and the type of disposition. Your second question asks if we could ‘elaborate as to why petitions would be closed without presidential action.’ . . . Both pardon and commutation applications are closed without

Along similar lines, it would also be useful if the proposed clemency board were to have at least one academic, preferably a social scientist with training and skill in data collection and both qualitative and quantitative analysis. Again, every member of the board should always have a crystal clear sense of *what* it is doing, *how* it is doing it, and—perhaps most importantly—*why*, in comparison to previous boards. The need for such data was no more apparent than when many of Bill Clinton’s last-minute pardons did not go through the “normal channels”:

These infamous “last-minute” pardons were, in part, notable because they generated unprecedented interest in information about *historical* trends in the use of the pardoning power. . . . The *New York Times* investigated patterns in clemency applications across several years¹⁵³ and reporters for the *Los Angeles Times* wondered if “other presidents [had] pardoned as many individuals whose applications were not first reviewed by the Justice Department.”¹⁵⁴ The *New York Daily News* also wondered about the number of times previous presidents had “bypassed traditional channels” to grant pardons.¹⁵⁵ *USA Today* was curious about the Department of Justice’s role in the clemency process and what limits there were to the president’s use of the pardoning power¹⁵⁶ while reporters from the *Washington Post* and *Christian Science Monitor* questioned whether “last-minute” pardons were “the norm.”¹⁵⁷ For the first time, calls for empirical analysis of the

presidential action if the petitioner withdraws the application or dies during the pendency of its consideration. Moreover, a pardon application will be closed administratively if the petitioner repeatedly fails to respond to a request by the Pardon Attorney for information necessary for the processing of his application. Further, a commutation application will be closed administratively if an applicant who seeks only reduction of his prison sentence is released from prison before the President takes action on his request. Finally, since a person is not eligible to seek commutation of sentence if he is challenging his conviction or sentence through litigation, a commutation application will be closed administratively if it is learned that the clemency applicant is simultaneously seeking relief from the courts.

E-mail from Ronald Rodgers, U.S. Pardon Attorney, to P.S. Ruckman (May 10, 2013).

153. Kurt Eichenwald & Michael Moss, *Rising Numbers Sought Pardons in Last 2 Years*, N.Y. TIMES (Jan. 29, 2001), <http://www.nytimes.com/2001/01/29/us/rising-numbers-sought-pardons-in-last-2-years.html?pagewanted=all>.

154. See Jonathan Peterson & Lisa Getter, *Clinton Pardons Raise Questions of Timing, Motive*, L.A. TIMES (Jan. 28, 2001), <http://articles.latimes.com/2001/jan/28/news/mn-18078>; Richard A. Serrano & Stephen Braun, *47 Pardons Skirted Review, Papers Show*, L.A. TIMES (Feb. 8, 2001), <http://articles.latimes.com/2001/feb/08/news/mn-22752>.

155. Dave Saltonstall, *Bill’s Very Bumpy Road from White House Pardons, Softgate Have Pals Muttering ‘Tacky,’ ‘Sordid’*, N.Y. DAILY NEWS (Feb. 11, 2001), <http://www.nydailynews.com/archives/news/bill-bumpy-road-white-house-pardons-sofagate-pals-muttering-tacky-sordid-article-1.910966>.

156. Judy Keen, *Process Intended to Keep ‘Tranquility’*, USA TODAY (Mar. 1, 2001), <http://usatoday30.usatoday.com/news/politics/2001-03-01-pardonqa.htm>.

157. Peter Grier, *Clinton’s Suspect Pardons ‘Pardongate’ Sours Ex-President’s Legacy, His Wife’s Image, and Public View of Politics*, CHRISTIAN SCI. MONITOR (Feb. 23, 2001), <http://www.csmonitor.com/2001/0223/p1s2.html>; Michael Powell, *Pardons With Precedent; Marc Rich Drama is Latest in a Long Line of Last Acts*, WASH. POST, Feb. 26, 2001, at C1.

pardon power were coming from outside the discipline of political science.¹⁵⁸

In most instances, however, the search for data driven context came up empty-handed. “Experts”—some from within the Department of Justice—provided anecdotes and relied upon their recent memory. Some even brought such reference points to congressional investigations. But no one could even produce data on the number of pardons granted by previous presidents that did not go through “normal channels.” It was all sad, unimpressive guesswork.¹⁵⁹

If useful data are gathered, analyzed, and correctly understood, Lieber’s hope that “a series of fair principles and rules” might be “settled by practice,” and the pardon power could be protected from “arbitrary action.”¹⁶⁰ Under the current system, it is so easy to imagine nothing like this is going on. Indeed, a former U.S. pardon attorney in the administrations of George H.W. Bush and Bill Clinton has said:

I can tell you that the system for reviewing cases and for getting cases, and the kinds of considerations that we brought to bear in the Department of Justice were really pretty random. . . . I can tell you that the degree of secrecy and randomness and inefficiency [in the present system] is extraordinary.¹⁶¹

E. *Revamp the Annual Report of the Attorney General*

Finally, the *Annual Report* of the Attorney General should return to the level of transparency that existed in its pages from 1885 to 1932. In that period, the name of each recipient of clemency was listed along with the state where he or she was tried, the offense(s), the date of sentencing, the sentence, the form of clemency, and, in many (if not most) instances, some explanation as to why clemency was granted. Disagreements between the president and the pardon attorney or attorney general were noted, as were

158. Ruckman, *supra* note 9, at 821.

159. In one instance, a former U.S. pardon attorney, speaking about Clinton’s late pardons said, “this is the first time that I’m aware of that a huge number of pardons was done at the very end of the term.” But that same individual was the U.S. pardon attorney in the previous administration, that of George H.W. Bush, who—like most presidents before him—granted the largest number of pardons in the fourth and final year of his term. Moreover, almost half of Bush’s pardons and commutations of sentence were granted in the last month and half of his term—18 percent of his total falling in the last week. Transcript, *Pardon Probe* (PBS television broadcast, Feb. 14, 2001), http://web.archive.org/web/20130723114720/http://www.pbs.org/newshour/bb/law/jan-june01/pardon_2-14.html; P.S. Ruckman Jr., Professor of Pol. Sci., Rock Valley Coll., Address at the Annual Meeting of the Midwest Political Science Association: “Last-Minute” Pardon Scandals: Fact and Fiction (Apr. 15–18, 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214600, at 3–4, 10.

160. LIEBER, *supra* note 11, at 406.

161. Margaret Colgate Love, Former U.S. Pardon Attorney, Address at the University of St. Thomas Law Journal Symposium: Reviewing Clemency in a Time of Change (Apr. 15, 2015).

instances where applications did not go through “normal channels” and were decided upon directly by the president.¹⁶²

In addition to all of this information, the *Annual Report* should provide the date when each application was filed, so that there can be better public assessment of the process and those who are administering it. While it may be impractical to provide all of the same information for applications that are denied, some data should be provided which reveal the length of time that it takes for those applications to be processed as well.

VII. EXPECTATIONS, GOALS, AND ASSESSMENT

There was a time when presidents granted more pardons than they denied. Specific numerical quotas are probably inappropriate, but all of the authors in this issue are in agreement that the pardon power was not placed in the Constitution in order that presidents might neglect it. In *Federalist 74*, Alexander Hamilton noted that criminal codes have an almost natural tendency toward over-severity. For that reason, he argued, there should be “easy access” to mercy.¹⁶³ By almost any standard or measure one might employ, it is impossible to reasonably conclude that there has been “easy access” to federal executive clemency in the United States, at least not in the last five decades.

A. *More Pardoning*

One underlying goal of the changes proposed here is an increase in use of the pardon power. Absent clear and convincing data that this or that year’s applicants, as a group, are more serious offenders, less likely to have experienced rehabilitation, or that punishment continues to serve some public good, the number of clemency grants should at least *moderately* correlate with trends in federal convictions, time served by the prison population, and completion of sentences. When federal convictions and the prison population boom (as they have since the 1980s), and pardons and commutations of sentence decline precipitously, the clemency board should not conclude that it is the normal course of business. It should instead prepare reports that explain with terrific precision *why* the disparities exist.

At present, presidents can complain that they are not getting applications they want to see.¹⁶⁴ Deputy attorney generals can say they are recom-

162. Former U.S. Pardon Attorney Margaret Colgate Love argues Franklin Roosevelt’s 1933 “decision to stop publishing reasons for grants deprived the public of the factual predicate necessary to hold pardon decision-makers accountable and reinforced the impression that pardoning was mysterious, capricious, and possibly corrupt. It also encouraged both the president and the Justice Department to think that they did not need to be accountable to the public for pardoning.” Ruckman, *supra* note 149, at 9.

163. THE FEDERALIST NO. 74 (Alexander Hamilton).

164. President Obama has explained his lack of pardoning on the fact that the Office of the Pardon Attorney just isn’t sending him the kinds of applications that he wants. See P.S. Ruckman

mending clemency, but presidents are not responding positively.¹⁶⁵ U.S. pardon attorneys can claim they are forwarding positive recommendations but their suggestions are being ignored.¹⁶⁶ This shell game should end.

If recommendations are being forwarded to the president, and the president is simply not acting on them, everyone should know. If recommendations are not being forwarded, everyone should know that as well. Aggregate data on the paths of clemency applications should be regularly charted. If applications tend to get log-jammed in the Office of the Deputy Attorney General, or at any single point in the bureaucratic trail, everyone should know exactly where that point is. The tail should be explicitly pinned on the donkey(s), again, regularly.¹⁶⁷ Greater transparency is the best possible path to consistency and, consequently, fairness.

B. *More Regular Pardoning*

Whatever the flow of applications and recommendations, the tendency of pardons to be granted in the month of December, and more so in the fourth and last year of each term (and certainly the final days and hours of the term), should be consciously and valiantly resisted by all of the actors involved. For most of our nation's history, presidents granted pardons regularly throughout the term. A full month would not pass without a single pardon or commutation of sentence. Pardons were not so much newsworthy events as they were regular, expected occurrences—the residue of a general sense that presidents, as a matter of constitutional duty, were supposed to participate in our system of checks and balances. This all ended in the administration of Dwight Eisenhower.¹⁶⁸

December pardoning—probably a by-product of Judeo-Christian tradition—sends all of the wrong signals, yet 51 percent of 2,973 individual

Jr., *Obama: Even More Applications May Mean More Mercy*, PARDON POWER BLOG (Mar. 21, 2015), <http://www.pardonpower.com/2015/03/obama-more-applications-may-mean-more.html>. It was also reported that, under George W. Bush, “the White House repeatedly sought more favorable recommendations.” Morison, *supra* note 138.

165. When testifying before the U.S. Senate Judiciary Committee in the aftermath of President Clinton's controversial last minute pardons, former Deputy Attorney General Eric Holder noted, quite defensively, “There have been times when we have made, I have made recommendations to the President in favor of a pardon request that was not granted.” *President Clinton's Eleventh Hour Pardons: Hearing Before the Comm. on the Judiciary*, Serial No. J-107-3, 107th Cong. 1 (2001) (statement of Eric Holder Jr., Former Deputy Attorney Gen., Dep't of Justice).

166. Former U.S. Pardon Attorney Margaret Colgate Love has felt the need to emphasize that there were “times” when she “made recommendations to the President in favor of a pardon request that was not granted.” P.S. Ruckman Jr., *More on the O.P.A.*, PARDON POWER BLOG (Sept. 4, 2015), <http://www.pardonpower.com/2015/09/more-on-opa.html>.

167. See *supra* note 150.

168. P.S. Ruckman Jr., *The Problem, in a Nutshell*, PARDON POWER BLOG (Aug. 13, 2015), <http://www.pardonpower.com/2015/08/the-problem-in-nutshell.html#more>.

grants of clemency over the last thirty-nine years have been in that month.¹⁶⁹ As I have noted elsewhere:

Whatever merit there may be to the notion that the Scriptural narrative of the Crucifixion of Christ [it] certainly serves as a very poor building block for public understanding of federal executive clemency [and as a] model for clemency policy making, it is even more problematic. Indeed, the clear sense of the Crucifixion story is that the prisoner, Barabbas, was guilty and on his way to execution. But, because of “tradition,” the arbitrary decision making of Pilate and the passions of a mob, Barabbas was the recipient of an extraordinary act of grace. The incident thus provides no consideration whatsoever for clemency as the result of a truly deliberative process. Nor does it consider clemency as the expected—if not *well deserved*—result of rehabilitation, or clemency following the expiration of a sentence. Indeed, the case of Barabbas serves as a remarkably poor baseline for the typical clemency application floating around in the Department of Justice, which does *not* involve the death penalty and, more often than not, features an applicant who has completed his/her sentence, properly addressed all associated fines and penalties and is simply seeking to have his/her civil rights restored. In sum, the more intelligent approach would be for the pardon power to be used more frequently and more evenly across the months of the year.¹⁷⁰

While it is true that most presidents have granted the largest number of pardons in the fourth and last year of the term, the last-minute pardon bonanza of Bill Clinton was more unusual than anything else.¹⁷¹ Still, last-minute pardoning invites the criticism that presidents are behaving in a manner to escape political accountability for their decision-making. In addition to calling the pardon power in question, deserving recipients are cast in a bad light as well.

C. *Exercise of Group Pardons*

Finally, in an era of mass incarceration, it is reasonable to hope for a day when pardons are granted more frequently and conspicuously as the product of explicit, methodical calculation toward the ends of justice and the public good. The economy has languished for some time now. Budgets are tight. Costly prisons cannot always be the go-to answer. Nor should they be, if there is a sense that alternative forms of punishment are more appropriate or more conducive to successful reincorporation into society.

There is a place for pardoning chicken stealing, coin mutilation, illegal sale of bald eagle feathers, lumber theft from government property, or em-

169. P.S. Ruckman Jr., *Seasonal Clemency Revisited: An Empirical Analysis*, 11 WHITE HOUSE STUDIES 21, 27 (2011).

170. *Id.* at 33–34.

171. Ruckman, *supra* note 159, at 2.

bezzlement from national banks. But in an era of mass incarceration with over four thousand offenses in the U.S. criminal code and increasing concerns about overcriminalization,¹⁷² it seems appropriate that a newly created clemency board can constantly remind itself that the clemency power can be appropriately exercised for *classes* of persons. Amnesties (or group pardons) are a great American tradition dating back to George Washington,¹⁷³ and a clemency board should always explore the possibility and appropriateness of such grants, in addition to individual grants.

This approach to clemency is quite common worldwide. In January of 2010, for example, the president of Manila granted eighteen commutations of sentence, giving special consideration to “health conditions and the age of the convicts.”¹⁷⁴ One year earlier, over 500 prisoners were freed in Ghana when clemency was granted to categories of recipients including the following: nursing mothers guilty of non-bailable offenses, first-time offenders who had served more than half of their term, all first-time offenders above the age of seventy years, and all seriously ill prisoners not sentenced to death or life imprisonment. Exempt from the amnesty were offenders in those categories who were jailed for murder, armed robbery, rape, defilement, narcotics, threat of death, carrying offensive weapons, manslaughter, and escaping from lawful custody.¹⁷⁵

In January of 2015, 584 prisoners were released by decree in Egypt who had served at least fifteen years of life sentences or had served at least half of their six-month sentences. The decree excluded those convicted of crimes that harmed the government or crimes involving explosives, weapons and ammunition, drugs, illegal profiteering, bribes, and forgery.¹⁷⁶ In March, 2015, the president of Tunisia commuted almost 1,000 prison sentences on the basis of “objective criteria” focusing on “the gravity of the crime or the offence, length of sentence served and the penalty remaining to be executed. Other criteria such as first-time or repeat offender status and

172. “Overcriminalization describes the trend to use the criminal law rather than the civil law to solve every problem, to punish every mistake, and to compel compliance with regulatory objectives. Criminal law should be used only if a person intentionally flouts the law or engages in conduct that is morally blameworthy or dangerous.” *Overcriminalization*, THE HERITAGE FOUNDATION, <http://www.heritage.org/issues/legal/overcriminalization> (last visited Mar. 24, 2016).

173. P.S. Ruckman Jr., *Daniel Horowitz: Don’t Know Much About History . . .*, PARDON POWER BLOG (July 18, 2015), <http://www.pardonpower.com/2015/07/daniel-horowitz-dont-know-much-about.html>.

174. P.S. Ruckman Jr., *Manila: 21 Pardons*, PARDON POWER BLOG (Jan. 7, 2010), <http://www.pardonpower.com/2010/01/manila-21-pardons.html>.

175. P.S. Ruckman Jr., *Ghana: 500 Pardons. Amnesty!*, PARDON POWER BLOG (Jan. 7, 2009), <http://www.pardonpower.com/2009/01/ghana-500-pardons-amnesty.html>.

176. *Egypt to Pardon 584 Prisoners on Jan 25*, CAIROSCENE (Jan. 22, 2015), <http://www.cairoscene.com/BusinessAndPolitics/Egypt-to-Pardon-584-prisoners-jan25>.

good conduct [were] determining.” Detainees convicted of “serious crimes” (terrorist crimes, weapon trafficking, and smuggling) were excluded.¹⁷⁷

In April 2013, “as many as 7,000” persons were released from prisons in Syria. The amnesty reduced death penalty sentences to life imprisonment and also covered “prisoners with incurable diseases and elders over 70.” Also excluded were “political prisoners or those convicted of drug and weapon trafficking.”¹⁷⁸

The point is not so much to advocate for any of these particular examples of amnesty as appropriate in the United States. But there is a place for more regular, serious consideration of the delineation of particular classes of persons for federal executive clemency, based on explicitly stated policy goals, considerations of justice and the public good.

Currently, there are thousands of individuals in our federal prisons who were convicted of drug offenses and received harsh sentences under sentencing guidelines since rejected by both parties in both chambers of Congress. On August 2, 2010, Congress addressed disparities in crack and powder cocaine sentencing with passage of the Fair Sentencing Act (FSA).¹⁷⁹ It reduced federal mandatory minimums and maximums for crack-related offenses to an 18:1 ratio (from a ratio of 100:1). Right away, there were concerns about whether or not the FSA should be applied retroactively. Families Against Mandatory Minimums (FAMM) issued a statement, which read, in part:

Retroactive application of the crack law by Congress and the United States Sentencing Commission could affect an estimated 21,000 prisoners over the next 30 years, reducing sentences by an average of almost four years. Enactment would result in substantial savings in prison costs—currently shouldered by overburdened American taxpayers—at no peril to public safety. Each prisoner requesting a sentence reduction would be considered individually, allowing courts to ensure that dangerous offenders are not returned to society early. . . . Congress must make the crack law retroactive. It’s a matter of simple fairness . . . [they] must provide relief to those already in prison serving stiff sentences for crack violations. It’s only right that Congress show them the same compassion, fairness, and justice that the new law provides to those entering the prison system.¹⁸⁰

177. *Tunisia: President of Republic Pardons 1,351 Inmates on Independence Day*, ALLAFRICA (Mar. 20, 2015), <http://allafrica.com/stories/201503210123.html>.

178. *Syrian Presidential Pardon to Release Some 7,000 Prisoners*, ENGLISH.NEWS.CN (Apr. 16, 2013), http://news.xinhuanet.com/english/world/2013-04/16/c_132314334.htm.

179. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

180. *FAMM Hails Introduction of Retroactive Crack Bill*, FAMM (Dec. 17, 2010), <http://web.archive.org/web/20130123053708/http://www.famm.org/NewsandInformation/PressReleases/FAMMHailsIntroductionofRetroactiveCrackBill.aspx>.

Courts also had to deal with more technical questions, such as whether or not appellants should be subject to the new guidelines if they were sentenced after the passage of the FSA, or whether the relevant point in time was when crimes were thought to have been committed.¹⁸¹ Meanwhile record numbers of applications for commutations of sentence flew into the Office of the Pardon Attorney.¹⁸²

On April 23, 2014, former Deputy Attorney General James M. Cole announced that the Department of Justice would “prioritize” commutation applications from inmates serving federal sentences who likely would have received a substantially lower sentence if convicted of the same offense(s) today; who were nonviolent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels; had served at least ten years of their prison sentence; did not have a significant criminal history; had demonstrated good conduct in prison; and had no history of violence prior to or during their current term of imprisonment.¹⁸³

To date, Mr. Cole’s program has yielded few positive results, but President Obama’s administration is not yet over. A newly created clemency board should, again, constantly be mindful of the possibility of granting clemency to classes of persons. If we are going to incarcerate at high rates, we should be ever more mindful of ways to decrease the prison population in accordance with the ends of justice and the public good.

VIII. CONCLUSION

In 1919, Attorney General A. Mitchell Palmer’s *Annual Report* argued that his duties and responsibilities had “increased so greatly” that it became “practically impossible” to give clemency applications “the attention and thought” that they required.¹⁸⁴ Palmer thus proposed the creation of a three-member Pardon and Parole Board that would make recommendations to the president.¹⁸⁵ Three years later, the American Civil Liberties Union sent a letter to President Harding calling for the creation of a “new agency” to process clemency applications. According to the *Washington Post*, the organization thought the Department of Justice was “unable” to “go into” cases in a proper manner because of its “organization,” its “other many duties,” and the dominant role of federal attorneys who conducted the pros-

181. P.S. Ruckman Jr., *Retroactivity: Easterbrook V. Posner*, PARDON POWER BLOG (Aug. 29, 2011), <http://www.pardonpower.com/2011/08/retroactivity-easterbrook-v-posner.html>.

182. P.S. Ruckman Jr., *More on Obama, Records and Clemency Applications*, PARDON POWER BLOG (Aug. 27, 2013), <http://www.pardonpower.com/2013/08/more-on-obama-records-and-clemency.html>.

183. *New Clemency Initiative*, DEP’T OF JUSTICE (Apr. 22, 2015), <http://www.justice.gov/pardon/new-clemency-initiative>.

184. *Annual Report of the Attorney General*, Dec. 8, 1919, 4.

185. *Id.*

ecution.¹⁸⁶ It is so unfortunate that reform-minded persons did not win the day on these fronts a long, long time ago.

Many have high hopes that President Obama will exercise the pardon power more generously before his term finally ends. It is quite unfortunate that he has not exhibited more interest to date. But here we are. Unfortunately, if he grants record numbers of pardons and commutations of sentence between now and the end of the term, it may cause as much harm as good so far as public perceptions of the pardon power are concerned. The recommendations outlined above would, if implemented, prevent future presidents from ever finding themselves in such a predicament.

186. *Seeks New Pardon Agency*, WASH. POST, Apr. 3, 1922, p. 6.