

# ARTICLES

## CLEMENCY AND PRESIDENTIAL ADMINISTRATION OF CRIMINAL LAW

RACHEL E. BARKOW\*

*President Obama's use of enforcement discretion to achieve important domestic policy initiatives—including in the field of criminal law—has sparked a vigorous debate about where the President's duty under the Take Care Clause ends and legitimate enforcement discretion begins. But even with broad power to set enforcement charging policies, the President controls only the discretion of his or her agents at the front end to achieve policy goals. What about enforcement decisions already made, either by the President's own agents or by actors in previous administrations, with which the President disagrees? The Framers anticipated this issue in the context of criminal law and vested the President with broad and explicit back-end control through the constitutional pardon power. This clemency power is a powerful tool for the President to oversee federal criminal administration. But while centralized authority over enforcement discretion at the front end has grown, the clemency power finds itself falling into desuetude.*

*This Article explores the fall of the clemency power and argues for its resurrection as a critical mechanism for the President to assert control over the executive branch in criminal cases. While clemency has typically been referred to as an exercise of mercy and even analogized to religious forgiveness, it also serves a more structurally important role in the American constitutional order that has been largely overlooked: It is a critical mechanism for the President to control the executive department in criminal matters. Those in favor of strong presidential administration or advocates of a unitary executive theory should encourage a more robust employment of the clemency power. But even critics of strong presidential powers or unitary executive theory in other contexts should embrace clemency as a mechanism of control in the criminal sphere. Whatever the merits of other unitary executive or presidential administration claims involving military power or oversight over administrative agencies, clemency stands on different footing. It is explicitly and unambiguously grounded in the Constitution's text, and it has an established historical pedigree. It is also a crucial checking mechanism given the landscape of criminal justice today. The current environment of expansive federal criminal laws and aggressive charging by federal prosecutors has produced a criminal justice*

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*system of unprecedented size and scope. Federal prisons are overcrowded and expensive, and hundreds of thousands of individuals are hindered from reentering society because of a federal record. Clemency is a key tool for addressing poor enforcement decisions and injustices in this system, as well as checking disparities in how different U.S. Attorneys enforce the law.*

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INTRODUCTION

Several of President Obama’s most important domestic policy initiatives involve decisions not to enforce federal law.<sup>1</sup> In 2012, the Obama Administration announced that it would not enforce removal provisions in the Immigration and Nationality Act against “certain young people who were brought to this country as children and know only this country as home.”<sup>2</sup> In 2014, President Obama went even further on the immigration front by issuing an executive directive that

<sup>1</sup> See, e.g., Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783 (2013) (describing the President’s decision to exercise discretion not to enforce statutes as “[t]he Obama Administration’s preferred tool for domestic policy”).

<sup>2</sup> Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enforcement 1 (June 15, 2012) [hereinafter Napolitano Memo], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. Those eligible are generally students who have been in the United States for at least five years, arrived in the United States before the age of sixteen, are not currently over the age of thirty, and have not been convicted of any crimes other than minor misdemeanors. *Id.*

would allow up to five million people to avoid deportation.<sup>3</sup> President Obama also turned to his enforcement discretion to address the backlash from those who discovered they could not keep their health insurance policies for failure to meet minimal requirements under the Affordable Care Act (ACA). President Obama campaigned for the law with a pledge that under the ACA, “[i]f you like your plan, you can keep it.”<sup>4</sup> To keep that promise, he told insurance companies he would refuse to enforce those provisions of the law that would require cancellation of the policies, at least through 2014.

Enforcement discretion has been equally important in criminal policymaking in the Obama Administration. In the wake of state legislation in Washington and Colorado to legalize marijuana, the Department of Justice (DOJ) announced that the federal government would focus its enforcement actions to prevent specific harms.<sup>5</sup> The DOJ suggested that if a case fell outside those areas, it would not be prosecuted even if it violated the letter of the Controlled Substances Act.<sup>6</sup> The DOJ provided similar guidance about what cases would be prosecuted federally in those states that have legalized medical marijuana.<sup>7</sup>

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<sup>3</sup> Michael D. Shear, *Obama Moves Ahead on Immigration*, N.Y. TIMES, Nov. 21, 2014, at A1.

<sup>4</sup> The pledge is conditional on insurers informing consumers of what is not covered by their plans and making clear that they have the option to buy a new plan with federal subsidies on health insurance exchanges. See Sheryl Gay Stolberg & Michael D. Shear, *Inside the Race to Rescue a Health Site, and Obama*, N.Y. TIMES, Dec. 1, 2013, at A1. The Treasury Department has also announced that it will delay enforcement of the part of the law that penalizes employers for failing to offer health insurance to their employees. Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8543, 8569 (Feb. 12, 2014).

<sup>5</sup> See Memorandum from James M. Cole, Deputy Att’y Gen. of the United States, to All U.S. Att’y’s 1–2 (Aug. 29, 2013) [hereinafter Cole 2013 Memo], available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (listing the federal government’s enforcement priorities with respect to marijuana as “[p]reventing the distribution of marijuana to minors; [p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; [p]reventing the diversion of marijuana” to states where it has not been legalized; making sure marijuana activity is not a cover for trafficking in other drugs; “[p]reventing violence;” preventing the growth, use, or possession of marijuana on federal lands; and preventing drugged driving).

<sup>6</sup> *Id.* at 2 (“Outside of these enforcement priorities, the federal government has traditionally relied on states and local enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”).

<sup>7</sup> See Memorandum from David W. Ogden, Deputy Att’y Gen. of the United States, to Selected U.S. Att’y’s 1–2 (Oct. 19, 2009) [hereinafter Ogden Memo], available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf> (“The prosecution of significant traffickers of illegal drugs . . . and the disruption of illegal drug manufacturing and trafficking networks . . . should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”); Memorandum from James M. Cole, Deputy Att’y Gen. of the United States, to U.S. Att’y’s 2 (June 29, 2011) [hereinafter Cole 2011 Memo], available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance->

DOJ's enforcement policies have not been limited to federalism issues. In the summer of 2013, the DOJ announced new charging policies in all drug cases that could trigger mandatory minimum sentences.<sup>8</sup> Whereas previous DOJ policies had required prosecutors to charge the most serious readily provable offense,<sup>9</sup> the current charging policy instructs prosecutors that "severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers"—thus, prosecutors should not charge quantities necessary to trigger mandatory minimum sentences as long as certain criteria are met.<sup>10</sup>

The use of enforcement discretion as a policymaking tool is hardly new, of course, but the scope and scale of its use in the current Administration has prompted criticism by policymakers and academics.<sup>11</sup> There is now a vigorous debate about where the President's

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2011-for-medical-marijuana-use.pdf (clarifying the Ogden Memo by noting that people "in the business of cultivating, selling or distributing marijuana" or knowingly facilitating those activities are subject to federal prosecution regardless of state law).

<sup>8</sup> Memorandum from Eric Holder, Jr., Att'y Gen. of the United States, to the U.S. Att'ys & Assistant Att'y Gen. for the Criminal Div. 1 (Aug. 12, 2013) [hereinafter Holder Mandatory Minimum Memo], available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-convict-enhancements-in-certain-drugcases.pdf> (refining the DOJ's "charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders").

<sup>9</sup> See, e.g., Memorandum from John Ashcroft, Att'y Gen. of the United States, to All Fed. Prosecutors 2 (Sept. 22, 2003) [hereinafter Ashcroft Memo], available at [http://www.justice.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm) (declaring the policy of the DOJ to be to "charge and pursue the most serious, readily provable offense"). When Eric Holder became Attorney General, he softened the policy by informing prosecutors that, while they must "ordinarily charge the most serious offense that is consistent with the nature of the defendant's conduct" and readily provable, they should conduct "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime." Memorandum from Eric H. Holder, Jr., Att'y Gen. of the United States, to All Fed. Prosecutors 2 (May 19, 2010) [hereinafter Holder Charging Policy Memo] (citations omitted) (internal quotation marks omitted), available at <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf>. See generally Alan Vinegrad, *Justice Department's New Charging, Plea Bargaining and Sentencing Policy*, N.Y. L.J., June 10, 2010, at 1–2 (comparing Attorney General Holder's charging, plea bargaining, and sentencing policies with memoranda from previous Attorneys General).

<sup>10</sup> See Holder Mandatory Minimum Memo, *supra* note 8, at 2 (detailing these criteria, which include the absence of violence or the possession of a weapon, no trafficking to or with minors, no ties to gangs or organized crime, no leadership role in a criminal organization, and no significant criminal history).

<sup>11</sup> See, e.g., Delahunty & Yoo, *supra* note 1, at 784 (criticizing the Obama Administration's use of executive "nonenforcement" to implement policy); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 674–75 (2014) (calling for limited executive discretion for nonenforcement); Ashley Parker, *Boehner to Seek Bill to Sue Obama over Executive Actions*, N.Y. TIMES, June 26, 2014, at A16 (describing Speaker Boehner's proposed lawsuit over President Obama's use of executive authority). But see, e.g., Saikrishna Bangalore Prakash, Response, *The Statutory*

duty under the Take Care Clause ends and legitimate enforcement discretion given limited resources begins.<sup>12</sup>

But even if one believes the President has broad powers to set charging policies for law enforcement officers, the President limits the discretion of his or her agents only at the front end; what about enforcement decisions already made with which the President disagrees? Even when the President provides guidance *ex ante*, there is bound to be slack between the President's wishes and the behavior of his or her many agents because no front-end guidance can anticipate the precise details and circumstances of every possible violation of the law. And because providing too much detail about enforcement discretion undermines the deterrent effect of the law, upfront guidance is typically vague in order to provide prosecutors room to bring actions where necessary and to keep would-be law violators from knowing exactly where the lines are drawn. As a result, there will undoubtedly be enforcement actions and outcomes with which the President disagrees even after the President has provided guidance to his or her agents. Additionally, the President may disagree with enforcement actions that occurred during a prior administration, just as Presidents disagree with executive orders and rules of prior administrations. The President can change the enforcement actions of prior administrations only through back-end controls.

Despite the critical importance of back-end oversight, almost all scholarly focus has been on the front end, with little to no attention paid to what can be done after enforcement decisions have already been made. This is understandable in most contexts given presidential preferences for focusing guidance efforts at the pre-enforcement stage and the legal impediments to influencing pending cases and reversing judgments already made.<sup>13</sup> But criminal cases are different: The President is not limited to front-end controls or removing prosecutors, but also has broad and explicit power at the back end of the process.

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*Nonenforcement Power*, 91 TEX. L. REV. 115, 115–17 (2013) (arguing that President Obama's selective enforcement of the Deferred Action for Childhood Arrivals (DACA) policy was not actually a suspension or dispensing of the law); Shoba Sivaprasad Wadhia, Response, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59, 60 (2013) (defending Obama's nonenforcement of the DACA program).

<sup>12</sup> See *infra* notes 249–63 (describing recent academic works on the proper boundaries of executive discretion in light of the Take Care Clause).

<sup>13</sup> See, e.g., *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.3d 1534, 1536–37 (9th Cir. 1993) (holding that the President and White House staff may not engage in *ex parte* communications with agencies in formal adjudications under the terms of the Administrative Procedure Act); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211–14 (2013) (describing the convention against “presidential direction of the adjudicative activities of executive agencies”).

The Pardon Clause vests the President with “Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”<sup>14</sup> Even those commentators most critical of the President’s refusal to enforce laws have conceded that the clemency power has an unambiguously broad reach.<sup>15</sup> Similarly, although there is a vigorous debate about the reach of presidential administration and whether the President is appropriately an “overseer” or “decider” when it comes to administrative actions,<sup>16</sup> criminal law stands on different footing. This is because the Constitution contemplates explicit presidential decisional authority when it comes to grants of mercy in criminal cases.

Clemency is thus a uniquely powerful weapon in the President’s toolkit for making sure that enforcement reflects his or her priorities and values, and ensuring that his or her agents do not contradict those views in a manner that overly restricts liberty. It is a flexible tool that can be used on an individualized basis or as a wholesale matter, to correct applications of law across a range of cases that share certain attributes. Clemency may also be granted on a conditional basis to correct particularly pernicious collateral consequences of convictions. It can, in short, be a key presidential oversight mechanism for keeping federal criminal law enforcement in check. And yet, while centralized authority over enforcement discretion at the front end has grown, the clemency power finds itself falling into desuetude.

Why would a power that rests on such strong constitutional footing receive so little use when it can be an effective mechanism for keeping prosecutors in line with presidential priorities and policies? This Article explores the fall of the clemency power and argues for its resurrection as a critical mechanism for the President to assert control over the executive branch in criminal cases. While clemency has typically been referred to as an exercise of mercy and even analogized to religious forgiveness<sup>17</sup>—which may be true as it has been applied in individual cases—it also serves a more structurally important role in the American constitutional order that has been overlooked.

Clemency is a key tool for the President to control the executive department. Those in favor of a unitary executive—the theory which

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<sup>14</sup> U.S. CONST. art. II, § 2, cl. 1. Slightly more than half of the state constitutions phrase the clemency power similarly. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 605 (1991).

<sup>15</sup> See *infra* note 263.

<sup>16</sup> See, e.g., Peter L. Strauss, Foreword, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 705 (2007).

<sup>17</sup> See Mark Osler, *A Biblical Value in the Constitution: Mercy, Clemency, Faith, and History*, 9 U. ST. THOMAS L.J. 769, 775 (2013) (describing clemency as both a constitutional and Christian value).

holds that “all federal officers exercising executive power must be subject to the direct control of the President”<sup>18</sup>—should encourage its more robust employment. It is a mechanism just as powerful—if not more so—as the power to remove executive officers with whom the President disagrees as a policy matter, or as the ability to provide front-end enforcement guidance. Similarly, advocates of strong presidential administration should applaud the greater accountability and effectiveness that comes with presidential oversight of federal criminal law policy.<sup>19</sup> Even critics of unitary executive theory or those with concerns about robust presidential decision-making authority should embrace clemency as a mechanism of control because it is explicitly and unambiguously grounded in the Constitution’s text, and it comes with an established historical pedigree. Moreover, it is a presidential tool that provides a checking mechanism that is otherwise absent in our current political environment.

The clemency power is critical given the federal criminal justice system we have today. The problem of overbroad federal criminal laws and excessive charging by federal prosecutors in recent decades has been well documented.<sup>20</sup> At the same time, the limits of front-end enforcement guidance and a convention against removal have made it difficult for Presidents to control federal prosecutors.<sup>21</sup> The pathologies associated with federal criminal lawmaking have produced a fed-

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<sup>18</sup> Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992).

<sup>19</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001) (describing the accountability and effectiveness benefits that can be achieved with presidential administration).

<sup>20</sup> See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Moral and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748–49 (2005) (arguing that federal criminal law is overbroad because it “criminalizes relatively trivial conduct” and “cover[s] subjects that were previously the exclusive province of state law”); Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1497 (2008) (describing the “academic consensus” on the overbreadth of federal criminal law); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 413 (2001) (“[P]rosecutors frequently charge more and greater offenses than they can prove beyond a reasonable doubt.”); Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 74 (1998) (counting, almost two decades ago, “more than 10,000 regulatory requirements or proscriptions carrying criminal sanctions under the current federal law”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (arguing that the overbreadth of criminal law “empower[s] prosecutors”).

<sup>21</sup> See Vermeule, *supra* note 13, at 1201–03 (noting the development of a convention against midstream removal of U.S. Attorneys). The scope of this convention is unclear. While Vermeule states it broadly, the U.S. Attorney firings that underlie Vermeule’s theory involved specific allegations that the attorneys were removed for failing to bring politically-motivated prosecutions. Thus the convention may be limited to the use of the removal power to control prosecutorial charging discretion to achieve political ends as opposed to a general convention against midterm removals.

eral criminal justice system of unprecedented size and scope<sup>22</sup> with overcrowded<sup>23</sup> and expensive<sup>24</sup> federal prisons and hundreds of thousands of individuals hindered from reentering society because of a federal record.<sup>25</sup> Clemency alone cannot solve these problems, of course, but it is one way to address poor enforcement decisions and injustices in this system, as well as to check disparities in how different U.S. Attorneys enforce the law.

Part I begins by describing the President's clemency power<sup>26</sup> under the Constitution and summarizing the history of its use, including its sharp decline in recent decades. Part II explains how this power serves as a critical mechanism for the President to control executive officials. Part III turns to the pressing need for a more robust exercise of this authority in light of the current federal criminal justice system.

## I

### THE CONSTITUTIONAL PARDON POWER

Article II of the Constitution makes clear that the President's power to grant clemency is a core executive prerogative. The power is placed alongside the commander-in-chief powers in Section 2 of

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<sup>22</sup> See AM. BAR ASS'N, CRIMINAL JUSTICE SYSTEM IMPROVEMENTS 2 (2008), available at [http://www.americanbar.org/content/dam/aba/migrated/poladv/transition/2008dec\\_crim\\_justice.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/transition/2008dec_crim_justice.authcheckdam.pdf) (reporting that the federal prison population "has more than doubled in the last 20 years"); LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP'T OF JUSTICE, NCJ 243936, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 2 (2013), available at <http://www.bjs.gov/content/pub/pdf/cpus12.pdf> (stating that in 2012, there were 216,900 inmates held in federal prisons); MARK MOTIVANS, U.S. DEP'T OF JUSTICE, NCJ 239913, FEDERAL JUSTICE STATISTICS, 2010, at 2 (2013), available at <http://www.bjs.gov/content/pub/pdf/fjs10.pdf> (similarly stating that in 2010, there were 401,290 federally sentenced offenders in confinement or under community supervision).

<sup>23</sup> See NATHAN JAMES, CONG. RESEARCH SERV., THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS (2014) available at <http://www.fas.org/sgp/crs/misc/R42937.pdf> ("Overall, the federal prison system was 36% over its rated capacity in FY2013, but high- and medium-security male facilities were operating at 52% and 45%, respectively, over rated capacity.")

<sup>24</sup> See Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Div., U.S. Dep't of Justice, to the Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 7 (July 11, 2013), available at [http://www.justice.gov/criminal/foia/docs/2013\\_annual-letter-final-071113.pdf](http://www.justice.gov/criminal/foia/docs/2013_annual-letter-final-071113.pdf) (observing that federal prison spending has increasingly crowded out other justice investments over the past decade, and that the sequester has made the situation much worse).

<sup>25</sup> See *infra* notes 347–56 and accompanying text (describing the barriers to reentry created by collateral consequences).

<sup>26</sup> The clemency power is an umbrella term that includes within it the power to pardon, grant amnesty, commute a sentence, remit fines, or issue reprieves. Kobil, *supra* note 14, at 575–76. Because the constitutional text refers specifically to pardons, it is known as the Pardon Clause, and all of the forms of clemency are often collectively viewed as species of pardoning authority and sometimes called "pardons."



Article II. Specifically, the Pardon Clause states that the President “shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”<sup>27</sup>

There was little debate over the Clause at the Framing.<sup>28</sup> The New Jersey and Virginia plans did not include a provision for the granting of clemency, but Alexander Hamilton supported a proposal based on the British model to provide for executive clemency powers.<sup>29</sup> Hamilton argued that the executive should “have the power of pardoning all offences except Treason; which he shall not pardon without the approbation of the Senate.”<sup>30</sup> The Report of the Committee of Detail modified the language to replace the exception for treason to instead exempt from clemency those cases of impeachment, and it made no mention of a role for the Senate.<sup>31</sup> Edmund Randolph’s proposal to exempt treason from the Pardon Clause’s purview failed, as did a proposal by Roger Sherman that would have required the Senate to approve any pardon by a two-thirds vote.<sup>32</sup> Unlike the clemency power possessed by most state governors at the time, which was generally subject to legislative override or sharper restrictions on its scope, presidential clemency is not subject to any legislative restrictions and can issue any time after a crime has occurred, even before trial.<sup>33</sup>

The Supreme Court has recognized that the Pardon Clause includes five forms of clemency: “pardons, commuta[tions] of sentence, reprieves, remissions of fines and penalties, and amnesties.”<sup>34</sup> Two of these, “Reprieves and Pardons,” are mentioned expressly in the Pardon Clause.<sup>35</sup> The President’s power of reprieve delays the execution of the punishment imposed by the court.<sup>36</sup> A pardon, which removes the legal consequences of a conviction, may be granted either

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<sup>27</sup> U.S. CONST. art. II, § 2.

<sup>28</sup> *Schick v. Reed*, 419 U.S. 256, 260 (1974) (pointing out that the Framers “did [not] devote extended debate to its meaning”).

<sup>29</sup> Kobil, *supra* note 14, at 590 n.125.

<sup>30</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292 (Max Farrand ed., 1911).

<sup>31</sup> Kobil, *supra* note 14, at 590. A proposal at the Convention to require Senate consent for pardons was rejected by a vote of eight to one. *Id.* at 590 n.130.

<sup>32</sup> *Id.* at 590–91.

<sup>33</sup> See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 189 (2005) (“Article II handed the president a far mightier pardon pen, authorizing him to single-handedly and conclusively pardon at any time after a crime occurred and thereby spare a man from even having to stand trial.”).

<sup>34</sup> Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 570 (2001) (footnotes omitted). See generally *id.* at 570 nn.37–42 (discussing commentary and case law on the five forms of clemency).

<sup>35</sup> U.S. CONST. art. II, § 2.

<sup>36</sup> W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 26 (1941).

before or after an individual begins his or her sentence.<sup>37</sup> In practice, pardons have typically been granted after a person has served his or her sentence and the individual has a demonstrable record of law-abiding behavior.<sup>38</sup> Pardons “restore[ ] those civil and political rights that were forfeited by reason of the conviction, most of which are a matter of state law, and remove statutory disabilities imposed by reason of having committed the offense.”<sup>39</sup>

Beyond its explicit text, the Pardon Clause also includes amnesties, commutations, and the remission of fines and forfeitures. Amnesties are essentially pardons granted to a class of offenders instead of individually.<sup>40</sup> The Supreme Court has acknowledged that the differences between amnesties and pardons amount to “philological interest” rather than “legal importance,”<sup>41</sup> but has observed that amnesties are typically “addressed to crimes against the sovereignty of the State, to political offenses, [and with] forgiveness being deemed more expedient for the public welfare than prosecution and punishment.”<sup>42</sup> Amnesties typically come in the aftermath of war or some other political upheaval.<sup>43</sup> The Court has also interpreted the Pardon Clause to vest the President with the power of commutation,<sup>44</sup> which is to give a lesser sentence than the one imposed, and to remit fines and forfeitures<sup>45</sup> on the theory that these are lesser powers included within the greater power of pardon.

In light of its textual clarity and historical background, courts have recognized few limits on the President’s clemency power.<sup>46</sup> Other than impeachment, it covers “every [criminal] offence [sic]

<sup>37</sup> *Id.* at 23; Kobil, *supra* note 14, at 576.

<sup>38</sup> Kobil, *supra* note 14, at 576.

<sup>39</sup> Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 *STAN. J. C.R. & C.L.* 253, 290 (2010).

<sup>40</sup> JOHN MABRY MATHEWS, *THE AMERICAN CONSTITUTIONAL SYSTEM* 168 (1st ed. 1932) (“Amnesty differs from pardon in that it applies to whole classes of persons or communities rather than to individuals.”).

<sup>41</sup> *Knote v. United States*, 95 U.S. 149, 153 (1877).

<sup>42</sup> *Burdick v. United States*, 236 U.S. 79, 94–95 (1915).

<sup>43</sup> Morison, *supra* note 39, at 291.

<sup>44</sup> *Biddle v. Perovich*, 274 U.S. 480, 486–87 (1927). The commuted sentence may be any sentence that is less than the one originally issued. *See Schick v. Reed*, 419 U.S. 256, 267 (1974) (holding that the President may decrease a sentence but cannot “aggravate” it).

<sup>45</sup> *E.g.*, *Ill. Cent. R.R. v. Bosworth*, 133 U.S. 92, 103 (1890); *Osborn v. United States*, 91 U.S. 474, 478 (1875).

<sup>46</sup> Because “the pardoning power is an enumerated power of the Constitution,” the Court has concluded that any limitations “must be found in the Constitution itself.” *Schick*, 419 U.S. at 267.

known to the law,"<sup>47</sup> including charges of contempt of court.<sup>48</sup> Clemency cannot affect the vested rights of a third party, nor can it command the return of monies paid into the United States treasury.<sup>49</sup> But outside of that, the President may attach conditions to a grant as long as they do not "otherwise offend the Constitution."<sup>50</sup> While the Court has allowed an individual to decline a pardon that was granted with the aim of making the individual testify in a case where he had invoked his right against self-incrimination,<sup>51</sup> individuals may not decline commutations and insist on serving more time.<sup>52</sup>

"[T]he President may exercise his discretion under the Reprieves and Pardons Clause for whatever reason he deems appropriate"<sup>53</sup> or for "no reason at all."<sup>54</sup> The President is not "required to base decisions on objective and defined criteria."<sup>55</sup> In *Ohio Adult Parole Authority v. Woodard*,<sup>56</sup> a majority of the Justices concluded that pardon procedures must comply with the Due Process Clause.<sup>57</sup> The extent of this process appears to be quite limited, however, as the Justices noted that the type of case that would cross the line would be one "whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."<sup>58</sup> Judicial supervision of

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<sup>47</sup> *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866). The offenses must be federal, of course. Federal criminal law includes the District of Columbia penal code and the Uniform Code of Military Justice. Morison, *supra* note 39, at 278–79.

<sup>48</sup> *Ex parte Grossman*, 267 U.S. 87, 115 (1925).

<sup>49</sup> *Knote v. United States*, 95 U.S. 149, 154 (1877).

<sup>50</sup> *Schick*, 419 U.S. at 266. For example, one common condition in the early years of the republic was enlistment in the Navy. Kobil, *supra* note 14, at 593. For an excellent discussion of conditional pardons, see Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665 (2001).

<sup>51</sup> *Burdick v. United States*, 236 U.S. 79, 94 (1915). A lower court created a test to determine the legality of clemency grants with strings attached: First, the condition must be in the public interest and, second, the condition may "not unreasonably infringe on the individual commuttee's constitutional freedoms." *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1236 (D.D.C. 1974).

<sup>52</sup> *Biddle v. Perovich*, 274 U.S. 480, 487 (1927).

<sup>53</sup> *Hoffa*, 378 F. Supp. at 1225.

<sup>54</sup> *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring).

<sup>55</sup> *Id.*

<sup>56</sup> 523 U.S. 272 (1998).

<sup>57</sup> Justice O'Connor made this point in her concurrence, which was joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 288–89 (O'Connor, J., concurring in part and concurring in the judgment). Justice Stevens, in a separate opinion, agreed. *Id.* at 290–92 (Stevens, J., concurring in part and dissenting in part).

<sup>58</sup> *Id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 292 (Stevens, J., concurring in part and dissenting in part) ("There are valid reasons for concluding that even if due process is required in clemency proceedings, only the most basic elements of fair procedure are required.").

clemency is thus minimal. For its part, Congress cannot limit the power in any way.<sup>59</sup> In the words of the Supreme Court, “[t]o the executive alone is intrusted [sic] the power of pardon; and it is granted without limit.”<sup>60</sup>

The pardon power is, then, a sweeping constitutional power that is checked only by the political process and the power of voters to elect a new President should they disagree with the clemency decisions of the current one,<sup>61</sup> or a Congress angry enough to seek impeachment.<sup>62</sup>

Despite the clear sweep of the power, presidential clemency grants have become rarities in recent decades. The remainder of this section explores why one of the clearest grants of power in the Constitution would be used so infrequently, even as Presidents have made expansive claims to executive power on far shakier constitutional footing.<sup>63</sup> The analysis begins with the history of clemency grants and then explains why they have declined.

### A. *The Use of the Clemency Power*

Clemency was commonplace in the nation’s early history, and the recipients were “ordinary people for whom the results of a criminal prosecution were considered unduly harsh or unfair.”<sup>64</sup> Before the Civil War, the system was relatively informal.<sup>65</sup> Until the middle of the

<sup>59</sup> See *Ex parte* Garland, 71 U.S. 333, 380 (“This power of the President is not subject to legislative control.”).

<sup>60</sup> *United States v. Klein*, 80 U.S. 128, 147 (1871).

<sup>61</sup> President Ford’s pardon of President Nixon affected his popularity and may have cost him the election. See Scott Shane, *For Ford, Pardon Decision Was Always Clear-Cut*, N.Y. TIMES, Dec. 29, 2006, at A1 (noting that President Ford himself thought the pardon “was a major factor in his failure to win election to the presidency in 1976”).

<sup>62</sup> See *Ex parte* Grossman, 267 U.S. 87, 121 (1925) (noting that if the President were to abuse his clemency powers, the remedy would be impeachment). No President has been impeached because of the exercise of the pardon power. Although President Johnson’s grant of general amnesty after the Civil War drew the ire of Congress, it was not an official charge in his impeachment proceedings. Leonard B. Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 U. COLO. L. REV. 1, 16 (1976).

<sup>63</sup> See *infra* note 99 and accompanying text.

<sup>64</sup> Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1175 (2010).

<sup>65</sup> See George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850*, 16 FED. SENT’G REP. 212, 213–14 (2004) (describing the pre–Civil War pardon process, where judges would urge presidential intervention on behalf of defendants); see also Love, *supra* note 64, at 1175 (noting the early reliance of Presidents on their Secretaries of State as “official custodian[s] of pardon documents” and on their Attorneys General “for advice about how and when to exercise their constitutional power”). Efforts at formalizing the pardon process came relatively late. President Polk issued pardon warrants spelling out the reasons for pardon,

nineteenth century, the Secretary of State had official authority to investigate and issue pardon warrants, though typically the Attorney General also reviewed the applications.<sup>66</sup> Presidents often heard personally from those seeking pardons. President Lincoln, for example, took an active interest in clemency requests from soldiers as well as civilians and had many pardon petitioners to the White House.<sup>67</sup>

As federal criminal laws expanded, the clemency process became more formalized. In the administration of Millard Fillmore, the Attorney General and Secretary of State agreed that it made more sense for the Attorney General to take over the process of reviewing all applications. After the Civil War, in 1865, Congress approved funding for a pardon clerk to assist the Attorney General in reviewing clemency petitions, and then created the Office of the Pardon Attorney in 1891.<sup>68</sup>

Even after these changes, grant rates remained relatively high. Between 1885 and 1930, clemency was frequently granted more than 300 times per year, and on average 222 times per year.<sup>69</sup> Between 1892 and 1930, 27% of applications received some form of clemency grant.<sup>70</sup> More than 75% of those grants involved the reduction or elimination of a prison term.<sup>71</sup>

The first big shift in clemency practice occurred after federal parole emerged on the scene in 1910. Parole essentially replaced clemency as the primary mechanism for reducing sentences.<sup>72</sup> As a result, by the 1930s, the bulk of clemency grants went to restore the rights of individuals who had already served their sentences because parole,

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President Fillmore delegated responsibility over clemency petitions to his attorney general, and President Buchanan appointed a pardon clerk. *Id.* at 1176–77.

<sup>66</sup> Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 286 (2013).

<sup>67</sup> Love, *supra* note 64, at 1177–78.

<sup>68</sup> Barkow, *supra* note 66, at 286–87.

<sup>69</sup> Love, *supra* note 64, at 1185–86.

<sup>70</sup> See HUMBERT, *supra* note 36, at 97–99 tbl.I.

<sup>71</sup> Love, *supra* note 64, at 1186.

<sup>72</sup> Love, *supra* note 64, at 1189 (“By the end of the 1930s, parole had largely supplanted clemency as a means of releasing prisoners.”); see also Krent, *supra* note 50, at 1678 (explaining that conditional pardons declined with the passage of federal parole and probation statutes). In 1939, Attorney General Cummings’s office recommended that “[a]ll releases on condition of good behavior and under supervision should be under the parole law, and not by conditional pardon.” 3 U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES 297 (1939). Attorney General Cummings compared the institutions of pardon and parole and determined that parole was preferable because “the parole organization has better facilities [than pardon] for determining when a prisoner should be so released and for supervising him thereafter.” *Id.*

not commutation, was the mechanism for shortening sentences.<sup>73</sup> Between 1910 and 1929, Presidents granted more commutations than pardons.<sup>74</sup> However, between 1930 and 1936, pardons became much more prevalent, with Presidents granting 1.7 times as many pardons as commutations.<sup>75</sup> But that did not mean that sentences ceased being reduced, because parole reduced at least as many sentences as had been previously reduced by commutations.<sup>76</sup> Thus, even with this structural change that shifted the primary mechanism for sentence reductions from commutations to parole, individuals in the federal system continued to receive reductions in their sentences and relief to assist in their reentry to society.<sup>77</sup>

The 1980s ushered in the second, more dramatic shift in clemency practice. This was the beginning of the substantial decline in clemency that we continue to see at present. First, the passage of the Sentencing Reform Act abolished parole in the federal system,<sup>78</sup> so individuals

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<sup>73</sup> See Love, *supra* note 64, at 1186–89 (describing the rise of post-sentence pardons to restore civil rights).

<sup>74</sup> See HUMBERT, *supra* note 36, at 98–99 tbl.I.

<sup>75</sup> See HUMBERT, *supra* note 36, at 99 (depicting the number of applications for clemency and the dispositions made of them). The ratio of commutations to pardons began its sharp decline in the early twentieth century. See *Clemency Statistics*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/pardon/statistics.htm> (last updated April 27, 2015) (outlining the clemency statistics for each President in the twentieth and twenty-first centuries). Between 1920 and 1935, the percentage of total clemency actions that were commutations fell dramatically. In 1920, 50% of clemency actions were commutations. See HUMBERT, *supra* note 36, at 98 (showing 320 acts of commutation out of 639 total acts of clemency granted). By 1930, that figure dropped to 38%, and in 1935, it was just 11%. See *id.* at 99 (counting 85 acts of commutation out of 221 total acts of clemency granted in 1930 and 36 acts of commutation out of 311 total acts of clemency granted in 1935).

<sup>76</sup> Compare MARGARET WERNER CAHALAN WITH THE ASSISTANCE OF LEE ANNE PARSONS, U.S. DEP'T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 164 tbls.6-18, 6-19A (1986) (noting that approximately 202 federal inmates were released on parole in 1915, 919 in 1920, and 2447 in 1935), with *Clemency Statistics*, *supra* note 75 (indicating 73 federal inmates were released due to commutation in 1915 and 306 in 1920, but only 36 in 1935). The parole numbers here are approximate because historical data from the Bureau of Justice Statistics reported parolees as a percentage of released inmates, not as an absolute total. CAHALAN, *supra*, at 164 tbls.6-18, 6-19A.

<sup>77</sup> The inverse relationship between parole and pardons discussed above continued into the 1940s and 1950s. In 1940 and 1945, approximately 2931 and 3852 federal prisoners were released on parole, CAHALAN, *supra* note 76, at 164 tbl.6-19A, while 31 and 25 inmates received commutations, respectively, *Clemency Statistics*, *supra* note 75. By 1950 and 1955, respectively, parole releases grew to approximately 3646 and 4396, CAHALAN, *supra* note 76, at 164 tbl.6-19A, while commutations decreased to 14 and 4, *Clemency Statistics*, *supra* note 75. In the same time period, the number of pardons generally increased. In 1940, Roosevelt granted 242 pardons, and in 1945, Roosevelt and Truman granted a combined 374 pardons. *Id.* In 1950, Truman pardoned 400, but in 1955, Eisenhower granted only 59 pardons. *Id.*

<sup>78</sup> Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. § 3551 (2012)).

sentenced after November 1, 1987 received determinate sentences.<sup>79</sup> The rationale for this was the movement toward “truth in sentencing” so that offenders and the public would know exactly what term an offender would serve.<sup>80</sup> Although a few people informed Congress of the need for commutation practice to change in light of the abolition of parole, the executive branch did not modify its approach or policies.<sup>81</sup>

Second, the same tough-on-crime political forces that ushered in the abolition of parole also brought about a decline in the use of clemency.<sup>82</sup> President Reagan’s immediate predecessor, President Carter, granted 21% of all clemency requests, which was down from President Kennedy’s 36% grant rate, President Johnson’s 31% grant rate, President Nixon’s 36% grant rate, and President Ford’s 27% grant rate.<sup>83</sup>

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<sup>79</sup> See U.S. DEP’T OF JUSTICE, HISTORY OF THE FEDERAL PAROLE SYSTEM 2 (2003), available at <http://www.justice.gov/uspc/history.pdf> (providing a history of the federal parole system).

<sup>80</sup> See S. REP. NO. 98-223, at 34 (1983) (quoting Senator Kennedy, who introduced the Sentencing Reform Act, explaining that the federal sentencing system was “unfair to the defendant, the victim, and society” because “[i]t defeat[ed] the reasonable expectation of the public that a reasonable penalty will be imposed at the time of the defendant’s conviction, and that a reasonable sentence actually will be served”).

<sup>81</sup> When the House Judiciary Committee’s Subcommittee on Criminal Justice considered the Sentencing Reform Act, some experts testifying before the Subcommittee discussed the need to increase the availability of clemency as a safety valve given the abolition of parole. See *Federal Sentencing Revision: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 98th Cong. 866 (1984) (statement of Dennis Curtis, Professor, Univ. Southern Cal. Law Ctr.) (“If we were to abolish parole, and thereby decrease our opportunities to correct mistakes in sentencing or to grant mercy when appropriate, we would invite expansion of the executive pardon function . . .”); *id.* at 982 (testimony of Norm Maleng, King Cnty. Prosecuting Att’y) (noting the need for “some safety net functions” including “a board of clemency”). Some testimony before the Subcommittee on Criminal Justice on a precursor bill to the Sentencing Reform Act also raised the need for commutations as a safety valve in light of the elimination of parole. See *Federal Criminal Law Revision: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 97th Cong. 1002 (1981) (testimony of Norm Maleng, King Cnty. Prosecutor & Vice-Chairman, Wash. State Sentencing Guidelines Comm’n) (commenting on S. 1630, a precursor to the Sentencing Reform Act, and noting that “[w]ithout a parole authority to release a prisoner . . . [t]he appellate courts and the clemency and pardons board” provide relief); *id.* at 64 (testimony of Jonathan Rose, Assistant Att’y Gen., U.S. Dep’t of Justice) (“[I]f you eliminate the parole system, you will eliminate a safety valve, [but] there is always the executive clemency mechanism as well.”); *id.* at 204 (testimony of William Greenhalgh, Professor, Georgetown Univ. Law Ctr.) (noting—in response to Representative McCollum’s statement that “we always have executive clemency if we do not have parole”—that clemency “does not happen very often”).

<sup>82</sup> See Barkow, *supra* note 66, at 288 (describing the relationship between the politics of crime and clemency); Love, *supra* note 64, at 1170–71 (same).

<sup>83</sup> Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT’G. REP. 139, 140–41 (2001); Kobil, *supra* note 14, at 602.

President Reagan's clemency grant rate dipped to 12%.<sup>84</sup> Thus, while the trend was already downward, the decline grew steeper with President Reagan's presidency. This was undoubtedly part of his deliberate strategy to create a tougher crime policy with the goal of "polariz[ing] the debate" on drugs and prisons, so that Republicans would be seen as the party of law and order.<sup>85</sup> Criminal law emerged as a key political issue, and politicians learned that being seen as weak on crime was a devastating political liability.<sup>86</sup> Subsequent Presidents have thus continued the sharp downward trajectory in clemency grants—President George H.W. Bush granted 5% of clemency requests, President Clinton granted 6% of requests, and President George W. Bush granted only 2%.<sup>87</sup>

The rate of decline in commutation grants in particular is even sharper. While the advent of parole led to a big dip, a residual number of commutations were still granted. In 1910, when federal parole was first introduced, President Taft granted 18% of commutations; by 1915, Taft's rate of commutations granted had shrunk to 13%.<sup>88</sup> The decline continued into the 1920s<sup>89</sup> and 1930s: In 1930, the rate was 7%.<sup>90</sup> In 1940 and 1945, President Roosevelt granted 2% and 3% of commutations, respectively.<sup>91</sup>

President Nixon granted 7% of the requested commutations, a rate that dipped to 3% with President Carter, and less than 1% with Presidents Reagan and George H.W. Bush.<sup>92</sup> Although the rate of commutations granted grew slightly to 1.1% with President Clinton, it

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<sup>84</sup> Shanor & Miller, *supra* note 83, at 141.

<sup>85</sup> See Barkow, *supra* note 66, at 288 (discussing the politics of criminal justice during the Reagan presidency).

<sup>86</sup> See *id.* (“[N]o President could afford to be seen as soft on criminal law.”).

<sup>87</sup> Mark Osler & The Clemency Reform Project, *Clemency for the 21st Century: A Systemic Reform of the Federal Clemency Process 1* (Apr. 10, 2013) (unpublished manuscript) (on file with the *New York University Law Review*), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2248361](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2248361).

<sup>88</sup> *Clemency Statistics*, *supra* note 75. The Office of the Pardon Attorney did not distinguish between pardon and commutation petitions until 1962. Love, *supra* note 64, at 1186 n.66. As a result, the percentages of commutations granted reflect the number of commutations granted divided by the total number of pardon and commutation petitions received.

<sup>89</sup> In 1919, 1920, and 1921, President Wilson granted 23%, 33%, and 22% of commutations, respectively. *Clemency Statistics*, *supra* note 75. Commutations for alcohol offenses during Prohibition likely account for this spike. William M. Landes & Richard A. Posner, *The Economics of Presidential Pardons and Commutations*, 38 J. LEGAL STUD. 61, 74 (2009).

<sup>90</sup> *Clemency Statistics*, *supra* note 75.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*



fell to 0.13% with George W. Bush, and rested at 0.01% with President Obama as of January 1, 2015.<sup>93</sup>

Clemency grant rates have plummeted to such low levels that observers have noted that it has become “hard to tell what distinguishes the handful of lucky winners from the thousands of disappointed suitors”; in the end, the process seems to “operate[ ] like a lottery.”<sup>94</sup> The *New York Times* editorial board has been harsher, declaring that the comparison is unfair to lotteries.<sup>95</sup>

### B. Analyzing the Decline

The number of people with federal convictions continues to grow,<sup>96</sup> and the current federal prison population is greater than the prison population of any state.<sup>97</sup> Given the rise in federal prosecutions and prisoners, the number of clemency requests has likewise increased.<sup>98</sup> Yet the number of clemency grants has fallen, both in absolute terms and as a proportion of requests. This drop has occurred in the shadow of aggressive claims of presidential power in other areas.<sup>99</sup> This section considers the key reasons for the decline despite the strong constitutional footing of the clemency power.

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<sup>93</sup> *Id.* President Obama’s rate rose to 0.26% by April 27, 2015, *id.*, and will likely continue increase given his stated commitment to granting commutations for individuals who meet certain criteria, *see infra* note 156 and accompanying text.

<sup>94</sup> Love, *supra* note 64, at 1201–02.

<sup>95</sup> Editorial, *What Happened to Clemency?*, N.Y. TIMES, Aug. 22, 2013, at A26 (“No one seems to know why some [clemency] requests are granted and others denied. . . . [A]t least if you pick the right [lottery] numbers, you’re guaranteed to win.”).

<sup>96</sup> *See* GLENN R. SCHMITT & ELIZABETH JONES, U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2013, at 1 (2014), *available at* [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2014/FY13\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2014/FY13_Overview_Federal_Criminal_Cases.pdf). (“Over the last decade, the number of these cases has generally increased each year . . . .”).

<sup>97</sup> *See* E. ANN CARSON, U.S. DEP’T OF JUSTICE, NCJ 247282, PRISONERS IN 2013, at 3 tbl.2, *available at* <http://www.bjs.gov/content/pub/pdf/p13.pdf> (reporting that there were 215,866 federal prisoners at the end of 2013, while the state with the largest prison population—Texas—had a prison population of 168,280).

<sup>98</sup> *See Clemency Statistics*, *supra* note 75 (showing a 47% increase in the number of clemency petitions received each year between 1994 and 2004, and a 476% increase between 2004 and 2014).

<sup>99</sup> *See, e.g.*, Dawn E. Johnsen, *What’s a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 397–98 (2008) (describing the Bush Administration’s expansion of executive privilege); Deborah N. Pearlstein, *Ratcheting Back: International Law as a Constraint on Executive Power*, 26 CONST. COMMENT. 523, 523 (2010) (recounting the Bush Administration’s expansion of executive power to “detain, interrogate, and try suspected terrorists” in the wake of the terrorist attacks of September 11, 2001); Roger Wicker, *Executive Overreach and Recess Appointments*, 31 MISS. C. L. REV. 319, 319 (2013) (criticizing President Obama’s use of recess appointments); Laura Meckler, *Obama Shifts View of Executive Power*, WALL ST.

## 1. *Politics*

The main reason for fewer clemency grants is the politics surrounding clemency and crime more generally. The American system has taken a sharply punitive turn in the past four decades.<sup>100</sup> Scholars such as David Garland and William Stuntz have offered persuasive accounts of this dynamic. Both identify the widespread disorder and increasing violence of the 1960s as the beginning point of this turn.<sup>101</sup> As violent crime rates, including homicide rates, skyrocketed and urban riots broke out across America, the public lost faith in the criminal justice system and viewed it as too lenient. Elected officials responded to this public fear and dissatisfaction by taking ever-tougher stances on crime. Republicans embraced the strategy first, but Democrats quickly followed. Key interests have also pushed for more expansive and tougher criminal laws, including prosecutors, victims' rights organizations, rural communities that may depend on prisons for jobs, private prison companies, and corrections unions.<sup>102</sup> The media plays a part in the dynamic by focusing attention on the most heinous crimes, regardless of overall crime rates or patterns, thus creating the impression of constant threat and danger.<sup>103</sup>

Not much stands against this push for more expansive laws and sentences. Those likely to become criminal defendants "cannot easily self-identify in advance" to advocate for change.<sup>104</sup> Those already branded as criminals and their families and friends are likewise not well positioned to lobby for change because they are disproportionately poor, lack organization, and often do not even have the right to vote.<sup>105</sup> And while the effects of the get-tough criminal justice system have produced negative effects on particular communities and

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J., Mar. 30, 2012, at A1 (noting Obama's broad use of executive authority to "press his domestic agenda").

<sup>100</sup> See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 5 (2011) ("Between 1972 and 2000, the nation's imprisonment rate quintupled. The number of prisoner-years per murder multiplied nine times. Prisons that had housed fewer than 200,000 inmates in Richard Nixon's first years in the White House held more than 1.5 million as Barack Obama's administration began." (footnote omitted)).

<sup>101</sup> See DAVID GARLAND, *THE CULTURE OF CONTROL* 75 (2001) (identifying "social, economic, and cultural changes" that became "most pronounced from the 1960s onward" as key factors driving the punitive turn); STUNTZ, *supra* note 100, at 244–81 (describing the relationship between rising crime rates in the 1960s and the punitive turn that followed).

<sup>102</sup> Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. REV.* 715, 728–29 (2005).

<sup>103</sup> See *id.* at 749–50 (identifying the failure of the media to accurately portray crime rates).

<sup>104</sup> *Id.* at 726.

<sup>105</sup> See *id.* (describing how those who have served or are serving sentences have little political influence to engender change in criminal law).

blocks,<sup>106</sup> those communities do not always push back against tougher criminal laws. Many individuals in those communities prefer a strong punitive response, in spite of its costs, because they believe the punitive approach avoids more pervasive violence.<sup>107</sup> Racial justice groups are similarly conflicted in responding to this dynamic. Even though tough-on-crime politics have had a disproportionately harsh effect on people of color, that segment of the population is also disproportionately affected by crime and divided on how to deal with the issue.<sup>108</sup> And given their missions to accomplish racial justice across a range of areas, these groups may decide that a focus on criminal justice would compromise their chances of success in other areas.<sup>109</sup> As a result, these groups have largely focused on improving the rights of law-abiding citizens and have paid less attention to criminal justice reform.<sup>110</sup>

An elected official—including a President or governor thinking about clemency—quickly realizes that there is little to gain from pursuing any action perceived as soft on crime. This is obviously true when crime rates are high and criminal justice is a top concern of the public, as it was in the 1970s and 1980s. But it remains true even as crime rates decline. Because there are few identifiable or powerful constituent groups that will respond to criminal justice reforms with votes or donations, politicians gain little from these efforts, at least in the short-term.<sup>111</sup> But they always stand ready to lose, because the

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<sup>106</sup> See Jennifer Gonnerman, *Million-Dollar Blocks*, VILLAGE VOICE (Nov. 9, 2004), <http://www.villagevoice.com/2004-11-09/news/million-dollar-blocks/> (explaining the rise in so-called “million dollar blocks,” defined as those “where so many residents were sent to state prison that the total cost of their incarceration will be more than \$1 million”).

<sup>107</sup> See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 36–44 (2012) (describing the support by some individuals in majority minority communities for a punitive response).

<sup>108</sup> See *id.* at 42–44 (delineating the viewpoint differences among people of color on tough-on-crime policies).

<sup>109</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 54, 223–29 (2012) (recounting the efforts of civil rights advocates coupled with the silence toward mass incarceration reform).

<sup>110</sup> See *id.* at 226–27 (describing how the professionalization of civil rights organizations “enhanced their ability to wage legal battles but impeded their ability” to address caste in the criminal justice system, and explaining that civil rights advocates seek “stories of racial injustice” that evoke sympathy and defy stereotypes—which criminals do not).

<sup>111</sup> Smart criminal justice reforms yield dividends over a longer term by reducing crime and recidivism rates, but politicians facing election pressures typically do not have the luxury of waiting to point to results. See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1281 (2005) (pointing out that politicians “tend not to find it worthwhile to propose long-term solutions that address the root causes of crime but that will not yield tangible results before the next election cycle”). And because it is difficult to demonstrate the link between any one criminal justice initiative and crime rates, even if a reform were to produce results relatively quickly, the public may doubt the causal

risk is ever-present that one bad decision will grab the public's attention and make the official vulnerable to being voted out of office. That was the lesson drawn from Willie Horton, who committed a rape and robbery while on furlough from a life sentence. Horton was featured in one of George H.W. Bush's presidential campaign ads against former Massachusetts Governor Michael Dukakis. Many credit the ad as being a critical part of Dukakis's defeat—and that has certainly been the lesson that politicians have drawn from it.<sup>112</sup>

This political climate has produced America's sky-high incarceration rate<sup>113</sup>—a rate several times greater than that in other Western democracies.<sup>114</sup> There has been a proliferation of new criminal laws with ever-broader coverage and more relaxed mens rea requirements.<sup>115</sup> Parole, as noted, has been greatly constricted.<sup>116</sup> Sentences

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link. See FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* (2007) (explaining the complexity and interaction of factors that are linked to declining crime rates).

<sup>112</sup> See, e.g., DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* (1995) (describing how the effect of the Horton ad influenced the decisions of subsequent politicians); *Dead Man Walking Out*, *ECONOMIST*, June 8, 2000, available at <http://www.economist.com/node/315488> (characterizing President Clinton's hawkish positions on criminal justice as a lesson learned from the Horton legacy).

<sup>113</sup> *Prison Population Rates per 100,000 of the National Population*, INT'L CENTRE FOR PRISON STUD., [http://www.prisonstudies.org/info/worldbrief/wpb\\_stats.php?area=all&category=WB\\_poprate](http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=WB_poprate) (last visited Jan. 27, 2015) (showing America's rate of imprisonment leading every country in the world except the small country of Seychelles, which has a population just over 90,000).

<sup>114</sup> The United States imprisons 707 people per 100,000 of the population; for comparison, the United Kingdom imprisons 149 per 100,000, Canada 118, and Germany 81. *Id.*

<sup>115</sup> See JOHN S. BAKER, JR., HERITAGE FOUNDATION, LEGAL MEMORANDUM NO. 26, *REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 1* (2008), available at <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes> (finding that Congress added about fifty-seven crimes per year between 2000 and 2007, a rate in line with the 1980s and 1990s, and that many of the new crimes lacked mens rea requirements); STUNTZ, *supra* note 100, at 260–63 (noting that while “criminal liability rules grew broader [and] the number of overlapping criminal offenses mushroomed,” there was a doctrinal shift away from requiring prosecutors to show that defendants *intended* to commit a wrong or break a law); BRIAN W. WALSH & TIFFANY M. JOSLYN, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* (2010) (examining all nonviolent criminal offense statutes introduced during the 109th Congress (2005–06) and finding that more than half lacked requirements that defendants know their conduct was wrongful or prohibited).

<sup>116</sup> The federal government and sixteen states have abolished discretionary parole entirely. *Parole*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 817, 817 (2009). Many jurisdictions that did not do so have adopted “truth-in-sentencing” laws that prevent inmates from receiving parole before they have served a minimum percentage of their sentences. Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1043–44 (2010); see also

for most offenses have gone up sharply.<sup>117</sup> Mandatory minimum sentences and dramatic increases for recidivist offenders, such as three-strikes laws, are commonplace.<sup>118</sup>

These developments have occurred across both state and federal jurisdictions, with the dynamic at the federal level being the more extreme. The number of criminal offenses has exploded to the point that it is not even possible to get an accurate assessment of just how many federal crimes there are.<sup>119</sup> The sharpest increase has occurred in the last four decades: More than 40% of the federal criminal laws passed after the Civil War have come after 1970, and more than 25% were passed after 1980.<sup>120</sup> Federal sentences are typically more severe than state sentences for similar crimes,<sup>121</sup> and the federal government is less likely than the states to pay attention to the costs associated with more severe sentences.<sup>122</sup>

It is easy to see how federal clemency has been a casualty in this environment despite its firm rooting in the Constitution. Although he

TODD REIMERS, PAROLE: THEN & NOW 3–4 (1999), available at <http://www.senate.state.tx.us/SRC/pdf/ib0599.pdf> (mapping state parole policies).

<sup>117</sup> See U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 46 (2004) (observing that the average federal sentence length doubled after the passage of the Sentencing Reform Act). *But see* Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1106 (1992) (noting that the 1980 determinate sentencing legislation in North Carolina slightly reduced the sentence lengths for the twenty most common felonies).

<sup>118</sup> See Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 11 (1999) (noting that every state and the federal government has at least some mandatory sentencing laws); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 69 (2009) (describing the proliferation of mandatory minimum sentencing laws, and noting that twenty-five states and the federal government have “three strikes and you’re out” laws).

<sup>119</sup> See *Criminal Code Reform: Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. 1 (2014) (statement of Rep. F. James Sensenbrenner, Jr., Chairman, Over-Criminalization Task Force) (characterizing the federal criminal code as a “vast chaotic, disorganized amalgamation of Federal criminal statutes”); *id.* at 2 (statement of Rep. Robert C. “Bobby” Scott, Member, H. Comm. On the Judiciary) (reporting that the Congressional Research Service could not give an accurate count of the number of criminal provisions in the code); *id.* at 25 (testimony of Roger A. Fairfax, Jr., Professor, George Washington Univ. L. Sch.) (noting the criticism of the federal criminal code “for its excessive length, lack of organization, redundant provisions, and outdated offenses”).

<sup>120</sup> Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 885 (2009).

<sup>121</sup> Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 574 (2011).

<sup>122</sup> Barkow, *supra* note 111, at 1300–11 (explaining why the federal government is less likely than state governments to pay attention to cost constraints in setting criminal justice policies).

was not the beneficiary of clemency, the shadow of Willie Horton looms large over executives considering pardons or commutations.<sup>123</sup> Former Arkansas Governor Mike Huckabee, a relatively prolific pardoner, received national attention and criticism after a man whose sentence he commuted in 2000 subsequently murdered four police officers in 2009.<sup>124</sup> Many posited that the commutation would have a negative effect on Huckabee's future chances for elected office.<sup>125</sup>

In addition to the Horton critique, clemency grants also expose executives to accusations of malfeasance and favoritism. On his last day in office, President Clinton granted 140 pardons and several commutations to, among others, Clinton's half-brother and billionaire fugitive Marc Rich.<sup>126</sup> Criticism of Clinton's clemency decisions<sup>127</sup> led him to defend the pardons and commutations a month later in an op-ed in the *New York Times*.<sup>128</sup> To take another example, Dan Kobil recounts how an Ohio governor lost a reelection bid in part because he commuted the death sentences of six individuals. The press corps who had hoped the governor could get a second term complained that he could have done more good by not commuting the sentences. As one put it, "[s]o you saved the lives of six nonentities . . . . And who cares? If you'd kept your mouth shut, the world would be no poorer,

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<sup>123</sup> See, e.g., Jay Carney, *Huckabee's Willie Horton*, TIME (Dec. 5, 2007), [http://swamp.land.time.com/2007/12/05/huckabees\\_willie\\_horton/](http://swamp.land.time.com/2007/12/05/huckabees_willie_horton/) (referring to Governor Huckabee's pardon controversy as his "Willie Horton"); Jonathan Martin, *Governors More Clemency-Wary*, SEATTLE TIMES, June 21, 2010, at A1 (discussing Governor Gregoire's pardons in the context of Willie Horton).

<sup>124</sup> See Perry Bacon Jr. & Garance Franke-Ruta, *Huckabee's Pardons at Issue After Police Killings*, WASH. POST, Dec. 1, 2009, at A2 (noting "renewed scrutiny of [Huckabee's] pardon record" as a result of the episode).

<sup>125</sup> See, e.g., Kate Zernike, '00 Clemency May Be Issue for Huckabee, N.Y. TIMES, Dec. 1, 2009, at A1 (referencing Huckabee's pardon of Maurice Clemmons as "a big issue"); Jonathan Martin, Op-Ed., *Mike Huckabee's Maurice Clemmons Problem*, SEATTLE TIMES OPINION NORTHWEST BLOG (Dec. 18, 2013, 6:31 AM), <http://blogs.seattletimes.com/opinionnw/2013/12/18/mike-huckabees-maurice-clemmons-problem/> ("If Huckabee is serious, he'll have to answer his Maurice Clemmons problem.").

<sup>126</sup> See Sonya Ross, *Clinton Pardons More Than 100*, WASH. POST (Jan. 20, 2001, 10:49 AM), [http://www.washingtonpost.com/wp-srv/aponline/20010120/aponline104904\\_000.htm](http://www.washingtonpost.com/wp-srv/aponline/20010120/aponline104904_000.htm) (discussing the pardons and their recipients). See generally *Commutations and Pardons Granted by Clinton*, WASH. POST, Jan. 21, 2001, at A17 (listing the recipients).

<sup>127</sup> See, e.g., Editorial, *An Indefensible Pardon*, N.Y. TIMES, Jan. 24, 2001, at A18 (criticizing President Clinton for pardoning Marc Rich); Elaine Shannon & Viveca Novak, *Bill, How Low Can You Go?*, TIME (Feb. 17, 2001), <http://content.time.com/time/nation/article/0,8599,99807,00.html> (criticizing Clinton for pardoning Manhattan lawyer Harvey Weinig).

<sup>128</sup> William Jefferson Clinton, Op-Ed., *My Reasons for the Pardons*, N.Y. TIMES, Feb. 18, 2001, at A13.

and you'd be around for another four years to fight for the underdog."<sup>129</sup>

In this environment, it should hardly be surprising that many current governors have sharply limited their offices' clemency grants<sup>130</sup> or that Presidents have done the same.

## 2. *Structural Bias at DOJ*

While politics is the main force driving clemency's decline, the structure for issuing clemency decisions also influences how often clemency is dispensed. The decline in federal clemency has been particularly pronounced because it is now embedded in a structure that makes grant recommendations unlikely. Since 1891, clemency applications have been processed by the Office of the Pardon Attorney, which is housed inside the Department of Justice. For most of that time, the Pardon Attorney reported directly to the Attorney General, who then relayed the Pardon Attorney's recommendations to the White House. In 1978, Attorney General Griffin Bell delegated supervisory authority to the Deputy Attorney General (DAG), where it remains to this day. The bulk of the DAG's work involves the supervision of federal prosecutions, so his or her main focus is on enforcement. Indeed, law enforcement is the main mission of the entire DOJ.<sup>131</sup> To place clemency in the DOJ thus creates an inherent tension because all clemency decisions are, in effect, reviews of prosecutorial decisions already made.<sup>132</sup> Put another way, each pardon application is "a potential challenge to the law enforcement policies underlying the conviction."<sup>133</sup> It is no surprise that clemency decisions "increasingly reflected the perspective of prosecutors" who would be disinclined to second-guess themselves and their policies.<sup>134</sup>

This is not to suggest that prosecutors are always biased against clemency. When President McKinley approved the first clemency rules in 1898, he required clemency applications to be forwarded to the judge who heard the case and the U.S. Attorney's Office that

<sup>129</sup> Kobil, *supra* note 14, at 608 (quoting MICHAEL V. DiSALLE, *THE POWER OF LIFE OR DEATH* 204 (1965)).

<sup>130</sup> See, e.g., Maggie Clark, Stateline, *Governors' Pardons Are Becoming a Rarity*, GOVERNING (Feb. 11, 2013), <http://www.governing.com/news/state/sl-governors-balance-politics-with-pardons.html> (citing Wisconsin's Governor Scott Walker, New York's Governor Andrew Cuomo, and Massachusetts's Governor Deval Patrick as having granted no pardons as of the date of the article).

<sup>131</sup> Barkow, *supra* note 66, at 312.

<sup>132</sup> *Id.* at 313 ("Prosecutors have a stake in maintaining their reputations and therefore opposing any second look at their decision-making process.").

<sup>133</sup> Love, *supra* note 64, at 1194.

<sup>134</sup> Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 *FORDHAM URB. L.J.* 1483, 1496 (2000).

brought it. Even though there was a “requirement of a favorable recommendation from the prosecutor, . . . in most years between 1900 and 1936, more than half of the thousands of petitions filed” were forwarded to the White House with a recommendation in favor of a clemency grant.<sup>135</sup>

But prosecutors who came of age during the tough-on-crime era are likely to have a different frame of reference than prosecutors trained when criminal law was not a hot-button political issue. These prosecutors would likely share the general public’s sense of concern over disorder. Moreover, the desire for career advancement may make federal prosecutors less amenable to recommending grants today than they were in the early part of the twentieth century because of the changing political calculus.

Prosecutors also develop viewpoints from their experience, which itself reflects changes in the broader culture and political landscape. Undoubtedly, working on criminal cases day after day desensitizes prosecutors to incarceration.<sup>136</sup> If you hand out twenty-year sentences on a routine basis, a five-year or ten-year sentence that is disproportionate given the facts may not seem as significant as it would be to someone who takes a fresh perspective on the case. As these sentences became commonplace because of the political process, prosecutors become further immune to the idea that any one case is exceptional. Attorney General William Mitchell commented on this dynamic in a speech in which he observed that President Hoover was more inclined to grant clemency than the DOJ. As he put it, “[i]f executive clemency were granted in all cases of suffering families, the result would be a general jail delivery, so we [at DOJ] have to steel ourselves against such appeals.”<sup>137</sup> In contrast, he noted that the President, “with a human sympathy born of his great experiences in the relief of human misery, has now and again, not for great malefactors but for humble persons in cases you never heard of, been inclined to disagree with the prosecutor’s viewpoint and extend mercy.”<sup>138</sup>

Prosecutors as a matter of culture and practice see their function as enforcers and not as policymakers. Congress makes the call whether to criminalize behavior and to provide the sentencing range it

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<sup>135</sup> Love, *supra* note 64, at 1181–82.

<sup>136</sup> See G.K. Chesterton, *The Twelve Men*, in TREMENDOUS TRIFLES 80, 85–86 (1909) (“[T]he horrible thing about all legal officials, even the best . . . is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place.”).

<sup>137</sup> William D. Mitchell, Att’y Gen. of the United States, Reform in Criminal Procedure (Oct. 13, 1932), *quoted in* HUMBERT, *supra* note 36, at 121.

<sup>138</sup> *Id.*



thinks is appropriate; a prosecutor's job is to enforce that law. Prosecutors thus tend not to view cases with attention to collateral consequences on families or third parties,<sup>139</sup> much less to the broader effects charging policies may have. As such, they may miss instances where the punishment does not make sense as a matter of justice or where applying a law in a particular case produces more harm than good. Their occupation makes them far more inclined to deny a clemency request than those who do not enforce the criminal laws in the first instance.

This helps explain why the substantive regulations that the Pardon Office follows discourage positive referrals to the President.<sup>140</sup> The rules stress that a commutation "is an extraordinary remedy that is rarely granted."<sup>141</sup> The DOJ appears to have first taken this position in a report issued after parole had replaced clemency as the primary mechanism for releasing offenders.<sup>142</sup> One can see the basis for that view in a system where parole is available because parole officials can look at the same factors as the executive in reviewing a commutation request. But the DOJ's view on commutations did not change when parole was abolished. Left in place was the notion that a commutation request was extraordinary and rarely granted even when parole did not provide an alternative means of reviewing sentences or changed circumstances.

The regulations do not place the same thumb on the scale against a grant in the case of pardons, though they do require waiting periods before individuals can file. Regulations adopted during the Kennedy Administration required pardon applicants to wait three years from release to file, and five years in the case of serious crimes.<sup>143</sup> Those waiting periods were extended during the Reagan Administration and remain in effect today.<sup>144</sup> Under current regulations, all applicants must wait five years from the date they were released to file, and those convicted of serious crimes must wait seven years.<sup>145</sup> Reviewing officials are to consider the "[p]ost-conviction conduct, character, and

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<sup>139</sup> See *Collateral Consequences Weighed for Corporations, Not for Individuals*, CORP. CRIME REP. (May 24, 2013, 9:01 AM), <http://www.corporatecrimereporter.com/news/200/collateralconsequences05242013/> (quoting Mythili Raman, then Acting Chief of the Criminal Division of the Department of Justice, as noting in testimony before Congress that while the collateral consequences for corporations are part of DOJ charging decisions, "[f]or individuals, collateral consequences never enter into the equation").

<sup>140</sup> See Kobil, *supra* note 14, at 603 (describing how the regulations governing applications for clemency impede its use).

<sup>141</sup> U.S. ATTORNEYS' MANUAL § 1-2.113 (1997).

<sup>142</sup> Love, *supra* note 64, at 1191.

<sup>143</sup> Kobil, *supra* note 14, at 603.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

reputation” of the applicant, the “[s]eriousness and relative recentness of the offense,” and the applicant’s “[a]cceptance of responsibility, remorse, and atonement.”<sup>146</sup> In addition, the DOJ states that a legal disability “can provide persuasive grounds for recommending a pardon.”<sup>147</sup> There are undoubtedly many applicants who have had clean records for years who have good reasons for clearing their records. And yet, the recommendations for pardon grants, like those for commutations, remain at record lows.<sup>148</sup>

The President is not bound to follow the Pardon Attorney’s recommendations as a matter of law,<sup>149</sup> but as a matter of practice the President has been quite deferential to the recommendations.<sup>150</sup> It would be politically risky to grant a pardon in the face of a negative recommendation from the Pardon Office, particularly if the individual receiving the grant were to go on to commit an additional crime.<sup>151</sup>

Presidents, however, do not seem to have paid much attention to this dynamic or to care about it until the end of their terms in office. At that point, they may be more likely to contemplate their historical legacy and look for applications to grant so that they do not go on record as particularly unforgiving or as having abandoned the clemency power completely. This is also the point when concerns with reelection and fears of partisan retaliation fade, so Presidents may be more amenable to making clemency decisions where the anticipated criminal justice and law enforcement benefits outweigh the anticipated costs—instead of making decisions solely based on political costs and benefits. That is, Presidents may focus more on the criminal justice policy merits at the end of their terms.<sup>152</sup> The problem is that

<sup>146</sup> U.S. ATTORNEYS’ MANUAL, *supra* note 141, at 1-2.112.

<sup>147</sup> *Id.*

<sup>148</sup> Between President Obama’s first inauguration and April 27, 2015, the Pardon Office received 1888 pardon petitions, and 64 petitions were granted. During President George W. Bush’s administration, 2498 pardon petitions were received and 189 were granted. *Clemency Statistics*, *supra* note 75.

<sup>149</sup> 28 C.F.R. § 1.11 (2014).

<sup>150</sup> Dafna Linzer and Jennifer LaFleur, *Presidential Pardons Heavily Favor Whites*, (Dec. 3, 2011, 11:00 PM), PROPUBLICA, <http://www.propublica.org/article/shades-of-mercy-presidential-forgiveness-heavily-favors-whites> (“[President] Bush followed the recommendations of the pardons office in nearly every case . . . President Obama—who has pardoned 22 people, two of them minorities—has continued the practice of relying on the pardons office.”).

<sup>151</sup> See Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 606 (2012) (“[I]t would be a bold—or foolhardy—president who overrode the recommendations of his pardon attorney.”).

<sup>152</sup> See P.S. Ruckman, Jr., *The Pardoning Power: The Other “Civics Lesson.”* 20 (Nov. 7–10, 2001) (unpublished manuscript) (on file with the *New York University Law Review*), available at <http://pardonresearch.com/papers/7.pdf> (“[F]reedom from public criticism and/

by then it is usually too late to make sound decisions, because the current apparatus is not prepared to provide grant recommendations.

So even at the end of a President's term in office, when he or she may be looking for grants, they are not to be found. One can see the controversial clemency decisions issued by President Clinton at the end of his second term as a reflection of this broken process. Former Pardon Attorney Margaret Love notes that "[t]he extraordinary spate of irregular grants on Clinton's last day in office was as much the result of the Justice Department's neglect of its institutional responsibilities as it was of the President's disregard of his."<sup>153</sup> President George W. Bush explicitly complained that he was not being provided with grant recommendations when he sought them and urged President Obama to focus on fixing the clemency process.<sup>154</sup>

President Obama seemed poised to take this advice when he first assumed office. His initial White House Counsel considered the creation of a clemency board that would take clemency decisions out of the DOJ.<sup>155</sup> President Obama now appears to have abandoned that plan. Instead, he seems to have adopted a strategy for increasing the number of positive grant recommendations by the DOJ by providing specific criteria for cases where he is inclined to give commutations and seeking the help of outside interest groups in identifying those applications for the DOJ.<sup>156</sup> Putting aside the relative merits of those different paths,<sup>157</sup> both approaches reflect the fact that, even in a

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or partisan retaliation might be just the very thing a president needs to make a fair decision in a tough case.”).

<sup>153</sup> Love, *supra* note 64, at 1200.

<sup>154</sup> See Peter Baker, *Don't Go Away Mad: The Final, Heartfelt Conflict that Ended the Bush-Cheney Partnership*, N.Y. TIMES MAG., Oct. 13, 2013, at 36 (recounting President Bush's final advice to President Obama before Obama's inauguration: “Whatever you do, Bush told Obama, make sure you set a pardon policy from the start and then stick to it.”).

<sup>155</sup> Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 20 (2015).

<sup>156</sup> This is known as Clemency Project 2014. It targets individuals with minimal criminal histories and without any record of violence or prison disciplinary proceedings who are currently serving long sentences for offenses where there has been a change in the law such that they would likely have received a substantially lower sentence if sentenced today. See *Clemency Project Overview and FAQs*, NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS <http://www.nacdl.org/clemencyproject/> (last visited Feb. 2, 2015) (describing criteria prisoners need to meet to be eligible for this executive program). The Project relies on lawyers outside of the DOJ to screen the cases for these criteria, but it recently hit a setback when the Administrative Office of the United States Courts ruled that Federal Defenders and lawyers appointed under the Criminal Justice Act could not work on the cases. Alia Malek, *Federal Defenders Barred from Massive Clemency Drive*, AL JAZEERA AMERICA (Aug. 1, 2014), <http://america.aljazeera.com/articles/2014/8/1/drugs-clemency-attorneys.html>.

<sup>157</sup> Mark Osler and I have explained the shortcomings of Clemency Project 2014 and have argued that the sounder approach for presidential administration and criminal justice

political climate that depresses the grant rate, Presidents are still interested in using this power. Interest in these approaches also reveals that the current system does not produce enough positive grants on its own, and therefore the President needs to intervene in some manner to provide a corrective.<sup>158</sup>

## II

### CLEMENCY, THE UNITARY EXECUTIVE, AND PRESIDENTIAL ADMINISTRATION

Clemency's demise should be cause for alarm among those who care about individualized justice, but its disuse raises a deeper structural concern. The clemency power is a critical mechanism for the President to control federal law enforcement officers, so its disuse should also concern anyone interested in maintaining strong presidential oversight over the executive branch. In short, reforming the structure of clemency should be considered an urgent matter for any President who cares about his constitutional responsibility to oversee the administration of federal criminal justice. This Part first explains this structural function of clemency and then explores its relationship to unitary executive and presidential administration theories.

#### A. Clemency's Structural Function

Commentators have recognized several purposes of clemency. In an early case interpreting the power, Chief Justice Marshall called its application "an act of grace."<sup>159</sup> Subsequent cases have similarly emphasized clemency's function as dispensing individualized mercy.<sup>160</sup>

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policy is the creation of a bipartisan expert body that can analyze petitions and track reentry and recidivism data. Barkow & Osler, *supra* note 155, at 4–7. Recent articles have raised serious questions about how Clemency Project 2014 is operating. *See, e.g.*, Josh Gerstein, *Obama's Drug-Sentencing Quagmire*, POLITICO (Jan. 5, 2015, 5:32 AM), <http://www.politico.com/story/2015/01/barack-obama-drug-sentencing-policy-113954.html> (pointing out that President Obama's "plan to commute the sentences of nonviolent drug offenders who were caught up in the disparities in laws governing crack and powder cocaine is lagging, burdened by vague guidelines, lack of Justice Department resources and the unusual decision to invite advocacy groups like the ACLU to help screen applications"); Sari Horwitz, *Bureaucracy Slows Clemency Efforts*, WASH. POST, Mar. 1, 2015, at A3 (noting that the progress of Clemency Project 2014 "has proven deeply frustrating to prisoners' advocates").

<sup>158</sup> For an argument that the proper fix involves the creation of a clemency board, see Barkow & Osler, *supra* note 155, at 19–21 (proposing an independent, bipartisan clemency board that serves solely at the pleasure of the President and whose members are not subject to confirmation by the legislative branch).

<sup>159</sup> *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833).

<sup>160</sup> *See, e.g.*, *Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011) ("[C]lemency [is] a prerogative granted to executive authorities to help ensure that justice is tempered by mercy."); *Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) ("The clemency power . . .

Others have highlighted clemency as a means for correcting errors in the system. This can include substantive errors of wrongful convictions, or procedural errors, such as cases where constitutional or other legal rights have been abused or ignored.<sup>161</sup> Clemency can also be used to address charging and sentencing decisions to ensure that punishment is just and proportionate.<sup>162</sup> As the Supreme Court has observed, “[e]xecutive clemency exists to afford relief from undue harshness . . . in the operation or enforcement of the criminal law.”<sup>163</sup> This view has deep roots in English common law, where clemency was “an important vehicle for dispensing mercy” in the face of a punishment regime where all felonies otherwise received the death penalty.<sup>164</sup>

Other commentators have emphasized the benefits to the state from granting clemency. Blackstone argued that clemency “endear[s] the sovereign to his subjects, and contribute[s] more than any thing to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.”<sup>165</sup> Sir Edward Coke also noted that mercy strengthened the king’s power.<sup>166</sup> Later commentators like James Iredell and Alexander Hamilton pointed out that clemency might be necessary to maintain civil peace in cases of rebellions and insurrections.<sup>167</sup> James Wilson argued during the Constitutional Con-

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hold[s] out the promise that mercy is not foreign to our system.”); *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (noting that clemency is an act of “mercy”); *Schick v. Reed*, 419 U.S. 256, 266 (1974) (describing the clemency power as allowing the President to “forgive” the defendant); James D. Barnett, *The Grounds of Pardon in the Courts*, 20 *YALE L.J.* 131, 131 (1910) (referring to a pardon as “an act of grace” and “a work of mercy”).

<sup>161</sup> See Hoffstadt, *supra* note 34, at 572 (noting that clemency can address two types of errors: “convicting the wrong person” and “convicting the right person without affording her the full panoply of constitutional and legal rights to which she is entitled”).

<sup>162</sup> See *id.* at 568 (noting one role of clemency is “enhancing the fairness of sentences”).

<sup>163</sup> *Ex parte Grossman*, 267 U.S. 87, 120 (1925).

<sup>164</sup> Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting “Apparent Innocence” in the Criminal Law*, 33 *AM. CRIM. L. REV.* 1, 44–45 (1995); see also KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 17 (1989) (observing that clemency “softened the harshness of the system” where “death was the penalty prescribed for every felony”); Douglas Hay, *Property, Authority and the Criminal Law* (noting that pardons “moderated the barbarity of the criminal law in the interests of humanity” and although “erratic and capricious,” they were “a useful palliative until Parliament reformed the law in the nineteenth century” (citing 1 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 116, 137 (1948)), in *ALBION’S FATAL TREE* 17, 44 (1975)).

<sup>165</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*391.

<sup>166</sup> 3 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 233 (photo. reprint 1985) (London, W. Clarke & Sons 1817) (“Mercy and truth preserve the king, and by clemency is his throne strengthened.”).

<sup>167</sup> THE FEDERALIST No. 74, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1961); James Iredell, Address at the North Carolina Ratifying Convention (July 28, 1788), in 4 THE FOUNDERS’ CONSTITUTION 18 (Philip B. Kurland & Ralph Lerner eds., 1987).

vention that pardons could be used to get individuals to testify against others.<sup>168</sup> Justice Holmes highlighted that clemency “is not a private act of grace from an individual happening to possess power,” but rather “a part of the Constitutional scheme,” and that its grant reflects “the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.”<sup>169</sup>

The Framers and contemporary scholars<sup>170</sup> have also seen the clemency power as a key part of the separation of powers because it allows the executive to check the legislative and judicial branches. At the North Carolina ratifying convention, James Iredell pointed out that clemency allowed the executive to cabin overbroad general laws because “[i]t is impossible for any general law to foresee and provide for all possible cases that may arise.”<sup>171</sup> Clemency allowed a correction for the “many instances where, though a man offends against the letter of the law, . . . peculiar circumstances in his case may entitle him to mercy.”<sup>172</sup> Alexander Hamilton similarly defended the Pardon Clause on this basis, noting that “[t]he criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”<sup>173</sup>

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<sup>168</sup> Rosenzweig, *supra* note 151, at 598. James Iredell also described the use of pardons as a tool to obtain cooperation from co-conspirators. Iredell, *supra* note 167, at 18 (noting that “it is often necessary to convict a man by means of his accomplices” and the President “ought to be intrusted [sic] with the most effectual means of procuring” accomplice testimony).

<sup>169</sup> *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

<sup>170</sup> See, e.g., Hoffstadt, *supra* note 34, at 593 (“[T]he clemency power acts as an Executive check on both the Legislative and the Judicial branches.” (footnote omitted)); Kobil, *supra* note 14, at 596 n.176 (“[C]lemency was intended to give the executive a check on the legislative and judicial functions.”); Love, *supra* note 134, at 1506 (observing that clemency can “serve[ ] the purpose of checking the legislature”); Morison, *supra* note 39, at 302 (arguing that the Pardon Clause serves “as a limited check on Congress’ legislative authority by empowering the President to alleviate the legal consequences of a criminal offense, either on behalf of a specific individual or an entire class of offenders, in spite of the existing statutory framework”); Rosenzweig, *supra* note 151, at 595 (noting that the pardon power is “the personification of the government acting as a check on the institutions of the government”); Note, Executive Revision of Judicial Decisions, 109 HARV. L. REV. 2020, 2034 (1996) (noting that the role of the pardon power in checking judicial decision making has been recognized by the Supreme Court).

<sup>171</sup> Iredell, *supra* note 167, at 17.

<sup>172</sup> *Id.*

<sup>173</sup> THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For a more modern statement, see MOORE, *supra* note 164, at 85 (“Since there are only so many levels of punishment, and since the levels of culpability are infinite and the human capacity for causing harm is boundless in its variety, there will necessarily be ‘hard cases’ in which the predetermined sentence is wrong.” (internal citation omitted)).

The Framers were particularly attuned to the need for an executive check on overbroad legislation because of their awareness of English criminal law in the eighteenth century. It was replete with capital sentences for most crimes, including thefts, because the legislature “err[ed] on the side of severity when considering particular offences.”<sup>174</sup> As John Langbein observed about this period of English history, “[p]articulans are inflationary, because there is no counter-constituency to resist the analogy that extends penal sanctions from one thing to the next.”<sup>175</sup> The Framers would have understood this dynamic and would have also seen how pardons were a critical check to avoid applications of the law that were too severe.<sup>176</sup>

While clemency performs all the functions previously mentioned, it has another role that has been largely ignored. The clemency power is a key mechanism for the President to control executive power and the agents of that power, namely, federal prosecutors.<sup>177</sup> Federal prosecution is a core executive power,<sup>178</sup> and the prosecutors who exercise that power possess enormous discretion in deciding whether and how to charge criminal cases.<sup>179</sup> There are often multiple federal statutes that could be charged in a given case, and prosecutors can pick any or all of them (or choose not to charge at all).<sup>180</sup> In making this selection, prosecutors control whether defendants will be subject to mandatory

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<sup>174</sup> John H. Langbein, *Albion's Fatal Flaws*, 98 PAST & PRESENT 96, 118 (1983) (critiquing Hay, *supra* note 164).

<sup>175</sup> *Id.*

<sup>176</sup> See Hay, *supra* note 164, at 44 (describing this function of pardons in England in the period preceding the American Revolution).

<sup>177</sup> Margaret Love has noted this function for clemency, observing that it can be a “useful policy and management tool” for the President by “revealing where particular laws or enforcement policies are overly harsh, and where prosecutorial discretion is being unwisely exercised,” and by giving the President a mechanism to send “a very direct and powerful message about how he wishes the law to be enforced by his appointees in the future.” Love, *supra* note 64, at 1206.

<sup>178</sup> *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (“There is no real dispute that the functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.”).

<sup>179</sup> See, e.g., Barkow, *supra* note 120, at 876–84 (discussing the wide-ranging and weakly checked power of federal prosecutors); Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 403–05 (2013) (arguing that the prevalence of plea bargaining, the wide-range of potential charges, the scaling back of parole, and the presence of mandatory minimums have all contributed to “prosecutors’ domination of the process”); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIRCUIT REV. 1, 2 (2009) (“Prosecutors decide which cases to pursue and plea bargains to accept, determining the fates of the vast majority of criminal defendants who choose not to stand trial.”).

<sup>180</sup> Barkow, *supra* note 120, at 877; Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1423 (2008); see also Stuntz, *supra* note 20, at 518 (describing the breadth of the criminal code as it relates to

minimum sentences and what sentencing range will be triggered under the Sentencing Guidelines.<sup>181</sup> Prosecutors also determine which offenders should receive sentence reductions for cooperation.<sup>182</sup>

These prosecutorial decisions receive almost no judicial oversight precisely because courts view these decisions as within the “‘special province’ of the Executive.”<sup>183</sup> In *Heckler v. Chaney*, the Supreme Court held that agency non-enforcement decisions are “presumptively unreviewable.”<sup>184</sup> The Court analogized the FDA’s decision not to enforce a provision of the Food, Drug, and Cosmetic Act at issue in the case to the enforcement decisions of criminal prosecutors, noting that both decisions have “long been regarded as the special province of the Executive Branch.”<sup>185</sup> Commentators have largely accepted this deference to prosecutorial decision making.<sup>186</sup> Courts leave it to the President to regulate this enforcement discretion precisely because it is part of the President’s duty to “take Care that the Laws be faithfully executed.”<sup>187</sup>

Yet Presidents have done very little to regulate criminal law enforcement discretion even though there are significant disparities in how different U.S. Attorneys charge cases.<sup>188</sup> The Attorney General,

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federal misrepresentation crimes and how prosecutors can choose among one or more of these charges).

<sup>181</sup> See Barkow, *supra* note 120, at 877 (noting that the prevalence of mandatory minimum laws allows prosecutors to bring charges that come with strict penalties).

<sup>182</sup> See *id.* at 877–78 (explaining that the prosecutor’s decision to depart on the basis of substantial assistance is the only way most defendants are able to avoid mandatory minimum sentences).

<sup>183</sup> *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)); see also *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013) (describing the broad presidential power of prosecutorial discretion).

<sup>184</sup> 470 U.S. at 832 (finding the FDA’s non-enforcement decision to be precluded from judicial review by Section 701(a)(2) of the Administrative Procedure Act); see also *Chaney v. Heckler*, 718 F.2d 1174, 1192 (D.C. Cir. 1983) (Scalia, J., dissenting) (“[E]nforcement priorities are not the business of this Branch, but of the Executive . . .”), *rev’d*, 470 U.S. 821 (1985).

<sup>185</sup> *Heckler*, 470 U.S. at 832.

<sup>186</sup> See, e.g., Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1352 (2008) (“[M]ost commentators worry more about the coercive power of prosecutors rather than their power to be lenient. More importantly, courts have refused to police prosecutorial charging decisions, and prosecutorial power is rarely highlighted in the press as a cause for concern.”); Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1306 n.25 (2000) (“Mercy is tolerated readily in prosecutorial decision making, particularly in charging decisions.”).

<sup>187</sup> *Armstrong*, 517 U.S. at 464 (quoting U.S. CONST. art. II, § 3); see also Price, *supra* note 11, at 684–85 (noting that the Office of Legal Counsel takes a similarly broad view of the scope of executive charging discretion).

<sup>188</sup> See BRIAN D. JOHNSON, *THE MISSING LINK: EXAMINING PROSECUTORIAL DECISION-MAKING ACROSS FEDERAL DISTRICT COURTS* iii–iv (2014) (describing disparities in charge reductions and case declinations across different ages, genders, races, and federal district courts), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/>



the President's delegate to oversee all federal prosecutors, has offered little guidance on how federal prosecutors should exercise their prosecutorial discretion. Each U.S. Attorney has "plenary authority with regard to federal criminal matters" within his or her respective district and is "invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority."<sup>189</sup>

The DOJ has offered some guidance in various memos and through the U.S. Attorneys' Manual, but the memos offer instruction at a high level of generality that leaves room for wide variation in interpretation by each U.S. Attorney's Office.<sup>190</sup> Even when the memos address specific substantive issues—such as whether to charge a corporation<sup>191</sup> or when federal drug charges should be brought<sup>192</sup>—

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245351.pdf; Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 424 (2010) (combining data from the Sentencing Commission and the Administrative Office of the U.S. Courts to conclude that gender exerts a statistically significant influence on charging decisions).

<sup>189</sup> U.S. ATTORNEYS' MANUAL, *supra* note 141, at 9-2.00 (2009).

<sup>190</sup> For a terrific summary of charging policy differences among U.S. Attorneys since Attorney General Benjamin Civiletti first published Principles of Federal Prosecution in 1980, see Vinegrad, *supra* note 9, at 1–2. For examples of approaches that give line prosecutors more discretion, see Memorandum from Janet Reno, U.S. Att'y Gen., to Holders of U.S. Attorneys' Manual, Title 9 (Oct. 12, 1993) (describing how a prosecutor can individually assess each case when determining whether or not to bring a charge, despite the Sentencing Guidelines); Holder Mandatory Minimum Memo, *supra* note 8, at 1–2 (discussing how prosecutors should use their charging discretion to preserve federal resources and weigh various factors not related to the evidence before charging); U.S. ATTORNEYS' MANUAL, *supra* note 141, at 9-27.300 (encouraging prosecutors to consider a number of factors while charging the defendant with the "most serious offense that is consistent with the nature of the defendant's conduct"). Attorney General Holder has also emphasized federalism concerns, instructing prosecutors not to initiate charges unless he or she determines that "the prosecution serves a substantial federal interest, the person is not subject to effective prosecution elsewhere, and there is no adequate non-criminal alternative to prosecution." Memorandum from Eric Holder, Jr., U.S. Att'y Gen., to Heads of Dep't of Justice Components and U.S. Att'ys, 1 (Aug. 12, 2013), available at <http://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-substantial-federal-interest.pdf>. Attorney General John Ashcroft offered the most stringent parameters in recent decades, instructing line prosecutors that they "*must* charge and pursue the most serious, readily provable offense." Ashcroft Memo, *supra* note 9, at 2 (emphasis added). Even under this more restrictive regime, prosecutors could take different views on what could be "readily" proven and could seek supervisor approval of a lesser charge. See Vinegrad, *supra* note 9, at 1 (describing procedures prosecutors had to follow under the Ashcroft Memo).

<sup>191</sup> There are a series of memoranda specifying what factors should be considered before charging a corporation criminally. See Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Atty's, pt. II.A (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>; Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Atty's 3–4 (Jan. 20, 2003), available at <http://www.albany.edu/acc/courses/acc695spring2008/thompson%20memo.pdf>;

they leave federal prosecutors with ample discretion to determine how to enforce federal law. And, in fact, U.S. Attorneys' Offices have varied in their interpretations of the memos and their charging decisions.<sup>193</sup>

This generality is understandable. The memos cannot anticipate every case that will arise under the thousands of federal criminal laws, or the local circumstances that may influence charging decisions in the ninety-four federal districts. Moreover, for strategic reasons, the memos are written in vague terms so that would-be offenders do not look for enforcement loopholes to exploit. The idea is to give prosecutors guidance without undermining the deterrent force of the law. Thus, for most of the past thirty-four years, the DOJ's policies on charging have given prosecutors considerable discretion to take dif-

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Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Att'ys 4 (Dec. 12, 2006), *available at* [http://www.justice.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf); Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Atty's 3-4 (Aug. 28, 2008), *available at* <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf>.

<sup>192</sup> See, e.g., Ogden Memo, *supra* note 7, at 1 (addressing charging policies in jurisdictions that legalized medical marijuana); Cole 2011 Memo, *supra* note 7, at 2 (providing further clarification on charging policies in jurisdictions with legalized medical marijuana); Cole 2013 Memo, *supra* note 5, at 1 (addressing charging policies in states that have legalized marijuana); Holder Mandatory Minimum Memo, *supra* note 8, at 2 (outlining the factors in determining whether to charge quantities that trigger a mandatory minimum).

<sup>193</sup> For example, U.S. Attorneys in California indicated in August of 2013 that the DOJ charging memos on medical marijuana would not stop them from pursuing cases involving medical and recreational marijuana. See David Downs, *US Attorney Melinda Haag to Continue Crackdown Despite White House Directive*, E. BAY EXPRESS LEGALIZATION NATION BLOG (Aug. 30, 2013), <http://www.eastbayexpress.com/LegalizationNation/archives/2013/08/30/us-attorney-melinda-haag-to-continue-crackdown-despite-white-house-directive> (quoting a spokesperson for the U.S. Attorney's Office for the Northern District of California as stating that the office did "not expect a significant change" in its policies because "it appears that the cases that have been brought in this district are already in compliance with the guidelines"); Matt Volz, *Medical Marijuana Roadmap Paved by DOJ Decision*, HUFFINGTON POST (Sept. 4, 2013, 8:30 AM), [http://www.huffingtonpost.com/2013/09/04/medical-marijuana-doj\\_n\\_3865009.html](http://www.huffingtonpost.com/2013/09/04/medical-marijuana-doj_n_3865009.html) ("U.S. Attorney Benjamin Wagner, whose office covers the Eastern District of California, said more than half of the cases his office prosecutes comply with the criteria set out by the policy memo."). For a discussion of raids on medicinal marijuana dispensaries in the Obama administration, see Tim Dickinson, *Obama's War on Pot*, ROLLING STONE, Feb. 16, 2012, at 32, *available at* <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216> ("With more than 100 raids on pot dispensaries during his first three years, Obama is now on pace to exceed Bush's record for medical-marijuana busts."). Similarly, despite instructions on charging corporations, it is difficult to predict when a company will be charged criminally or whether the government will elect to reach a deferred prosecution or non-prosecution agreement instead. See Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1187 (2006) (arguing that "wildly varying and seemingly contradictory charging practices may hamper deterrence and reform").

ferent positions on how federal law should be enforced.<sup>194</sup> Individual prosecutors take different views about how cases should be charged, and there is wide geographic variation even with the DOJ's guidance memos.<sup>195</sup> That discretion means there will inevitably be cases in which prosecutors bring charges in conflict with presidential priorities and policies.

Clemency provides an *ex post* corrective for cases the President believes were charged inappropriately. Many times since the nation's founding, Presidents have used the clemency power to express their disagreement with charging decisions. This parallels the practice in England in which the king used the pardon power to police charging decisions by private citizens based on the king's views of an individual offender (often informed by the judge in that case)<sup>196</sup> or based on broader theories of culpability (typified by pardons for offenders who were young, did not exhibit violence, or were motivated by economic or other distress).<sup>197</sup> Presidents have likewise used the clemency power not only to voice disagreement with a particular decision to charge, but also to reflect broader policy views.

The use of the clemency power to implement presidential policies is best seen in the use of broad, systemic grants.<sup>198</sup> According to

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<sup>194</sup> See JOHNSON, *supra* note 188, at 57, 104 (using a dataset of 284,869 federal arrests between 2003 and 2005 to find strong evidence for “[s]ignificant variation” across federal districts in case dismissals and charge reductions); Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 177–85 (2004) (describing variation among U.S. Attorneys’ Offices, in spite of DOJ policy memos, in the application of several policies and practices).

<sup>195</sup> See, e.g., Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 101–02 (2005) (highlighting “[t]he actions of some participants in the criminal justice system,” including prosecutors, which “caused more arbitrary variation in criminal sentences”); Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 142 (2005) (describing different U.S. Attorneys’ Offices’ attitudes towards charging drug crimes); Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 230 (2003) (“[G]eographic locality doubtless plays a role in deciding which cases to bring to trial.”).

<sup>196</sup> See Langbein, *supra* note 174, at 109 (noting the “considerable influence” of judges over the pardon process).

<sup>197</sup> See *id.* at 113 (noting five categories of factors that tended to influence clemency decisions in favor of the accused in eighteenth-century England: character, age or physical health, “circumstances of the crime,” socioeconomic status, and “respectability” of the defendant or his family (citing P.J.R. King, *Decision-Makers and Decision-Making in the 18th Century Criminal Law: The Social Groups Involved in the Punishment of Property Offenders and the Criteria on Which Their Decisions Were Based* 22–28 (Mar. 1981) (unpublished typescript))). A later version of King’s typescript was published as Peter King, *Decision-Makers and Decision-Making in the English Criminal Law, 1750–1800*, 27 HIST. J. 25 (1984).

<sup>198</sup> For a superb overview of these types of pardons, see Shanor & Miller, *supra* note 83, at 139–40. See also Ruckman, *supra* note 152, at 28 fig.3 (listing presidential amnesties).

Charles Shanor and Marc Miller, at least one-third of U.S. Presidents have used the clemency power in this way.<sup>199</sup> This began immediately with President Washington's pardons of participants in the Whiskey Rebellion<sup>200</sup> and has continued throughout American history. Thomas Jefferson pardoned all those incarcerated under the Alien and Sedition Acts in light of his view that the legislation was unconstitutional.<sup>201</sup> After the Civil War, President Andrew Johnson used his clemency power "single-handedly to eviscerate a large plank of congressional Reconstruction policy."<sup>202</sup> President Wilson used his clemency power to express his disagreement with the Volstead Act, granting clemency to hundreds of individuals convicted of alcohol-related offenses.<sup>203</sup> President Roosevelt granted amnesty to more than 1500 people who violated espionage or draft laws.<sup>204</sup> Presidents Ford<sup>205</sup> and Carter<sup>206</sup> granted amnesty to thousands of people who had failed to register for the draft during the Vietnam War in violation of the Selective Service Act. President Kennedy granted clemency to hundreds of first-time nonviolent drug offenders as an expression of disagreement with mandatory drug punishments in certain cases he viewed as disparate and not consistent with average sentences in comparable cases.<sup>207</sup>

And, of course, there are countless instances where Presidents have used the clemency power not systematically but individually to correct outlier cases that, in the President's view, should not have been charged as they were.<sup>208</sup> Those cases can also advance broader

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<sup>199</sup> Shanor & Miller, *supra* note 83, at 139.

<sup>200</sup> *Id.* at 140.

<sup>201</sup> *Id.* at 143.

<sup>202</sup> Morison, *supra* note 39, at 309–11.

<sup>203</sup> Ruckman, *supra* note 152, at 1–8 (noting that President Wilson used his clemency power often in cases involving offenses related to alcohol and particularly in the aftermath of the Volstead Act, which was passed after an override of his veto).

<sup>204</sup> *Id.* at 28 fig.3.

<sup>205</sup> Mark Osler & Matthew Fass, *The Ford Approach and Real Fairness for Crack Convicts*, 23 FED. SENT'G REP. 228, 229.

<sup>206</sup> Proclamation No. 4483, 42 Fed. Reg. 4391 (Jan. 24, 1977).

<sup>207</sup> Shanor & Miller, *supra* note 83, at 142 (noting reports from the Attorney General that indicated some of the commutations were granted because the "sentences were felt to be considerably longer than the average sentences imposed for such offenses" and "could be considered disparate").

<sup>208</sup> For example, President Clinton issued pardons and reprieves for individuals "sentenced pursuant to mandatory-sentencing drug laws" who he "felt . . . had served long enough." Clinton, *supra* note 128. President George W. Bush pardoned John Edward Forte, likely because of "the mandatory minimum sentences required in drug cases." *Bush Pardons 14 Individuals: Outgoing President Also Commutes the Prison Sentence of 2 Others*, NBC NEWS (Nov. 24, 2008), [http://www.nbcnews.com/id/27895909/ns/politics-white\\_house/t/bush-pardons-individuals/#.U-LyoPIdWIE](http://www.nbcnews.com/id/27895909/ns/politics-white_house/t/bush-pardons-individuals/#.U-LyoPIdWIE). In 2013, President Barack Obama commuted the sentences of eight people whose crack cocaine convictions were the result of

policies because they send messages to prosecutors about what kinds of cases go too far in the President's view.<sup>209</sup>

Clemency is a key means for "achieving uniformity in law execution."<sup>210</sup> The President represents national interests, whereas U.S. Attorneys might favor local interests or constituencies that cut against national interests and uniformity.<sup>211</sup> A crime that may seem severe in the eyes of a local prosecutor because of how it compares to crime more generally in that jurisdiction may not be severe when viewed with a national lens that focuses on all federal cases. When prosecutors exercise their charging discretion in a manner that conflicts with the President's view of how the laws should be faithfully executed, clemency provides a mechanism for correcting those judgments so that they fall in line with the view of the President, who, as Chief Justice Marshall put it when he was serving as a Representative from Virginia in the House, "expresses constitutionally the will of the nation."<sup>212</sup>

This is not an argument for the politicization of prosecution. Federal prosecutors should be independent from politics so that individuals are charged based on what they have done, not what political ends their prosecutions serve. But to acknowledge the cultural independence of the Department of Justice in making decisions about individual cases does not require giving the Department complete control over larger policy questions of criminal law. The elected President can and should appropriately weigh in on big-picture judgment

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an "unfair system." Saki Knafo, *Obama Commutes Sentences of 8 Inmates Convicted of Crack Offenses*, HUFFINGTON POST (Jan. 23, 2014, 1:38 AM), [http://www.huffingtonpost.com/2013/12/19/obama-pardon-crack-cocaine\\_n\\_4474876.html](http://www.huffingtonpost.com/2013/12/19/obama-pardon-crack-cocaine_n_4474876.html) (quoting Press Release, Pres. Barack Obama, Statement by the President on Clemency (Dec. 19, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/12/19/statement-president-clemency>). Zachary Price provides similar examples of the President making individualized determinations that cases should not be prosecuted in the first place or should be dismissed as a matter of executive enforcement discretion. Price, *supra* note 11, at 728–30; see also Rosenzweig, *supra* note 151, at 595–96 (noting that the pardon power gives the President a mechanism to mitigate punishment where there was not sufficient moral blame to justify the sentence).

<sup>209</sup> Barkow & Osler, *supra* note 155, at 10–12 (explaining this signaling function of clemency).

<sup>210</sup> Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 552 (2005) (discussing the importance of the unitary executive in enforcing the federal law uniformly).

<sup>211</sup> Cf. Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1217 ("As the executive, the president is supposed to make the hard resource-balancing decisions that cannot be entrusted to a 538-person political body that will rarely be able to reach consensus on micro decisions, not to mention a group that will invariably want the best for its members' individual constituencies.").

<sup>212</sup> 10 ANNALS OF CONG. 615 (1800).

calls, such as overall enforcement priorities and whether laws extend too far so as to require discretion to focus on curbing their abuses.

It is also important to recognize that the cultural independence of prosecutors can pose dangers of its own. Prosecutors' decisions to bring charges threaten individual liberty, thus it is critical that they face checks on their judgment. Judicial checks are notably lacking in federal criminal law today, with most cases resolved by plea instead of jury, and mandatory sentencing taking away the power of judges to temper prosecutorial decisions that stretch too far.<sup>213</sup> It is wholly appropriate for the head of the executive branch—the President—to provide oversight to make sure that these independent prosecutors are not being too aggressive in their applications of law.

Clemency provides that check. Critically, it is a one-way check that allows the President only to mitigate punishment, not to “aggravate” it,<sup>214</sup> because it is the threat to individual liberty that concerned the Framers. The Framers thought criminal cases presented a sufficient threat to liberty such that a series of discretionary checks were needed, including explicit presidential oversight in the form of clemency.<sup>215</sup> Clemency also allows the President to correct decisions of prior administrations with which he or she disagrees and to prevent charges being brought by future administrations for crimes committed during his or her time in office. That is, the pardon power gives the President “intertemporal control over prior successful prosecutions” and “some future prosecutorial activities in a way he could not if he merely controlled prosecutions while he was in office.”<sup>216</sup>

Because the clemency decision is squarely placed with the President, it is a decision for which he or she is plainly accountable. Executive discretion not to bring charges could rest anywhere down the chain of command, including a law enforcement officer's decision not to arrest or investigate, or a line prosecutor's decision not to bring charges. Unlike the President, those individuals are neither elected nor directly democratically accountable.<sup>217</sup> But the power to grant

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<sup>213</sup> See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1024–28 (2006) (describing the absence of checks on prosecutorial decision making and observing that, “[w]ithout judicial oversight to speak of or any internal constraints, the potential for arbitrary enforcement is high”).

<sup>214</sup> *Schick v. Reed*, 419 U.S. 256, 267 (1974).

<sup>215</sup> See *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013) (noting how the pardon power protects individual liberty). This is consistent with other discretionary checks on excessive government power in criminal cases. See Barkow, *supra* note 186, at 1345–46 (discussing these checks, such as jury nullification).

<sup>216</sup> Prakash, *supra* note 210, at 541.

<sup>217</sup> To be sure, Presidents typically grant clemency at the end of their terms, which limits their ability to be held accountable for those decisions in a subsequent presidential

clemency rests only with the President, placing the accountability squarely with him or her.

The clemency decision itself, moreover, is subject to greater scrutiny than decisions not to enforce. With a clemency determination, there is typically already a record of the person's alleged wrongdoing against which the clemency grant can be judged. In cases where an individual is not charged, there may be very little public information to second-guess the executive's decision.<sup>218</sup>

### *B. Clemency's Relationship to Unitary Executive and Presidential Administration Theories*

Clemency, then, is a prime example of the kind of structure praised by unitary executive theorists and those in favor of presidential administration who see advantages to intensive presidential management of the executive branch. The President can control the core executive power of prosecution not only by removing prosecutors and replacing them with those who share his or her policy views, but also by undoing their decision making through the clemency power when he or she believes they exercised their discretion in a way that infringed too much on individual liberty.<sup>219</sup>

The Framers saw clemency in precisely this light and not merely as a tool for forgiveness. "Executive clemency exists," the Supreme Court reminds us, "to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law."<sup>220</sup> It stands "as an independent protection for individual citizens against the *enforcement* of oppressive laws that Congress may have passed."<sup>221</sup> The clemency power, in other words, provides not just a check on Congress, but also on the President's enforcement agents.

It is not particularly surprising that criminal law scholars have overlooked this institutionally important function of clemency, for criminal law scholarship in general has paid relatively little attention to core structural constitutional checks and their relationship to criminal law administration.<sup>222</sup> What is more surprising is the fact that uni-

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election. But they remain accountable on a personal level, and individuals in their political party may also be affected by the decisions.

<sup>218</sup> See Barkow, *supra* note 186, at 1353–54 ("Decisions not to charge are generally unknown to any actor other than the defendant or, if relevant, the victim.")

<sup>219</sup> See Prakash, *supra* note 210, at 541 (noting that Presidents have this power because "subordinates are fallible," because it "enables presidents to assume intertemporal control over prior successful prosecutions," and to prevent some future prosecutions).

<sup>220</sup> *Ex parte Grossman*, 267 U.S. 87, 120 (1925).

<sup>221</sup> *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013) (emphasis added).

<sup>222</sup> See Barkow, *supra* note 213, at 992 (arguing that scholars have overlooked separation of powers analysis as it relates to criminal law administration); Bierschbach &

tary executive and presidential administration theorists have not given clemency much due. Consider, first, the unitary executive scholarship. While there has been an abundance of scholarship by unitary executive theorists that has focused precisely on the question of the President's constitutional control over the executive department,<sup>223</sup> these theorists have paid scant attention to the role that clemency plays in the executive scheme or, for that matter, to criminal law in general. Yet criminal law is an area where the Framers gave the President broad and explicit oversight power to control executive-agent decision making through the clemency power.

At the heart of unitary executive theory is the claim that "all federal officers exercising executive power must be subject to the direct control of the President."<sup>224</sup> The core textual support for this theory is the Vesting Clause of Article II: "*The executive Power shall be vested in a President of the United States of America.*"<sup>225</sup> Some unitary theorists also rely on the Take Care Clause as establishing a hierarchy within the executive department that places the President at the

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Bibas, *supra* note 179, at 400 (noting that few scholars have applied separation of powers framework to criminal law jurisprudence).

<sup>223</sup> For literature on the unitary executive theory, see, for example, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 13–21 (2008) (presenting a defense of unitary executive theory based on the traditions and historical practices of the executive branch); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 *YALE L.J.* 541, 598 (1994) (rejecting the idea that the President lacks a textually explicit power of removal); Calabresi & Rhodes, *supra* note 18, at 1166 (discussing various models of unitary executive theory); Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 *U. CHI. L. REV.* 357, 357 (1990) (arguing that courts should rigidly enforce constitutional rules rather than defer to congressional policy judgments about the way in which federal authority is most efficiently exercised); Stephen L. Carter, *The Independent Counsel Mess*, 102 *HARV. L. REV.* 105, 105–07 (1988) (describing implications of *Morrison v. Olson* for the separation of powers between branches of government); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231 (1994) (discussing consequences of the legal system's validation of the post-New Deal administrative state in spite of its unconstitutionality); Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 *AM. U. L. REV.* 313 (1989) (arguing that the independent counsel statute in *Morrison* did unconstitutionally infringe on the Chief Executive's powers); Geoffrey P. Miller, *Independent Agencies*, 1986 *SUP. CT. REV.* 41 (1986) (describing the controversy surrounding the constitutionality of the modern administrative state); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 *CORNELL L. REV.* 1021, 1038 (2006) (explaining that most supporters of the congressional-delegation theory favored delegation of removal power to the President). A principal work rejecting the historical basis of unitary executive branch theory but explaining its functional benefits is Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1, 47–55, 119 (1994) (arguing that the belief in a strong unitary executive does not derive from the Framers).

<sup>224</sup> Calabresi & Rhodes, *supra* note 18, at 1158.

<sup>225</sup> U.S. CONST. art. II, § 1, cl. 1 (emphasis added).



top.<sup>226</sup> Unitary executive theorists praise this design because it places clear lines of authority in the President, thus fostering accountability<sup>227</sup> and efficiency.<sup>228</sup>

Unitary executive thought has been preoccupied with the relationship between removal and the civil regulatory state.<sup>229</sup> In the literature and case law, the key contentious implication of this theory is that it renders unconstitutional those agencies headed by individuals whom the President cannot remove at will.<sup>230</sup> This focus on whether

<sup>226</sup> See Calabresi & Rhodes, *supra* note 18, at 1165–67 (“Unitary executive theorists read [the Vesting Clause], together with the Take Care Clause, as creating a hierarchical, unified executive department under the direct control of the President.”).

<sup>227</sup> See, e.g., Frank B. Cross, *The Surviving Significance of the Unitary Executive*, 27 HOUS. L. REV. 599, 731 (1990) (noting that the unitary executive “safeguard[s] public accountability”); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 42–45 (1995) (arguing that the Framers sought to create a strong and unitary executive in order to achieve accountability, among other values); Lessig & Sunstein, *supra* note 223, at 119 (“The belief in a strongly unitary executive . . . is simple and unambiguous. It fits well with important political and constitutional values, including the interests in political accountability, in coordination of the law, and in uniformity in regulation.”).

<sup>228</sup> See, e.g., Miller, *supra* note 223, at 56 (“[T]he centralization and coordination that a unitary executive makes possible are likely to be more conducive to efficient government than is a splintered executive branch subject to various checks and balances beyond those set forth in the text of the Constitution.”); see also Michele E. Gilman, Symposium, *Presidential Power in the Obama Administration: Early Reflections: Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 378 (2010) (discussing the view of unitary executive proponents that, “[i]n light of the growth of the modern administrative state, the unitary executive fosters accountability and efficiency because only the President is situated to oversee the vast and complex federal bureaucracy”); Lessig & Sunstein, *supra* note 223, at 93–94 (discussing efficiency as one of the “unitary virtues” that influenced the Framers and arguing that while the Framers did not intend to create a unitary executive in the modern sense of the word, such a view is true to the Framers’ goals in light of changed circumstances).

<sup>229</sup> See, e.g., CALABRESI & YOO, *supra* note 223, at 14 (“We focus the bulk of our attention on the removal power, since historically that is the issue that has received the most attention.”); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16 n.2 (2010) (citing articles addressing removal); Calabresi & Prakash, *supra* note 223, at 598 (“[T]he President may remove executive officers using his Vesting Clause grant of ‘executive Power’ that allows him to superintend the execution of federal law.”); Harold J. Krent, *The Role of the President in the Twenty-First Century: From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523 (2008) (assessing President Bush’s conception of the unitary executive in the administrative sphere); Lawson, *supra* note 223, at 1244–45 (describing the constitutional debate as centered on whether and when the President must have unlimited power to remove subordinate executive officials).

<sup>230</sup> See, e.g., *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484 (2010) (holding that while good cause removal provisions had been upheld in other cases, two layers of removal protection was an unconstitutional constraint on the President’s removal power); Neomi Rao, *Presidential Influence Over Administrative Action: A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2542 (2011) (“The Court’s reasoning [in *PCAOB*] strongly suggests that statutory limits on the President’s removal power, such as those protecting the officers of the independent

the President can remove an executive officer helps to explain why unitary executive theorists have all but ignored criminal law. The Attorney General and U.S. Attorneys are removable at will as a matter of formal law.<sup>231</sup> Congress has made no attempt to restrict the President's ability to replace them by imposing a "good cause" standard or any other limit. Thus, the DOJ<sup>232</sup> and the U.S. Attorneys' Offices within it<sup>233</sup> are not cast from the same mold as the so-called "independent agencies"<sup>234</sup> that have occupied the bulk of the unitary executive scholarship<sup>235</sup> and the Supreme Court's case law.<sup>236</sup> Tellingly, just about the only aspect of criminal law that has been of interest to unitary theorists has been the independent counsel law because it restricted the ability of the President to remove a prosecutor.<sup>237</sup>

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agencies, are unconstitutional."); Paul R. Verkuil, *The Status of Independent Agencies after Bowsher v. Synar*, 1986 DUKE L.J. 779, 788 ("The Reagan administration ha[d] argued in a variety of settings that congressional restrictions on . . . independent agencies in general are unconstitutional. In *Synar v. United States*, [626 F. Supp. 1374 (D.D.C.)], *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986),] a three-judge court accepted the administration's position." (footnote omitted)).

<sup>231</sup> See OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEPT. OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 335 (2008), available at <http://www.justice.gov/opr/us-att-firings-rpt092308.pdf> ("It is the President's and the Department's prerogative to remove a U.S. Attorney who they believe is not adhering to their priorities or not adequately pursuing the types of prosecutions that the Department chooses to emphasize."); *id.* at 330 ("[U.S. Attorneys] may be dismissed for any reason or for no reason.").

<sup>232</sup> See, e.g., Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 898–99 (2008) (noting that the President directly oversees the DOJ and can remove its leaders at will, as opposed to the leaders of independent agencies).

<sup>233</sup> See *Chabal v. Reagan*, 841 F.2d 1216, 1220 (3d Cir. 1988) ("[I]t can hardly be suggested that [U.S. Attorneys] are not 'purely executive' officers or that the President lacks the plenary authority to remove them.").

<sup>234</sup> *PCAOB*, 561 U.S. at 483. The defining feature of independent agencies is that they are "run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Id.*

<sup>235</sup> See, e.g., Barkow, *supra* note 229, at 16 & n.2 (collecting a sample of the "countless law review articles" on unitary executive theory and independent agencies).

<sup>236</sup> See, e.g., *PCAOB*, 561 U.S. at 492–95 (discussing this line of cases).

<sup>237</sup> See, e.g., Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive in Historical Perspective*, 31 ADMIN. & REG. L. NEWS 5, 7 (2005) (focusing on the independent counsel law as a challenge to unitary executive theory); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1017–20 (2007) (same); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 97–99 (1990) (same); Lessig & Sunstein, *supra* note 223, at 14–22 (same); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 603–05 (2005) (same); Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century*,

But as scholars have emphasized in recent years, the President's formal power to remove an agency head is a poor touchstone for what makes an agency independent.<sup>238</sup> Adrian Vermeule argues that, quite apart from for-cause removal, "conventions"—norms situated between law and politics—better explain agency independence.<sup>239</sup> Along with the Chair and Vice Chairs of the Federal Reserve as well as SEC, FCC, and FEC Commissioners, Vermeule uses U.S. Attorneys as examples of officials lacking formal, textually-based for-cause tenure, but benefiting from conventions of independence.<sup>240</sup> As he observes, a convention developed against a President removing a U.S. Attorney "during the President's term" even though a separate convention allowed "en masse replacement of U.S. Attorneys at the time of a partisan change of administration."<sup>241</sup> Thus, if one considers convention as opposed to formal law, prosecutors are not removable at will and have more independence than formalist theories recognize. This was amply demonstrated by the backlash Attorney General Alberto Gonzales received during the middle of President George W. Bush's administration when he dismissed U.S. Attorneys who had been initially appointed by President Bush.<sup>242</sup>

More fundamentally, while removal has been the center of attention in the scholarship and case law, it is not the only implication of a unitary executive theory, nor is it the only mechanism for a President to control executive officers. As Steven Calabresi and Kevin Rhodes

1889–1945, 80 NOTRE DAME L. REV. 1, 2–4 (2004) (same); John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1950–53 (2009) (same) (reviewing STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008)).

<sup>238</sup> See Barkow, *supra* note 229, at 17–18 ("The brightest prospect for [addressing the problem of capture] . . . lies in intelligent agency design that moves beyond the simple focus on presidential removal decisions and other traditional features of agency independence."); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600–01 (2010) (arguing that various mechanisms that make independent agencies increasingly responsive to the President undermine the traditional focus on presidential removal power in defining independence); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013) ("[T]here is no single feature—not even a for-cause removal provision—that every agency commonly thought of as independent shares."); Vermeule, *supra* note 13, at 1174 ("The legal test of independence [for-cause tenure protection] fails adequately to describe or make sense of agency independence in practice.").

<sup>239</sup> Vermeule, *supra* note 13, at 1163, 1181–94.

<sup>240</sup> *Id.* at 1175, 1201.

<sup>241</sup> *Id.* at 1202. *But see supra* note 21 and accompanying text (suggesting a more modest convention about midterm removals that is concerned with whether they were politically motivated).

<sup>242</sup> See *infra* notes 273–77 (describing decisions to remove prosecutors at-will and their consequences); Vermeule, *supra* note 13, at 1202 (describing the backlash).

have pointed out, there are two stronger means by which the President could control the executive department aside from removal.<sup>243</sup> First, the President “might have the direct power to supplant any discretionary executive action taken by a subordinate with which he disagrees, notwithstanding any statute that attempts to vest discretionary executive power only in the subordinate.”<sup>244</sup> Second, instead of acting directly in place of a subordinate, the President “has the power to nullify or veto their exercises of discretionary executive power.”<sup>245</sup>

While the scope of the President’s decision-making power in administrative law is subject to debate, there is more clarity within criminal law. That is because clemency is a prime example of such authority being given directly to the President and not a subordinate. Clemency is an explicit decision-making mechanism for the President to supplant a discretionary decision made by a subordinate when that decision infringes too much on individual liberty. It is an express presidential veto.

But to the extent unitary theorists have focused on presidential control in criminal matters, they have focused on the DOJ charging memos.<sup>246</sup> While these memos amount to relatively modest oversight of line prosecutors, they have nonetheless sparked renewed interest in the limits to using enforcement discretion *not* to enforce particular laws. Along with the Obama Administration’s positions on the ACA<sup>247</sup> and immigration,<sup>248</sup> these memos have drawn attention to the

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<sup>243</sup> See Calabresi & Rhodes, *supra* note 18, at 1166 (noting that removal is “[t]he third and weakest model of the unitary executive”). Calabresi and Rhodes focus on constitutional mechanisms of control, but there are many additional political means by which Presidents can control agencies, some of which are arguably more powerful than removal. See Barkow, *supra* note 229, at 42–64 (discussing these political means, such as agencies’ funding sources, restrictions on agency personnel, and relationships with other agencies).

<sup>244</sup> Calabresi & Rhodes, *supra* note 18, at 1166; see also Liberman, *supra* note 223, at 353 (“The grant of the executive power to the President must mean either that he can exercise any law-executing authority himself or direct how it is exercised.”). But see Strauss, *supra* note 16, at 704–05 (arguing that where Congress delegates functions to an agency, the President’s role “is that of overseer and not decider”).

<sup>245</sup> Calabresi & Rhodes, *supra* note 18, at 1166.

<sup>246</sup> See, e.g., Price, *supra* note 11, at 757–61 (critiquing the Obama Administration’s enforcement discretion policies on marijuana).

<sup>247</sup> See Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Dep’t of Health & Human Servs., to State Ins. Comm’rs (Nov. 14, 2013), available at <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.pdf> (informing insurance commissioners that certain health plans will not be considered, out of compliance with the ACA); OFFICE OF CONSUMER INFO. & INS. OVERSIGHT, U.S. DEP’T OF HEALTH & HUMAN SERVS., INSURANCE STANDARDS GUIDANCE SERIES—INFORMATION (2010), available at <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/guidance-limited-benefit-2nd-supp-bulletin-120910.pdf> (waiving enforcement of portions of the ACA); see also Price, *supra* note 11, at 673–74 (describing

relationship between the President's enforcement discretion and his or her obligations under the Take Care Clause.

Critics, some of whom include prominent advocates of the unitary executive school of thought,<sup>249</sup> have argued that, in some of these instances, the Administration's practice of failing to enforce the law based on policy disagreement conflicts with the President's duties under the Take Care Clause.<sup>250</sup> Their view is that the President's duty to enforce can be excused only for a limited set of reasons.<sup>251</sup>

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President Obama's claim to waive certain requirements of the ACA); Maggie Fox, *Why Your Employer May Be Eyeing the New Obamacare Exchanges*, NBC NEWS (Jan. 30, 2014, 12:02 AM), <http://www.nbcnews.com/health/health-care/why-your-employer-may-be-eyeing-new-obamacare-exchanges-n18861> (describing the goal of the ACA to get rid of abuse in the insurance industry).

<sup>248</sup> See Napolitano Memo, *supra* note 2, at 1 (setting forth guidance on the exercise of discretion regarding the enforcement of certain immigration laws); Shear, *supra* note 3 (reporting on President Obama's recent executive actions concerning immigration). The immigration policy positions in particular have received significant attention. This is because immigration is in general a highly politicized topic and, in the case of how to treat individuals who arrived in the United States as children, the President took a position that Congress appeared to reject by not passing the Development, Relief, and Education for Alien Minors Act (DREAM Act). Delahunty & Yoo, *supra* note 1, at 783–84 (accusing the DACA program of “effectively [writing] into law ‘the DREAM Act’”). *But see* Wadhia, *supra* note 11, at 69 (describing differences between the DREAM Act and the DACA program).

<sup>249</sup> John Yoo, for instance, has long defended a robust theory of the unitary executive, Yoo, *supra* note 237, at 1950–53, but has come out strongly against the DACA policy. Delahunty & Yoo, *supra* note 1, at 783–84.

<sup>250</sup> See Delahunty & Yoo, *supra* note 1, at 784–85 (arguing that President Obama's claim of prosecutorial discretion in immigration violates the Take Care Clause); Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 284–90 (2013) (describing the argument that aspects of President Obama's immigration policy violate the Take Care Clause); Price, *supra* note 11, at 751–54, 759–61 (criticizing the Administration's decisions not to enforce provisions of the Affordable Care Act and its DACA policy as “breach[es] of executive duty” that “violate the proper respect for congressional primacy in lawmaking that should guide executive action”); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 105 (2013) (arguing that the Take Care Clause requires that “the Executive cannot exercise prosecutorial discretion to make Law in contravention of congressional will”); Lauren French, *Lawmakers, Experts Clash on Boehner's Obama Lawsuit*, POLITICO, July 16, 2014, <http://www.politico.com/story/2014/07/john-boehner-obama-lawsuit-debate-merits-108979.html> (describing President Obama's delay in enforcing the ACA as the focus of Speaker Boehner's lawsuit against President Obama).

<sup>251</sup> See, e.g., Delahunty & Yoo, *supra* note 1, at 786 (noting the “generally accepted excuses or justifications for the breach of the duty to execute the laws, such as unconstitutionality of the law, equity in individual cases, and resource limitations”); Price, *supra* note 11, at 704 (advocating a presumption against failure to enforce as a categorical matter, but allowing for case-by-case determinations not to enforce based on particular facts and circumstances).

One consideration widely acknowledged as legitimate is a lack of resources.<sup>252</sup> Indeed, even staunch critics of nonenforcement agree that the President's obligations under the Take Care Clause must be assessed in light of the resources allocated by Congress and the need to prioritize. For example, although Robert Delahunty and John Yoo argue that the Take Care Clause imposes a duty on the President to enforce laws "in *all* situations and cases,"<sup>253</sup> they later soften that stance and concede that Congress's failure to provide sufficient enforcement resources may excuse that duty:

[T]he President seems undeniably to have the power to decide on the proper allocation of the limited personnel and resources available to him for enforcing the laws and to establish enforcement priorities for the agencies under him. Indeed, one can argue that the President's ability to moderate legislative purposes through enforcement is a necessary and desirable consequence of a constitutional system that seeks to protect individual liberties by separating the power to legislate from the power to enforce.<sup>254</sup>

Delahunty and Yoo's criticism of the Administration's stance on immigration enforcement is thus not based on the general use of resource constraints as a rationale, but on their view that the Administration did not make out a sufficient case of scarcity to justify its position in that context.<sup>255</sup>

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<sup>252</sup> See, e.g., *Myers v. United States*, 272 U.S. 52, 291–92 (1926) (Brandeis, J., dissenting) ("Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so."). As Justice Brandeis explained, "[t]he President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted."). *Id.*

<sup>253</sup> Delahunty & Yoo, *supra* note 1, at 784, 845. They also note that an executive can fail to enforce unconstitutional statutes and can decline enforcement based on the individual equities of a case. *Id.* at 836–45.

<sup>254</sup> *Id.* at 792.

<sup>255</sup> *Id.* at 847–49. The Administration takes the view that cases involving young students who arrived in the United States before the age of sixteen are not the best use of limited resources, building on a prior memo that listed other relevant factors for immigration agents and attorneys to consider in deciding where to expend resources. See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge & All Chief Counsel 2 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (providing guidance to Immigration and Customs Enforcement (ICE) personnel on factors to consider in the exercise of prosecutorial discretion "[b]ecause the agency is confronted with more administrative violations than its resources can address"). But Delahunty and Yoo argue that "[b]ecause the Administration has not indicated how much ICE was spending on the removal of DREAMers . . . , it has not shown that nonenforcement against the DREAMers would result in significant savings or achieve significant benefits." Delahunty & Yoo, *supra* note 1, at 849. Critics of Delahunty and Yoo argue that this is misguided because Congress has appropriated enough funds to seek removal of less than four percent of the total estimated unauthorized population. Wadhia, *supra* note 11, at 63.

Zachary Price similarly argues that the Take Care Clause should be read to supply a presumption against presidential authority to “categorically suspend enforcement of statutes for policy reasons,” but he would allow executive decisions not to enforce because of limited resources as long as they are individualized based on the facts of each case and not categorical pronouncements.<sup>256</sup> In his view, the drug offense charging memos “can just barely be reconciled with an appropriate understanding of executive-branch responsibility” because they “promise[ ] only to focus resources on particular types of cases, not to avoid prosecution altogether in other circumstances.”<sup>257</sup> A recent critique of nonenforcement on separation-of-powers grounds likewise acknowledges that “it would be illogical to hold the president responsible where Congress has failed to provide sufficient resources to fund all of its legislative priorities.”<sup>258</sup>

One could argue that “[t]he problem of insufficient resources is an endemic feature of the modern federal government”<sup>259</sup> thus justifying enforcement discretion across a range of situations. But even if one does not go that far, it is hard to deny that resources are far short of what would be necessary for anything close to full enforcement in the criminal context.<sup>260</sup> Even Delahunty and Yoo note that “it can be argued that Congress implicitly encourages, and perhaps desires, broad enforcement discretionary authority as an antidote to its own overregulation or overcriminalization.”<sup>261</sup> More importantly for the

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Saikrishna Prakash points out that Delahunty and Yoo’s article itself cites the relevant statistics demonstrating resource constraints and argues that “[a]t most, the Administration can be faulted for failing to advert to the statistics that the professors cite.” Prakash, *supra* note 11, at 118; *see also* Delahunty & Yoo, *supra* note 1, at 788 (“Realistically, ICE cannot remove much of the illegal immigrant population unless Congress increased funds more than twentyfold.”).

<sup>256</sup> Price, *supra* note 11, at 704.

<sup>257</sup> *Id.* at 757–58.

<sup>258</sup> Love & Garg, *supra* note 211, at 1217.

<sup>259</sup> Prakash, *supra* note 11, at 118–19 (“A combination of so many laws, so many scofflaws, and limited resources necessarily will mean that there will be inadequate resources to enforce all the laws on the books against all those who have violated it.”).

<sup>260</sup> *See* Wadhia, *supra* note 11, at 63 (noting that in both criminal and immigration contexts, there are “far many more . . . individuals who can be charged . . . than there are resources to prosecute them”); Holder Mandatory Minimum Memo, *supra* note 8, at 1 (“[R]ising prison costs have resulted in reduced spending on criminal justice initiatives, including spending on law enforcement agents, prosecutors, and prevention and intervention programs”); Ogden Memo, *supra* note 7, at 1 (“The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources.”).

<sup>261</sup> Delahunty & Yoo, *supra* note 1, at 792 n.57. They also note that the need for discretionary executive decision making to protect against oppressive or disproportionately harsh laws “seems particularly obvious in the area of criminal law enforcement.” *Id.* at 792–93.

question of clemency, whether these commentators are right or wrong on the limits of presidential oversight over enforcement discretion,<sup>262</sup> they concede their arguments do not apply to the President's ability to exercise oversight through clemency.<sup>263</sup>

Although criticism of the unitary executive theory is abundant, it has focused on its condemnation of independent agencies and on unitary executive theorists' reading too much into the meaning of executive power in the Vesting Clause. But even those who object to strong unitary theories recognize that executive powers specifically enumerated in Article II belong to the President.<sup>264</sup> The clemency power is just such an enumerated power. Recognizing it, moreover, does not upend the entire administrative state that has developed in the post-New Deal era, which is what so upsets critics of unitary executive theory in the civil sphere.

Just as clemency falls outside the debate over the scope of executive discretion not to charge under the Take Care Clause, it also avoids the questions raised about whether the scope of presidential administration is limited to supervision or includes direct decision-making power as well.<sup>265</sup> Recent decades have seen a wealth of scholarship touting the benefits—notably, accountability and efficiency—of placing centralized oversight and decision-making authority with the President.<sup>266</sup> In the context of non-criminal domestic administration,

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<sup>262</sup> For a critique, see Prakash, *supra* note 11, at 115–16 (rejecting the view that the immigration policy is flawed because it is not individualized enough and questioning why the President lacks the ability to announce rules to be used in the exercise of his discretion). See also *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013) (“The President may decline to prosecute or may pardon because of the President’s own constitutional concerns about a law *or* because of policy objections to the law, among other reasons.”); Prakash, *supra* note 210, at 527, 553 (noting examples of early Presidents directing district attorneys to begin or end prosecutions).

<sup>263</sup> See Price, *supra* note 11, at 699 (acknowledging the sweep of the Pardon Clause but arguing that “[c]lemency is different from nonenforcement in important ways”). Delahunty and Yoo specifically note that they “give no specific consideration to executive nonenforcement decisions in the criminal area.” Delahunty & Yoo, *supra* note 1, at 787, 842 (distinguishing clemency from immigration nonenforcement because “the Constitution itself seems to envisage no kind of presidential ‘equity’ power, other than in the Pardon Clause (which concerns crimes, not civil violations)”).

<sup>264</sup> See Calabresi & Rhodes, *supra* note 18, at 1168–69 n.76 (citing nonunitarians who recognize the enumerated powers); Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL’Y REV. 361, 404–05 (1993) (noting that the Constitution’s explicit placement of the “plenary [clemency] power in the President is a formal aspect of separation of powers” that even those who disagree with both unitary executive theorists and separation of powers formalists cannot ignore).

<sup>265</sup> For a thoughtful exploration of the differing views on the role of the President and a summary of the scholarship, see Strauss, *supra* note 16.

<sup>266</sup> See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. (forthcoming 2015) (manuscript at 44–45 & nn.170–72) (on file with the *New York University Law Review*) (summarizing this scholarship).



there are often questions about whether a statute places such authority with a specific governmental actor other than the President, or whether the statutory scheme contemplates that the President will take on a more direct role.<sup>267</sup> Clemency avoids this debate because the Constitution vests the clemency power specifically with the President in the clear and explicit text of Article II, with the lone exception being cases of impeachment.<sup>268</sup> The Framers explicitly envisioned that the clemency power would be used to check applications of the letter of the law and “[t]he criminal code.”<sup>269</sup> And that check rests specifically with the President. Moreover, it is a check that is not subject to judicial review or a formal process: “[T]he history and nature of the pardon power support the universal judgment that there are no legal constraints on the grounds for exercise of the power.”<sup>270</sup>

Clemency is thus the rare situation where everyone on all sides of the debates over unitary executive and presidential administration theories should agree: clemency is a robust oversight and decisional power placed in the President directly.

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<sup>267</sup> See *id.* (manuscript at 8–11) (documenting struggles between Presidents and Congresses in determining the location of decision-making authority).

<sup>268</sup> Shanor & Miller, *supra* note 83, at 139 (“[B]ecause the pardon power is explicit in the Constitution’s text, it seems less vulnerable to criticism on separation of powers grounds than the authority of the executive branch, regularly exercised, to decline to prosecute particular cases or to plea bargain for lesser offenses than those recognized by Congress . . .”).

<sup>269</sup> THE FEDERALIST NO. 74, *supra* note 173, at 447 (“The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”); cf. Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 L. & CONTEMP. PROBS. 47, 52–53 (1998) (arguing that it is not sufficient to leave it up to Congress to cabin laws and provide greater specificity regarding their application because of the institutional and political dynamics that produce those laws in the first instance); Shanor & Miller, *supra* note 83, at 139 (“This [pardon] power . . . should be viewed as a limited exception to the general duty of the president to faithfully execute the laws.”).

<sup>270</sup> Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1303 (1996) (emphasis omitted). Peter Strauss, the leading critic of the presidential administration theories that place robust decision-making power with the President, notes that situations such as this—“where we do not expect judicial review, a developed record for administrative action, relatively formal administrative process, or FOIA transparency”—present “a stronger case for the President as ‘the decider.’” Strauss, *supra* note 16, at 757. That is because placing decision-making authority with the President does not undercut the sophisticated mechanisms of oversight and review that exist for agencies—none of which are present in the context of clemency. While I support a more structured and transparent process for clemency that relies on data and evidence-based knowledge about recidivism and reentry for a bipartisan board to use in making recommendations, see Barkow & Osler, *supra* note 155, at 22–25 (detailing the benefits associated with data-driven clemency decisions), the President must remain the ultimate decision maker.

One would think, then, that clemency presents a common ground where proponents and opponents of the unitary executive and strong presidential administration theories could come together in agreement in recognition of the President's authority in this sphere to control criminal law enforcement power. And perhaps there is unity on this score.

But all that is evident in the current literature is that both sides seem to have agreed that this power is relatively unimportant. Clemency has been a topic for philosophers to debate the concept of mercy and retributive justice, and for some criminal law scholars to emphasize as a mechanism for error correction, particularly in capital cases. Constitutional scholars, however, have given it short shrift. They likely view it as unimportant or a relic of English common law, because it is used so infrequently in modern times and because it is governed predominantly by discretion and politics and not by law. As the next Part explains, however, clemency is of urgent importance in modern times. Its desuetude should be a cause for alarm by everyone who cares about executive power as well as those who care about criminal justice.

### III

#### THE MODERN RELEVANCE OF CLEMENCY

The political reasons for clemency's decline are clear. But those same political factors make clemency more important than ever.

##### A. Fewer Mechanisms for Controlling Prosecutors

One reason clemency is increasingly important is that it is harder for the President to maintain control over criminal law enforcement in the federal system because presidential removal authority over prosecutors has grown limited as a matter of practice. In addition, monitoring the thousands of prosecutors and cases has grown increasingly difficult and has produced great disparities in practices among the ninety-four U.S. Attorneys' Offices.

First, consider the President's ability to exercise control through the removal of prosecutors who are not performing as the President would like. If removal is the talisman for unitary executive theorists, they should be disturbed by developments in recent decades that limit the President's removal power in this area. To be sure, the creation of the independent counsel law and the subsequent case of *Morrison v. Olson* attracted widespread attention by unitary executive theorists.<sup>271</sup>

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<sup>271</sup> See, e.g., David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 *FORDHAM L. REV.* 71, 76–80 (2009) (describing Justice Scalia's dissent in *Morrison v.*

It fit squarely in the independent-agency model that the theory finds most disturbing. The law restricted the President's ability to remove independent counsels even when those officials were exercising core executive powers.<sup>272</sup>

But the independent counsel law is not the only development that has made it harder to control prosecutors. Even prosecutors working at the DOJ are, as a practical matter, hard for the President to remove. In 2006, senior DOJ officials told nine U.S. Attorneys to resign from their posts, prompting Congress to question whether the firings were inappropriately based on political reasons.<sup>273</sup> The DOJ's Inspector General and the Office of Professional Responsibility also investigated the matter and ultimately issued a critical report that faulted Attorney General Gonzales for using a "fundamentally flawed" process for removing the attorneys.<sup>274</sup> The scandal and political fallout led Attorney General Gonzales<sup>275</sup> and other high-level DOJ lawyers to resign.<sup>276</sup> Adrian Vermeule, as noted, describes the political backlash as an example of an unwritten convention of U.S. Attorney independence, because this kind of political reaction to dismissal severely constrains the President's ability to remove them if he or she is dissatisfied with how they are doing their job.<sup>277</sup>

Clemency is a critical safeguard against developments that restrict removal. Even if a President finds it too costly to remove a U.S. Attorney, he or she can check against overreaching by using the clemency power in those cases where the U.S. Attorney went too far.<sup>278</sup>

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*Olson* as "the leading judicial articulation of the unitary executive theory"); Yoo, *supra* note 237, at 1950–51 (2009) (discussing the *Morrison* Court's return to a "cleaner separation of powers among simple executive, legislative, and judicial powers"); Yoo, Calabresi & Colangelo, *supra* note 237, at 603–04 (noting the realization of Scalia's prediction in his *Morrison* dissent that independent counsels would be manipulated for political purposes).

<sup>272</sup> See 28 U.S.C. § 596(a)(1) (2006) (authorizing removal of independent counsels only by impeachment, conviction, or by the Attorney General for good cause or conditions substantially impairing the independent counsel's duties).

<sup>273</sup> OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 231, at 1.

<sup>274</sup> *Id.* at 356–57.

<sup>275</sup> Eric Lichtblau & Scott Shane, *A Defender of Bush's Power, Gonzales Resigns*, N.Y. TIMES, Aug. 27, 2007, at A1.

<sup>276</sup> See Dan Eggen, *Head of Civil Rights Division to Leave Justice Department*, WASH. POST, Aug. 24, 2007, at A7 (noting that the head of the Civil Rights Division and "nearly a dozen other senior Justice Department officials" resigned in the wake of the scandal).

<sup>277</sup> See Vermeule, *supra* note 13, at 1201–02 (recognizing that while a President can engage in wholesale replacement of U.S. Attorneys during partisan changes in administration, targeted replacement is forbidden as a matter of convention).

<sup>278</sup> The President does not have a similar tool for a U.S. Attorney who is not sufficiently aggressive in his or her estimation. Like just about all constitutional checks, the pardon power is concerned with government overreaching and not under-activity.

Similarly, because the clemency power applies to all criminal cases except impeachment, and Congress cannot limit its scope even in cases brought by independent counsels, the President can also use the clemency power to rein in independent counsels who overreach. To be sure, it is a politically costly move by a President, but Presidents have done it.<sup>279</sup>

But it is not just the challenge of removing prosecutors that makes it harder to control them. The sheer number of prosecutors and cases makes centralized monitoring difficult. There are now approximately 6000 federal prosecutors around the country, spread among ninety-four districts.<sup>280</sup> They are responsible for charging cases under more than 4000 federal criminal laws—and potentially hundreds of thousands, if regulatory crimes are included<sup>281</sup>—40% of which have been promulgated since 1970.<sup>282</sup>

This system produces a docket of almost 70,000 cases every year, which is double the number of cases on the docket 25 years earlier.<sup>283</sup> Keeping track of how the law applies in all these cases is all the more difficult because most federal cases are resolved by pleas instead of trials.<sup>284</sup> Without the benefit of a trial record and a robust adversary proceeding, it is hard to know the full extent of the facts to assess how prosecutors are doing. While the DOJ can produce guiding memos

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<sup>279</sup> President George H.W. Bush, for example, pardoned many figures in the Iran-Contra affair, offering several reasons. Shane, *supra* note 264, at 401–02 (stating the five reasons offered by the President, which included pardons’ traditional role in “put[ting] national political traumas to rest”). President Clinton also issued several pardons to individuals convicted by independent counsels. Love, *supra* note 64, at 1199 n.121. President George W. Bush commuted the sentence of Scooter Libby, who was charged by a special prosecutor, Patrick Fitzgerald. Scott Shane & Neil A. Lewis, *Bush Commutes Libby Sentence, Saying 30 Months ‘Is Excessive,’* N.Y. TIMES, July 3, 2007, at A1.

<sup>280</sup> U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT—FISCAL YEAR 2010, at 1–2, available at <http://www.justice.gov/sites/default/files/usao/legacy/2011/09/01/10statrpt.pdf> (listing the total number of attorneys employed by U.S. Attorneys’ Offices and the percentage of attorney personnel involved in criminal matters).

<sup>281</sup> See *Regulatory Crime: Identifying the Scope of the Problem: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 2 (2013) (statement of Rachel E. Barkow, Segal Family Professor of Regulatory Law and Policy, Faculty Director, Center on the Administration of Criminal Law, New York University School of Law) (noting that some estimates put the number of regulatory crimes at more than 300,000).

<sup>282</sup> See Barkow, *supra* note 121, at 523–24 (“The number of federal criminal laws now hovers somewhere over 4000, with roughly 40% of the laws passed after the Civil War coming in the 25-year period between 1970 and 1998.”).

<sup>283</sup> *Id.* at 524.

<sup>284</sup> See Bierschbach & Bibas, *supra* note 179, at 403 (“Prosecutors control sentencing largely through plea bargaining, which disposes of more than 95 percent of criminal cases.”).

and principles, it is simply not possible for it to police how each U.S. Attorney proceeds.<sup>285</sup>

Moreover, as the DOJ recognizes, there will necessarily be regional variation based on local criminal threats and needs.<sup>286</sup> Not all districts have the same mix of crimes. In some districts, the most serious crimes brought by federal prosecutors—which are serious for that local community—would be deemed relatively minor in other jurisdictions and would otherwise be handled by state prosecutors in those districts.<sup>287</sup> There are thus large disparities among the ninety-four different U.S. Attorneys' Offices in terms of what cases are prosecuted, what kinds of plea agreements are offered, and whether prosecutors move for departures under the Sentencing Guidelines.<sup>288</sup>

These disparities can produce vast sentencing differences. For example, U.S. Attorneys' Offices have dramatically different charging policies with respect to the sentencing enhancements available under

<sup>285</sup> See Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 643 (2011) (noting the "DOJ is a fragmented agency, one in which several autonomous decision-makers help shape enforcement policy" and in which U.S. Attorneys "have tremendous power over federal criminal law enforcement and a great deal of independence from the DOJ in Washington").

<sup>286</sup> See Holder Mandatory Minimum Memo, *supra* note 8, at 1 ("When making these individualized assessments, prosecutors must take into account numerous factors, such as . . . the needs of communities [they] serve.").

<sup>287</sup> See Alexander Bunin, *Reducing Sentencing Disparity by Increasing Judicial Discretion*, 22 FED. SENT'G. REP. 81, 81 (2009) ("United States Attorneys have different priorities based on such factors as the coordination between state and federal law enforcement, a district's proximity to an international border, peculiarities within different prosecutors' offices, and whether the population of a given area is urban or rural"); *id.* (noting that a community's "view of the gravity of [an] offense" and the "public concern generated by the offense" are also relevant to sentencing); Kahan, *supra* note 269, at 52 (noting that federal prosecutors have incentives to "please . . . local interests"); Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—the Center Doesn't*, 117 YALE L.J. 1374, 1379 (2008) (describing political and institutional relationships between U.S. Attorneys, their staff, and local law enforcement and local political entities).

<sup>288</sup> See U.S. SENTENCING COMM'N, *supra* note 117, at 88–92 (observing wide variation among districts over policies about which cases to prosecute, what kind of plea agreements to offer, and when and how to move for departures from the Sentencing Guidelines); LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 8–10 (1998), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/1998/199801\\_5K\\_Report.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/1998/199801_5K_Report.pdf) (finding disagreement between U.S. Attorneys' Offices over the appropriateness of a 5K1.1 letter where the defendant provides information on his or her own behavior and no uniform criteria for determining whether assistance was substantial); Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 424–25 & n.302 (2009) (reviewing U.S. Sentencing Commission data for 2006 to 2007 and finding that rates of downward departures based on substantial assistance motions filed by the government under U.S.S.G. § 5K1.1 vary from upwards of 33% in districts where prosecutors are generous with these motions to below 10% in those where they are not).

21 U.S.C. § 851.<sup>289</sup> This statutory provision doubles the applicable mandatory minimum sentences for drug offenders with prior felonies, but it is charged erratically.<sup>290</sup> The percentage of eligible defendants who receive the § 851 enhancements ranges from zero in some districts to more than seventy-five percent in others.<sup>291</sup> Similarly, prosecutors vary widely in how they charge 18 U.S.C. § 924(c), which addresses the use of a firearm in relation to a drug trafficking felony or crime of violence and imposes tough mandatory sentences.<sup>292</sup> Offices also disagree on what discounts they offer to defendants for providing substantial assistance to law enforcement in bringing cases against other individuals.<sup>293</sup>

Clemency provides an avenue for the President to promote greater uniformity in the treatment of these federal cases because the President can consider how cases stack up against national patterns. The President can correct agents who reach too broadly because of a local demand when such a tough approach is not in the national interest. Whereas charging memos are necessarily vague because they need to speak to all possible cases that can be brought, a presidential clemency grant can help provide more specific guidance about which cases go too far because clemency takes place in a specific factual setting. By granting clemency in cases of prosecutorial overreach, the President communicates to line prosecutors how the law should be enforced going forward.<sup>294</sup> This is an appropriate role for the Presi-

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<sup>289</sup> U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 252–56 (2011).

<sup>290</sup> See *United States v. Young*, 960 F. Supp. 2d 881, 882–83 (N.D. Iowa 2013) (documenting disparities of over 2000% between districts in how often prosecutors deploy the drug sentencing enhancements available in 21 U.S.C. § 851, and the lack of any national-level policy regarding § 851 enhancements prior to August 12, 2013); HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 46–47 (2013), [www.hrw.org/sites/default/files/reports/us1213\\_ForUpload\\_0\\_0\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf) (finding that § 851 enhancements were applied to anywhere from 1.5%—in the Southern District of California and the Northern District of Texas—to 87%—in the Northern District of Florida—of eligible defenders, as well as “seven districts where the enhancement was not applied to any of the eligible offenders”).

<sup>291</sup> U.S. SENTENCING COMM'N, *supra* note 289, at 255; see also *Young*, 960 F. Supp. 2d at 882–83 (discussing the “jaw-dropping, shocking disparity” in decisions to charge § 851 enhancements).

<sup>292</sup> See U.S. SENTENCING COMM'N, *supra* note 289, at 113–14 (describing the “inconsistent” charging practice for § 924(c) and pointing out that “the practice sometimes varied within districts, either by division or by individual prosecutor”).

<sup>293</sup> *Id.* at 111 (“[T]here appears to be no nationwide Department of Justice practice concerning the extent of the reduction that should be recommended for any particular type of cooperation.”).

<sup>294</sup> Love, *supra* note 64, at 1206; see also Barkow & Osler, *supra* note 155, at 12 (“Several layers of bureaucracy lie between the chief executive and [Assistant U.S. Attorneys] . . . and priorities are easily diluted as they are communicated down this long

dent, who is accountable to the national electorate, and is precisely the kind of oversight the Framers envisioned.<sup>295</sup>

This is not to say that other mechanisms do not serve an important role or that clemency is more important. Removal and front-end tools, such as enforcement memos, remain significant, and Presidents may well wish to look to ways to improve executive oversight through these tools as well. But there is no denying that current conventions against removal and limits on upfront guidance, given the breadth and scope of federal criminal law, make clemency more important than ever as a critical tool for the exercise of executive control.

### B. *Increasing Danger of Overreach*

Clemency is particularly crucial now because the risk of overreach in criminal cases is so high. The same “pathological politics” discussed above that helped bring about the decline in clemency also provide strong reasons for why clemency is greatly needed.<sup>296</sup> Politicians, to demonstrate that they are tough and responsive to crime, pass “[h]ighly general” criminal laws that they spend little time analyzing.<sup>297</sup> Congress expects prosecutors to work out the details and calibrate enforcement to changing times and varied circumstances.<sup>298</sup> In other words, Congress leaves it up to the executive to make sure these sweeping laws do not sweep too far.<sup>299</sup>

But federal prosecutors are not well situated to be the only backstop against overreach.<sup>300</sup> For one, prosecutors have an interest in sweeping criminal laws because the current system is built on plea bar-

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line. Clemency sends a clear message to those line prosecutors about what matters to the president.”).

<sup>295</sup> See AMAR, *supra* note 33, at 186 (noting that Article II “confirm[s] the president’s place at the apex of three grand pyramids of national power: military, administrative, and prosecutorial”).

<sup>296</sup> See, e.g., Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1142 (2012) (“Executive clemency can provide yet another tool in dismantling corrections policies that have led to years of prison expansion and have drained the public fisc.”); Osler & Fass, *supra* note 205, at 231 (advocating the use of mass clemency to reduce crack cocaine sentences); Shanor & Miller, *supra* note 83, at 144 (same); Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT’G REP. 184, 186 (2001) (advocating mass clemency for immigrants with misdemeanor convictions to prevent their deportation).

<sup>297</sup> Kahan, *supra* note 269, at 50.

<sup>298</sup> For the classic analysis of this political dynamic, see Stuntz, *supra* note 20, at 546–49.

<sup>299</sup> It is, in the words of Adam Cox and Cristina Rodríguez, a “de facto delegation.” Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 511, 528–29 (2009).

<sup>300</sup> This is not to say that prosecutors should refrain from exercising their discretion to correct injustices. For a persuasive argument that prosecutors have an obligation to do so, see *infra* note 314 (discussing Judge Gleeson’s opinion in *United States v. Holloway*).

gaining, and what drives plea bargaining is increased prosecutorial leverage. Prosecutors benefit from having a menu of broad laws with mandatory sentences from which to choose because it gives them greater control over the bargaining process and makes it more likely that defendants will cooperate with them to avoid the mandatory term.<sup>301</sup> They may charge or threaten to charge defendants with crimes to pressure them to plead guilty or cooperate.<sup>302</sup> If defendants refuse, they face huge trial penalties in the federal system.<sup>303</sup> Sentences are, on average, three times higher if defendants opt for trial.<sup>304</sup> Even innocent individuals may plead guilty to avoid that risk, particularly when the evidence makes it unclear how a jury will decide.<sup>305</sup> This is why prosecutors endorse mandatory minimums and resist reforms that would limit them.<sup>306</sup> But those individuals who do

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<sup>301</sup> U.S. SENTENCING COMM'N, *supra* note 289, at 106 (“The overwhelming majority of the prosecutors interviewed opined that mandatory minimum penalties are effective law enforcement tools because they encourage guilty pleas and cooperation.”).

<sup>302</sup> See HUMAN RIGHTS WATCH, *supra* note 290, at 1–2 (“[I]n the US plea bargaining system, many federal prosecutors strong-arm defendants by offering them shorter prison terms if they plead guilty, and threatening them if they go to trial with sentences that, in the words of Judge John Gleeson . . . , can be ‘so excessively severe, they take your breath away.’”). Federal prosecutors may also “face significant incentives to advance imaginative readings of vague criminal offenses in order to please influential local interests.” Kahan, *supra* note 269, at 52.

<sup>303</sup> For example, in a sample of 5858 drug defendants who were eligible for § 851 enhancements, those who went to trial were 8.4 times more likely to receive the enhancement than those who pleaded guilty. HUMAN RIGHTS WATCH, *supra* note 290, at 52. Similarly, among defendants convicted of drug offenses carrying mandatory minimums, those who went to trial received sentences averaging 11 years longer than those who pleaded guilty, perhaps in part because only 4.9% of those who went to trial received relief from the mandatory minimum laws, compared to 60.4% of those who pleaded guilty. *Id.* at 105; see also Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991–1992*, 31 LAW & SOC'Y REV. 789, 806 tbl.3 (1997) (showing that minority federal defendants receive harsher trial penalties relative to white defendants); Jeffrey T. Ulmer, James Eisenstein & Brian D. Johnson, *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560, 575 (2010) (finding a 15% sentence length increase for federal defendants who go to trial rather than plead guilty, controlling for Sentencing Guideline-based factors).

<sup>304</sup> HUMAN RIGHTS WATCH, *supra* note 290, at 2 (“In 2012, the average sentence of federal drug offenders convicted after trial was three times higher (16 years) than that received after a guilty plea (5 years and 4 months)"); Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 347–48 (2005) (noting that defendants who waive a jury trial get a sentence that is, on average, “300 percent lower than similarly situated defendants who exercise their Sixth Amendment right to trial by jury”).

<sup>305</sup> See, e.g., Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS, Nov. 20, 2014, at 16, 18.

<sup>306</sup> See Barkow, *supra* note 102, at 728 (observing prosecutorial support for mandatory minimum sentences); Letter from Robert Gay Guthrie, Pres., Nat'l Ass'n of Assistant U.S. Att'ys, to Sen. Patrick Leahy, Chairman, & Sen. Charles Grassley, Ranking Member,



go to trial and lose receive sentences that even the prosecutors in their cases think are excessive, because prosecutors had been willing to accept sentences far lower at the plea bargaining stage. These cases are often well suited for clemency because the sentences are based on the posturing prosecutors deem necessary to get pleas, not on the sentences prosecutors actually think appropriate.

Consider the case of Francois Holloway.<sup>307</sup> He stole three cars at gunpoint over the course of two days. He was charged with carjacking plus three separate counts under 18 U.S.C. § 924(c) for using a firearm during the course of three carjackings. This subjected him to a mandatory sentence of 55 years for the three § 924(c) counts, because the first imposed a sentence of five years and each subsequent count tacked on another 25 years. The prosecutors offered to drop two of the § 924(c) counts if he pleaded guilty, so he would have faced a minimum sentence of five years under the § 924(c) count. Coupled with the carjacking charge, he faced a sentencing range of 130 to 147 months (approximately 10 to 12 years) if he pleaded guilty. Holloway's lawyer thought he could win at trial, so he turned down the offer. Holloway lost at trial and received a sentence of 691 months (more than 57.5 years).<sup>308</sup> It cannot possibly be the case that a defendant deserves a sentence five times greater—42 years longer<sup>309</sup>—simply because he exercises his constitutional right to go to trial.

Moreover, sentences are often grossly disproportionate to the sentences received by other, often more culpable, individuals involved in the same crime.<sup>310</sup> In Holloway's case, his accomplice pleaded guilty, testified at trial, and received a sentence of 27 months<sup>311</sup>—even though the accomplice carried the firearm and Holloway did not.<sup>312</sup> None of Holloway's codefendants received sentences greater than six years.<sup>313</sup> Clemency exists in part to allow the President to police coercive exercises of prosecutorial power that produce sentences far

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Senate Judiciary Comm. (Jan. 31, 2014), available at <http://www.naaua.org/2013/images/docs/MandMinSentencingLegOppose013114.pdf> (opposing the Smarter Sentencing Act).

<sup>307</sup> United States v. Holloway, Nos. 95-CR-78 (JG), 01-CV-1017 (JG), 2014 WL 3734269 (E.D.N.Y. July 25, 2014).

<sup>308</sup> *Id.* at \*1–2.

<sup>309</sup> *Id.* at \*2 (calculating the difference between the sentence Holloway received with how long he would have served had he taken the plea offer).

<sup>310</sup> Clemency has been used in the past to even out sentences among codefendants. See, e.g., Hoffstadt, *supra* note 34, at 585 n.102 (providing an example of commutations issued by President Clinton for this reason).

<sup>311</sup> *Id.* at 2. Holloway's accomplice was released in 1997. *Id.*

<sup>312</sup> Stephanie Clifford, *Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose*, N.Y. TIMES, July 29, 2014, at A16.

<sup>313</sup> *Id.*

longer than are just and place too great a burden on the constitutional exercise of the trial right.<sup>314</sup>

It is not just self-interest and a desire to maintain bargaining leverage that makes prosecutors insufficient stopgaps against overbroad laws; prosecutors do not see themselves exercising such roles because of their institutional identity. They do not see themselves as analogous to regulatory agencies, which take on more or less aggressive positions on ambiguous laws as administrations and policy views change. Criminal law generally has not been seen in these same terms.<sup>315</sup> Even though prosecutors have discretion to decide whether to charge offenders with crimes and must pass on many eligible cases because of limited resources, they typically see this role as exercised on a case-by-case basis depending on the facts of the case. They generally seem uncomfortable with the idea of exercising that discretion to ignore laws entirely or to cabin their use in categorical ways such as by taking more limited interpretations of how they apply or heightening what those laws require of the government.

This is evidenced by the fact that the DOJ rarely shifts policies on how substantive laws should be enforced to relax enforcement when a law proves to be too broad. The recent DOJ memos on mandatory minimum charging policies and on drug enforcement policies in states that have authorized either medical or recreational marijuana are exceptions to the usual DOJ approach.<sup>316</sup> The normal approach is to leave line prosecutors and each U.S. Attorney with broad discretion to decide how to proceed within their district armed with only the broadest outlines from the DOJ about what to do.

Those outlines typically do not view the laws passed by Congress as requiring narrowing or a close analysis for how they should be tai-

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<sup>314</sup> Judge Gleeson sentenced Holloway in 1996. In 2013, he asked the U.S. Attorney for the Eastern District of New York to agree to vacate two of the § 924(c) convictions. *Holloway*, 2014 WL 3734269, at \*3. The U.S. Attorney initially denied the request, citing clemency as the appropriate avenue to correct the sentence in the case. *Id.* In May of 2014, Judge Gleeson asked the U.S. Attorney to reconsider so that Holloway could face a “more just resentencing” and because of the unlikelihood that Holloway would receive relief through the clemency process. *Id.* The U.S. Attorney agreed, and Holloway was resentenced on July 29, 2014 to time served. *Id.* at \*3–4; Monique O. Madan, *At Behest of Judge, U.S. Shortens Man’s 57-Year Mandatory Sentence*, N.Y. TIMES, July 30, 2014, at A20. Holloway’s case is the rare exception where the prosecutor’s office agrees to vacate convictions and reevaluate what was originally charged. Indeed, that is almost certainly why the story made the *New York Times*—because it is so unusual. The typical avenue of correction is the one the U.S. Attorney originally cited: clemency.

<sup>315</sup> *But see* Barkow, *supra* note 102, at 721 n.4 (noting scholars who have used an administrative law lens to analyze criminal justice agencies).

<sup>316</sup> For a collection of the recent DOJ memos on mandatory minimum charging policies and on drug enforcement policies in states that have authorized either medical or recreational marijuana, see *supra* notes 190–95.

lored on the ground. On the contrary, the DOJ charging memos typically take a robust view of these laws. Indeed, as noted, for a time it was official DOJ policy that, with limited exceptions, prosecutors had to charge defendants with the “most serious, readily provable offense or offenses.”<sup>317</sup> Even the more relaxed policy that instructs prosecutors that they generally *should* charge the most serious offense suggests a presumption in favor of total enforcement. Thus, line prosecutors likely proceed in most cases viewing all laws on the books as fair game without recognizing that Congress passed those laws assuming they would be checked by the discretion of prosecutors.<sup>318</sup>

The more specific charging memos put forth by DOJ fall short of remedying the problem. As an initial matter, the small handful of memos on particular laws do not address how resources should be prioritized in the context of the thousands of other federal criminal statutes for which there are no such DOJ memos. Even in the domain in which they operate, these memos are vague and leave open the possibility that prosecutors will bring actions even when the President believes that doing so is not the best use of finite federal law enforcement resources.<sup>319</sup> Particularly with a federal prison population that is

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<sup>317</sup> Ashcroft Memo, *supra* note 9. Roughly half a million individuals were prosecuted federally while the memo was in effect from September 22, 2003, until the Holder Memo displaced it on May 19, 2010. For fiscal years 2003 to 2010, there were 498,930 cases filed against 675,598 individuals; even removing the 2003 and 2010 data, since the Ashcroft Memo was not in effect the entire time during those fiscal years, there were still 370,341 cases against 502,927 individuals. See U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2003 (59,998 cases; 81,624 defendants); U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2004, at 8 (61,443 cases; 83,594 defendants); U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2005, at 8 (60,062 cases; 82,778 defendants); U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2006, at 9 (58,702 cases; 81,088 defendants); U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2007, at 9 (59,228 cases; 80,712 defendants); U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2008, at 9 (63,042 cases; 85,122 defendants); U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2009, at 9 (67,864 cases; 89,633 defendants); U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2010, at 9 (68,591 cases; 91,047 defendants). Given the memo’s command that the most serious charges had to be brought irrespective of individual circumstances, undoubtedly some of those cases are particularly strong candidates for clemency.

<sup>318</sup> See Barkow, *supra* note 120, at 880 (“Congress therefore routinely passes laws with punishments greater than the facts of the offense would demand to allow prosecutors to use the excessive punishments as bargaining chips and to obtain what . . . Congress would view as the more appropriate sentence via a plea instead of a trial.”).

<sup>319</sup> For example, the DOJ memo that was issued after Colorado and Washington legalized small amounts of marijuana emphasized the DOJ’s “limited investigative and prosecutorial resources” and highlighted its priorities for enforcement. Cole 2011 Memo, *supra* note 7, at 1. It cautioned that, “[o]utside [those] enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws,” *id.* at 2,

overcrowded and eating up more and more of the total law enforcement budget, taking away funds for FBI agents and prosecutors, the President must be particularly attuned to how best to use those prison beds given cost constraints.

Clemency can provide the check on overbroad laws that prosecutors are not providing because it places the policy judgments with the President, who is accountable to the national electorate and expressly charged with this task in the Constitution. As Judge Brett Kavanaugh of the D.C. Circuit recently noted:

One of the greatest *unilateral* powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior—more precisely, the power either not to seek charges against violators of a federal law or to pardon violators of a federal law.<sup>320</sup>

Alexander Hamilton envisioned precisely this function for clemency. When Hamilton was promoting clemency as a needed corrective, he was well aware of excessive laws in eighteenth-century England and the critical role clemency played in checking them.<sup>321</sup> Like the jury,<sup>322</sup> executive clemency provides a key mechanism for making sure laws do not extend to cases where it would be unjust and for providing needed individualized justice. Although not every felony is punishable by death, as it was at common law, federal mandatory sentencing provisions present the same concerns as those mandatory English laws. Clemency in that system was “best understood as an adjunct to the sentencing system, compensating for the lack of direct judicial discretion.”<sup>323</sup> That same compensatory tool is needed for federal mandatory sentencing laws because the check of judicial discretion is lacking.<sup>324</sup>

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suggesting areas where the federal government would decline to bring prosecutions. But the memo noted that if state enforcement efforts prove insufficient, “the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions.” *Id.* at 3.

<sup>320</sup> *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013).

<sup>321</sup> See *supra* notes 173–76 and accompanying text.

<sup>322</sup> See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48–65 (2003) (describing the jury’s critical role in a system of separate powers as a check on legislative and executive overreaching).

<sup>323</sup> Langbein, *supra* note 174, at 109.

<sup>324</sup> The Sentencing Commission has summarized the three biggest congressional changes in mandatory sentencing since the middle of the twentieth century: (1) “more mandatory minimum penalties,” (2) the expansion “of mandatory minimum penalties to offenses not traditionally covered by such penalties,” such as “controlled substances, firearms, identity theft, and child sex offenses,” and (3) “mandatory minimum penalties that are generally

In the era of discretionary and indeterminate federal sentencing that governed from 1910 until 1987,<sup>325</sup> judges and parole officers had discretion to tailor punishments to individuals and account for relevant factors. In the year parole ended in the federal system, for example, there were almost 19,000 people on parole.<sup>326</sup> Parole officials thus determined that 39.5% of the prison population at that time<sup>327</sup> was appropriately released before serving their maximum sentence. Discretionary sentencing also allowed room for judges to ensure that punishments fit the offense and offender. In the absence of parole and judicial discretion, clemency is the key avenue for checking mandatory sentences, which can be excessive in particular cases.<sup>328</sup>

In the federal system, mandatory sentencing is used most frequently in drug cases,<sup>329</sup> and there are particular reasons to be concerned with overbreadth in that context.<sup>330</sup> The trigger for the statutory mandatory minimum sentence is quantity.<sup>331</sup> Congress

lengthier than mandatory minimum penalties in earlier eras.” U.S. SENTENCING COMM’N, *supra* note 289, at xxv.

<sup>325</sup> This time frame marks the beginning and end of parole in the federal system. See U.S. DEP’T OF JUSTICE, *supra* note 79, at 1–2.

<sup>326</sup> LAURA MARUSCHAK, LAUREN GLAZE & THOMAS BONCZAR, BUREAU OF JUSTICE STATISTICS, ADULTS ON PAROLE IN THE UNITED STATES, 1975–2012 (2013), available at <http://www.bjs.gov/content/data/corpop12.csv>.

<sup>327</sup> In 1987, the federal prison population was approximately 48,000. U.S. DEP’T OF JUSTICE, NCJ 110331, PRISONERS IN 1987, at 2 tbl.2 (1988), available at <http://www.bjs.gov/content/pub/pdf/p87.pdf>.

<sup>328</sup> See Krent, *supra* note 50, at 1674 (noting that judges may lack discretion to impose an appropriate punishment and in that situation the President can provide the check on Congress through the pardon power). Judge Gleeson’s recent effort in the *Holloway* case, see *supra* notes 307–14 and accompanying text, to get the U.S. Attorney’s Office in the Eastern District of New York to agree to vacate a conviction two decades old to allow Judge Gleeson to resentence the defendant provides another possible outlet for correction.

<sup>329</sup> See U.S. SENTENCING COMM’N, *supra* note 289, at xxvii. (“Over three-quarters (77.4%) of convictions of an offense carrying a mandatory minimum penalty were for drug trafficking offenses.”).

<sup>330</sup> As Judge Gleeson recently pointed out, “the misuse of prosecutorial power over the past 25 years has resulted in a significant number of federal inmates who are serving grotesquely severe sentences, including many serving multiple decades and even life without parole for narcotics offenses that involved no physical injury to others.” United States v. Holloway, Nos. 95-CR-78 (JG), 01-CV-1017 (JG), 2014 WL 3734269, at \*4 (E.D.N.Y. July 25, 2014, amended July 28, 2014) (Memorandum Regarding the Vacatur of Two Convictions Under 18 U.S.C. 924(c)).

<sup>331</sup> For example, possession with intent to distribute 1 gram of LSD, 28 grams of crack, or 500 grams of powder cocaine carries a mandatory 5-year minimum. 21 U.S.C. § 841(b)(1)(B) (2012). Possession with intent to distribute 10 grams of LSD, 280 grams of crack, or 5 kilograms of powder cocaine escalates the mandatory minimum to 10 years. *Id.* § 841(b)(1)(A); see also U.S. DEP’T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES 15 (1994) (“[D]rug quantities, as a result of the incorporation of mandatory-minimums into the Sentencing Guidelines, are the

passed these laws on the assumption that greater quantities produce greater harms and individuals dealing in larger quantities were the kingpins of the trade.<sup>332</sup> It does not appear, however, that Congress paid much attention to how these laws would intersect with conspiracy law and the actual operation of most drug trafficking networks. Because of the operation of federal conspiracy law, *anyone* involved in a drug trafficking conspiracy is responsible for all the reasonably foreseeable quantities of drugs trafficked by that conspiracy.<sup>333</sup> This means a small-fry corner seller could find himself being held to the same penalty as a major drug leader.

The Sentencing Guidelines reflect this dynamic as well. The Guidelines were calibrated to line up with the mandatory minimums set by Congress.<sup>334</sup> Thus, they are also predominantly focused on quantity as the driver in setting punishment. And the relevant conduct provisions also mean that individuals are held responsible not simply for the drug quantities that they themselves handle, but for all the drug quantities involved in the jointly undertaken criminal activity.<sup>335</sup>

Congress also established some drug sentences based on erroneous information about the dangers of the drug. The crack/powder cocaine sentencing disparity originated in the Anti-Drug Abuse Act of

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single most important determinant of the drug offender's sentence length."'). For a critique of the quantity-based approach, see Mark Osler, *We Need Al Capone Drug Laws*, N.Y. TIMES, May 5, 2014, at A23.

<sup>332</sup> U.S. SENTENCING COMM'N, *supra* note 289, at 24 ("[T]he kingpins . . . can be identified by the amount of drugs with which they are involved . . .") (quoting Sen. Byrd, 132 CONG. REC. 27, 193 (Sept. 30, 1986)); *id.* at 349 n.845 (noting the Sentencing Commission's "concurrence with Congress's judgment that the quantity of drug involved in an offense is an important measure of the seriousness of the offense and the culpability of the offender").

<sup>333</sup> See 21 U.S.C. § 846 (2012) (establishing attempt and conspiracy liability as subject to the same penalties as those prescribed for principal offenses); see also, e.g., *Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946) (holding that defendants in a conspiracy are liable for all acts of co-conspirators in furtherance of the conspiracy); *United States v. Hayes*, 391 F.3d 958, 963 (8th Cir. 2004) (finding defendant liable for co-conspirator's "reasonably foreseeable" possession of crack cocaine); *United States v. Soto-Beníquez*, 356 F.3d 1, 51 (1st Cir. 2003) (finding incarcerated defendant liable for the drug quantity distributed by co-conspirators because the quantity was "reasonably foreseeable to him because he was still supervising his drug points by telephone").

<sup>334</sup> See *United States v. Diaz*, No. 11-CR-00821-2 (JG), 2013 WL 322243, at \*6 (E.D.N.Y. Jan. 28, 2013) (Memorandum Explaining a Policy Disagreement with the Drug Trafficking Offense Guideline) ("[T]he Guidelines incorporated the mandatory minimum provisions of the [Anti-Drug Abuse Act].").

<sup>335</sup> See U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 1B1.3, cmt. (n.2) (2014) (noting that a defendant is responsible for "all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook"); see also *United States v. Laboy*, 351 F.3d 578, 583 (1st Cir. 2003) (citing § 1B1.3 in holding that the defendant should have reasonably foreseen his conspirator's sale of one kilogram because defendant "was a high-level gang member").

1986.<sup>336</sup> At that time, Congress believed that crack cocaine was significantly more addictive, associated more strongly with violence, and posed a greater harm to children than powder cocaine.<sup>337</sup> In 1987, the Sentencing Commission, following Congress's lead, adopted what is known as the 100-to-1 ratio between powder and crack cocaine.<sup>338</sup> For example, to receive the same sentence as someone with five grams of crack cocaine, an individual would need 500 grams of powder cocaine. In the following decades, the Sentencing Commission strongly criticized the 100-to-1 ratio, issuing multiple reports citing research that the ratio was unjustifiable based on scientific evidence.<sup>339</sup> Congress finally backtracked from this approach to crack and powder cocaine in the 2010 Fair Sentencing Act, which recognized that the 100-to-1 ratio was not grounded in evidence.<sup>340</sup> But the Fair Sentencing Act was not retroactive, so individuals are currently serving out sentences that are now recognized by all three branches as unjust.

Clemency provides a setting for exposing these kinds of failings or overreaches in the law and a means for correcting them until needed legislative changes are made. It has long been "the tool by which many of the most important reforms in the substantive criminal law have been introduced," prompting changes in areas of insanity, self-defense, and the grading of crimes.<sup>341</sup> As patterns of injustice become exposed through a series of clemency grants, they can prompt legislative reexamination.

While line prosecutors and even U.S. Attorneys may feel unqualified to analyze whether laws on the books are built on faulty premises

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<sup>336</sup> *Kimbrough v. United States*, 552 U.S. 85, 95 (2007) (citing Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207).

<sup>337</sup> See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 90 (2002) [hereinafter 2002 USSC REPORT] (summarizing the legislative history of the Anti-Drug Abuse Act of 1986).

<sup>338</sup> U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (1995) (stating that the 1987 guidelines used the 100-to-1 quantity ratio to set drug penalties).

<sup>339</sup> *Id.* at 197 (suggesting a revision of the ratio absent any commensurate threats of increased harm from crack cocaine); 2002 USSC REPORT, *supra* note 337, at 91, 103 (recognizing that some concerns underpinning the harsher crack cocaine penalties, such as violence or protecting poor and minority neighborhoods, were overstated and thus warrant a critical reexamination); U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (2007) (finding that the ratio overstates the harmfulness of crack cocaine and the seriousness of its penalties, while the severe punishments mostly impact minority communities).

<sup>340</sup> H.R. REP. NO. 111-670, at 3 (2010) ("Over the last 20 years, the assumptions about the more severe effects of crack cocaine compared to powder cocaine have been proven unfounded.").

<sup>341</sup> Love, *supra* note 64, at 1184–85 (quoting U.S. DEP'T OF JUSTICE, 3 THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 295–96 (1939)).

or if they should be narrowly construed as a categorical matter because they would otherwise be too broad, the President should not feel a similar reluctance in making enforcement policy based on these concerns.<sup>342</sup> Given the limited resources of the federal government and the drain aggressive law enforcement places on the prison system and thus the overall DOJ enforcement budget, this kind of centralized corrective is critical.<sup>343</sup> Indeed, this is precisely the kind of policy adjustment the President makes all the time in the administrative state when rules and policies at civil enforcement agencies are changed.

The need for this kind of policy assessment is especially critical in criminal law. There is an emerging consensus among politicians across the political spectrum, as well as among scholars and public policy experts, that the punitive turn in American criminal law has been too sharp, producing disproportionately high sentences in many cases, either as measured by what is necessary to deter or by what is retributively just given the offense and offender.<sup>344</sup> It is extremely expensive to run a system of mass imprisonment, and the resulting budget pressures make it harder to pay for other key criminal justice measures that keep the system running and protect public safety.<sup>345</sup> And when so many people are incarcerated, the effects on communities and third parties can make the effort counterproductive and produce more

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<sup>342</sup> Clemency has been used for this purpose in the past. For instance, the Georgia Board of Pardons and Paroles commissioned a group of professors to identify those prisoners serving time under obsolete laws so that those sentences could be commuted. Kobil, *supra* note 14, at 635.

<sup>343</sup> See Kahan, *supra* note 269, at 54–55 (noting that more oversight by “DOJ, through the President,” would produce more moderate outcomes than leaving decisions with each U.S. Attorney and would be “more sensitive to . . . the public fisc generally”).

<sup>344</sup> There are, of course, disproportionately low sentences as well, across a range of offenses. But there is a growing consensus that the greater problem at this point in history, given the mass numbers of those incarcerated, is the proliferation of sentences that are disproportionately too long. See U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2012), available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/TableN.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/TableN.pdf) (showing that in 2012, federal judges sentenced offenders above the Guidelines range 1631 times, but below the Guidelines range 37,710 times, including 14,723 times without a recommendation from the prosecution); see also PUBLIC OPINION STRATEGIES & THE MELLMAN GROUP, PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA 4 (2012) (finding that supermajorities of voters, 77% to 86%, favor reduced sentences for nonviolent offenders).

<sup>345</sup> See Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Div., U.S. Dep’t of Justice, to the Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 7 (July 11, 2013), available at <http://www.justice.gov/criminal/foia/docs/2013-annual-letter-final-071113.pdf> (observing that federal prison spending has increasingly limited other justice investments over the past decade); NAT’L CRIMINAL JUSTICE ASS’N & VERA INST. OF JUSTICE, THE IMPACT OF FEDERAL BUDGET CUTS FROM FY10–FY13 ON STATE AND LOCAL PUBLIC SAFETY: RESULTS FROM A SURVEY OF CRIMINAL JUSTICE PRACTITIONERS 2–3 (2013) (documenting reductions in police and prosecutorial staff and services in states around the country due to budget cuts).



crime than it prevents. Without adequate checks on this process in the judiciary or in parole, clemency takes on added importance. As Margaret Love writes, “[h]istory teaches that the demand for clemency increases when the criminal justice system lacks other mechanisms for delivering individualized justice, recognizing changed circumstances, and correcting errors and inequities.”<sup>346</sup>

### C. *The Need for Relief from Collateral Consequences*

Clemency is not just about reducing sentences of individuals currently serving terms of confinement. It also addresses problems that arise for individuals who have already served their full sentence but continue to live with collateral consequences of convictions.<sup>347</sup> Federal convictions severely constrain employment and housing opportunities, access to federal benefits, and civic participation. In all but two states, felony convictions restrict voting rights.<sup>348</sup> A federal conviction can disqualify an individual from federal grand or petit jury service,<sup>349</sup> from serving in the military,<sup>350</sup> and from possessing firearms.<sup>351</sup> The employment consequences of a federal conviction are vast: Certain federal convictions preclude individuals from a host of jobs<sup>352</sup> and are grounds for denying or revoking certain employment licenses.<sup>353</sup> Federal regulations create both permissive and mandatory exclusions from public housing for certain convictions,<sup>354</sup> and federal convictions

<sup>346</sup> MARGARET COLGATE LOVE, AM. CONSTITUTIONAL SOC’Y, REINVENTING THE PRESIDENT’S PARDON POWER 10 (2007), available at <https://www.acslaw.org/files/Presidential%20Pardons%20Issue%20Brief%20-%20October%202007.pdf>. Dan Kobil labels this function for clemency as “justice-enhancing,” a term he uses to describe grants of clemency aimed at mitigating the excesses of the criminal justice system based on individualized rationales or changes in societal opinion. Kobil, *supra* note 14, at 624–34; see also Hoffstadt, *supra* note 34, at 571 (making the case for further use of the clemency power as an extrajudicial tool of corrective justice due to current systemic failures).

<sup>347</sup> See generally Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153 (1999) (detailing the sweep of collateral consequences of convictions).

<sup>348</sup> JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 (2014), available at [http://sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Primer.pdf](http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf).

<sup>349</sup> 28 U.S.C. § 1865(b)(5) (2012).

<sup>350</sup> 10 U.S.C. § 504(a) (2012).

<sup>351</sup> 18 U.S.C. § 922(g)(1) (2012).

<sup>352</sup> See, e.g., 12 U.S.C. § 1829 (2012) (insured financial institutions); 18 U.S.C. § 1033 (2012) (the business of insurance); 20 U.S.C. § 7115(b)(2) (2012) (elementary and secondary schools); 42 U.S.C. § 5119a(a)(1) (2012) (care providers for vulnerable populations); 49 U.S.C. § 44935 (2012) (airports).

<sup>353</sup> See, e.g., 46 U.S.C. § 70105(c)(1) (2012) (Transportation Worker Identification Card); 49 U.S.C. § 31310 (2012) (Commercial Motor Vehicle Operator License); 49 U.S.C. § 5103a (2012) (Hazardous Material Endorsement).

<sup>354</sup> 24 C.F.R. § 982.553 (2014).

can bar persons from crucial forms of federal assistance, including food stamps and student loans.<sup>355</sup>

These collateral consequences have a devastating effect on the ability of formerly incarcerated individuals to reenter society successfully without committing more crimes.<sup>356</sup> Other than seeking a pardon, there are no alternative mechanisms for offenders to clear their records at the federal level.<sup>357</sup> Some states have alternative mechanisms to expunge criminal records or obtain certificates of good conduct to assist formerly incarcerated individuals in obtaining employment and housing, but the federal system relies exclusively on clemency to alleviate collateral consequences of convictions.<sup>358</sup> Individuals thus need pardons more than ever to avoid collateral effects that may make reentry difficult or impossible.<sup>359</sup>

The pardon power allows the President to limit the negative effects of collateral consequences on successful reentry. The President could use this authority in two ways. First, an outright pardon would remove the collateral consequences of a conviction.<sup>360</sup> Second, the President could grant partial or conditional pardons that limit certain

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<sup>355</sup> See, e.g., 21 U.S.C. § 862a(a) (2012) (lifetime ban from Temporary Assistance to Needy Families and food stamps for felony drug convictions); 20 U.S.C. § 1091(r) (2012) (forms of federal student loan assistance); 38 U.S.C. § 6104 (2012) (veterans' benefits); 5 U.S.C. § 8312 (2012) (government employee benefits).

<sup>356</sup> Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 156–57 (2010) (noting high rates of recidivism and the monetary costs of collateral consequences).

<sup>357</sup> See Love, *supra* note 64, at 1171 (“[F]ederal law makes almost no provision for shortening a prison term and makes no provision at all for mitigating the collateral consequences of conviction.”).

<sup>358</sup> MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 7 (2005) (noting that in forty-two states and in the federal system, “pardon provides the only system-wide relief from collateral sanctions and disqualifications based on conviction”).

<sup>359</sup> See Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 33–34 & n.67 (2005) (recognizing that the effect of pardons on civil consequences “is a largely neglected but increasingly important aspect of the general trend toward greater retribution”); Demleitner, *supra* note 347, at 162 (advocating for the expungement of criminal records, in addition to pardons, as a comprehensive solution to restore ex-offenders’ civil and political rights); LOVE, *supra* note 346, at 11 (asserting that “[i]n the federal system, pardon is the only way for a federal offender to overcome the legal disabilities and stigma of conviction,” which impede “reentry and reintegration”).

<sup>360</sup> Morison, *supra* note 39, at 327 (“It is axiomatic that a pardon also relieves the grantee from any collateral disabilities or penalties that flow directly from the commission or conviction of a federal offense . . .”). Note, however, that because a pardon does not “compel regulatory authorities to ignore the conduct underlying a conviction,” the underlying conduct itself might “demonstrate[] a failure to satisfy the professional standards or moral fitness appropriate to a particular employment.” *Id.* at 331. Thus, a licensing body may still revoke a license on the basis of the conduct underlying the offense for which a pardon was granted. But the pardon would prevent the automatic

collateral consequences that the President believes to be unwise or unjust in a particular case, even if the President is not prepared to remove the conviction entirely from an individual's record. Governors have used partial pardons at the state level to target particular collateral consequences.<sup>361</sup> Although they have not been employed at the federal level, there is no reason the President has to view a pardon as an all-or-nothing proposition. The Supreme Court, in *Ex parte Wells*, upheld the constitutionality of conditional pardons on the ground that the full pardon power in Article II implies lesser pardon powers.<sup>362</sup> A partial pardon would thus fall within the logic of *Wells*. Indeed, a President could couch a partial pardon as a conditional pardon. For example, the President may find that the limitation on federal housing assistance for individuals convicted of drug trafficking offenses sweeps too broadly, and that some individuals deserve relief from those consequences, but that the conviction should otherwise stay on an individual's record. Under this theory, the President could offer a pardon that is conditioned on the grantee accepting that the pardon eliminates the targeted collateral consequences on public housing assistance, but that all other collateral consequences would still apply.

Clemency is a particularly crucial tool for executive control over collateral consequences because there is no comparable *ex ante* mechanism that allows prosecutors to limit their scope. Even if a prosecutor believes that a given case does not merit a particular collateral consequence, he or she is not able to remove it from the case as long as charges are brought and a conviction is obtained. Only the President, through the back-end clemency power, can achieve piecemeal relief from certain collateral sanctions that the President believes should not apply in a particular case.

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consequences of convictions that flow from statutes, such as the inability to obtain federal housing assistance.

<sup>361</sup> For example, Governor Kathleen Sebelius of Kansas issued a partial pardon of a DUI offender to allow the grantee to travel to Canada for business purposes. Tim Carpenter, *Sebelius Pardons Drunken Driver*, TOPEKA CAPITAL J., Jan. 15, 2009, at 1, available at [http://cjonline.com/stories/011509/kan\\_377566813.shtml](http://cjonline.com/stories/011509/kan_377566813.shtml). Scholars have advocated the notion of targeted clemency relief to address specific problems, such as the restoration of voting rights through clemency. See, e.g., Melissa C. Chiang, Comment, *Some Kind of Process for Felon Reenfranchisement*, 72 U. CHI. L. REV. 1331, 1332 (2005) (discussing how some states use clemency expressly for reenfranchisement).

<sup>362</sup> *Ex parte Wells*, 59 U.S. (18 How.) 307, 314 (1855) ("The real language of the constitution is general, that is, common to the class of pardons, or extending the power to pardon to all kinds of pardons known in the law as such, whatever may be their denomination."); accord *Lee v. Murphy*, 63 Va. (22 Gratt.) 789, 791 (1872) ("[T]he King may extend his mercy upon what terms he pleases, and may annex to his bounty a condition precedent or subsequent . . .").

### CONCLUSION

Proponents of strong executive power often think of that power in terms of military might and the commander-in-chief power, or of the President's place at the top of the federal regulatory bureaucracy. But the President's role in criminal justice is no less important. Indeed, it is particularly critical now, with a political process that often yields overbroad laws, a bloated federal prison population, and hundreds of thousands of individuals who face reentry difficulties because of a federal conviction. While the President can use his or her removal powers over prosecutors to exercise oversight, or attempt to give *ex ante* guidance about which laws should be enforced, those measures are insufficient checks. Removal is politically dangerous, and *ex ante* guidance can only go so far for the same reasons that laws themselves are often overbroad. It is too difficult to anticipate in advance every fact pattern and each unique defendant who may fall within a law's prohibitions. Prosecutors will be imperfect agents of the President's priorities and policies because there is always slack between principals and agents, and the slack will be particularly great in this context precisely because there are so many laws and factual variations, not to mention geographic disparities.

Clemency is the constitutional tool that allows the President to control the executive branch through *ex post* control over specific cases. It gives the President the authority to limit disparities and to communicate his or her policy preferences to prosecutors throughout the country. It is a mechanism for protecting liberty because it allows the President to correct his or her agents when they reach too far.

The Framers recognized the fundamental importance of the pardon power to individual liberty and to an energetic, effective President with control over the executive branch; it is time we did as well.