

“A Day Late and a Dollar Short”—President Obama’s Clemency Initiative 2014

PAUL J. LARKIN, JR.*

ABSTRACT

Over his last two years in office, President Barack Obama used his Article II Pardon Clause power to commute the sentences imposed on more than 1,700 drug offenders. In a 2017 law review article, he congratulated himself for reinvigorating the federal clemency process. His clemency initiative, however, was hardly the unqualified success that he claims. Obama waited far too long before undertaking his effort. He should have started it in 2010, rather than in 2014. That would have allowed the thousands of clemency decisions he made to be handled at a more reasonable pace and probably more accurately. He also should have issued a general conditional commutation order rather than undertake a case-by-case re-examination of the sentence each clemency applicant received. That would have allowed district court judges, who are far better than any president could be at making sentencing decisions, to resentence each offender. Finally, he should have reformed the clear structural defect in the federal clemency process. The Department of Justice controls the clemency application process even though, as the agency that prosecuted every clemency applicant, the department suffers from an actual or apparent conflict of interest. In sum, Obama could have done far more by doing far less or by doing something far different than by acting as the Resentencer-in-Chief.

TABLE OF CONTENTS

I. “A DAY LATE . . . ”	149
II. “. . . AND A DOLLAR SHORT”	153
A. <i>The Lost Opportunity for a Compromise</i>	153
B. <i>The Lost Opportunity to Let District Courts Resentence Drug Offenders</i>	156
III. WHAT PRESIDENT OBAMA SHOULD HAVE DONE	160
CONCLUSION	161

* Senior Legal Research Fellow, The Heritage Foundation; M.P.P. George Washington University, 2010; J.D., Stanford Law School, 1980; B.A., Washington & Lee University, 1977. The views expressed in this Article are the author’s own and should not be construed as representing any official position of The Heritage Foundation. I want to thank Rachel Barkow, Margaret Love, John Malcolm, and the editorial staff of the *Georgetown Journal of Law & Public Policy* for excellent comments on an earlier version of this Article. Any errors are mine. © 2018, Paul J. Larkin, Jr.

In an article published in the Harvard Law Review shortly before he left office, former President Barack Obama took credit for a variety of criminal justice initiatives that he implemented or proposed during his eight years in office.¹ One such measure was a clemency project that he directed Attorney General Eric Holder to execute that was originally known as the Clemency Initiative 2014.² The Framers granted the president the power to grant clemency in Article II because they believed that the nation's chief executive should be able (among other things) to ameliorate miscarriages of justice.³ Obama believed that the federal drug trafficking laws imposed unduly lengthy terms of imprisonment on offenders, and he created this project so that the Department of Justice could assist him with deciding when and how to reduce disproportionate sentences.⁴ The department announced the initiative on April 23, 2014, and Obama acted on clemency applications until the day before he left office, January 19, 2017.⁵ Some have lauded the former president for his benevolence in the exercise of his commutation authority.⁶ Obama has even patted himself on the back for “reinvigorat[ing]” the federal clemency power in a manner that “set a precedent” for other chief executives.⁷

1. Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).

2. *Id.* at 835–38. For descriptions, analyses, and criticisms of the Obama clemency initiative, see Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 2–3 (2015); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 885–88 (2016); Bill Keller, *The Bureaucracy of Mercy*, THE MARSHALL PROJECT (Dec. 14, 2015), <https://www.themarshallproject.org/2015/12/13/the-bureaucracy-of-mercy#.z1dz5VdVx> [<https://perma.cc/4KQZ-MLHD>]; Margaret Love, *Clemency is Not the Answer* (Updated), THE CRIME REPORT, July 13, 2015, <http://thecrimereport.org/2015/07/13/2015-07-our-approach-to-clemency-needs-a-reset/> [<https://perma.cc/S7KX-3W2D>]; Mark William Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System* (Sept. 6, 2016), <https://ssrn.com/abstract=2835668> [<https://perma.cc/TF7C-WJM5>].

3. Larkin, *supra* note 2, at 847–51. Article II, § 2 of the Constitution provides in part as follows: “The President . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”

4. Larkin, *supra* note 2, at 885–88.

5. OFF. OF THE PARDON ATT'Y, U.S. DEP'T OF JUSTICE, CLEMENCY INITIATIVE (Feb. 2, 2017), <https://www.justice.gov/pardon/clemency-initiative> [<https://perma.cc/Z4Z8-LU2K>]. The Justice Department and Obama acted on all clemency petitions received by mail by September 15, 2016. *Id.*

6. See Maurice Chammah, *The Man Who Ran Obama's Clemency Machine*, THE MARSHALL PROJECT (Feb. 14, 2017) (an interview with Neil Eggleston, Obama's final White House Counsel), <https://www.themarshallproject.org/2017/02/14/inside-obama-s-clemency-machine#.JdifZchnJ> [<https://perma.cc/5LQM-K9GF>]; THE WHITE HOUSE, PRESS BRIEFING BY PRESS SECRETARY JOSH EARNEST, WHITEHOUSE.COM (July 13, 2015) (“[T]he President has taken pretty bold action when it comes to commutations.”), <https://obamawhitehouse.archives.gov/the-press-office/2015/07/13/press-briefing-press-secretary-josh-earnest-7132015> [<https://perma.cc/GWT4-UFM9>]. Of course, not everyone has patted Obama on the back. See Charles Krauthammer, *Obama's Self-Revealing Final Act*, WASH. POST, Jan. 19, 2017, https://www.washingtonpost.com/opinions/global-opinions/obamas-self-revealing-nal-act/2017/01/19/fa693c08-de7c-11e6-ad42-f3375f271c9c_story.html?hpid=hp_no-name_opinion-card-c%3Ahomepage%2Fstory&utm_term=.f56de9690f65 [<https://perma.cc/V52B-V8GH>]; Jim Talent, *The Qualities of Mercy*, NATIONAL REVIEW ONLINE, Jan. 20, 2017, <http://www.nationalreview.com/corner/444043/chelsea-manning-bradley-manning-presidential-pardon> [<https://perma.cc/MQ73-KT7K>].

7. Obama, *supra* note 1, at 838.

Obama’s clemency initiative, however, was hardly the unqualified success that Obama claims. It did not fall as far short of expectations as did “New Coke,” but it could have accomplished far more than it did. Of course, Obama is not the first president to act triumphantly for an undertaking that fell far short of expectations. Remember George W. Bush’s “Mission Accomplished” banner? But Obama could have done far more by doing far less or something far different. This article explains why.

Part I explains why Obama waited far too long before establishing his clemency initiative. Part II argues that the initiative fell far short of what he could have accomplished if he had issued a general conditional commutation order rather than undertake a case-by-case re-examination of the sentence each clemency applicant received. Part III then identifies an initiative that Obama should have pursued instead of the one for which he claims such credit: structural reform of the federal clemency process.⁸

I. “A DAY LATE . . .”

We should start with the most obvious criticism. Obama began his initiative far too late in his presidency. Obama was sworn into office on January 20, 2009, yet the initiative was known as the Clemency Initiative 2014, not the Clemency Initiative of 2009, 2010, or every other year before 2014. That is curious. Why the delay?

It could be argued that Obama should have directed Attorney General Eric Holder to begin that initiative at least five years earlier.⁹ The problem that the initiative sought to address emerged in 1986, not 2014. It was the disparity between the stiffer sentences imposed on “crack” cocaine traffickers than powdered cocaine traffickers. The cause of that difference was the sentencing ratio used by the Anti-Drug Abuse Act of 1986. That act mandated the same lengthy sentences for small-scale crack cocaine dealers as for large-scale pow-

8. For other comments on Obama’s clemency initiative and *Harvard Law Review* article, see Editorial, Mr. Obama, *Pick Up Your Pardon Pen*, N.Y. TIMES, Jan. 16, 2017, https://www.nytimes.com/2017/01/16/opinion/mr-obama-pick-up-your-pardon-pen.html?referer&_r=0; [https://perma.cc/UD7U-SCSG]; Will Baude, *The President doesn’t need Congress’s help to fix unjust sentences*, VOLOKH CONSPIRACY, WASH. POST, Mar. 1, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/01/the-president-doesnt-need-congresss-help-to-fix-unjust-sentences/?tid=a_inl&utm_term=.1446593b8537; [https://perma.cc/AC7X-B8KB]; Maurice Chammah, *Responding to: The Man Who Ran Obama’s Clemency Machine*, LIFE FOR POT (response by the author of the interview with Neil Eggleston), <https://www.lifeforpot.com/response-to-the-man-who-ran-obama-s-clemency-machine.html> (last accessed Mar. 4, 2017) [https://perma.cc/4Y3Q-QBXM]; Dustin Palmer, *President Obama’s Criminal Justice Legacy: What Went Wrong*, CARCERAL COMPLEX, Feb. 23, 2017, <http://carceralcomplex.com/2017/02/president-obamas-criminal-justice-legacy-what-went-wrong/> [https://perma.cc/76TD-7BXP]; Brett Diehl, *Commentary on “President Obama’s Criminal Justice Legacy: What Went Wrong,”* CARCERAL COMPLEX, Feb. 23, 2017, <http://carceralcomplex.com/2017/02/commentary-on-president-obamas-criminal-justice-legacy-what-went-wrong/> [https://perma.cc/KSX6-AFZ3]; Liliana Segura, *Obama’s Clemency Problem—And Ours*, THE INTERCEPT, Dec. 24, 2016, <https://theintercept.com/2016/12/24/obamas-clemency-problem-and-ours/> [https://perma.cc/U8Q6-69Y5].

9. Eric Holder became U.S. Attorney General on February 3, 2009.

dered cocaine traffickers. It did so by fixing an amount that triggered the mandatory minimum sentences for crack at 100 times less than the triggering amount for powdered cocaine.¹⁰

Given the demand for crack cocaine, the segregated residential housing patterns in urban areas, and the relative ease of enforcing the drug laws against crack dealers operating in “open air drug markets,” thousands of black crack cocaine traffickers ended up being arrested, convicted, and sentenced under the 1986 law to lengthy terms of imprisonment.¹¹ That ratio proved quite controversial. In short order, academics criticized its wisdom,¹² the U.S. Sentencing Commission described its racially disparate effects,¹³ and defendants challenged its constitutionality.¹⁴ Indeed, it is fair to say that, by 2009, everyone who was involved in or knew anything about the federal drug sentencing laws would have been aware of this debate. Accordingly, someone who had been a member of the U.S. Senate from 2005 to 2008 and who claimed that “[c]riminal justice reform has been a focus of my entire career”¹⁵ certainly would have known, long before January 20, 2009, about the crack cocaine nightmare, the mandatory minimum provisions of the federal drug laws, and the consequences of combining the two of them. That is why some might argue that Obama was wrong not to begin his initiative very shortly after becoming president.

That argument is a reasonable one, but I find it unpersuasive. Obama had a large number of items on his plate when he became president that were, in my

10. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841 (2012) (amended 2010)).

11. See Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J. L. & PUB. POL’Y 241, 241–42, 251–52, 279, 284–85 (2013). The initial idea was to punish crack cocaine trafficking more severely than powdered cocaine distribution because crack was thought more addictive, debilitating, and dangerous. See, e.g., *United States v. Thompson*, 27 F.3d 671, 678 & n.3 (D.C. Cir. 1994). Unfortunately, members of Congress bid up the sentencing ratio in a real-life version of *Quien Es Mas Macho?*, <http://norewardisworththis.tumblr.com/post/64845798933/sn1-quien-es-mas-macho-sketch-from-21719> [<https://perma.cc/E2KE-6ELN>], until they reached the 100:1 ratio adopted in the 1986 act. See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 368–74 (1988); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 124–25 (2014); Larkin, *supra* note 11, at 241–42.

12. See, e.g., GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES (2008); MARC MAUER, RACE TO INCARCERATE (2d ed. 2006); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995). *Contra* KENNEDY, *supra* note 11; Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256 (1994) (discussing the criticisms of the 1986 act but arguing that it did not violate equal protection principles).

13. See, e.g., U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY apps. B & C (2007) (summarizing public testimony from numerous sources on the racially disparate impact of crack cocaine sentencing); U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 102 (2002) (“The overwhelming majority of offenders subject to the heightened crack cocaine penalties are black”); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (1997) (“[N]early 90 percent of the offenders convicted in federal court for crack cocaine distribution are African-American”); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY xii (1995) (“Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine.”).

14. See, e.g., *Thompson*, 27 F.3d at 678 & n.3 (collecting cases).

15. Obama, *supra* note 1, at 812.

opinion, far more important to the nation than any single criminal justice issue. The country was involved in wars in Afghanistan and Iraq. He had to decide whether to prosecute those conflicts more aggressively, maintain the status quo, or begin an orderly withdrawal. The economy was still in the nadir of the Great Recession. He had to decide what fiscal policies would lift the nation without generating inflation. The change in administrations involved a switch in the political party staffing the White House. He had to fill out his administration with political appointments so that he could get their advice on all of the problems he would confront. Those matters were far more important to resolve in the short run than the crack-versus-powdered cocaine sentencing disparity. Plus, the best initial approach was to persuade Congress to amend the Anti-Drug Abuse Act of 1986 by reducing the 100:1 crack powdered cocaine ratio and making that amendment retroactive. A legislative remedy was more sensible than trying to remedy thousands of potentially excessive terms of imprisonment through clemency by reviewing each one on a case-by-case basis. Obama was, in fact, able to convince Congress in 2010 to ratchet down the ratio from 100:1 to 18:1 via the Fair Sentencing Act of 2010, which was a considerable improvement in the law.

Unfortunately, the act was not a complete remedy because it did not apply retroactively.¹⁶ The law benefitted only those offenders who were sentenced on or after the date that Obama signed it, August 3, 2010.¹⁷ From that day forward it was clear that Congress would not afford relief to crack offenders who had been sentenced during the preceding 24 years. Thousands of them would remain in prison under sentences that Congress and the President now believed were far too long to serve any legitimate rationale for punishment. They could not hope for an earlier release unless Obama gave it to them by commuting their sentences. Yet, he did not put that process in motion. He could have—and should have—directed Attorney General Holder to immediately initiate the program that later became Obama’s clemency initiative. At a minimum, he and the attorney general could have put on their thinking caps and come up with a plan to deal with the thousands of prisoners who were needlessly languishing in prison. But he did not.

That was inexcusable. Presidents and governors have traditionally used their clemency powers to grant relief to prisoners suffering from punishments that are unjust because their sentences are grossly severe.¹⁸ If Obama believed that the federal drug laws imposed unduly disproportionate sentences on small-scale, nonviolent offenders—the challenge most commonly advanced against the federal drug laws¹⁹—then he had the moral obligation to rectify that injustice

16. See Larkin, *supra* note 11, at 248.

17. See *Dorsey v. United States*, 567 U.S. 260, 281 (2012) (holding that the Fair Sentencing Act’s more lenient penalties to apply to offenders who committed crimes before August 3, 2010, but were sentenced after that date).

18. Larkin, *supra* note 2, at 849–50 & nn.51–52.

19. See Larkin, *supra* note 11, at 242–43 n.9 (collecting authorities making that argument).

through his clemency power and to start that process *immediately* once Congress refused to remedy it through legislation. Yet, he did not. The result was to leave thousands of drug offenders in prison under sentences that Congress and Obama now believed were far too long to serve any legitimate rationale for punishment.

Yes, Obama did start the clemency initiative in 2014, and, yes, he eventually commuted the sentences of more than 1,700 prisoners. But any analysis of the success of his initiative should take into account what he actually did. The available evidence suggests that, acting under a directive to come up with a recommendation in thousands of pending cases involving drug offenders, the Justice Department Office of the Pardon Attorney (OPA) sent a template to the U.S. Attorneys' Offices inviting them to recommend a new sentence for convicted offenders under the law, U.S. Sentencing Guidelines, and Justice Department policies that would have been applicable had the offender been sentenced in 2016.²⁰ Working at a breakneck rate to process applications for Obama's consideration over the last months of his presidency, the OPA sent him more applications than anyone could reasonably expect the president to consider in anything approaching a detailed manner. In all likelihood, Obama did use his (auto)pen²¹ to make clemency decisions; he just signed whatever checklist someone prepared for him. The only precedent that Obama's clemency initiative set for his successors is that the president should delegate to officials at the Justice Department the clemency authority that the Framers intended that he alone would exercise on behalf of the nation.²²

Obama's approach may have resulted in just sentences for the beneficiaries of this program, but it is not the proper way for a clemency system to operate. When granting clemency, the president acts on behalf of the nation, legally and symbolically. It is well-settled law that clemency is a prerogative for the president *alone* to exercise,²³ but a corollary to that principle is that the *president* alone should be the one to exercise it, not Justice Department officials. Moreover, the president should not act as a Resentencer-in-Chief for the criminal justice system. He has neither the knowledge of an offender nor the time to learn what is necessary to carry out that task responsibly. He should leave

20. See Margaret Colgate Love, *Obama's Clemency Legacy: An Assessment*, 29 FED'L SENT. RPTR. 271, 272, app. 274–75 (2017).

21. See Jared A. Favole, *Obama: I've Got a Pen and I've Got a Phone*, WALL ST. J., Jan. 20, 2014 ("President Barack Obama, meeting with his cabinet for the first time in 2014, signaled his willingness to bypass Congress if lawmakers fail to act on his long-stalled agenda. [¶] 'We are not just going to be waiting for legislation to make sure that we're providing Americans with the help that they need,' Mr. Obama said from the White House . . . 'I've got a pen and I've got a phone. I can use that pen to sign executive orders and take executive actions . . . that move the ball forward.'"), <https://blogs.wsj.com/washwire/2014/01/14/obama-ive-got-a-pen-and-ive-got-a-phone/> [<https://perma.cc/R2MA-MN3Z>].

22. See generally Paul J. Larkin, Jr., *Delegating Clemency*, 29 FED. SENT'G RPTR. 267 (2017) (arguing that the president cannot and should not delegate his clemency power to subordinate officers).

23. See, e.g., *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1872) (ruling that Congress may not limit or regulate the president's Pardon Clause authority); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (same).

making sentencing decisions to “people who sentence offenders for a living.”²⁴

Of course, by necessity the president will rely on the advice of others, including Justice Department officials. But he should neither delegate decision-making authority to others nor give the appearance of having done so. The former punts to others a decision that the Framers intended only the president would exercise; the latter suggests to the public that the president is too busy to undertake the responsibilities that the Constitution imposes on him. Neither outcome pays Article II the respect that it deserves.

II. “. . . AND A DOLLAR SHORT”

Obama made two large-scale mistakes in his implementation of the Clemency Project 2014. He could have compromised with the members of Congress who wanted to combine sentencing reform with reforms to substantive federal criminal law. He also could have issued one clemency order reducing the sentences imposed on drug offenders who could not take advantage of the Fair Sentencing Act of 2010, an order that would have allowed the district courts to resentence those offenders.

A. *The Lost Opportunity for a Compromise*

Sentencing reform is only one criminal justice issue that has been debated on Capitol Hill over the last few years. Another is reform of substantive federal criminal law.²⁵ A principal subject of concern is the inadequate definition of the mental state—*mens rea* or *scienter*—required for conviction, as well as the complete absence of any such requirement in strict liability crimes.²⁶ There is considerable support in the legal community to reform and reduce the federal criminal code.²⁷ The Senate has not demonstrated much interest in substantive

24. Larkin, *supra* note 22, at 268.

25. See, e.g., John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. L. & POL. 249, 258–59, 272–92 (2016) (discussing recent reform efforts in detail).

26. Both of those issues arise in connection with the phenomenon known as “overcriminalization,” the neologism given to the overuse, misuse, and abuse of the criminal law. See Darryl K. Brown, *Criminal Law’s Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL’Y 657, 657 (2011) (“Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes.”). In that context, the issue arises in connection with the definition of an offense, particularly when regulations help define its scope, or the punishment imposed for its commission. See also, e.g., Michael B. Mukasey & John G. Malcolm, *Criminal Law and the Administrative State*, in LIBERTY’S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 283 (Dean Reuter & John Yoo eds., 2016); Michael B. Mukasey & Paul J. Larkin, Jr., *The Perils of Overcriminalization*, THE HERITAGE FOUNDATION, LEGAL MEMORANDUM No. 146 (Feb. 12, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM146.pdf; Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065 (2014).

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

criminal law reform,²⁸ but there is strong, bipartisan support for reform in the House of Representatives.²⁹ The House has supported a “default mens rea” standard for use in cases where a federal statute does not contain a scienter element appropriately limiting criminal liability to morally blameworthy parties.³⁰ The different positions between the two chambers led to an impasse in the 115th Congress,³¹ and no criminal justice reform legislation became law.

despite this bipartisan support, the tendency to overcriminalize continues to grow stronger.”); Paul J. Larkin, Jr., *Finding Room in the Criminal Law for the Desuetude Principle*, 65 RUTGERS L. REV. COMMENTARIES 1, 1–2 & nn.2–7 (2014) (collecting authorities).

28. The principal criminal justice subject of interest in the Senate over the last few years has been sentencing reform. *See, e.g.*, Smarter Sentencing Act of 2015, S. 502, 114th Cong. (2015); Smarter Sentencing Act of 2014, S. 1410, 114th Cong. (2014); Smarter Sentencing Act of 2013, S. 1410, 113th Cong. (2013). Senator Orrin Hatch, however, introduced a bill in the 115th Congress that would have adopted a default scienter standard. *See* Mens Rea Reform Act of 2015, S. 2298, 114th Cong. (2015). On the wisdom of such legislation, see John G. Malcolm, *The Case for the Smarter Sentencing Act*, 26 FED. SENT’G REP. 298 (2014).

29. Malcolm, *supra* note 25, at 275; *see also, e.g.*, BOBBY SCOTT, DEMOCRATIC VIEWS ON CRIMINAL JUSTICE REFORM RAISED BEFORE THE OVERCRIMINALIZATION TASK FORCE & THE SUBCOMM. ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS 120 (2014), usa.gov/1SozxIO [perma.cc/9FLM-PBHH]; *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. (2013); *Regulatory Crime: Solutions: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. 2 (2013); *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. (2013); *Principles for Revising the Criminal Code, Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011); *Criminal Code Modernization and Simplification Act of 2011: Hearing on H.R. 1823, Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011).

30. Malcolm, *supra* note 25, at 275 (“In May 2013, the U.S. House of Representatives Committee on the Judiciary established an Over-Criminalization Task Force, which held a series of hearings over the course of a year. The need for meaningful *mens rea* reform was a consistent theme throughout those hearings. During the task force’s first hearing, Subcommittee Chairman James Sensenbrenner asked four witnesses to name their top priority to address overcriminalization; each wanted *mens rea* reform. The task force subsequently devoted an entire hearing to the issue, titled “Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law.”) (footnotes omitted).

31. *See* Juliet Eilperin, *The Daily 202: Why Criminal Justice Reform May Actually Get Done This Year—If These Two Hurdles Can Be Overcome*, WASH. POST, May 9, 2016, https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2016/05/09/daily-202-why-criminal-justice-reform-may-actually-get-done-this-year-if-these-two-hurdles-can-be-overcome/572ff07c981b92a22d6c6553/?utm_term=.afaf0daa2478 [https://perma.cc/ZK9D-VEGN] (noting that one of the “two biggest hurdles [to criminal justice reform] right now” is “mens rea . . . [T]here are still some serious differences between the two chambers’ proposals. The biggest centers around what’s known as ‘mens rea,’ a legal phrase used to describe state of mind. Basically, the fight boils down to whether prosecutors should be forced to prove that someone *intended* to break the law, specifically when it comes to white-collar corporate crimes. [¶] The House Judiciary Committee already moved a bill that says, when federal criminal law fails to provide a clear standard of intent, prosecutors would have to prove defendants ‘knew, or had reason to believe, the conduct was unlawful.’ [¶] ‘There needs to be a significant change in the criminal intent standards,’ Goodlatte said, adding the senators ‘must find a way to deal with the fact that there are over 5,000 criminal statutes and hundreds of thousands of regulations on the books under which somebody could be charged with a crime.’ [¶] Americans for Tax Reform President Grover Norquist, a signatory to the conservative movement’s ‘Right on Crime Statement of Principles,’ said he believes a package has better than 50-50 odds of passage, but he is adamant that there will be no criminal justice reform

The reason why may be in large part because Obama opposed any substantive criminal law reform.³² In his view, “[d]espite broad support” for sentencing reform, “there was vocal opposition from some while others pushed for the reform legislation to be paired with proposals such as mens rea reform,” reform that, in his opinion “could undermine public safety and harm progressive goals.”³³

It is possible that the two parties could not have reached a compromise over criminal justice reform in today’s polarized political environment. It is possible that no reform was feasible in a presidential election year.³⁴ It is possible that each party decided that it would fare better in the next Congress and with the next administration than by fashioning a compromise version of the Senate and House bills. And it is possible that a new bill would be far better than one hastily cobbled together in the midst—and heat—of a presidential campaign.

But it is difficult to believe that Obama could not have accomplished his sought-after sentencing reform by compromising with the Republicans who sought substantive criminal law reform. Maybe an offer to compromise would not have satisfied Mitch McConnell, the Republican Majority Leader, or the Republican majority in the Senate, but it might have persuaded enough Republican senators to combine with their Democratic counterparts to create a supermajority of supporters. Maybe Obama could have cajoled enough Republican senators to support his sentencing reform efforts if he went along with their substantive proposals. That could have altered the calculus. After all, the

without mens rea. ‘The idea that the hard left of the Democratic Party likes to threaten businesspeople with jail for not complying with regulations that they’ve written in some cubbyhole somewhere is ridiculous,’ he said.”) (emphasis omitted).

32. See Obama, *supra* note 1, at 829 n.89; see also Eilperin, *supra* note 31 (“Most Democrats—including the president—have warned that these changes could create loopholes for corporate wrongdoers and other bad actors. [¶] White House senior adviser Valerie Jarrett said there could be ‘unintended consequences,’ like if a robber took money from a bank without knowing it was federally insured, but she emphasized that she believes these differences can be reconciled. ‘We are building momentum in support in both the House and Senate, and I’m optimistic President Obama will have a chance to sign a meaningful criminal justice reform bill’”).

33. Obama, *supra* note 1, at 829 n.89.

34. See Eilperin, *supra* note 31 (“For a while, it looked like criminal justice reform would be the great white whale of this Congress: that elusive triumph that was just out of reach for the Democrats and Republicans who believed it was finally within their grasp. As lawmakers return to town this week, though, there are signs it could happen this Congress—though it remains an uphill battle The window of opportunity to pass the bill is narrow. The closer the election gets, the harder it becomes to pass big-ticket legislation. Reform advocates hope the House can pass its bill in June, to provide enough time for the Senate to act and reconcile its proposal with that of the lower chamber. Since the Senate Judiciary Committee has already passed a criminal justice bill, lawmakers can substitute their revised measure as an amendment on the floor. That, though, depends on Mitch McConnell deciding to bring the bill up for consideration The Senate Majority Leader holds most of the cards, and he’s keeping them close to the vest. McConnell has still not said whether the most recent version of the Senate bill, which has 18 Republican co-sponsors and 19 Democratic co-sponsors, has sufficient GOP support to merit a floor vote. He remains nervous that vulnerable GOP incumbents could get accused of being soft on crime. One of his recurring nightmares is Willie Horton-style ads being run against his members. And he is always loathe to highlight divisions among Republican senators. Sens. Ted Cruz (Tex.) and Tom Cotton (Ark.), for instance, are outspoken critics of this effort.”) (emphasis omitted).

number of cases that could have been affected by the retroactive application of the Fair Sentencing Act of 2010 numbers in the thousands while the number of cases to which *mens rea* reform would have led to an acquittal (or to no indictment) might be one or two dozen per year. Unfortunately, we will never know whether Obama could have accomplished his goal because he never expressed any willingness to compromise. The result was a lost opportunity to improve the criminal law along with the drug sentencing statutes.

B. The Lost Opportunity to Let District Courts Resentence Drug Offenders

Obama also had another option to provide drug offenders with an opportunity for a sentence reduction. He could have used an approach similar to the amnesty that some of his predecessors used when granting clemency to a large number of parties without undertaking a case-by-case analysis of each offender's own situation. For example, George Washington granted amnesty to participants in the Whiskey Rebellion, Andrew Johnson pardoned members of the Confederacy willing to take an oath of loyalty to the United States, and Jimmy Carter granted amnesty to Vietnam War draft evaders. Relying on that approach, Obama could have promulgated one large-scale commutation order that would have effectively enabled prisoners sentenced under the Anti-Drug Abuse Act of 1986 to obtain the benefits of the Fair Sentencing Act of 2010.³⁵

35. It is possible, but less likely, that Obama had a third option available to him, an option akin to the type of "second look" sentencing review that various experts have recommended. *See, e.g.*, Margaret Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code Sentencing Revision*, 42 U. TOL. L. REV. 859 (2011); Margaret Love, *Taking a Serious Look at "Second Look" Sentencing Reforms*, 21 FED'L SENT. RPTR. 149, 150 (2009). A district court may modify an offender's term of imprisonment upon a motion by the Director of the Bureau of Prisons if, after considering the same factors that were relevant to the initial sentencing decision, the court makes the following findings: (1) "extraordinary and compelling reasons warrant such a reduction," (2) the Director of the Bureau of Prisons finds that the offender is not a danger to public safety, and (3) a reduction is consistent with relevant policy statements issued by the U.S. Sentencing Commission. 18 U.S.C. § 3582(c) (2017). To take advantage of that option, Obama would have needed to take two steps. First, he would have had to persuade the U.S. Sentencing Commission to treat the non-retroactivity of the Fair Sentencing Act of 2010 as an "extraordinary and compelling" reason for resentencing. Second, he would have had to direct the Federal Bureau of Prisons to ask district courts to resentence offenders convicted under the Anti-Drug Abuse Act of 1986 who could not take advantage of the Fair Sentencing Act of 2010. The second step would have been easy. The Bureau of Prisons is a component of the Department of Justice, and the BOP Director reports to the Attorney General. 18 U.S.C. § 4010 (2012). The first step, however, might have been difficult. The Sentencing Commission is "an independent commission in the judicial branch of the United States" and the president can remove Sentencing Commissioners "only for neglect of duty or malfeasance in office or for other good cause shown," 28 U.S.C. § 991(a) (2012); *see* *Mistretta v. United States*, 488 U.S. 361, 380-412 (1989). For this approach to work, the Sentencing Commission would have had to adopt a policy statement approving resentencing of those offenders who were not already eligible for sentencing under the more lenient provisions of the Fair Sentencing Act of 2010. The Sentencing Commission might not have approved such a policy statement given that Congress did not make the 2010 act retroactive. *See supra* notes 16-17 and accompanying text.

The commutation order would have worked as follows: Section 1 would have provided that the order applied to every drug offender who was not able to take advantage of the Fair Sentencing Act of 2010 because he or she was sentenced prior to the date that law went into effect. Section 2 of the order would have commuted every offender’s sentence to what it would have been had the offender been able to apply for resentencing under that act. Section 3 would have waived any non-jurisdictional objection that the government could have raised to a prisoner’s petition for resentencing by the district court.³⁶ Section 3 also would have allowed every eligible prisoner to apply in district court for a lesser term of imprisonment. Mind you, it would not have guaranteed that result—the Fair Sentencing Act of 2010 did not reduce the *maximum* term of imprisonment for crack cocaine trafficking—but it would have given offenders a chance for an earlier release. Section 4 would have provided that, in any case in which the prisoner was not resentenced within *X*—fill in your period of choice: 90 days, 180 days, 365 days, something else—he or she would be released immediately. That section would have provided an incentive for district courts to undertake resentencing hearings in a timely manner. Such an order would have effectively accomplished precisely what Obama sought to achieve, but was unable to persuade Congress to do—make the 2010 act apply retroactively.

Furthermore, that order would have lodged resentencing decisions in the hands of the officials best able to decide what term of imprisonment is appropriate for a particular offender: district court judges. One way to help ensure that decisions are made accurately and efficiently is to empower the most experienced parties with the responsibility to make decisions within their areas of expertise. That could have been done here. The president does not appoint district court judges to make foreign policy judgments, and the Electoral College does not choose presidents to make sentencing decisions. Unlike presidents, district court judges are experienced in sentencing, and they can better determine what modifications, if any, should be made to an offender’s period of confinement, given the commutation order described above. Unlike district courts, presidents are responsible for making foreign policy, military,

36. Prisoners could have applied for relief under 28 U.S.C. § 2255(a) (2012) (“A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.”). A prisoner would be able to argue that Obama’s commutation rendered his sentence “in excess of the maximum authorized by law” or “otherwise subject to collateral attack.” *Id.* There is a one-year statute of limitations on petitions, but the limitation does not purport to be jurisdictional. Moreover, it may even be possible that the Justice Department itself could have brought the matter to the relevant district court for it to resentence the prisoner. The statute says that “[a] prisoner in custody . . . may move the [sentencing] court” for a modification of his sentence. It does not say that the government may not do so too. That option would have been important if a prisoner were serving a life sentence and hoped to be released immediately under Section 4 of the proposed commutation order discussed in the text by not seeking judicial relief. *Id.*

and budgeting decisions, and presidents can use the additional time they would have by letting district courts resentence offenders to learn how best to address the nation's other problems. Of course, the president could effectively delegate commutation/resentencing decisions to subordinate officers in the Justice Department, and Obama likely did just that in his initiative.³⁷ But that is an inappropriate way to make clemency decisions.

Why did Obama not issue one amnesty-like commutation order to be implemented by the district courts? We do not know. Obama said that he saw clemency as a power to correct "individual cases of injustice."³⁸ Attorney General Loretta Lynch added that Obama could not have granted "mass" clemency and had to evaluate each case on its own terms.³⁹ Is that the likely explanation? Did Obama reject this option because he lacked the power to grant clemency *en masse*? That is dubious. As noted above, several presidents have granted amnesty to a large category of offenders,⁴⁰ and the Supreme Court of the United States has found nothing wrong with dispensing mercy in that manner.⁴¹ Given the resources that Obama devoted to this problem, it is not likely that this option was overlooked.⁴² Was Obama reluctant to use his inherent powers in a broad manner? Also dubious. Obama spent the last few years of his presidency governing by Executive Order, sometimes adventurously.⁴³ He was not shy about pushing the edge of the envelope of his Article II powers, and there is no reason to believe that he saw his clemency authority in a peculiar light.

Why then did he choose to commute sentences on a retail basis? Maybe Obama liked resentencing offenders (or letting his subordinates do so) because

37. See *supra* text accompanying notes 20–22.

38. Obama, *supra* note 1, at 835.

39. See P.S. Ruckman, Jr., *Creepy Cloud of Error/Ignorance in the Air*, PARDON POWER (Jan. 5, 2016), <http://www.pardonpower.com/search?updated-max=2017-01-13T22:30:00-06:00&max-results=20&start=20&by-date=false> [https://perma.cc/6TQ7-QQPX] ("Recently, U.S. Attorney General Loretta Lynch appeared on the *Rachel Maddow Show* and said the granting of a pardon is 'an individual decision that's made on a case-by-case basis.' Consequently, 'There's no legal framework or regulatory framework that allows for a pardon of a group *en masse*.' The statement was, of course, a preposterous blunder. Amnesties and group pardons are a great American tradition.").

40. Larkin, *supra* note 2, at 846–47 & n.42.

41. See *Knote v. United States*, 95 U.S. 149, 152–53 (1877) ("The Constitution does not use the word 'amnesty;' and, except that the term is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance."); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) ("To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty.").

42. See Obama, *supra* note 1, at 836 ("I asked my team to look more systematically at how clemency could be used to address particularly unjust sentences in individual cases. This led to an unprecedented effort to identify the types of inmates who deserve particular consideration for clemency—and to encourage individuals who have demonstrated good behavior in the federal system to seek clemency if they were sentenced under outdated laws that have since been changed and are no longer appropriate to accomplish the legitimate goals of sentencing.") (footnote omitted).

43. See, e.g., DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* (2015).

that enabled *him* to decide when an offender should be released. Keep in mind that not every commutation entitled an offender to be released immediately. Many drug offenders had their sentences shortened, but still had to serve additional time before being released.⁴⁴ Maybe he feared that, if given the chance to resentence drug offenders, district courts would not be as generous as he was. District courts could have reimposed the identical period of incarceration originally handed down in the exercise of their sentencing discretion. Maybe Obama liked being able to claim that he commuted “more [sentences] than the previous eleven Presidents combined.”⁴⁵ Until the initiative engaged its afterburners in 2016, a considerable number of people had criticized Obama for being stingy with his clemency power.⁴⁶ Perhaps he wanted to prove them wrong and go out of office with a bang. Whatever the reason, the law did not force Obama down the path he selected. He chose it himself and likely wound up correcting fewer injustices than he could have remedied if he had let district courts make the final decisions.⁴⁷

There is a larger issue lurking behind the above discussion. How should a president approach clemency? Or, what is the proper use of the clemency power? My view is that the president should not re-examine every case for potential illegalities or injustices in the way that Obama did. Instead, the president should use his Pardon Clause authority as a way of announcing the nation’s forgiveness for individuals who have gone astray, but who, like the Prodigal Son, have returned chastened, repentant, and wiser for the lessons learned. The president is the only federal official who can forgive transgressions

44. See Larkin, *supra* note 22, at 268; Love, *supra* note 20, at 272.

45. Obama, *supra* note 1, at 837.

46. See, e.g., Douglas A. Berman, *Nearly a Year into Clemency Initiative, Turkeys Remain More Likely To Get Prez Obama Pardon Than People*, SENTENCING LAW & POLICY (Nov. 26, 2014), http://sentencing.typepad.com/sentencing_law_and_policy/2014/11/nearly-a-year-into-clemency-initiative-turkeys-remain-more-likely-to-get-prez-obama-pardon-than-peop.html [<https://perma.cc/G33N-LYGQ>] (“At the risk of being a holiday party pooper, I cannot help but note that it has now been a full 10 months since the Obama Administration publicly announced . . . that it was eager to identify low-level, nonviolent drug offenders for possible clemency relief. Since that time, however, the President has granted clemency to a grand total of one prisoner and now to two turkeys.”).

47. As of January 19, 2017, 3,469 clemency applications were pending from drug offenders (and 4,412 from non-drug offenders, for a total of 7,881). OFF. OF THE PARDON ATT’Y, U.S. DEP’T OF JUSTICE, CLEMENCY INITIATIVE, *supra* note 5.

Attorney General Jeff Sessions has not publicly announced whether he will continue Obama’s clemency practice. Given his opinion of the program as a Senator, however, it is likely a goner. See Ramsey Cox, *Sessions: Obama Abuses ‘Pardon Power,’* HILL, Apr. 4, 2014, <http://thehill.com/blogs/floor-action/senate/204261-sessions-obama-is-abusing-pardon-power> [<https://perma.cc/M45Z-44AV>] (“If this latest unilateral action becomes the norm, then what kind of Pandora’s Box has the president opened?” Sessions said Wednesday evening. ‘Can a president pardon all people convicted of financial fraud, or identity theft, or unlawful re-entry into the country, or any category of crime when Congress does not act as the executive wishes?’ [¶] ‘To unilaterally determine that a sentence was unjustified simply because the president disagrees with the underlying criminal justice policy is a thumb in the eye of the law enforcement officers, prosecutors, defense attorneys, judges, court and prison personnel who put time and resources into these cases,’ Sessions said. ‘And it sends the message that the United States government is not serious about combating drug crimes.’”).

on behalf of the nation. The highest and best use of the clemency process is for him to say, “On behalf of the people of the United States, I forgive you. Go, and sin no more.”⁴⁸

Using the clemency power to conduct case-by-case, fact-intensive resentencing decisions does not express the judgment of the nation; it just second-guesses decisions made by judges who are far more qualified to sentence offenders than the president is. We would not want the president to second guess factual findings by juries in criminal cases, not only because there are better uses of his time, but also because there is no reason to believe that the president will do a better job of examining the evidence than will juries and the federal judiciary. There is no good reason for an entirely different approach if the goal is simply a proper sentence for a particular offender.⁴⁹ Yet, that is precisely what Obama did.

To be sure, there should always be room for the president to review excessive punishments. But that review should occur only at the wholesale level. That is, the president should be free to decide that a statute leads to grossly disproportionate sentences and should be revised by Congress both prospectively and retrospectively. In the meantime, there is a mechanism for him to use to ameliorate the punishments already imposed, a device that does not require him to undertake a case-by-case review of each prisoner’s sentence. That procedure is the one explained above. But that is not what Obama did.

III. WHAT PRESIDENT OBAMA SHOULD HAVE DONE

Obama was right that a president’s clemency decisions “are a way to restore a degree of justice, fairness, and proportionality to the system” and that they “are no substitute for achieving lasting changes to federal sentencing law through legislation.”⁵⁰ Yet he was not limited to choosing between those two options. There was another one that he could also have selected: he could have restructured the federal clemency process.⁵¹

48. Cf. *John* 8:10–11 (King James) (“When Jesus had lifted himself up, and saw none but the woman, he said unto her, Woman, where are those thine accusers? Hath no man condemned thee? She said, No man, Lord. And Jesus said unto her, Neither do I condemn thee: Go, and sin no more.”)

49. I do not mean to say that a president should not second-guess the judgment of a jury if a person can later prove that he is innocent. The most honorable use of clemency is the exoneration of the mistakenly convicted innocent person. See *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (“Executive clemency has provided the ‘fail safe’ in our criminal justice system It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.” (quoting KATHLEEN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989))).

50. *Id.* at 838.

51. Some commentators have recommended that Congress readopt parole in some form. See, e.g., Keller, *supra* note 2. I think that Congress is more likely to expand the availability and amount of “good time” or “earned time” credit available for prisoners than resurrect parole. See Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 *Geo. J.L. & Pub. Pol’y* 1, 36–43 (2013). At the same time, I also believe that Congress does not have to

There is a broad consensus today that the federal clemency process is in need of reform.⁵² The current system leaves too much authority over clemency petitions to the Justice Department, the very agency that prosecuted every federal clemency applicant. That may not have been a problem in the nineteenth century and the first three-quarters of the twentieth, but since then the politicization of criminal justice has created an actual or apparent conflict of interest on the part of the Justice Department, which the president should remedy. Several commentators have offered suggestions as to how the president should restructure the federal clemency system. Some recommend creating a board of clemency advisors;⁵³ another recommendation is for the president to move the clemency process into the Executive Office of the President and to use the vice president as principal clemency advisor.⁵⁴ Donald Trump became president just over a year ago, however, and he has found that it is all he can do just to get his cabinet nominees and other senior officials in place. Clemency reform has not been a high priority item. It must wait its turn, assuming that Trump eventually turns to this subject at all.

Of course, Obama was right that no Executive Order can have the same (relative) permanence as legislation. What one Executive Order builds, a later one can demolish. Every new president can revise or abandon the clemency process that his predecessors had in place. But if Obama had wanted “to reinvigorate the clemency power and to set a precedent that will make it easier for future Presidents, governors, and other public officials to use it for good,”⁵⁵ he should have revised the process by which recommendations flow from prisons to the Oval Office. He didn’t. So, we will have to wait to learn what, if anything, his successor decides to do.

CONCLUSION

Obama believed that the federal drug laws had the effect of throwing away people who could be saved if they were released from prison. Perhaps unlike any other president, Obama used his Article II clemency power to review and resentence more than 1,700 federal drug offenders. After their release, whether now or later, they will have an opportunity to walk the straight and narrow, to reunite with family members, and to counsel others in their communities not to pursue the path that lead to their incarceration. If all goes well, Obama’s

disinter parole because it was reborn by operation of law, and is available to prisoners today. Once the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that the U.S. Sentencing Guidelines cannot be mandatory, parole sprang back into effect because it is clear that Congress would never have repealed the parole laws if the Sentencing Guidelines were only advisory. See Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303 (2013).

52. See Larkin, *supra* note 2, at 900–03; *id.* at 900 n.226 (collecting authorities arguing in favor of reform).

53. See, e.g., Barkow & Osler, *supra* note 2.

54. See Paul J. Larkin, Jr., *Essay: A Proposal to Restructure the Clemency Process—The Vice President as Head of a White House Clemency Office*, 40 HARV. J.L. & PUB. POL’Y 237 (2017).

55. Obama, *supra* note, 1, at 838.

clemency initiative will give some offenders back some portion of their lives and help others make decisions to avoid incarceration altogether. For the individuals who have already benefitted from that initiative or who will do so later on, the project was or will be a success.

Where Obama went wrong, however, was in the program's design and implementation. Obama should have started the initiative much earlier than he did, and he should have been more modest in how he used his Pardon Clause authority. Obama should have simply reduced drug offenders' maximum sentence to whatever sentence they could receive today for the same offense, and left to the district courts the decision of what precise period of incarceration each offender should serve. Obama's approach might have left hundreds or thousands of offenders in custody for drug offenses beyond the terms they would have served if he had started earlier and left resentencing decisions to the professionals. If so, Obama should not be taking a victory lap for leaving in prison people who do not belong there.

Obama also should have remedied the structural defects in the federal clemency system, flaws that make it difficult for clemency applicants to get a fair shake, the principal one being the stranglehold that the Justice Department has on clemency recommendations. Redesigning that process would have been a valuable improvement to the clemency process and criminal justice system. Instead, Obama exacerbated the problem by allowing Justice Department lawyers to make resentencing decisions, decisions that life-tenured district court judges are far more competent to make than prosecutors.

Hopefully, President Donald Trump will learn from his predecessor's mistakes.