Pardon Me: The Case for a Federal Clemency Board

By Jonathan T. Helton

***Resolved: The United States Federal Government should significantly reform its policies regarding convicted prisoners under federal jurisdiction***

This case creates a federal clemency board to replace the current clemency review process. The current process, overseen by the Dept. of Justice, is prone to conflict of interest and is extremely slow, which is why there is currently a massive backlog of clemency applications. Most states use a board to review clemency applications; such boards have fewer conflicts of interest and approve more clemency petitions. Examples from the States show increased clemency is good, but the best evidence is that we already have a successful plan model at the federal level. Pres. Gerald Ford, in 1974, created a one-year Presidential Clemency Board to review the myriad of cases arising out of problems in the military during the Vietnam War. They bypassed the Justice Department, reviewed the cases quickly and efficiently, made recommendations to Pres. Ford, and he granted thousands of applications for clemency to those deserving. This experiment was successful, very low-cost, but unfortunately terminated after its mandate ran out one year later. Experts say we should do the same thing again as a regular matter of public policy for dealing with federal crime.

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Pardon Me: The Case for a Federal Clemency Board

Ah, the 1970s. You’re pretty young-looking, Judge, so you probably don’t remember gas lines, wide ties, and Watergate. And there’s something else everyone has forgotten about the 1970s, even though it was a powerful and successful effort at criminal justice reform. But we need it now more than ever. And that’s why my partner and I are affirming that: The United States Federal Government should significantly reform its policies regarding convicted prisoners under federal jurisdiction.

OBSERVATION 1. DEFINITIONS

Clemency

*Kenny Lo, Betsy Pearl, and Akua Amaning 2020 (Lo is a research associate for Criminal Justice Reform at the Center for American Progress. Pearl and Amaning are associate directors for Criminal Justice Reform at the Center.) “Clemency 101” 1 May 2020* <https://www.americanprogress.org/issues/criminal-justice/reports/2020/05/01/484300/clemency-101/>(accessed June 24, 2021)

[Clemency](https://clemency.com/clemency-meaning) is a mechanism for granting a person convicted of a criminal offense relief from a court-ordered sentence or punitive measure. There are two main methods through which clemency can be given—pardon or commutation of sentence. A pardon exempts a convicted individual from any remaining punishment or future consequences stemming from a conviction. Commutations reduce an individual’s sentence, either fully or partially. Clemency is usually requested through a petition or an application process and can be granted for any number of reasons.

OBSERVATION 2. INHERENCY

FACT 1. Decreasing use of clemency power.

Prof. Shon Hopwood 2021 (Assoc. Professor of Law at Georgetown Univ. Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

Prior to the Civil War, grants of clemency were frequent, and the process was generally informal. Between the late 1800s and 1930, clemency was granted, on average, 222 times per year with 27 percent of applications receiving some form of relief. But despite the sweeping scope of the clemency power, grants of clemency have [drastically decreased](https://www.pewresearch.org/fact-tank/2020/11/24/so-far-trump-has-granted-clemency-less-frequently-than-any-president-in-modern-history/) in recent decades. The creation of a more formalized pardons process caused a steep downward trajectory in clemency grants. Recent presidents have granted between 5-10 percent of these requests, with George W. Bush granting only 2 percent.

FACT 2. Federal clemency crisis

Prof. Rachel Barkow & Prof. Mark Osler 2021 (Barkow is Professor of Law and the Faculty Director of the Center on the Administration of Criminal Law at NYU. Osler - law professor at Univ of St. Thomas School of Law) “14 Steps Biden’s DOJ Can Take Now to Reform America’s Criminal Legal System” 15 March 2021 <https://theappeal.org/the-lab/white-paper/14-steps-bidens-doj-can-take-now-to-reform-americas-criminal-legal-system/#2.-reform-clemency> (accessed June 24, 2021)

Biden inherits a clemency crisis. There are currently [more than 15,000 petitions waiting for an answer](https://www.justice.gov/pardon/clemency-statistics), having piled up over the course of the Trump presidency. But the problem is not unique to Trump; President Obama commuted more sentences than any president since Harry Truman, but still [approved only 5 percent](https://famm.org/wp-content/uploads/Second-Look-White-Paper.pdf?utm_source=The+Appeal&utm_campaign=e5a5f44bfb-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-e5a5f44bfb-58424539) of requests. The current formal review process is hopelessly broken and cannot deal with the backlog, and a restructure is essential.

FACT 3. Current structure blocks resolution

The problems are conflict of interest and bureaucratic delay

Prof. Shon Hopwood 2021 (Associate Professor of Law at Georgetown Univ. Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

The causes of modern-day pardon paralysis are two-fold. First, the placement of the clemency process within the Department of Justice allows prosecutors too much influence—sometimes amounting to veto power—over decisions in individual cases. And these are cases in which the DOJ has an obvious conflict of interest, with prosecutors asked to second-guess the very sentences they themselves sought. Second, the process is grossly bureaucratic, requiring multiple layers of review—often by people with little criminal law experience—before a clemency petition even reaches the president.

OBSERVATION 3. The Plan, implemented by Congress and the President

1. Create a panel modeled after Pres. Gerald Ford’s Presidential Clemency Board to review and recommend applications for clemency.

2. Any laws in conflict are amended or superseded and existing clemency review procedures in the Justice Dept. are abolished.

3. Funding from General Federal Revenues and cutting existing Justice Dept. clemency bureaucracy.

4. Plan takes effect 6 months after an Affirmative ballot

5. All Affirmative speeches may clarify.

OBSERVATION 4. The Resolution. The Ford Board brings back effective use of clemency

Pres. Ford’s Clemency Board demonstrated effective use of clemency powers

Prof. Mark Osler 2017 (law professor at Univ of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law.) “FEWER HANDS, MORE MERCY: A PLEA FOR A BETTER FEDERAL CLEMENCY SYSTEM” <https://lawreview.vermontlaw.edu/wp-content/uploads/2017/05/03-Osler.pdf> (accessed June 24, 2021)

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. 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 Gerald Ford’s use of the pardon power is most often considered in relation to his controversial pardon of Richard Nixon, his more relevant action was the creation of the Presidential Clemency Board three weeks earlier. 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. Ford intended the Board to be temporary and gave it precisely one year to complete its work, ending on September 15, 1975. 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 offenses” during the Vietnam War. A total of 21,729 eligible persons applied for this clemency, and the Clemency Board recommended relief for 14,514 of them. It was an ambitious and successful effort.

OBSERVATION 5. The ADVANTAGES

ADVANTAGE 1. Improved prison safety

A. The Link: Federal Bureau of Prison facilities are overcrowded

Emily Widra 2020 (graduate of the Smith College School of Social Work; on staff of Prison Policy Initiative, a non-profit advocacy group) 21 Dec 2020 “Since you asked: Just how overcrowded were prisons before the pandemic, and at this time of social distancing, how overcrowded are they now?” <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/> (accessed 22 July 2021) (brackets added)

Before the pandemic, nine state prison systems and the BOP [Bureau of Prisons] were operating at 100% capacity or more. These prison systems were holding more people than their facilities were designed to house. Now, 10 months into the pandemic, we find that there are still far too many people crowded into prisons across the country. Despite the ongoing pandemic, and [efforts to reduce](https://www.prisonpolicy.org/blog/2020/12/02/jail-and-prison-covid-populations/) the number of people behind bars, we calculated that 41 states are currently operating at 75% or more of their capacity, with at least nine of those state prison systems and the federal Bureau of Prisons are still operating at more than 100%.

B. The Solution: Clemency would reduce federal prison population

Mark Joseph Stern 2021 (He covers courts and the law for Slate.) “The Presidential Pardon Power Is Good” 19 January 2021 <https://slate.com/news-and-politics/2021/01/trump-pardon-corrupt-joe-biden-clemency.html> (accessed July 3, 2021)

Joe Biden will have a few tools at his disposal to reform the criminal justice system beginning on day one. His Justice Department, for instance, can implement policy changes like directing prosecutors to avoid criminal charges with draconian mandatory minimum sentences and rigorously implementing [compassionate release](https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf). But these options pale in comparison to clemency. Barack Obama granted [nearly 2,000](https://fivethirtyeight.com/features/obama-granted-clemency-unlike-any-other-president-in-history/) pardons and commutations during his two terms, focusing on people convicted of nonviolent drug offenses. In the process, he laid the groundwork for a systemic approach to clemency that Biden should dramatically expand upon. There are currently [more than 150,000 people](https://www.bop.gov/mobile/about/population_statistics.jsp) in the federal prison system; [nearly half of them](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) were convicted of drug offenses. Many of these people were sentenced under harsh drug laws that Biden authored and [now publicly regrets](https://www.independent.co.uk/news/world/americas/joe-biden-drug-policy-cocaine-crack-law-legislation-2020-president-election-bid-a8740271.html). Simply releasing or shortening the sentences of people convicted under these drug laws would put a huge dent in the federal prison population.

C. The Impact: Prison overcrowding is harmful and dangerous

American Civil Liberties Union copyright 2021 (civil rights advocacy group) “OVERCROWDING AND OTHER THREATS TO HEALTH AND SAFETY” <https://www.aclu.org/issues/prisoners-rights/cruel-inhuman-and-degrading-conditions/overcrowding-and-other-threats-health> (accessed July 11, 2021)

Prison overcrowding leads to increased violence, the inability to provide necessary medical care and other essential services, and degrading practices like requiring prisoners to sleep on the floor. Many prisons and jails expose prisoners to dangerous environmental conditions like extreme heat or cold, contaminated food, and a lack of basic sanitation.

ADVANTAGE 2. More justice and fairness in a harsh system

Since 1984 federal parole abolition, there are few options for leniency, but robust use of clemency solves

Prof. Shon Hopwood 2021 (Associate Professor of Law at Georgetown University Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

A robust clemency power is essential to fairness in the criminal justice system. Previously, federal parole could address a variety of systemic and individual injustices arising from criminal prosecutions, such as wrongful convictions, overly harsh charging and sentencing determinations, and prison terms that extend well beyond the need for rehabilitation. But with the elimination of federal parole in 1984, there is no process for releasing those in federal prison who, through their rehabilitative efforts, no longer pose a threat to public safety. By reinstituting a forward-leaning clemency process, the system can more easily recognize those deserving of mercy.

ADVANTAGE 3. Economic benefits.

A. Economic benefits for individuals. Pardons allow successful reintegration into society with jobs and housing

Prof. Shon Hopwood 2021 (He is an Associate Professor of Law at Georgetown University Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

Pardons are also critical to reintegrating the formerly incarcerated into society. A felony conviction dramatically reduces employment opportunities and earning potential. There are approximately 45,000 collateral consequences of a felony conviction imposed by federal, state, and local governments, ranging from the right to vote to access to housing. A full pardon can eliminate these consequences, and without it, economic and social opportunities for those who have supposedly paid their debts to society are foreclosed. At the same time, our economy is often deprived of an important source of labor: people coming out of prison.

B. Economic benefits for society

Ryan Allen Hancock and Carl Oxholm III 2020 (Hancock - J.D.; attorney at Willig, Williams & Davidson and Chair of the firm's Employment Law Group. Oxholm - J.D. and M.P.P) “Pardons and Public Safety: Examining A Decade of Recidivism Data in Pennsylvania” August 2020 <http://www.plsephilly.org/wp-content/uploads/2020/08/PA-Pardon-Recidivism-Study-2008-2018-pv-August-2020.pdf> (accessed July 11, 2021)

This report builds on the pathbreaking report of the Economy League of Greater Philadelphia titled “Pardons as an Economic Investment Strategy: Examining a Decade of Data” (April 2020). The Economy League found that pardons awarded to Pennsylvania residents who had applied for a pardon during the years 2008-2018 had an estimated economic impact of $16,494,815 (from the date their pardons were awarded through December 2019). In particular, it concluded that “pardons can be a powerful economic tool in the areas of the state most in need of growth” and recommended that “pardons, with continued oversight for public safety concerns, should be considered as no-cost workforce development and neighborhood investment tools.” It recommended taking steps to increase the number of pardon applicants, the percentage of applications granted, and the speed in which pardons are granted or denied.

2A Evidence: Clemency Board

DEFINITIONS & BACKGROUND

Constitutional background of Presidential clemency power and why it’s needed

Prof. Shon Hopwood 2021 (Associate Professor of Law at Georgetown Univ Law Center) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

Clemency is one of the broadest areas of executive power afforded to any president. Article II, § 2, cl. 1 of the U.S. Constitution vests the president with the “Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” This unambiguously broad grant of power to the president makes clemency a uniquely powerful tool to ensure that the enforcement of criminal law reflects the president’s priorities while allowing the president to ameliorate both systemic and individual miscarriages of justice.

SCOTUS: Clemency is a “fail safe”

*Kenny Lo, Betsy Pearl, and Akua Amaning 2020 (Lo is a research associate for Criminal Justice Reform at the Center for American Progress. Pearl and Amaning are associate directors for Criminal Justice Reform at the Center.) “Clemency 101” 1 May 2020* <https://www.americanprogress.org/issues/criminal-justice/reports/2020/05/01/484300/clemency-101/>(accessed June 24, 2021)

Clemency is an important tool for checking the unjust outcomes produced by the criminal justice system. The U.S. Supreme Court has called clemency the “[fail safe](https://supreme.justia.com/cases/federal/us/506/390/case.pdf)” of the judicial system, since it empowers chief executives to correct injustices on a case-by-case basis. For example, a president or a governor might pardon a person who was wrongfully convicted of a crime or commute the sentence of a person whose prison term far exceeded the severity of their offense.

INHERENCY

Conflict of interest within the DOJ

Paul J. Larkin, Jr. 2017 (Senior Legal Research Fellow in the Meese Center for Legal and Judicial Studies at Heritage Foundation. Former Assistant to the Solicitor General, argued 27 cases before the U.S. Supreme Court. He also was an attorney in the DOJ Criminal Division’s Organized Crime and Racketeering Section.) “Reorganizing the Federal Clemency Process” 31 May 2017 <https://www.heritage.org/crime-and-justice/report/reorganizing-the-federal-clemency-process> (accessed June 30, 2021)

The Department of Justice is effectively an adversary to each applicant because it prosecuted every one of them. That fact creates a serious risk that the department would be unlikely to look neutrally and dispassionately on an offender’s claim that he should never have been charged with a crime; that he is innocent; that there was a prejudicial error in his proceedings; that his sentence was unduly severe; or that for some other reason, such as his post-conviction conduct, he should be excused or his conduct forgiven. In any other decision-making process, critics maintain, a neutral party would play the role now performed by the department to avoid the appearance of a conflict of interest. The department should remain free to offer a recommendation as to whether the President should award clemency to a particular applicant, but it should not be in a position where it can decline to forward to the White House applications that a reasonable person would support.

Only 11 lawyers currently work for the Office of the Pardon Attorney

Anita Kumar 2021 (White House correspondent and associate editor, for POLITICO’s White House team) “Trump left behind a clemency mess. The clock’s ticking for Biden to solve it.” 11 February 2021 <https://www.politico.com/news/2021/02/11/biden-clemency-criminal-justice-468539> (accessed June 24, 2021)

The Constitution gives the president the power “to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.” That typically either comes in the form of a commutation — which reduces or eliminates a sentence, but does not wipe away a conviction — or a pardon, which disposes of all legal consequences from a crime. The cases generally start at the Justice Department's Office of the Pardon Attorney — which has just 11 lawyers — before they are sent to the attorney general and White House counsel’s office.

Current process: Four steps

Prof. Shon Hopwood 2021 (He is an Associate Professor of Law at Georgetown University Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 Jan 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

Currently, the Office of Pardon Attorney (OPA), located in the DOJ, gathers information and makes a recommendation on each individual clemency petition. Staff at OPA are required at the outset to seek the opinion of the local prosecutor who pursued the case. If that prosecutor recommends a denial, then petitions often receive negative recommendations at that point. The prosecutor can recommend a denial even though he or she might not have seen the clemency petitioner for decades while the petitioner was incarcerated in federal prison.  At the second step, the Pardon Attorney makes a recommendation. If the pardon attorney says no, the clemency petition will likely later die. The third stop is the desk of a staffer for the deputy attorney general (DAG), who does yet another review. The fourth stop is the DAG themself, who essentially supervises all criminal prosecutions at the DOJ and is a liaison between main DOJ and prosecutors. The DAG is probably the least likely person to second-guess the local prosecutor who recommends a denial, given the close working relationship between the DAG and prosecutors in the federal districts. By the time a recommended denial gets to staff of the White House Counsel, any hope for clemency is gone. The White House Counsel’s office has many other responsibilities, and it does not have the time or resources to run a full-blown clemency second-look operation. White House Counsel conducts the final review, with only favorable recommendations being presented to the president.

SQ clemency application process is complicated, random and arbitrary

Prof. Rachel Barkow & Prof. Mark Osler 2021 (Barkow is the Charles Seligson Professor of Law and the Faculty Director of the Center on the Administration of Criminal Law at NYU. Osler is a law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law) “14 Steps Biden’s DOJ Can Take Now to Reform America’s Criminal Legal System” 15 March 2021 <https://theappeal.org/the-lab/white-paper/14-steps-bidens-doj-can-take-now-to-reform-americas-criminal-legal-system/#2.-reform-clemency> (accessed June 24, 2021)

The current structure bears not one but [two fatal flaws](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2479595): It is overly bureaucratic and is a captive of the deeply conflicted DOJ. It features seven levels of review, sequential to one another, coursing through the pardon attorney, the deputy attorney general, and the White House counsel. Like too many sieves stacked up, it eliminates nearly everything, and what comes through can be [random and arbitrary](https://www.usatoday.com/story/news/politics/2017/01/09/two-brothers-two-petitions-clemency-two-different-outcomes/96297020/). Too much of it is embedded in the DOJ—the very institution that usually sought too-long sentences in the first place and is inclined to say no to requests to overturn its initial judgments.

SQ Pardon process has conflict of interest: It’s like letting the Yankees pick the Red Sox’s pitcher

The New York Times Editorial Board 2020 (The editorial board is a group of opinion journalists whose views are informed by expertise, research, debate and certain longstanding values.) “Trump Corrupted the Presidential Pardon. Biden Must Repair It.” 23 December 2020 <https://www.nytimes.com/2020/12/23/opinion/trump-biden-pardon.html> (accessed June 24, 2021)

First and most important: Take back control of the pardon process. The power to grant mercy may be the president’s alone, but the office of the pardon attorney operates out of the Justice Department. Under most administrations, before any request for clemency can land on the president’s desk, it has to survive review by a gantlet of people whose job it is to win convictions, not undo them. In some cases, the same prosecutors who sent a person to prison are asked to weigh in on granting that person mercy. It’s “akin to having Yankees fans pick the Red Sox’s starting pitcher,” wrote Mark Osler, a law professor at the University of St. Thomas School of Law who advocates for comprehensive clemency reform.

SQ pardon process has inherent conflict of interest within the Dept of Justice (DOJ)

Prof. Shon Hopwood 2021 (Assoc. Professor of Law at Georgetown Univ Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

The current process poses an inherent conflict of interest; as Heritage Foundation scholar Paul J. Larkin Jr., has noted, “the current system leaves too much authority over clemency petitions to the Justice Department, the very agency that prosecuted every federal clemency applicant.” On occasion, the president and DOJ have different policy perspectives as to criminal legal issues, and, under the Constitution, the president’s views should prevail. Bringing the clemency process within the White House’s domain is the only way to ensure that the president’s prerogatives take precedence over those of the DOJ.

Solvency: Ford Board only cost $5/case in 1975. Inherency: Nothing like it in today’s clemency system

Prof. Mark Osler 2017 (Osler is a law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law. Professor Mark Osler’s work advocates for sentencing and clemency policies rooted in principles of human dignity) “FEWER HANDS, MORE MERCY: A PLEA FOR A BETTER FEDERAL CLEMENCY SYSTEM” <https://lawreview.vermontlaw.edu/wp-content/uploads/2017/05/03-Osler.pdf> (accessed June 24, 2021)

The Board showed 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. 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.” Specifically for this project, NASA developed and implemented the system, which identified outlier decisions that could be referred to the entire Board for review at a cost of $5 per case. Oddly, some four decades later, such a system is not used to assess clemency outcomes.

A/T “First Step Act” – Still 3,000 imprisoned under previous laws

Prof. [Rachel Barkow](https://www.theatlantic.com/author/rachel-barkow/), Mark Holdren, and Prof. Mark Osler 2019 (Barkow is the Segal Family Professor of Regulatory Law and Policy at New York University. [Holden](https://www.theatlantic.com/author/mark-holden/) is the senior vice president and general counsel of Koch Industries. [Osler](https://www.theatlantic.com/author/mark-osler/) is professor of law at Univ. of St. Thomas in Minnesota) “The Clemency Process Is Broken. Trump Can Fix It.” 15 Jan 2019 <https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enoughwe-need-clemency-reform/580300/> (accessed June 24, 2021)

There are more than 3,000 people left in prison serving mandatory sentences under the old firearm-enhancement law and the three-strikes provision that imposed a life sentence. Add to that the many individuals who are serving excessive sentences because of prosecutorial overcharging, and it is easy to see the urgent need to correct these injustices.

A/T “President could personally review every pardon” – Does not scale (can’t do on large scale)

Prof. [Rachel Barkow](https://www.theatlantic.com/author/rachel-barkow/), Mark Holdren, and Prof. Mark Osler 2019 (Barkow is the Segal Family Professor of Regulatory Law and Policy at New York University. [Holden](https://www.theatlantic.com/author/mark-holden/) is the senior vice president and general counsel of Koch Industries. [Osler](https://www.theatlantic.com/author/mark-osler/) is the Robert and Marion Short professor of law at Univ of St. Thomas in Minnesota.) “The Clemency Process Is Broken. Trump Can Fix It.” 15 January 2019 <https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enoughwe-need-clemency-reform/580300/> (accessed June 24, 2021)

The first is informal: The president evaluates individual cases based on personal recommendations. This system does not scale.

A/T “Depends on the administration” – Dept of Justice (DOJ) process is inherently bureaucratic, too many layers & steps

Prof. Shon Hopwood 2021 (Associate Professor of Law at Georgetown University Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

Even when the DOJ upholds the president’s policy prerogatives, the process is needlessly bureaucratic, requiring many rounds of sequential review by at least some people with little expertise in criminal law. For a single clemency petition to be granted, essentially seven different deciders must either agree on a favorable recommendation or at least move the petition to the next reviewer—seven people who institutionally have no consistent interest in doing so. There is a reason why successful businesses eschew this sort of vertical, sequential decision making in favor of horizontal decision making by boards.

ADVANTAGES

Prison crowding

A/T “Prison population declining” – Biden is reversing the trend. Now it’s increasing again

Samantha Michaels 2021 (journalist) 21 July 2021 “Biden Said He’d Cut Incarceration in Half. So Far, the Federal Prison Population Is Growing.” <https://www.motherjones.com/crime-justice/2021/07/biden-said-hed-cut-incarceration-in-half-so-far-the-federal-prison-population-is-growing/> (accessed 22 July 2021)

During his campaign, President Joe Biden pledged repeatedly to reduce the country’s prison population, which, because of racist policing and sentencing laws, is disproportionately composed of people of color. At one point, he said his administration could cut the number of incarcerated people by [more than half](https://www.buzzfeednews.com/article/katherinemiller/joe-biden-incarceration-prison-population-cut-aclu), largely by investing in alternatives to prisons. Later he said he didn’t want to be bound by a percentage, but he reiterated that he hoped to drastically lower the number of people locked up. But six months into his term, those promises are ringing hollow. The number of people in federal prisons [is growing](https://sentencing.typepad.com/sentencing_law_and_policy/2021/07/federal-prison-population-starting-to-grow-again-as-we-approach-six-months-into-biden-administration.html). And Biden’s legal team recently announced that thousands of people who were released early from federal prisons last year to slow the spread of the coronavirus could be forced to return again after the pandemic ends.

Historical precedent: States have used clemency successfully to reduce prison overcrowding

Leah Sakala, Roderick Taylor, Colette Marcellin and Andreea Matei 2020 (Sakala: is a senior policy associate at the Urban Institute’s Justice Policy Center. She has over a decade of justice policy research and reform experience. Taylor: is a former research analyst at the Justice Policy Center.. Marcellin: is a research assistant at the Justice Policy Center, where she works on projects related to criminal and juvenile justice reform. Matei: is a research analyst at the Justice Policy Center) “How Governors Can Use Categorical Clemency as a Corrective Tool” November 2020 <https://www.urban.org/sites/default/files/publication/102696/how-governors-can-use-categorical-clemency-as-a-corrective-tool_0_1.pdf> (accessed June 30, 2021)

Recent examples align with a longer history of states using clemency power to advance reform and decarceration. A National Governors Association survey of 36 states’ self-reported clemency grants between 1981 and 1986 found that several states reported making grants in relation to legislative changes (NGA 1988). States have also used clemency as a tool to reduce prison overcrowding. A 1980 report found that at least 10 states had “used clemency on a regular basis as a means of prison population control.” For example, from 1979 to 1980, Maryland’s governor granted pardons and commutations to 1,142 people in prison, avoiding a potential court order to reduce the prison population. Furthermore, the National Governors Association survey found that West Virginia and Wyoming reported “crowding” as a reason for clemency decisions (NGA 1988)

Justice & Fairness

Existing bias in criminal justice system

American Bar Association 2019 (association of the legal profession) “How to confront bias in the criminal justice system” December 2019 <https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/how-to-confront-bias-in-the-criminal-justice-system/> (accessed June 30, 2021)

In 1999, the American Bar Association conducted a nationwide survey and released a [report](https://www.questia.com/library/journal/1G1-55041422/american-bar-assoication-report-on-perceptions-of) entitled “Public Understanding and Perceptions of the American Justice System,” in which half of the respondents thought that men were treated more fairly than women in the criminal justice system and fewer than half thought that people of color were treated as fairly as whites. A Pew Research Center study published last May on the perception of justice shows similar results some 20 years later: 9 in 10 black adults (87%) said blacks are generally treated less fairly by the criminal justice system than whites, a view shared by 61% of white adults.

Now is the time for reform: Clemency is needed to reform hugely disproportionate sentences

The New York Times Editorial Board 2020 (The editorial board is a group of opinion journalists whose views are informed by expertise, research, debate and certain longstanding values.) “Trump Corrupted the Presidential Pardon. Biden Must Repair It.” 23 December 2020 <https://www.nytimes.com/2020/12/23/opinion/trump-biden-pardon.html> (accessed June 24, 2021)

If ever there was a moment to reform the system, it is now. The decades-old American prison crisis has dumped millions of people behind bars, many suffering under hugely disproportionate sentences. Last summer, the nation was engulfed by mass protests over criminal-justice abuses, and prisons continue to endure many of the nation’s worst coronavirus outbreaks. Recent federal laws, including one signed by Mr. Trump, have alleviated some of the most egregious sentences, but they haven’t done nearly enough. There are currently nearly 14,000 clemency petitions waiting for action. And unlike so many other parts of the federal government, clemency is one area in which presidents can do a lot of good on their own, and fast.

Hamilton in Federalist 74: Clemency is needed to uphold justice, and Biden should use it

The New York Times Editorial Board 2020 (The editorial board is a group of opinion journalists whose views are informed by expertise, research, debate and certain longstanding values.) “Trump Corrupted the Presidential Pardon. Biden Must Repair It.” 23 December 2020 <https://www.nytimes.com/2020/12/23/opinion/trump-biden-pardon.html> (accessed June 24, 2021)

As President-elect Joe Biden prepares to take over, he has the opportunity to reimagine this [deeply important](https://www.nytimes.com/2018/01/18/opinion/obama-prisoners-clemency.html) but long-abused power and make it work more as the founders intended: as a counterweight to unjust prosecutions and excessive punishments. “Without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel,” Alexander Hamilton wrote in [the Federalist No. 74](https://avalon.law.yale.edu/18th_century/fed74.asp).

ADVOCACY / SOLVENCY

General advocacy for massively increasing clemency

Anita Kumar 2021 (White House correspondent and associate editor for POLITICO.) “Trump left behind a clemency mess. The clock’s ticking for Biden to solve it.” 11 February 2021 <https://www.politico.com/news/2021/02/11/biden-clemency-criminal-justice-468539> (accessed June 24, 2021)

More than 100 progressive groups working on criminal justice issues are urging Biden to overhaul the arduous clemency process and start resolving cases right away. One of them, the ACLU, [launched an ad campaign to push him to grant clemency](https://www.aclu.org/sites/default/files/field_document/clemencywapoad_final_outlined.pdf) to 25,000 people and make good on his pledge to tackle criminal justice issues amid a national reckoning on racial injustice. Among those who have met with Biden’s team are Cynthia Roseberry, deputy director of policy at the American Civil Liberties Union's Justice Division, and Nkechi Taifa, convener of the Justice Roundtable, an umbrella organization on criminal justice issues.

General advocacy: the U.S. people

Udi Ofer and Dylan Hayre 2020 (Ofer: Deputy National Political Director, Director of the Justice Division, American Civil Liberties Union. Hayre: Justice Division Campaign Strategist, American Civil Liberties Union) “Foreword from the American Civil Liberties Union” November 2020 <https://www.urban.org/sites/default/files/publication/102696/how-governors-can-use-categorical-clemency-as-a-corrective-tool_0_1.pdf> (accessed June 30, 2021)

Categorical commutations are also broadly supported by the public. People feel that communities are better served by releasing people who are not a threat to safety. An ACLU-commissioned Bully Pulpit Interactive poll found that a majority of voters—62 percent—believe that reducing the prison population would strengthen communities by reuniting families and saving taxpayer dollars that can be reinvested into the community. And overall, 80 percent of voters—86 percent of Democrats, 81 percent of Independents, and 73 percent of Republicans—support achieving those population reductions by a governor’s issuing broad, categorical commutations to release some people.

Bipartisan support

Anita Kumar 2021 (White House correspondent and associate editor for POLITICO.) “Trump left behind a clemency mess. The clock’s ticking for Biden to solve it.” 11 February 2021 <https://www.politico.com/news/2021/02/11/biden-clemency-criminal-justice-468539> (accessed June 24, 2021)

Even old guard Republicans have expressed a desire for more leniency. In his memoir, former President George W. Bush recalled that he shared his frustration with the pardon process with Obama in the limo on the way to the 2009 inauguration. He said that if he had one piece of advice, it would be to announce a pardon policy and stick with it.

Bipartisan use of pardons at the state level

*Kenny Lo, Betsy Pearl, and Akua Amaning 2020 (Lo is a research associate for Criminal Justice Reform at the Center for American Progress. Pearl and Amaning are associate directors for Criminal Justice Reform at the Center.) “Clemency 101” 1 May 2020* <https://www.americanprogress.org/issues/criminal-justice/reports/2020/05/01/484300/clemency-101/>(accessed June 24, 2021)

Several states have recently increased the use of clemency—which had been more common prior to the proliferation of tough-on-crime platforms in the mid-1980s—as part of the overall criminal justice reform movement. Oklahoma Gov. Kevin Stitt (R) granted pardons or commutations to more than 1,000 people in his first year in office. In 2020, in response to the COVID-19 pandemic, Stitt commuted the sentences of more than 450 people. Likewise, Washington Gov. Jay Inslee (D) similarly granted commutations to more than 1,100 people to contain the spread of the coronavirus in state correctional facilities. And Gov. Andy Beshear (D) of Kentucky issued commutations for more than 500 individuals at high risk for serious complications or death if they contracted COVID-19.

Even Sen. Tom Cotton believes there is a place for clemency

Prof. [Rachel Barkow](https://www.theatlantic.com/author/rachel-barkow/), Mark Holdren, and Prof. Mark Osler 2019 (Barkow is the Segal Family Professor of Regulatory Law and Policy at New York University. [Holden](https://www.theatlantic.com/author/mark-holden/) is the senior vice president and general counsel of Koch Industries. [Osler](https://www.theatlantic.com/author/mark-osler/) is professor of law at the University of St. Thomas in Minnesota) “The Clemency Process Is Broken. Trump Can Fix It.” 15 January 2019 <https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enoughwe-need-clemency-reform/580300/> (accessed June 24, 2021)

​Even the First Step Act’s primary nemesis, Republican Senator Tom Cotton, has acknowledged a role for clemency, saying as part of his attack on the legislation, “I grant that, in a particular case, the interaction of specific facts and the law can create an unjust sentence. If that happens, the best course of action is the scalpel of the governor or the president’s pardon and clemency power, not the ax of criminal leniency legislation.”

Clemency advisory board to advise the President is the solution

Prof. Rachel Barkow & Prof. Mark Osler 2021 (Barkow is the Charles Seligson Professor of Law and the Faculty Director of the Center on the Administration of Criminal Law at NYU. Osler is a law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law) “14 Steps Biden’s DOJ Can Take Now to Reform America’s Criminal Legal System” 15 March 2021 <https://theappeal.org/the-lab/white-paper/14-steps-bidens-doj-can-take-now-to-reform-americas-criminal-legal-system/#2.-reform-clemency> (accessed June 24, 2021)

The [solution is simple](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3601988): Take the process out of the DOJ; [create a clemency advisory board](https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/) with bipartisan, diverse membership; charge them with evaluating clemency petitions; and consider the board’s recommendations regularly. The power stays with the president, and he will get advice untainted from the bias of the prosecutors who charged all those cases in the first instance.

Pardon advisory board should be created, reviews moved out of Dept of Justice and into Executive Office of the President. Solves bureaucracy and conflict of interest

Prof. Shon Hopwood 2021 (He is an Associate Professor of Law at Georgetown University Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

Restoring the president’s clemency power requires a fundamental reorganization of the clemency process. President-elect Joe Biden should move the Office of the Pardon Attorney into the Executive Office of the President (EOP) and create an independent advisory board that serves at the president’s pleasure. This reorganization will remove unnecessary bureaucratic layers of review that impede the president’s use of his clemency power, resolve the conflict of interest inherent in the current structure, and provide the president with greater agency in using the clemency power to enforce his values and priorities.

Why the EOP?

Prof. Shon Hopwood 2021 (Associate Professor of Law at Georgetown University Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

Clemency supervision should reside in the Executive Office of the President because the Constitution expressly vests the power in the chief executive. Removing the clemency process from under DOJ’s direct control also resolves the inherent conflict of interest of placing federal prosecutors in charge of second guessing their department’s own prosecutorial decisions. And moving the process to the White House better allows the president to establish and enforce his own set of priorities and preferences regarding how they want to employ the clemency power.

President can do clemency reform via executive order

Prof. [Rachel Barkow](https://www.theatlantic.com/author/rachel-barkow/), Mark Holdren, and Prof. Mark Osler 2019 (Barkow is the Segal Family Professor of Regulatory Law and Policy at New York University. [Holden](https://www.theatlantic.com/author/mark-holden/) is the senior vice president and general counsel of Koch Industries. [Osler](https://www.theatlantic.com/author/mark-osler/) is the Robert and Marion Short professor of law at the University of St. Thomas in Minnesota.) “The Clemency Process Is Broken. Trump Can Fix It.” 15 January 2019 <https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enoughwe-need-clemency-reform/580300/> (accessed June 24, 2021)

​It took six years of intense wrangling to get the First Step Act passed. Clemency reform, however, requires the action of only one man. The president can act alone to fix what Congress did not.

A/T “Plan vagueness” – Definition of “Policy” doesn’t require all details, just a high-level overall plan

Merriam Webster online dictionary copyright 2021. https://www.merriam-webster.com/dictionary/policy

a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body

Specifics on how the Ford Board worked: 9-member board initially, flexible size

Prof. Mark Osler 2020 (Osler is a law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law. Professor Mark Osler’s work advocates for sentencing and clemency policies rooted in principles of human dignity.)) “Memo to the President: Two Steps to Fix the Clemency Crisis” March 2020 <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1469&context=ustlj> (accessed July 3, 2021)

The Ford precedent suggests two things: a larger board can do more work and allowing the size of the board to be flexible can accommodate spikes in petitions without creating backlogs. This second lesson may be particularly important. An executive order establishing the board can—and should—only define the number of people who will initially be appointed, without setting a number of “slots.” In other words, it should name the nine people appointed, while reserving the ability to change the number of people on the board going forward. This would have two positive effects. First, it would allow the board to grow or shrink according to the volume of cases to review. Second, it would mean that the board would never lose its power due to lack of a quorum if the president fell behind in making appointments.

Plan specifics: Expertise and examples of types of members who would be appointed to the Ford Board

Prof. Mark Osler 2020 (law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law) “Memo to the President: Two Steps to Fix the Clemency Crisis” March 2020 <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1469&context=ustlj> (accessed July 3, 2021)

Expertise should also be a factor when choosing members of a clemency board. The realities of criminal law can be both surprising and sobering; it is a field strewn with tragedy and grim realities. An exposure to those realities is important, but we should not re-create the mistake of looking only to prosecutors (or former prosecutors) to provide that knowing eye. Federal defenders, probation officers, judges, reentry specialists, and those who themselves have been incarcerated certainly have more experience with the lives of incarcerated people once the prison doors swing shut while, in contrast, the prosecutor’s relationship with the convicted person expires once an appeal is concluded.

Plan specifics: Diversity

Prof. Mark Osler 2020 (law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law) “Memo to the President: Two Steps to Fix the Clemency Crisis” March 2020 <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1469&context=ustlj> (accessed July 3, 2021)

Diversity must take several meanings in this context: racial and gender diversity, ideological diversity, and geographic diversity. Racial and gender diversity are essential, given the racial issues85 inherent in American criminal law and the changing dynamics of gender (and awareness of the dynamics of gender) within the field. Just as important are ideological and party identity diversity. It is essential that reform of clemency not become a captive of party politics. The statute defining the United States Sentencing Commission accounts for this problem by requiring that no more than four of the members of the seven person commission can be members of the same political party. It would make sense to impose a similar rule on the clemency board. Finally, geographic diversity is important because criminal law issues (and concomitant issues like reentry) are not homogeneous across the United States. For example, the use of enhanced sentences for narcotics convictions under 21 U.S.C. § 851 varies widely from one part of the country to another. Other significant regional variations include the prevalence (or lack thereof) of narcotics such as methamphetamine, the availability of reentry resources, and the presence of federal enclaves such as Indian reservations

How much will the Plan cost? Little or nothing. It uses some existing employees and cuts prison costs

Prof. Mark Osler 2020 (law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law. Professor Mark Osler’s work advocates for sentencing and clemency policies rooted in principles of human dignity.)) “Memo to the President: Two Steps to Fix the Clemency Crisis” March 2020 <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1469&context=ustlj> (accessed July 3, 2021)

As discussed previously, a clemency board would be revenue-positive for the government as a whole, given the expected savings in incarceration costs. Moreover, much of the staff expenses for the board already exist as part of the office of the pardon attorney (which, as proposed here, would transfer out of the DOJ). Expenses relating to the added personnel—the board members—are limited too since the board would be part-time and government service on the board would not be the principle source of income for the board members. That said, proper funding of the board to support a staff sufficient to both analyze petitions and collect data would be crucial to its success. If the board was positioned within the Executive Office of the President alongside bodies like the National Security Council, the Council of Economic Advisors, and the Office of Science and Technology Policy, its funding would come from an additional line item (and a relatively small one) in the budget for the Executive Office of the President.

Details on why the Ford Board was successful

Prof. Mark Osler 2017 (law professor at Univ of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law.) “FEWER HANDS, MORE MERCY: A PLEA FOR A BETTER FEDERAL CLEMENCY SYSTEM” <https://lawreview.vermontlaw.edu/wp-content/uploads/2017/05/03-Osler.pdf> (accessed June 24, 2021)

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 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. This should not surprise us. An independent board gives a political actor such as a governor or president some political “cover” on tough decisions. Third, diverse views on a board seemingly enhance the success of the larger project. President Ford intentionally sought out diverse voices (even on the subject of the Vietnam War), while the structure of the Delaware and South Carolina systems ensure that the makeup of their boards avoid monoculture.

Empirically successful: South Carolina

Prof. Mark Osler 2017 (Osler is a law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law. Professor Mark Osler’s work advocates for sentencing and clemency policies rooted in principles of human dignity) “FEWER HANDS, MORE MERCY: A PLEA FOR A BETTER FEDERAL CLEMENCY SYSTEM” <https://lawreview.vermontlaw.edu/wp-content/uploads/2017/05/03-Osler.pdf> (accessed June 24, 2021)

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. Like Delaware, South Carolina relies primarily on a board, but South Carolina’s Board is even more powerful because the Governor only has the power to grant clemency in capital cases. In all others, the Board acts on its own. South Carolina’s Board also has broader jurisdiction than the Delaware Commission, and is formally known as the Board of Probation, Parole and Pardon Services.

South Carolina is both transparent and diverse

Prof. Mark Osler 2017 (Osler is a law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law. Professor Mark Osler’s work advocates for sentencing and clemency policies rooted in principles of human dignity) “FEWER HANDS, MORE MERCY: A PLEA FOR A BETTER FEDERAL CLEMENCY SYSTEM” <https://lawreview.vermontlaw.edu/wp-content/uploads/2017/05/03-Osler.pdf> (accessed June 24, 2021)

South Carolina’s system provides an unusual amount of transparency and engagement. Hearings, as in Delaware, are a regular part of the clemency process, and in 2016 pardon hearings were scheduled for every month except January and February. Victims are invited to participate in pardon hearings, and a record of the hearings is kept. 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.

Empirically successful: Texas

Leah Sakala, Roderick Taylor, Colette Marcellin and Andreea Matei 2020 (Sakala: is a senior policy associate at the Urban Institute’s Justice Policy Center. She has over a decade of justice policy research and reform experience. Taylor: is a former research analyst at the Justice Policy Center.. Marcellin: is a research assistant at the Justice Policy Center, where she works on projects related to criminal and juvenile justice reform. Matei: is a research analyst at the Justice Policy Center) “How Governors Can Use Categorical Clemency as a Corrective Tool” November 2020 <https://www.urban.org/sites/default/files/publication/102696/how-governors-can-use-categorical-clemency-as-a-corrective-tool_0_1.pdf> (accessed June 30, 2021)

For example, survivors of violence, particularly survivors of human trafficking and gender-based violence, often face criminalization and incarceration. In 2020, Texas governor Greg Abbott created a clemency application for survivors of human trafficking and domestic violence and launched a public awareness campaign to inform survivors that they can apply to receive a full pardon. If granted, the pardon allows for release and criminal-record clearing, mitigating some of the barriers to reentry that people with commuted sentences often face.

Empirically successful: Delaware

Prof. Mark Osler 2017 (law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law) “FEWER HANDS, MORE MERCY: A PLEA FOR A BETTER FEDERAL CLEMENCY SYSTEM” <https://lawreview.vermontlaw.edu/wp-content/uploads/2017/05/03-Osler.pdf> (accessed June 24, 2021)

Delaware Lieutenant Governor Matthew Denn helpfully described the workings of that state’s Board of Pardons in an article for the Delaware Law Review. Since neither Delaware’s Constitution nor statute provide guidance on Board procedures (other than notification to victims and their families), 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 the weight to be accorded to acceptance of responsibility. This is precisely the sort of diversity of viewpoint that 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. As Denn puts it, “the Board’s decisions are often the result of five individuals employing multiple methods of analysis.” The distinction from the federal process is that they do this in concert rather than successively. The difference is clear: even when the deciders are political actors, a flat system can produce results unlikely to come from a vertical hierarchy.

Clemency board with structural variety would provide the best outcome

Prof. Mark Osler 2017 (law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law) “FEWER HANDS, MORE MERCY: A PLEA FOR A BETTER FEDERAL CLEMENCY SYSTEM” <https://lawreview.vermontlaw.edu/wp-content/uploads/2017/05/03-Osler.pdf> (accessed June 24, 2021)

Previously, Rachel Barkow and I have 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. 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 in charge of running federal clemency would benefit from being staffed with full-time, rather than part-time, commissioners.

Independent clemency board eliminates conflict of interest within the Dept of Justice (DOJ)

Prof. Shon Hopwood 2021 (Associate Professor of Law at Georgetown University Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

An independent advisory board is needed for several reasons. First, an advisory board eliminates the conflict of interest created by housing much of the clemency process within the DOJ.

Benefits of a flatter system: Data collection, less complexity, etc.

Prof. Mark Osler 2017 (law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law) “FEWER HANDS, MORE MERCY: A PLEA FOR A BETTER FEDERAL CLEMENCY SYSTEM” <https://lawreview.vermontlaw.edu/wp-content/uploads/2017/05/03-Osler.pdf> (accessed June 24, 2021)

A flatter, functional clemency process would open up the possibility of additional benefits beyond efficiency. As in the states, a greater degree of transparency could be achieved, as the system would become less complex and less hindered by the rules of multiple agencies. A permanent and professional staff could also collect and maintain data, providing useful guidance on issues such as the prediction of recidivism.

States manage pardons better than the federal government

The New York Times Editorial Board 2020 (The editorial board is a group of opinion journalists whose views are informed by expertise, research, debate and certain longstanding values.) “Trump Corrupted the Presidential Pardon. Biden Must Repair It.” 23 December 2020 <https://www.nytimes.com/2020/12/23/opinion/trump-biden-pardon.html> (accessed June 24, 2021)

It’s not enough simply to bring pardons back into the White House. Mr. Trump’s near total disregard of any process shows the danger in that. Instead, Mr. Osler proposes the establishment of a clemency board or commission with a direct line to the president, and staffed with experts in the field of criminal justice rather than with politicians worried about how their decisions might affect their electoral prospects. Board members should reflect the nation’s diversity in terms of race, geography and political ideology. Nearly all states incorporate the work of a board or commission in their clemency processes; not coincidentally, states generally do a much better job of handling their petitions than the federal government does.

A/T “Congress has to act to reduce minimum sentencing” – But we need clemency too, it helps the process

Prof. Rachel E. Barkow and Prof. Mark Osler 2015 (Barkow: Professor of Regulatory Law and Policy and Faculty Director, Center on the Administration of Criminal Law, New York Univ School of Law. Osler: Professor of Law, Univ. of St. Thomas School of Law) “Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal” Winter 2015 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5856&context=uclrev> (accessed July 11, 2021)

The pardon power is not sufficient (on its own) to reduce the federal prison population. The legislature must do its job by revising the laws and allowing retroactivity when appropriate. Yet the clemency power of the executive has a role in keeping the whole in balance and sending signals to prosecutors about how those laws should be charged. When that power goes unused, or when it is used without principle, the carefully balanced process of criminal justice is subtly undone. The structure for clemency must be rebuilt so that its intended function can be restored.

Board provides the President skilled info

Prof. Shon Hopwood 2021 (Associate Professor of Law at Georgetown University Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

Third, an independent advisory board can provide the president with input from an array of important perspectives, many of which are missing in the current structure. The board should include representatives from a wide range of interests—not just current and former prosecutors. This could include public defenders, judges, probation officers, victims of crime, criminologists, academics, formerly incarcerated individuals, and policy experts. The board should be politically balanced with the shared, bipartisan goal of executing the president’s vision for his clemency power. And, of course, the board should receive significant input from the DOJ.

Bolsters public confidence in the clemency process

Prof. Shon Hopwood 2021 (Associate Professor of Law at Georgetown Univ Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

At its core, reforming the system must at the very least involve removing the Office of Pardon Attorney from the DOJ and removing the DOJ’s ostensible veto power over the process. The establishment of a bipartisan board to advise the president and make recommendations would not only improve the efficiency of the process, it would also bolster the public’s confidence in it. And by doing so, the new process would offer the president more opportunities to grant mercy and forgiveness to those who are worthy of it.

Mitigates political concerns

Prof. Shon Hopwood 2021 (Associate Professor of Law at Georgetown Univ Law Center.) “How Joe Biden Can Fix The Broken Clemency Process” 11 January 2021 <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> (accessed June 24, 2021)

Second, an independent board could mitigate any political concerns with using the clemency power. While the politics of crime have substantially shifted from the peak of the era of mass incarceration more than a decade ago—when each party wanted to look tough on crime—a bipartisan independent advisory board would insulate a president from whatever political concerns remain.

State-level clemency reforms prove plan success and are a model for federal government to follow

Prof. Mark Osler 2020 (law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law) “Memo to the President: Two Steps to Fix the Clemency Crisis” March 2020 <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1469&context=ustlj> (accessed July 3, 2021)

It is telling that the states have overwhelmingly chosen boards or commissions to either make clemency decisions directly or to make recommendations to a governor. Six states give a board independent authority to make decisions, twenty states have power-sharing between a board and a governor, and eighteen more require that the governor take advice from and rely on the investigations done by a board. Thus, forty-four states, left to their own devices to come up with a workable approach to analyzing clemency petitions, have evolved to use clemency boards. That is a remarkable consensus. If, as Justice Brandeis put it, the states are the “laboratories” of democracy, then the findings on clemency are by now obvious.

DISADVANTAGE RESPONSES

A/T “No DOJ input” – Nothing stopping DOJ input

Prof. Mark Osler 2017 (law professor at University of St. Thomas School of Law and is the Robert and Marion Short Distinguished Chair in Law.) “FEWER HANDS, MORE MERCY: A PLEA FOR A BETTER FEDERAL CLEMENCY SYSTEM” <https://lawreview.vermontlaw.edu/wp-content/uploads/2017/05/03-Osler.pdf> (accessed June 24, 2021)

Independence of such a board from the Department of Justice would not bar the Department from participating in clemency; certainly, a clemency commission could include a Department representative, and input from the Department on individual cases could be a part of the investigative process.