

# Clemency

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*American clemency systems are as varied as the jurisdictions themselves. While the contemporary federal system is a poor exemplar, there are worthwhile examples to be found in the states and in a federal experiment in the wake of the Vietnam War. Commonalities exist between the higher-functioning processes, including the use of a horizontal and deliberative process rather than one that is vertical and rooted in sequential review. Here, those better systems are described with an eye to the improvement of the others and the continuing vitality of a tool that is deeply rooted in the history of Western Civilization.*

## INTRODUCTION

Clemency is a deep and abiding American tradition, rooted in the Judeo-Christian ethics of our society—a manifestation of the traditional virtue of mercy found in every state and the federal system of criminal law. That virtue is not only widely held but ancient: Christ was considered for pardon before Pilate in keeping with a Passover tradition,<sup>1</sup> and the Romans even had a goddess representing societal mercy, Clementia.<sup>2</sup>

What makes a clemency process “good” is a matter of perspective. Some might prefer a process that allows for many grants of commutations (the shortening of a sentence) and pardons (which eliminate the effects of a conviction, usually after a sentence has been served). Others might object to a large number of grants, seeing it as an undue intrusion on the work of juries and judges by the executive. However, no criminal system is perfect and unchanging. Thus, the mark of a good process is going to be that it allows for the fair consideration of all petitions and the grant of those petitions where mercy is warranted by a guiding principle or principles. A system that inconsistently or infrequently grants clemency is unlikely to meet this standard.

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1. Mark 15:6-15.

2. Mark Osler, *Obama's Clemency Problem*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/01/opinion/obamas-clemency-problem.html>.

By that measure, it is fair to say that the uneven and inconsistent<sup>3</sup> clemency system currently employed by the federal government—a bureaucratic disaster coursing through four federal buildings and at least seven sets of hands—is the worst clemency evaluation system in the history of the United States (with the possible exception of Rhode Island’s process, which sends clemency consideration through the state Senate for “advice and consent”).<sup>4</sup> No state system includes the federal process’s toxic combination of endless review and a central role for prosecutors.<sup>5</sup>

In this chapter, we will look at a few high-functioning state systems and a previous federal experiment as exemplars before turning to the problems found at the federal level. Based on a review of the high-functioning systems, three attributes stand out: They rely on boards rather than a vertical decision structure or single political actor, those boards have significant independence of action, and the boards display a diversity of viewpoints rather than a uniformity of background.

## I. SYSTEMS THAT WORK<sup>6</sup>

### A. STATE SYSTEMS

#### 1. A diversity of systems

Even a cursory examination of state systems reveals a fascinating truth: There seems to be no correlation between liberalism and broad grants of clemency or political conservatism and stinginess. In fact, we find some of the most functional and effective systems in states like South Carolina, while my own famously progressive state (Minnesota) issues pardons sparingly.<sup>7</sup> Many of the state systems (including those described below) offer benefits that are lacking in the current federal system, including transparency of process and an opportunity for victims or victims’ family members to have a voice in the process.<sup>8</sup>

3. P.S. Ruckman, Jr., *The Obama Administration: Breaking Records in a Broken Clemency System*, 29 FED. SENT’G REP. 87 (2017).

4. R.I. CONST. art. IX, § 13.

5. The Criminal Justice Policy Foundation maintains an on-line database for state clemency procedures (available at <http://www.cjpf.org/state-clemency/>), and Margaret Colgate Love has created a similar site for state pardon procedures in conjunction with the National Association of Criminal Defense Lawyers (available at <https://www.nacdl.org/rightsrestoration/>).

6. Much of this section is drawn from Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 1 (2017).

7. *Id.*

8. See *supra* note 5. For a discussion of victims in the criminal process, see Paul G. Cassell, “Crime Victims’ Rights,” in Volume 3 of the present Report.

Perhaps the most striking indictment of the federal clemency system is the bare fact that not a single state has adopted the federal system of multiple, redundant, secretive reviews, or anything remotely like it.<sup>9</sup> Instead, as Margaret Colgate Love described it after a thorough survey, the states<sup>10</sup> fall into three general categories.<sup>11</sup> The first includes six states that leave pardoning almost entirely to an independent board,<sup>12</sup> the second describes the 21 states where the governor shares the pardon power with a board or (in Rhode Island) the legislature,<sup>13</sup> and the third is comprised of 23 states where the governor has the sole power to pardon, though in 18 of these states there is an advisory consultation with a board who investigates the cases.<sup>14</sup>

The state systems are varied not only in their construction, but in their effectiveness and fairness. They certainly are not immune from scandal, either. For example, outgoing Mississippi governor Haley Barbour granted full pardons to 193 felons on his last day in office, including a man who had shot and killed his wife while she held their infant.<sup>15</sup> Still, there is much to learn from the higher-functioning systems.<sup>16</sup>

In her 2012 survey of state practices, Margaret Colgate Love identified 14 states that demonstrate well-functioning systems that provided “frequent and regular” pardon grants: Alabama, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Iowa, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, and South Dakota.<sup>17</sup> That list is striking for its deviation from the red/blue political divide we are used to, further establishing that fair and efficient administration of clemency can be and is accomplished by either party. It is not politics that matters, it is process.

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9. Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730, 754 (2012). Updated data is available at <http://ccresourcecenter.org>.

10. Washington D.C. does not have an executive with clemency powers.

11. Love, *supra* note 9, at 743-44.

12. *Id.* at 744-45.

13. *Id.* at 745-46.

14. *Id.* at 747-49.

15. Campbell Robertson, *Mississippi Governor, Already Criticized on Pardons, Rides a Wave of Them Out of Office*, N.Y. TIMES (Jan. 10, 2012), [http://www.nytimes.com/2012/01/11/us/gov-haley-barbour-of-mississippi-is-criticized-on-wave-of-pardons.html?\\_r=0](http://www.nytimes.com/2012/01/11/us/gov-haley-barbour-of-mississippi-is-criticized-on-wave-of-pardons.html?_r=0).

16. Some state systems are distinct from the federal clemency system because of the effects of parole. The federal system does not have parole, but for states that retain that mechanism parole will largely serve the function of commutations—that is, shortening existing sentences—while the clemency system will largely address pardons (which generally restore rights to those who have fulfilled a term of imprisonment).

17. Love, *supra* note 9, at 755-66.

So, what kind of process do we see in those states? First, five of the six states where pardon decisions are made by highly independent boards—Alabama, Connecticut, Georgia, Idaho, and South Carolina—are also among the 14 members of the “frequent and regular” list, while the sixth such jurisdiction, Utah, misses the cut largely because the board in that state gets only three to five requests for pardon a year.<sup>18</sup> There is a remarkable correlation between high-functioning clemency systems and the use of an independent board as primary arbiter.

Moreover, in each of the other states with high-functioning systems, we see a board playing some kind of a significant role in decision-making.<sup>19</sup> Thus, one common thread is clear: While other factors (local tradition or culture, for example) may influence outcomes, high-functioning state systems are consistently those that use clemency boards.

Why does this correlation exist? Notably, the clemency-board system used in high-functioning states is just as horizontal as the federal system is vertical. While the reviewers in the federal system are stacked one atop the other in a distinct hierarchy of power and perform reviews separately in ascending sequence—pardon attorney/deputy attorney general/White House counsel/president<sup>20</sup>—the members of a board are relative equals and make decisions together. A strength of that construct is that it allows for deliberation and consensus in a way that a vertical hierarchy does not. In other words, in a horizontal system, deciders with different filters must harmonize their views in direct consultation with one another, while the horizontal federal system allows different filters to be applied consecutively, in a way that allows nearly everything to be strained out.<sup>21</sup>

## 2. Delaware

We see the dynamic of a horizontal system at work if we look more closely at a high-functioning state, Delaware. There, the governor has the pardon power, but the state Constitution sets out that “no pardon, or reprieve for more than six months, shall be granted, nor sentence commuted, except upon the

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18. *Id.* at 767.

19. *Id.* at 756-66.

20. *See supra* Part III.

21. The horizontal system also avoids the multiplication of negative decision bias, *see supra* Section II(C), because the group makes one decision collectively.

recommendation in writing of a majority of the Board of Pardons after full hearing; and such recommendation, with the reasons therefor at length, shall be filed and recorded in the office of the Secretary of State.”<sup>22</sup>

That short bit of constitutional text establishes three things, all of which differentiate Delaware from the federal system. First, a board of pardons is the gatekeeper rather than a hierarchy of officials. Second, hearings are conducted. Third, the reasons for recommending a grant are to be described “at length.” The latter two features allow for a transparency that the federal system utterly lacks.

The board itself is chaired by the lieutenant governor and includes Delaware’s chancellor, secretary of state, treasurer, and auditor.<sup>23</sup> The board does not include the attorney general, but the Delaware Constitution allows that the attorney general may receive requests for information from the board.<sup>24</sup> It seems to be an efficient and effective system, granting over 200 pardons annually in a small state.<sup>25</sup> In contrast, President Obama granted only 70 pardons in his first seven-and-a-half years in office.<sup>26</sup>

Delaware Lieutenant Gov. Matthew Denn<sup>27</sup> helpfully described the workings of that state’s Board of Pardons in an article for the *Delaware Law Review*.<sup>28</sup> Since neither Delaware’s Constitution nor statute provide guidance on board procedures (other than notification to victims and their families),<sup>29</sup> this insight is particularly important. Denn carefully notes the differing views of the board members; for example, members were divided on whether or not an applicant’s practical need for clemency (i.e., to pursue employment) deserved significant weight and on the weight to be accorded to acceptance of responsibility.<sup>30</sup> This is precisely the sort of diversity of viewpoint one would expect to find in any clemency process, whether vertical or horizontal. The difference is that in a horizontal system, the board members are at the same level and are able to actively discuss and resolve those conflicts as they address discrete, real cases.

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22. DEL. CONST. art. VII, § 1.

23. *Id.* art. VII, § 2.

24. *Id.* art. VII, § 3.

25. Love, *supra* note 9, at 758.

26. Office of the Pardon Attorney, *Clemency Statistics*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/pardon/clemency-statistics>.

27. Denn served two terms as Lieutenant Governor before being elected Delaware Attorney General in 2014 (replacing Beau Biden). Esteban Parra, *Denn Takes Race for Attorney General*, THE NEWS JOURNAL (Nov. 5, 2014), <http://www.delawareonline.com/story/news/politics/2014/11/04/denn-takes-race-attorney-general/18508679/>.

28. Matthew Denn, *Clemency in the State of Delaware: History and Proposals for Change*, 13 DEL. L. REV. 55 (2012).

29. *Id.* at 60-61.

30. *Id.* at 61.

As Denn puts it, “the Board’s decisions are often the result of five individuals employing multiple methods of analysis.”<sup>31</sup> The distinction from the federal process is that they do this in concert rather than successively.<sup>32</sup> The difference is clear: Even when the deciders are political actors, a flat system can produce results unlikely to come from a vertical hierarchy.

### 3. South Carolina

According to Margaret Colgate Love, South Carolina is also among the elite group of states where pardoning is “frequent and regular,” issuing about 300 grants per year.<sup>33</sup> Like Delaware, South Carolina relies primarily on a board, but South Carolina’s is even more powerful as the governor has the power to grant clemency only in capital cases. In all others, the board acts on its own.<sup>34</sup> The board also has broader jurisdiction than the Delaware commission, and is formally known as the Board of Probation, Parole, and Pardon Services.<sup>35</sup>

While Delaware’s board is comprised of state officials with substantial other duties, the South Carolina Board is made up of seven members who are appointed by the governor.<sup>36</sup> The statute is quite specific as to qualifications: The director “must have at least ten years of training and experience in one or more of the following fields: parole, probation, corrections, criminal justice, law, law enforcement, psychology, psychiatry, sociology, or social work,”<sup>37</sup> and at least one of the other members must have at least five years of similar experience.<sup>38</sup> Geographical diversity is assured, as one member is appointed from each of South Carolina’s congressional districts.<sup>39</sup>

South Carolina’s system provides an unusual amount of transparency and engagement. Hearings, as in Delaware, are a regular part of the clemency process,<sup>40</sup> and in 2016, pardon hearings were scheduled for every month except

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31. *Id.*

32. Denn does recommend some changes; he suggests that for easy cases the Board be given the ability to decide cases without the Governor’s review, and limit multiple petitions by violent felons. *Id.* at 68-69. He concludes, however, that “[i]n general, Delaware’s unique clemency process works well and results in thoughtful, just outcomes from a Board of Pardons that has an unusually high level of public accountability.” *Id.* at 69.

33. Love, *supra* note 9, at 766.

34. S.C. CONST. art. IV, § 14, S.C. CODE ANN. § 24-21-920 (2016).

35. S.C. CODE ANN. § 24-21-10 (2016).

36. *Id.* § 24-21-10(A) & (B).

37. *Id.* § 24-21-10(A).

38. *Id.* § 24-21-10(B).

39. *Id.*

40. *Id.* § 24-21-50.

January and February.<sup>41</sup> Victims are invited to participate in pardon hearings,<sup>42</sup> and a record of these hearings is kept and maintained.<sup>43</sup> The board itself is strikingly diverse both racially and in vocational background. As of July 2016, the members of the board included a nurse, a phone-company supervisor, an MIT-trained engineer, a retired pharmaceutical manager, a social-studies teacher, a car broker and fitness trainer, and a Methodist minister.<sup>44</sup>

Why does South Carolina's system provide regular grants, even within a deeply conservative<sup>45</sup> political culture? At least part of the answer lies in the diversity of that Board, combined with a flat structure that requires them to work together regularly over a long period of time.<sup>46</sup>

### B. GERALD FORD'S PRESIDENTIAL CLEMENCY COMMISSION

The modern era of dysfunctional federal clemency contains a striking anomaly: President Ford's Presidential Clemency Board, which lasted just one year and led to the pardon of over 13,000 people who had been convicted or court-martialed in relation to the Vietnam War.<sup>47</sup> This shockingly brief period of competence was a creature of a dark time in our nation's history, coming in the wake of that war and Watergate. Both of those debacles played a role in Ford's successful experiment.

While Ford's use of the pardon power is most often considered in relation to his controversial pardon of Richard Nixon,<sup>48</sup> his more relevant action was

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41. South Carolina Board of Probation, Parole and Pardon Services, *2016 Parole and Pardon Hearings*, <http://www.dppps.sc.gov/content/download/75599/1739954/file/parolepardonhearings2016+.+REVSD.12.16.2015+email+from+pete.pdf>.

42. South Carolina Board of Probation, Parole and Pardon Services, *Pardon Hearing Explanation*, <http://www.dppps.sc.gov/Victim-Services/Pardon-Hearing-Explanation>.

43. S.C. CODE ANN. § 24-21-40 (2016).

44. South Carolina Board of Probation, Parole and Pardon Services, *Parole Board*, <http://www.dppps.sc.gov/Parole-Pardon-Hearings/Parole-Board>.

45. A 2010 Gallup poll found South Carolina to be one of the ten most conservative states in the country. Brian Montopoli, *And the Most Conservative State in the Union is...*, CBS NEWS (Aug. 2, 2010), <http://www.cbsnews.com/news/and-the-most-conservative-state-in-the-union-is/>.

46. Terms for the Board members are six years. S.C. CODE ANN. § 24-21-10(B) (2016).

47. Clemency expert P.S. Ruckman has evaluated the Ford project results, and concluded that 13,603 clemency grants resulted. P.S. Ruckman, *Ford's Clemency Board Revisited (2)*, PARDON POWER BLOG (Aug. 16, 2016), <http://www.pardonpower.com/2016/08/fords-clemency-board-revisited-2.html>.

48. Ford's proclamation of the pardon and accompanying remarks reflected a desire to end a potentially prolonged debate over Nixon's criminal liability. Gerald R. Ford, *President Gerald Ford's Pardon of Richard Nixon*, 13 FED. SENT'G REP. 207 (2001).

the creation of the Presidential Clemency Board.<sup>49</sup> That board left behind two lasting legacies, both of which have been largely ignored by history: the uncontroversial pardon of thousands, and a comprehensive report about how this was accomplished.<sup>50</sup>

The board was meant to be temporary,<sup>51</sup> and was given precisely one year to complete its work,<sup>52</sup> finishing on September 15, 1975.<sup>53</sup> The goal was to create a “program of conditional clemency for roughly 13,000 civilians and 100,000 servicemen who had committed draft or military absence offences” during the Vietnam War.<sup>54</sup> In all, 21,729 eligible persons applied for this clemency,<sup>55</sup> and the Clemency Board recommended relief for 14,514 of them.<sup>56</sup> It was an ambitious and successful effort.

Like South Carolina’s Board of Probation, Parole and Pardon Services, Ford’s Clemency Board was diverse in terms of background and race. It was chaired by former Sen. Charles Goodell, a Republican from New York.<sup>57</sup> Other members included prominent African-American attorney Vernon Jordan, Notre Dame President Father Theodore Hesburgh, Troy State University (AL) President Dr. Ralph Adams, Paralyzed Veterans of America Executive James

49. Oddly, Ford chose to announce his clemency project for draft dodgers at a VFW Convention, where it was poorly received. He may have chosen that date in an attempt to “hide” it behind another national news event: Evel Knievel’s attempt to jump the Snake River Canyon on a motorcycle. Laura Kalman, *Gerald Ford, the Nixon Pardon, and the Rise of the Right*, 58 CLEV. ST. L. REV. 349, 360 (2010).

50. PRESIDENTIAL CLEMENCY BOARD REPORT TO THE PRESIDENT (1975), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015012272848;view=1up;seq=7>.

51. A post-war temporary clemency program was not a new innovation. Such efforts were undertaken by George Washington after the Whiskey Rebellion; Lincoln and Johnson used clemency to heal wounds of the Civil War; Theodore Roosevelt employed it after the Spanish American War; Coolidge pardoned those convicted under the Espionage Act in World War I; and Truman issued four broad clemency proclamations after World War II. *Id.* at 355-79.

52. The Board’s report notes that Ford announced his clemency six weeks after taking office, the precise interval between Andrew Johnson’s taking office after the death of Lincoln and the clemency program he announced in the wake of the civil war. *Id.* at 1 & 178.

53. Executive Order 11803 (Sept. 16, 1974), THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=23895>; PRESIDENTIAL CLEMENCY BOARD REPORT TO THE PRESIDENT, *supra* note 50, at 165.

54. PRESIDENTIAL CLEMENCY BOARD REPORT TO THE PRESIDENT, *supra* note 50, at xi.

55. *Id.* at xii.

56. *Id.* at xxiii.

57. Executive Order 11803, *supra* note 53. Goodell was a war critic and liberal Republican, and also the father of NFL Commissioner Roger Goodell. Patrick Hruby, *Roger Goodell’s Tragic Sanctimony*, THE ATLANTIC (Sept. 12, 2014), <http://www.theatlantic.com/entertainment/archive/2014/09/roger-goodells-the-nfls-nixon-on-the-ray-rice-scandal/380112/>.

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Maye, General Lewis Walt, and Aida Casanas O'Connor,<sup>58</sup> who was described in the executive order as “a woman lawyer.”<sup>59</sup>

The board itself (which began with nine members, then doubled in size to 18 as applications increased)<sup>60</sup> relied on a staff of attorneys detailed from other departments and 125 summer interns.<sup>61</sup> The process they used was relatively simple. It began with a letter or phone call from a prospective applicant; the board considered “any affirmative expression of interest” as a provisional application.<sup>62</sup> The applicant then received a set of instructions to fill out forms setting out “only the minimum amount of information necessary for us to order pertinent government records,” according to the board, in an effort to make the application as easy as possible.<sup>63</sup> A staff member then gathered documents and prepared a case summary, which would be reviewed by a supervisor. That summary was mailed to the applicant for review and comment. Once those were received, the staff member who prepared the case summary would meet with a panel of three or four board members, and a decision would be made.<sup>64</sup>

The board exhibited a remarkable focus on consistency, and was innovative in pursuing that goal. One tool was the “Clemency Law Reporter,” an internal publication that addressed recurring issues and provided staff with direction.<sup>65</sup> Remarkably for their time, the board also used cutting-edge technology (for 1975) and employed “a computer-aided review of case dispositions for consistency with Board precedent.”<sup>66</sup> The system itself, which identified outlier decisions that could be referred to the entire board for review, was developed by and implemented by NASA especially for the project, at a cost of \$5 per case.<sup>67</sup> Oddly, some four decades later, such a system is not used now to assess clemency outcomes.

The Ford Clemency Board worked. It is telling that few remember it; after all, we remember disasters, not quiet successes.

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58. PRESIDENTIAL CLEMENCY BOARD REPORT TO THE PRESIDENT, *supra* note 50, at Appendix A.

59. Executive Order 11803, *supra* note 53.

60. PRESIDENTIAL CLEMENCY BOARD REPORT TO THE PRESIDENT, *supra* note 50, at xvii.

61. *Id.* at 164.

62. *Id.* at 24.

63. *Id.*

64. *Id.* at 26.

65. *Id.* at 283-89.

66. *Id.* at 327.

67. *Id.*

### C. LESSONS FROM THE STATES AND THE FORD CLEMENCY BOARD

The examples of the Ford Clemency Board and the high-functioning states set out a few simple commonalities and promise the possibility of features our federal system now lacks.

There are three strong commonalities among systems that work. High-functioning systems rely on boards, which serve to flatten out the process and force consensus among diverse voices. Because they consider petitions as a group rather than consecutively, they avoid redundancies and can maintain consistency.

Second, the more independence the board has, the more likely it is that the system will be efficient and offer frequent and regular grants of clemency.<sup>68</sup> This should not surprise us. An independent board gives a political actor such as a governor or president some “cover” on tough decisions and offers a political buffer.

Third, diverse views on a board seem only to enhance the success of the larger project. President Ford intentionally sought out diverse voices (even on the subject of the Vietnam War itself), while the structure of the Delaware and South Carolina systems ensures that the boards avoid monoculture.

The recipe for a working clemency system is short and sweet: It requires a horizontal structure centered on a well-chosen board that is both diverse and independent.

## II. THE CONTEMPORARY FEDERAL CLEMENCY PROCESS

### A. HISTORY

The current federal clemency system bears none of the markers of high-functioning systems described above. In contrast to state systems, the current federal clemency process courses through seven levels of review in succession. It is inefficient, bureaucratic, and would be rejected if it were part of any successful business. Each of the past three presidents have complained about the process, despite their differing views on the use of the pardon power.<sup>69</sup> Reform could and should streamline the process through use of a commission that reports directly to the president and allows the new commission to gather and analyze data to guide decision-making. However the chief executive chooses to employ the pardon power, he or she will be better served by a shorter, sharper process that delivers consistent, timely, and straightforward recommendations.

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68. See *supra* Section II(A)(1).

69. Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. Tol. L. Rev. 89, 101 (2015).

To understand the shape of the beast that is the current clemency review system, it is helpful to understand how it evolved. The process grew up organically in response to workload issues and the protection of power within the executive branch, rather than through an intentional scheme to produce efficiency or regularity.

In the early years of the republic, there was no formalized process for consideration of clemency. No systemic rules were developed until 1898, when President McKinley directed that all applications for clemency had to be submitted to the pardon attorney, an officer within the Department of Justice<sup>70</sup> (established in 1870) and then to the attorney general.<sup>71</sup> This system was relatively effective.

So how did things go wrong? It appears that at exactly the same time that clemency grants dropped—the 1980s—the clemency process became much more complex.<sup>72</sup> The drop-off is well-defined in the pardon attorney's published statistics, which extend back to 1900.<sup>73</sup> Considering both commutations of sentence and pardons, granted petitions almost always exceeded a hundred per year until the Reagan administration, when they dipped under that level, then crashed under George H.W. Bush, who granted less than 100 over his entire four-year administration.<sup>74</sup> This trend is particularly notable given that incarceration rates (and thus the number of people who might seek clemency) were rising at the same time the number of clemency grants was falling, meaning that the change in clemency grant *rates* was even more severe, with a sharp breaking point in the Carter/Reagan period. In order, President Kennedy granted 36% of the pardon and commutation petitions filed, Johnson 31%, Nixon 36%, Ford 27%,<sup>75</sup> Carter 21%, Reagan 12%, George H.W. Bush 5%, Clinton 6%, and George W. Bush 2%.<sup>76</sup>

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70. Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 FED. SENT'G REP. 5, 6 (2007).

71. *About DOJ*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/about>.

72. This was a time of great flux in federal criminal law, as parole was eliminated and mandatory sentencing guidelines imposed. Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 12 U.S.C. § 3551 (2016)).

73. Office of the Pardon Attorney, *supra* note 26.

74. *Id.*

75. This figure does not include the over 14,000 pardons Ford issued outside of the regular clemency process to draft evaders and Army deserters. *See supra* Section III(B). Presumably, the Pardon Attorney's statistics only include cases that went through that office, and the Ford grants came through an alternative process.

76. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 816-17 (2015).

A crucial shift in procedure seems to have happened almost imperceptibly. At the end of the Carter administration, Attorney General Griffin Bell delegated responsibility for approving and transmitting clemency recommendations to his subordinates.<sup>77</sup> This was formalized in the Reagan administration under Attorney General William French Smith, and the review and recommendation function of the attorney general passed to the deputy attorney general.<sup>78</sup>

A societal antagonism to rehabilitation does not explain the early clemency record of Barack Obama,<sup>79</sup> who failed to reverse the clemency slide during the first six years of his presidency.<sup>80</sup> In fact, the same week in 2016 that Obama took a group of clemency recipients to lunch in Washington with less than a year to go in his presidency, clemency experts George Lardner Jr. and P.S. Ruckman Jr. published an analysis in *The Washington Post* under the headline “On Pardons, Obama Could Go Down as One of the Most Merciless Presidents in History.”<sup>81</sup>

Neither theory nor politics alone created the failure of clemency we have seen over the past three decades. A primary culprit is, in fact, the clemency review process that emerged in the 1980s. It is the *process* that has failed, rather than simply the will of the presidents we have elected recently. This is reflected in the bare fact that the last three presidents have each complained that they did not see good clemency applications,<sup>82</sup> even as the system was bloated with over-sentenced drug defendants. Good cases were there; they just got beat up and run off as they ran through the defensive line that the clemency process had become.

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77. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1197 (2010).

78. Love, *supra* note 69, at 98 (citing 28 C.F.R. §§ 0.35, 0.36 (2017)). It is section 0.36 that specifically makes this delegation: “The Pardon Attorney shall submit all recommendations in clemency cases through the Deputy Attorney General and the Deputy Attorney General shall exercise such discretion and authority as is appropriate and necessary for the handling and transmittal of such recommendations to the President.”

79. Indeed, President Obama not only pressed for changes in policy and law, but also took a personal interest in the lives of those convicted. Sari Horwitz & Ann E. Marimow, *President Obama Grants Early Release to 61 More Federal Drug Offenders*, WASH. POST (Mar. 30, 2016), [https://www.washingtonpost.com/world/national-security/president-obama-grants-early-release-to-61-more-federal-drug-offenders/2016/03/30/7256bb60-f683-11e5-8b23-538270a1ca31\\_story.html](https://www.washingtonpost.com/world/national-security/president-obama-grants-early-release-to-61-more-federal-drug-offenders/2016/03/30/7256bb60-f683-11e5-8b23-538270a1ca31_story.html).

80. See Office of the Pardon Attorney, *supra* note 26.

81. George Lardner, Jr. & P.S. Ruckman, Jr., *On Pardons, Obama Could Go Down as One of the Most Merciless Presidents in History*, WASH. POST (Mar. 25, 2016), [https://www.washingtonpost.com/opinions/obamas-unpardonable-inaction-on-pardons/2016/03/25/dfe670a8-f07a-11e5-a61f-e9c95c06edca\\_story.html?utm\\_term=.07f3f8bebf79](https://www.washingtonpost.com/opinions/obamas-unpardonable-inaction-on-pardons/2016/03/25/dfe670a8-f07a-11e5-a61f-e9c95c06edca_story.html?utm_term=.07f3f8bebf79).

82. Love, *supra* note 69, at 101.

Even before the implementation of President Obama's Clemency Project 2014 (which added bureaucracy),<sup>83</sup> the clemency review process in recent administrations has involved seven sequential levels of review traversing four different buildings in the Washington, D.C., clemency maze: from the pardon attorney's staff, to the pardon attorney, then to the deputy attorney general's staff, then to the DAG, to the White House counsel's staff, then to the WHC, and finally to the president. Below, I will walk through the existing process, and then describe the layers of bureaucracy that Clemency Project 2014 added on top of that inherited disaster; then I will discuss the problems with the current federal system and the effects of negative decision bias.

## B. THE FEDERAL PROCESS WITHIN THE ADMINISTRATION

### 1. The pardon attorney's staff

When a prisoner or other convicted felon (with or without a lawyer) petitions for commutation of sentence or a pardon, they are required to submit a fairly simple form created by the pardon attorney<sup>84</sup> and made available to prisoners by wardens of federal prisons.<sup>85</sup> That form requests straightforward information about the defendant's conviction, sentence, appeals and other legal actions,<sup>86</sup> and criminal history.<sup>87</sup> Two questions require a narrative response. Question 5 requests a "complete and detailed account of the offense,"<sup>88</sup> and Question 7 simply asks that petitioners lay out their "reasons for seeking commutation of sentence."<sup>89</sup>

Unless an attorney or someone else has compiled letters of support or other documents for the petitioner, it is generally this bare-bones form that will arrive at the pardon attorney's office and be assigned to a staff member. An initial screening is performed, looking to whether the form is complete and basic eligibility is met<sup>90</sup> (for example, that the defendant is a federal convict, rather than one who was convicted in a state court).<sup>91</sup> If a commutation

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83. See *supra* Section III(B).

84. The form is publicly available at the Pardon Attorney's website, with separate forms available for pardons and commutations. Office of the Pardon Attorney, *Application Forms*, U.S. DEPT OF JUSTICE, <https://www.justice.gov/pardon/application-forms>.

85. 28 C.F.R. § 1.1 (2017).

86. Federal regulations bar a petition for clemency from being filed while other forms of relief are available. 28 C.F.R. § 1.3 (2017).

87. Office of the Pardon Attorney, *supra* note 84, at 1-4 (Petition for Commutation of Sentence).

88. *Id.* at 3.

89. *Id.* at 5.

90. Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 36 (2005).

91. 28 C.F.R. § 1.4 (2017).

petition<sup>92</sup> passes that preliminary screening, the staffer begins an investigation by contacting the warden of the prison to request three key documents: the judgment of conviction, the presentence investigation report, and the most recent prison progress report for that inmate.<sup>93</sup> With these documents in hand, the staffer can independently evaluate the defendant's criminal history, crime of conviction, and conduct and achievement in prison.

The role of the pardon attorney staff in conducting these investigations and drafting recommendations is important in the same way an FBI investigation is important in a criminal case—it is foundational and shapes all that follows. There is a fair amount of discretion built into this role, as well, and it is to be expected that some staffers will pursue and support a good case more than others. Historically, some staffers have been clearly antagonistic to the project: One former deputy actually arrived in the pardons office with a duplicate of a Monopoly “Get Out of Jail” card with a red-circle-and-slash “no” symbol over it,<sup>94</sup> while others were presumably more open-minded.

## 2. The pardon attorney

The pardon attorney is ultimately responsible for the recommendation that is sent up the chain through the remaining levels of review.<sup>95</sup> Certainly, as with any administrative job, the pardon attorney's viewpoint will vary depending on who holds the job. Intriguingly, and importantly, the pardon attorney is not subject to appointment and confirmation, and thus his or her tenure extends from one administration to the next: Margaret Colgate Love (1990-1997) served both George H.W. Bush and Bill Clinton,<sup>96</sup> Roger Adams (1998-2008) spanned the Clinton and George W. Bush regimes,<sup>97</sup> and Ronald Rogers (2008-2014) served the end of the George W. Bush administration and most of Barack

92. The process for a pardon petition is distinct but substantially similar. Morison, *supra* note 90, at 38-39.

93. The staffer may also seek out a variety of other documents if needed, such as published judicial opinions, trial and sentencing transcripts, newspaper accounts, or even grand jury transcripts. *Id.*

94. George Lardner, Jr., *Begging Bush's Pardon*, N.Y. TIMES (Feb. 4, 2008), <http://www.nytimes.com/2008/02/04/opinion/04lardner.html>.

95. Morison, *supra* note 90, at 39.

96. Margaret Colgate Love, *Time to Pardon People as Well as Turkeys, Mr. President*, WASH. POST (Nov. 12, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/11/AR2010111106093.html>.

97. Adams was fired after a recommendation surfaced in which he said that “[t]his might sound racist, but [the applicant] is about as honest as you could expect for a Nigerian. Unfortunately, that’s not very honest.” Alison Gendar, *Furor Over Bush Lawyer’s Racism in Deportation Case of Nigerian Minister*, N.Y. DAILY NEWS (July 14, 2008), <http://www.nydailynews.com/news/world/furor-bush-lawyer-racism-deportation-case-nigerian-minister-article-1.349796>.

Obama's two terms.<sup>98</sup> This means that the pardon attorney may not match the policy interests of the president, having been appointed by a predecessor with a different outlook.

### 3. The deputy attorney general (DAG) and staff

Since the 1980s, the deputy attorney general has had the responsibility of reviewing clemency cases and transmitting them to the White House.<sup>99</sup> The DAG, of course, has a broad set of responsibilities, which include “providing overall supervision and direction to all organizational units of the Department.”<sup>100</sup> This means that the DAG is the direct supervisor of the U.S. Attorneys and their assistants—the very people who prosecute cases, and who have the least to gain by clemency, which necessarily undoes the outcomes they have pursued. DAGs in the Obama administration have also had their staff review clemency cases before it reaches the DAG's desk.

The DAG is no simple pass-through, though. Pardon Attorney Deborah Leff resigned in January 2016, and writer Gregory Korte of *USA Today* was later able to obtain her letter of resignation.<sup>101</sup> In that letter to Deputy Attorney General Yates, Leff laid bare a few of the ghosts in the machine: “I have been deeply troubled by the decision to deny the Pardon Attorney all access to the Office of White House Counsel, even to share the reasons for our determinations in the increasing number of cases where you have reversed our recommendations.”<sup>102</sup> In terms of process, Leff revealed something important: The DAG often reversed her recommendations, and the DAG apparently forwarded to the White House only her own view and recommendation without including the contrary view of the pardon attorney. Given this power, the importance of the DAG's role can no longer be doubted.

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98. Emily Bazelon, *Power of the Pardon*, SLATE.COM (Apr. 25, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/04/mass\\_pardon\\_obama\\_may\\_grant\\_clemency\\_to\\_thousands\\_of\\_drug\\_offenders\\_that.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/mass_pardon_obama_may_grant_clemency_to_thousands_of_drug_offenders_that.html).

99. See *supra* Section III(A).

100. Office of the Deputy Attorney General, *About the Office*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/dag/about-office>. The Department of Justice's organizational chart illustrates the breadth of the job, as literally everything courses through this one position. *Agencies*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/agencies/chart>.

101. Gregory Korte, *Former Administration Pardon Attorney Suggests Broken System in Resignation Letter*, USA TODAY (Mar. 28, 2016), <http://www.usatoday.com/story/news/politics/2016/03/28/former-administration-pardon-attorney-suggests-broken-system-resignation-letter-obama/82168254/>.

102. Deborah Leff, *Letter of Resignation*, 28 FED. SENT'G REP. 312 (2016).

#### 4. The White House counsel and staff and the president

The case now moves to a third physical location, as the staff of the White House counsel is lodged in the Eisenhower Executive Office Building within the White House complex. They review the cases, then pass them along to the White House counsel. The office of the White House Counsel has a particularly political inflection, since the counsel must advise the president on the legal issues that governing and politics so often create.<sup>103</sup> At times, clemency cases must seem a necessary but distracting task.

The ultimate generalist, it is the president who finally makes the decision and signs the warrant for clemency. Barrack Obama clearly cared about the project of clemency, a fact that was reflected in the letter he sent to each clemency recipient.<sup>104</sup> Given that interest, one wonders why his administration was so slow to take up a significant number of clemency cases. The answer, very likely, lies in the layers of redundant bureaucracy described in the preceding paragraphs.

#### C. CLEMENCY PROJECT 2014

From the very day of his first inauguration, President Obama was urged to address clemency proactively. That urging came from someone who would know: his predecessor, George W. Bush. As the two rode together in a limousine to the inauguration ceremony, Bush advised Obama to “announce a pardon policy early on, and stick to it.”<sup>105</sup> Bush had good reason to give this advice; his own administration was plagued by the dysfunction of the existing clemency process. Two of Bush’s White House counsels, Harriet Miers and Fred Fielding, grew frustrated as they struggled to make it work.<sup>106</sup> Miers implored the pardon attorney and deputy attorney general for more favorable recommendations at a personal meeting, but to no avail.<sup>107</sup>

103. For example, Kathryn Ruemmler, who was Obama’s White House Counsel from 2011 through 2014, advised the President on a military strike in Syria, dealing with Senate filibusters, and keeping documents secret, as well as judicial appointments. Charlie Savage, *Departing White House Counsel Held Powerful Sway*, N.Y. TIMES (Apr. 6, 2014), [http://www.nytimes.com/2014/04/07/us/politics/departing-white-house-counsel-held-powerful-sway.html?\\_r=0](http://www.nytimes.com/2014/04/07/us/politics/departing-white-house-counsel-held-powerful-sway.html?_r=0).

104. Alan Schwarz, *With Clemency From Obama, Drug Offender Embraces Second Chance*, N.Y. TIMES (Aug. 14, 2015), [http://www.nytimes.com/2015/08/15/us/with-clemency-from-obama-drug-offender-embraces-second-chance.html?\\_r=0](http://www.nytimes.com/2015/08/15/us/with-clemency-from-obama-drug-offender-embraces-second-chance.html?_r=0).

105. GEORGE W. BUSH, DECISION POINTS 104 (2010).

106. Dafna Linzer & Jennifer LaFleur, *Propublica Review of Pardons in Past Decade Shows Process Heavily Favored Whites*, WASH. POST (Dec. 3, 2011), [https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElnVQO\\_story.html](https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElnVQO_story.html).

107. *Id.*

In 2014, the Obama administration decided to take action. Clemency Project 2014 was to receive statements of interest from prisoners, screen them for eligibility under defined criteria, then assign the cases to attorneys who had volunteered to work on these cases pro bono. Organization of this effort was outsourced to five groups: the American Bar Association, the National Association of Criminal Defense Lawyers, Families Against Mandatory Minimums, the American Civil Liberties Union, and the Federal Defenders.<sup>108</sup>

Two things together led to the new system being overwhelmed. The first was sheer numbers: over 35,000 federal inmates put in for the project.<sup>109</sup> The second event was the development of a complicated review system by the five supervising groups, which the Marshall Project outlined as requiring 10 distinct steps.<sup>110</sup> The result of such a combination of huge numbers and an unwieldy process is that by April 1, 2015, nearly a year later, the Clemency Project 2014 had submitted only 14 petitions to the pardon office.<sup>111</sup> This problem was compounded when those with the most experience in that area—the federal defenders—were largely pushed out of the process by the ruling of an administrative law judge.<sup>112</sup>

The Clemency Project constructed its own wobbly structure comprising redundant reviews and part-time experts. Those 35,000-plus cases from prisoners were first sent to the Clemency Project, which did a minimal screen for basic disqualifying factors.<sup>113</sup> From there, four more principal points of review were established (for a total of five, including the initial screen): a pro

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108. Lorelei Laird, *Clemency Project 2014 is Out to Help Prisoners Doing Excessive Time Due to Inflexible Sentencing*, ABA J. (July 1, 2015), [http://www.abajournal.com/magazine/article/clemency\\_project\\_2014\\_is\\_out\\_to\\_help\\_prisoners\\_doing\\_excessive\\_time](http://www.abajournal.com/magazine/article/clemency_project_2014_is_out_to_help_prisoners_doing_excessive_time).

109. Liz Goodwin, *Behind Obama's Commutations: 'Clemency Project' Off to a Slow Start*, YAHOO NEWS (Apr. 1, 2015), <https://www.yahoo.com/news/behind-obamas-commutations-clemency-project-off-115227232071.html>.

110. Bill Keller, *The Bureaucracy of Mercy*, MARSHALL PROJECT (Dec. 14, 2015), <https://www.themarshallproject.org/2015/12/13/the-bureaucracy-of-mercy#.MAfzjb1t>.

111. Goodwin, *supra* note 109.

112. *Id.*

113. For example, cases where a prisoner had been held for fewer than ten years were weeded out at this point. The factors for consideration established by James Cole at the onset of the project targeted inmates who: (1) are currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense today; (2) are non-violent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels; (3) have served at least 10 years of their sentence; (4) do not have a significant criminal history; (5) have demonstrated good conduct in prison; and (6) have no history of violence prior to or during their current term of imprisonment. Ryan J. Reilly, *DOJ Gears Up for Massive Obama Clemency Push*, HUFFINGTON POST (Apr. 23, 2014), [http://www.huffingtonpost.com/2014/04/23/obama-clemency-doj\\_n\\_5196110.html](http://www.huffingtonpost.com/2014/04/23/obama-clemency-doj_n_5196110.html).

bono attorney assessed the case, then a “screening committee” reviewed a summary prepared by the attorney, followed by a similar, redundant review by a “steering committee”—all before a petition was even written up—and finally the petition was reviewed again by the project,<sup>114</sup> before being submitted to the pardon attorney to run through the entire previously described gauntlet within the administration. In all, a clemency case traversing the Clemency Project and then the administration would face 12 different reviews; no less than a dozen chokepoints with different personnel and filters.

In the end, President Obama’s clemency initiative resulted in 1,715 commutations of sentence.<sup>115</sup> While President Obama’s grants were historically significant, his efforts largely failed if the goal was to (as he put it) “address particularly unjust sentences in individual cases” because so many deserving people were denied or never received an answer.<sup>116</sup> While the process was cranked hard enough to produce results, there is significant evidence that those results were both incomplete and inconsistent. *USA Today* reporter Gregory Korte highlighted the puzzling case of Harold and DeWayne Dampier, two brothers from Mississippi who “were indicted together, tried together, given the same sentence and, until recently, served their sentences at the same minimum-security prison.”<sup>117</sup> DeWayne had the more serious criminal record (two prior felony convictions as opposed to Harold’s one), yet it was DeWayne who got clemency and Harold who was denied.<sup>118</sup>

### III. THE STRUCTURE OF A REFORMED FEDERAL PROCESS

#### A. THE USE OF A CLEMENCY BOARD

Obviously, a central feature of a new federal clemency system should be the replacement of the vertical hierarchy we have now with a horizontal model built around a clemency board. The general idea of a federal clemency commission is not a new one; one variation or another was suggested by Charles Shanor and

114. Keller, *supra* note 110; Mark Osler, *Clementia, Obama, and Deborah Leff*, 28 *FED. SENT’G REP.* 309, 309-10 (2016).

115. Office of the Pardon Attorney, *supra* note 26.

116. Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 *HARV. L. REV.* 811, 836 (2017).

117. Gregory Korte, *Two Brothers, Two Petitions for Clemency, Two Different Outcomes*, *USA TODAY* (Jan. 9, 2017), <http://www.usatoday.com/story/news/politics/2017/01/09/two-brothers-two-petitions-clemency-two-different-outcomes/96297020/>.

118. *Id.*

Marc Miller in 2001,<sup>119</sup> Rachel Barkow in 2008,<sup>120</sup> and Jonathan Menitove in 2009.<sup>121</sup> In fact, White House Counsel Gregory Craig even pressed for one from within the administration in 2009.<sup>122</sup> We now have tried a vertical hierarchy for the review of clemency through many administrations, Republican and Democratic, hostile to clemency and seemingly embracing of it. The experiment has failed. Most strikingly, the system has failed even President Obama, a leader who by all accounts wanted clemency to work. In looking to what we need to do next, we have a solid foundation in the experience of the states and the Ford Clemency Board.

Simplifying and flattening the process will benefit presidents regardless of their approach to clemency, because they will be able to communicate their imperatives clearly to one level of a system rather than to several. If you are a president who cares most about releasing those over-sentenced for gun crimes, for example, that can be easily messaged to a board. Right now, sending a message that will be equally received by the pardon attorney, the deputy attorney general, and the White House counsel is a challenge, given that each has different interests.

### B. DIVERSITY AND INDEPENDENCE

A federal clemency board should be diverse in background and ideology, and have a relative level of independence, particularly from the Department of Justice.<sup>123</sup> The models of Delaware, South Carolina, and the Ford Clemency Board offer three different paths to diversity. Delaware uses a variety of elected officials, which will usually ensure at least that both major parties are represented, provided that those officials either serve through several administrations or are elected independently.

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119. Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139 (2001).

120. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1365 (2008) (arguing that “agencies might be employed to supplement—not replace—executive power over clemency by providing an additional check on overbroad criminal laws”). Barkow renewed and refined that idea in a later article co-authored by this writer. Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015).

121. Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 457-58 (2009).

122. Bill Keller, *On Pardons, Obama's the Stingiest President Since John Adams*, POLITICO (Dec. 13, 2015), <http://www.politico.com/magazine/story/2015/12/barack-obama-criminal-justice-pardons-213435>.

123. Because of the constitutional directive that clemency rest with the executive, independence from the president is not a relevant goal.

South Carolina's system, with one representative from each congressional district, offers at least geographic diversity and in practice seems to have allowed for racial and vocational diversity. In the federal system, it would be possible to replicate such a system by appointing one commissioner from each Court of Appeals circuit, but that would do little to encourage racial and ideological diversity. Similarly, the diversity of the Ford Board was achieved through the intentional actions of the executive, and President Ford lived at a time when bipartisan cooperation was common. It is unlikely that executive restraint would be enough to ensure ideological diversity in today's political environment.

Previously, Rachel Barkow and I suggested a clemency board where slots are filled by people of certain expertise; for example, we might require a commission to include a former federal prosecutor, a former federal defender, a former federal judge, a former federal probation officer, and a former police officer, among others.<sup>124</sup> Such a structure would ensure a variety of experiential knowledge and background, allowing for a fuller discussion of cases. Our inclusion of "former" in those descriptions was intentional; a board with the charge of running federal clemency would benefit from being staffed with full-time rather than part-time commissioners. A clemency commission could include a DOJ representative and input from the department on individual cases could be a part of the investigative process. As in the states, a greater degree of transparency could be achieved, as the system would be less complex and less hindered by the rules of multiple agencies.

### *C. WHAT MAY BE GAINED*

Above all, a functioning clemency process in the federal system would serve as what should be a crucial constitutional tool. The Framers did not insert the pardon power into the Constitution by accident; they intended it to be used for the purposes favored by the president. Given that truth, we need to craft a better machine to power this tool. The problem is clear, and so is the solution: Our inefficient vertical hierarchy of decision-making must be replaced with a modern horizontal process that can provide us with efficiency in the service of wisdom.

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124. Barkow & Osler, *supra* note 120, at 21.

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## RECOMMENDATIONS

Given the commonalities among high-functioning systems, other jurisdictions (including the federal government) should consider adopting the core characteristics of those better processes of clemency.

1. **A horizontal system, where members of a board deliberate with one another, seems to function more consistently and productively than one where officials review cases sequentially in a hierarchy.** A flatter, horizontal system allows for consistency through consensus in a way that is not possible in a hierarchical process.
2. **Those evaluating clemency—either in making recommendations to an executive or determining outcomes—should be diverse in background and ideology.** Bipartisanship isn't just a political hedge, but seems to lead to better outcomes.
3. **Inaction should be viewed as failure.** Every jurisdiction presents good opportunities for mercy that don't imperil public safety. Clemency has been included in every American jurisdiction's process for a reason: Our society has historically recognized the role that well-considered mercy can play in even a retributive criminal justice system.<sup>125</sup> The tool of clemency is there for a reason, and should not be ignored.

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125. Cf. Jeffrey G. Murphy, "Retribution," in the present Volume.