

After Trump: Restoring Legitimacy to the Pardon Power

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This introduction aims to provide an overview of Donald Trump's extraordinary record of pardoning, and a road map to the essays in this Issue. Together the essays discuss ways to restore legitimacy to the pardon power and increase its usefulness to the presidency, by

- limiting some of the pardon power's most extreme uses;
- supplementing the pardon power with statutory remedies so that the president is no longer personally responsible for so much routine criminal justice business; and
- managing the pardon power in a way that serves the presidency and not the parochial interests of federal prosecutors.

As this Issue's guest editor, I propose that Trump's irregular and undemocratic pardoning may lead to a more coherent and meaningful use of the pardon power in the service of an enlightened presidential policy agenda, to a renewed commitment to the historically close relationship between pardon and the justice system, and even to a transformation of the Justice Department's unforgiving prosecutorial culture.

I. Trump's Theater of Pardoning

The overarching theme that emerges from four years of Donald Trump's pardoning is an approach to executive authority as transactional and personality based, rather than principled, structured, and process based. From the nation's earliest days, unruly pardon has been harnessed to the rule-of-law virtues of the justice system, secured since the nineteenth century by its close connection to the Justice Department and by presidents respecting that connection. Trump ostentatiously rejected that connection from the start.

Trump not only detached the pardon power from the structure and operation of the justice system, he used the power to challenge and frustrate that system. In her essay that serves to keynote this Issue, Bernadette Meyler describes Trump's pardoning as a throwback to the theatrical practices of early modern European kings, realizing what some of the Framers feared was "the potential for pardons to overturn values of both liberalism and democracy."¹ Despite centuries of opportunity, no prior president has deployed the theatrical potential of pardoning to aggrandize his sovereignty with as much fanfare and determination as Trump.

Perhaps the most telling symbol of Trump's rejection of pardoning grounded in the rule of law was his spurning of the Justice Department's pardon advisory process that had guided his predecessors for more than a century. But this should have come as no surprise to anyone familiar with that process, which had not served either the public or the presidency well in many years.² Quite apart from his showman's instinct to use pardons to shock and titillate, Trump made no effort to disguise his contempt for the thin gruel the pardon process had been serving up since Ronald Reagan's presidency.

And the numbers do not lie. As documented in detail by Jack Goldsmith and Matt Gluck in this Issue,³ a bare 11% of President Trump's 238 grants of clemency were likely recommended through the ordinary operation of the official pardon process. Many of Trump's grants were the product of personal pique or fancy, and of an informal White House vetting process that became more and more chaotic as



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his days in office came to an end. Meyler documents the range of self-serving impulses that drove Trump's pardoning—which, in turn, presented unprecedented opportunities for influence peddling and self-dealing by others.⁴ The extent to which Trump's pardons or commutations disrupted or shut down ongoing federal prosecutions was unprecedented, confirming his disdain for the criminal process.

Trump's contempt for the institutions of government is perhaps best illustrated by his grants to soldiers prosecuted for war crimes. As described in this Issue by Daniel Maurer,⁵ these grants were predictably likely to have a corrosive effect on military discipline and morale, and on America's standing in the international community. Another batch of grants with similarly harmful foreign policy consequences involved U.S. security contractors convicted of firing indiscriminately on civilians during the occupation of Iraq, killing dozens in the process.⁶ Trump's scorn for the institutions of government is also exemplified by his actions to disrupt ongoing prosecutions or sharply curtail punishment in cases of political corruption⁷ or massive fraud against the government.⁸

This is not to say that all of Trump's final grants were inappropriate. More than eighty individuals saw their prison sentences reduced during Trump's final days in office, many of whom were brought to the President's attention by former prisoners playing a part in Trump's theater, and whom Trump thanked for this service by granting them full pardons.⁹ Still, the evident absence of a fair process, or even any effort to make the process appear fair, made even these reasonable grants suspect in the public eye.¹⁰

Now that Donald Trump has left the stage, it is time for an after-action report from the authors of this Issue. Meyler notes that public outrage over Trump's pardoning provides an opportunity to consider "how to reclaim the legitimacy of the pardon power in a liberal democracy." Frank Bowman, Daniel Maurer, and Daniel Kobil propose ways that the power either is or could be limited so that it is exercised in a manner consistent with democratic norms. Judge John Gleeson, JaneAnne Murray, and Gabriel Chin and David Schlüssel propose to supplement the power through statutory reforms so that pardon may be confined to the truly "extraordinary" situation. Jeffrey Crouch traces the history of the Justice Department's administration of the pardon power and argues for reestablishing a regular pardon process under the aegis of the attorney general, to encourage the president to pardon more generously and to educate the public about pardon's benign and useful functions.

Putting all of these ideas and arguments together as this Issue's guest editor, I conclude that the way to restoring pardon's democratic legitimacy lies in shrinking the portfolio of routine chores for which pardon is now exclusively responsible, and in freeing the Justice Department's pardon process from the suffocating influence of federal prosecutors.

II. Restoring Legitimacy to the Pardon Power

A. Limiting the Pardon Power

Of all the pardon-related issues that provoked controversy during Trump's tenure, the one that loomed largest as his term drew to a close was the power to pardon before a person is even charged. Throughout his final months in office, there was even talk (though not by him, at least publicly) of his issuing preemptive pardons to his family members or associates, to forgive them in advance for any crimes they might have committed prior to the pardon. After the January 6 attack on the Capitol, some speculated that Trump might try to pardon the rioters en masse. Trump even spoke of pardoning himself, a power no monarch, much less a prior president, had ever exercised or even claimed.

In this Issue, both Frank Bowman¹¹ and Daniel Kobil¹² discuss limits on the president's power to pardon preemptively. Bowman thoroughly examines the English precedents on which the Framers modeled the Article II pardon power to conclude that the president may pardon any federal crime committed before issuance of the pardon and may define the scope of the pardon's intended coverage very broadly (e.g., to cover all possible crimes of a particular type or arising from a sequence of events), including before any prosecution has been initiated.

Bowman also argues that the president may extend pardon to groups of individuals involved in certain events or transactions without specifically identifying each beneficiary, for any and all violations of federal law occurring during those events or transactions. For example, he argues, President Trump could have issued a blanket preemptive pardon to participants in the January 6 attack on the Capitol, though it would likely have had disastrous political consequences for him. However, Bowman draws the line at a Ford-Nixon-style "all federal crimes" pardon potentially covering conduct of which the president is wholly unaware, and therefore about which he or she cannot possibly have rendered a judgment on the propriety of mercy.

Kobil agrees that President Trump could, in theory, have used his pardon power to preclude the bringing of charges against the January 6 insurrectionists, but argues that any pre-conviction use of

pardon is against sound public policy. He therefore proposes a constitutional amendment to limit pardons to the conventional post-conviction scenario. The president would still be able to issue amnesty proclamations, as in the past, as a gesture of societal reconciliation, but individuals within the class of beneficiaries would be pardoned only if they accepted responsibility for their crime and pled guilty. He argues that many of the amnesties in American history were extended to classes of individuals who had either already been found guilty or who agreed as a condition of relief to accept formal responsibility for their crime.

Daniel Maurer discusses the many troubling issues raised for military morale and discipline, as well as under the law of war, by President Trump's pardon of three military officers charged with or convicted by court-martial of war crimes, and his intervention to block military discipline of a fourth officer similarly convicted.¹³ He argues that the president's dual role as chief executive and commander-in-chief, and the constitutionally unique status of the military justice system, may permit Congress to limit the president's ability to intervene in military cases via the pardon power by amending the Uniform Code of Military Justice (UCMJ). In the absence of any such legal limit, Maurer proposes that presidents ought to engage in "deliberate self-restraint" when it comes to pardoning American war criminals, in a way that acknowledges the competing interests involved. In what might be thought anomalous to those unfamiliar with principles and norms of the military justice system, he proposes that pardon is least appropriate after completion of the military process, whereas it might be permissible in the earlier stages of a court-martial case.

B. Supplementing the Power

Essays in this Issue by Judge Gleeson¹⁴ and Professor Murray¹⁵ (described in greater detail later in this section) support an argument that providing statutory alternatives to the constitutional pardon power may hasten restoration of its legitimacy and its usefulness to the presidency. Both articles propose that it is important to divert at least some of the business that is currently funneled into the pardon process (e.g., reducing prison terms and restoring rights post-sentence) into alternative legal channels, preferably the federal courts. This approach will both deliver justice more broadly and fairly and facilitate efficient management of the pardon process by reducing the many demands on it in recent years that have led to intractable case backlogs.

Those eager for a more generous use of the pardon power have with good reason blamed the Justice Department's parsimonious administration of the pardon process for the paucity of grants and their relatively humdrum quality in recent years.¹⁶ Respected scholars have advocated for stripping Justice of its gatekeeper role based on a supposed conflict with its prosecutorial responsibilities.¹⁷ But problems with the pardon process must also take account of the exponential growth in demands on the pardon power in recent years,¹⁸ a growth that has only accentuated pardon's inherently random and unfair operation.¹⁹ It will be impossible to devise a functional system for administering the pardon power unless and until there is an official decision about how this great executive power is to be deployed in the modern justice system.²⁰

Since the 1980s, the question bubbling under the surface of the federal justice system has been whether pardon should resume the historic operational role it played in the nineteenth century and the first years of the twentieth, reducing prison sentences and restoring rights to hundreds of people each year, or whether statutory substitutes (like parole and judicial set-asides) should again be enacted to supplement or supplant it.²¹ Until recently, both alternatives have been firmly rejected. And so the pardon power remained on the sidelines while the federal justice system became increasingly rigid and merciless, producing excessive prison sentences and a "new civil death" after release.²² Presidents since Bill Clinton have recognized the problem but have taken no systematic steps to address it. Even Barack Obama seems to have ignored the advice his predecessor gave him on the way to his inauguration, to "announce a pardon policy early on and stick to it."²³

Today we have the worst of both worlds: the pent-up demand for pardon is great because it is exclusively responsible for many of the justice-enhancing functions it performed in the nineteenth century, but the supply of pardon grants (including commutations) remains restricted by an administrative process constrained by a narrow and often mean-spirited prosecutorial worldview.

It is now Joe Biden's turn, informed by Trump's slapdash and unsystematic use of the power, to decide what role pardon will play in the operation of the federal justice system. There are early signs that Biden plans "a more deliberate, systemic process geared toward identifying entire classes of people who deserve mercy . . . to make good on his campaign promise to weave issues of racial equity and justice throughout his government."²⁴ He may also be persuaded that there is an alternative to systematic reliance on pardoning for routine justice functions: this is what Dan Freed and Steven Chanenson

described twenty years ago as “the more demanding road toward democratic reform.”²⁵ In this scenario, the administration would make the most of existing laws, or, if necessary, ask Congress to enact new laws, to supplement and even largely supplant the pardon power.

Happily, Congress has already begun this process. Judge Gleeson’s essay describes how the 2018 First Step Act has supplemented, if not potentially supplanted, the pardon power by allowing federal prisoners to apply directly to the sentencing court for a modification of sentence for “extraordinary and compelling reasons.” See 18 U.S.C. §3582(c)(1)(A)(i).²⁶ Describing a project sponsored by his firm that seeks reduction of decades-long stacked firearm sentences, Judge Gleeson shows how the federal courts of appeal have embraced an expansive clemency-like reading of this statutory standard, thereby lessening the need for commutations of sentence on a large scale. He recommends that the Biden administration should urge a newly constituted U.S. Sentencing Commission to free courts from the restrictions of the Justice Department’s miserly “compassionate release” policies so that they can apply their own merciful interpretations of “extraordinary and compelling reasons.”

In reality, it may take more substantive guidance from the Sentencing Commission in order to scale up judicial sentence reductions. It may also take high-level direction to federal prosecutors to vigorously support equitable relief by courts based on principles applicable in clemency cases, rather than opposing it across the board, as Judge Gleeson reports.²⁷ The report of the National Association of Criminal Defense Lawyers on “second look” sentencing offers recommendations to states devising laws to allow courts to reconsider and reduce lengthy prison terms and other aspects of a custodial sentence on humanitarian grounds.²⁸ This report’s recommendations are equally applicable to federal cases.

Addressing the other part of the clemency workload—post-sentence restoration of rights and status—is the task Professor Murray has set for herself.²⁹ She describes how federal law now provides no alternative to pardon to avoid or mitigate the collateral consequences of conviction, and how a nascent bipartisan effort in Congress may fill this gap with statutory remedies like the “Certificate of Rehabilitation” that Judge Gleeson awarded in his final year on the bench to a woman he had sentenced years before, in an effort to help her find employment as a health care professional, which the government never appealed.³⁰ She argues that the federal courts are uniquely situated and competent to act as an “auxiliary” to the pardon power in this context, to implement on a large scale a congressionally mandated statutory restoration-of-rights scheme. In their coauthored contribution to this Issue, Jack Chin and David Schlüssel analyze a bill in the last Congress that would have authorized federal courts to issue a certificate to overcome many collateral consequences, and propose how its legal effect might be enhanced.³¹

C. Managing the Pardon Power

The final step to restoring democratic legitimacy to pardoning is providing a process for accessing the power that is fairly available to all, and that delivers relief efficiently. As noted, many advocates for increased pardoning believe that the Justice Department’s management of the pardon program embodies a conflict of interest between the compassionate goals of executive clemency and the Department’s responsibility for federal criminal prosecutions, a conflict in which prosecution policy is the inevitable winner.

They have a point. But it was not always so.

As Jeffrey Crouch ably documents in this Issue,³² the Justice Department’s pardon program had a respected and independent role in that agency during the years before 1980, when the attorney general was personally responsible for advising the president on pardons, and a high percentage of clemency applicants were recommended favorably, frequently by prosecutors.³³ This track record of more than a century thoroughly refutes the argument that Justice necessarily has a conflict of interest that precludes its being a responsible steward of the president’s power. Crouch points out that it was not until the beginning of the 1980s that an unfortunate confluence of events fundamentally changed how the pardon power was used and administered. To begin with, presidents after Jimmy Carter were committed to a tough-on-crime agenda and had little interest in engaging in a politically risky activity like pardoning. Besides, at least during the 1980s, there was little demand for pardon since parole could shorten prison sentences and collateral consequences and digitized records had not yet become widespread.³⁴ Finally, the Justice Department’s approach to pardon underwent a profound change during the 1980s, after the crime war went into high gear. When Jimmy Carter’s Attorney General Griffin Bell delegated his pardon advisory duties to subordinates responsible for the day-to-day operations of prosecutors’ offices, the pardon program lost its privileged institutional status above the fray.³⁵ With operational oversight of pardons and prosecutions in the same hands, successive pardon attorneys (myself included) found it harder and harder to persuade political officials to whom they reported (who were usually themselves

former prosecutors or who staffed their offices with prosecutors) to approve recommendations favoring clemency. Favorable recommendations sent to the White House grew fewer and fewer in number and more and more anodyne. Until the last years of the Obama administration, no president evinced a sustained interest in having it any other way.³⁶

By the turn of the twenty-first century, the Justice Department's pardon program had become a subservient creature of its prosecutorial culture rather than a source of independent advice to the president. Presidents from Clinton to Obama complained that they could not rely on the Justice Department to manage their pardon power—although they took no steps to correct the situation.³⁷ Trump's aberrant pardoning practices simply made public what had become behind the scenes a dysfunctional and unproductive relationship between the Justice Department and the presidency in pardon matters. It is no wonder that many observers who hope for more from the pardon power believe that formal divorce is desirable and even inevitable.

But talk of divorce seems premature. The country has seen what can happen when the pardon power is unmoored from the justice system, as it was under Trump. At the same time, it should go without saying that the presidency in 2021 is not well served by pardon advice that consistently reflects the implacable prosecutorial culture of the 1980s and 1990s, as it has for at least the last thirty years.³⁸

It is possible for the Biden administration to revive a functional and productive institutional connection between the pardon power and the justice system by doing two things. First, as recommended in the previous section, it must take the pressure off the pardon power by assigning many of its functions elsewhere, seeking new legislative authority if necessary. Second, it must insist that the pardon program be returned to its former place as an independent and respected part of the Justice Department, serving the president and not the parochial interests of federal prosecutors. This means removing responsibility for pardon matters from subordinate officials who are also responsible for prosecution policy and returning it to the office of the attorney general, maximizing the advantage that official has historically enjoyed as one of the president's closest political advisers. With much pardon business outsourced to the courts or administrative agencies, the attorney general may involve the president in the occasional extraordinary case where other institutions are unwilling or unable to deliver an appropriate remedy.

A reinvigorated pardon program within Justice could be integral to an enlightened criminal justice agenda. If political appointees and line prosecutors understood their responsibility to include asking the sort of questions pardon should ask (whether a conviction is justifiable, whether a sentence is excessive, whether a person deserves a second chance), it would surely influence their handling of criminal cases in the first instance. In contrast, if responsibility for pardon advice were moved out of the Justice Department, whether to an independent agency or into the White House itself, the power would no longer be directly positioned to inform and temper prosecution and sentencing policies and practices. Clemency decisions would likely be less informed and perceived as less legitimate by law enforcement and possibly by the public as well. The president would doubtless be called on to mediate the inevitable conflicts between whatever entity was responsible for clemency advice and agencies responsible for criminal law enforcement.

President Biden reportedly has in mind a broad use of the power to address racial inequities produced by decades of federal prosecution and sentencing policies, and he is said to have already decided to rely upon the Justice Department's existing pardon process.³⁹ It would not be surprising to see him target relief to specific types of crimes that have had the harshest impact in the minority community, reducing sentences and expunging conviction records on a class-wide basis by executive order. In the meantime, there are almost certainly a large number of applications for pardon and commutation that were recommended for favorable action by the Justice Department during the four years in which President Trump essentially ignored the process. Acting favorably on those cases in his first year in office would be a substantial down payment on a commitment to revive the power to address broader policy goals.

Conclusion

In the end, Trump's abuse of the pardon power would be a blessing in disguise if it provided an incentive to restore legitimacy to pardoning, by reassigning many of pardon's routine functions (so that individuals will have fair and efficient access to relief), and by reaffirming the historically close ties between the president's power and the rule of law (so that presidents will have at their disposal an efficient instrument of criminal justice policy). Trump's lawless pardoning may even play a part in transforming the Justice Department's prosecutorial culture. As a longtime judge who also has personal experience with

both prosecuting and pardoning, Attorney General Merrick Garland is well positioned to reset the balance between these two great executive functions to the benefit of both.

Notes

- * Law Office of Margaret Love; Former U.S. Pardon Attorney, 1990–1997.
- ¹ See Bernadette Meyler, *Transforming the Theater of Pardoning*, 33 Fed. Sent'g Rep. 293 (2021).
- ² See Jeffrey Crouch, *The Office of the Pardon Attorney: What Comes Next?*, 33 Fed. Sent'g Rep. 337–40 (2021); see also Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. Crim L. & Criminology 1169, 1177 (2010).
- ³ See Matthew Gluck & Jack Goldsmith, *Donald Trump and the Clemency Process*, 33 Fed. Sent'g Rep. 298–99 (June 2021).
- ⁴ See, e.g., Michael Schmidt & Kenneth Vogel, *Prospect of Pardons in Final Days Fuels Market to Buy Access to Trump*, N.Y. Times, Jan. 17, 2021, <https://www.nytimes.com/2021/01/17/us/politics/trump-pardons.html?action=click&module=RelatedLinks&pgtype=Article>.
- ⁵ See Daniel Maurer, *War Crime Pardons and Presidential (Self-) Restraint*, 33 Fed. Sent'g Rep. 314–15 (June 2021).
- ⁶ See, e.g., Faliq Hassan & Jane Arraf, *Blackwater's Bullets Scarred Iraqis. Trump's Pardon Renewed the Pain*, N.Y. Times, Dec. 23, 2020, <https://www.nytimes.com/2020/12/23/world/middleeast/blackwater-trump-pardon.html>.
- ⁷ See Eric Lipton & Kenneth P. Vogel, *In Trump's Pardons, Disdain for Accountability*, N.Y. Times, Jan. 20, 2021, updated Mar. 21, 2021, <https://www.nytimes.com/2021/01/20/us/politics/trump-pardons-accountability.html>.
- ⁸ See Eric Lipton, *For Prosecutors, Trump's Clemency Decisions Were a 'Kick in the Teeth'*, N.Y. Times, Jan. 21, 2021, <https://www.nytimes.com/2021/01/21/us/politics/trump-pardons-medicare-fraud.html?searchResultPosition=4> (“Commutations in high-profile Medicare fraud cases have elicited anger among those who spent years pursuing complex prosecutions.”).
- ⁹ See, e.g., Peter Baker, *Trump Extends Pardon to Alice Johnson After She Praises Him at Convention*, N.Y. Times, Aug. 28, 2020, <https://www.nytimes.com/2020/08/28/us/politics/trump-alice-johnson-pardon.html?searchResultPosition=2>.
- ¹⁰ See Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 32 Capital U. L. Rev. 185, 186–87 (2002) (“[I]n pardoning, an apparently sound process tends to produce politically acceptable decisions.”).
- ¹¹ See Frank O. Bowman, III, *Are Blanket Pardons Constitutional?*, 33 Fed. Sent'g Rep. 301–06 (June 2021).
- ¹² See Daniel T. Kobil, *Article II and the Pardon Power: Did the Framers Drop the Ball?*, 33 Fed. Sent'g Rep. 307–12 (June 2021).
- ¹³ See Maurer, *supra* note 5.
- ¹⁴ John Gleeson, *Debevoise's Holloway Project and "Second Looks": How Challenging One Discrete Racial Inequity in Federal Criminal Justice Can Help Produce Systemic Change*, 33 Fed. Sent'g Rep. 319–27 (2021).
- ¹⁵ JaneAnne Murray, *Judicial Restoration of Rights as an Auxiliary to the Pardon Power*, 33 Fed. Sent'g Rep. 328–34 (2021).
- ¹⁶ See generally Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. Toledo L. Rev. 89 (2016). This includes pardons under President Barack Obama, who allowed his Justice Department to bungle the rollout of his Clemency Initiative by failing to make adequate changes in the official pardon process to address the extraordinary wave of new applications. See also Office of the Inspector General, *Review of the Department's Clemency Initiative* (Aug. 2018); U.S. Sentencing Comm'n, *An Analysis of the Implementation of the 2014 Clemency Initiative* (2017).
- ¹⁷ See, e.g., Paul Larkin, Heritage Foundation, *Reorganizing the Federal Clemency Process* (2017), <https://www.heritage.org/crime-and-justice/report/reorganizing-the-federal-clemency-process>; Love, *Justice Department Administration*, *supra* note 16; Rachel Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. Chi. L. Rev. 1 (2015); see also Editorial, *Trump Corrupted the Presidential Pardon. Biden Must Repair It*, N.Y. Times, Dec. 23, 2020, <https://www.nytimes.com/2020/12/23/opinion/trump-biden-pardon.html>.
- ¹⁸ See, e.g., Margaret Love, *Trump's Self-Serving Pardons Should Renew Calls for a Reckoning with the Presidential Power*, Wash. Post, Jan. 20, 2021:

[T]he law makes the president exclusively responsible—through his pardon power—for shortening most federal prison sentences and relieving the collateral consequences of conviction—functions that in most states are now routinely performed by judges and agencies under statutory schemes. For example, a presidential pardon is the only way a person convicted of a federal felony can qualify for many business and professional licenses, or regain the right to possess firearms. Indeed, I have been told—and my own practice would confirm—that a desire to regain firearms rights accounts for nearly half of the pardon applications filed. It is beyond absurd to make the president a one-person gun-licensing bureau for people convicted of nonviolent federal crimes who want to go hunting again.

- ¹⁹ See Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 Ford. Urb. L. J. 1483, 1500–05 (2000) (discussing Jeffrie Murphy's theory of pardon as public mercy, which is “not constrained by principles of fairness in the same way that justice is”).
- ²⁰ President Obama launched a late-term initiative to reduce drug sentences through the pardon power, but he did not consider other demands on the power or propose that his Justice Department make greater use of statutory

alternatives for reducing sentences. See Margaret Love, *Obama's Clemency Legacy: An Assessment*, 29 Fed. Sent'g Rep. 271 (2017).

- 21 See Love, *Twilight*, *supra* note 2, at 1175–95. See also 3 The Attorney General's Survey of Release Procedures: Pardon 295, U.S. Dep't of Justice (1939) (pardon as “the safety valve by which harsh, unjust, or unpopular results of formal rules could be corrected” and “the tool by which many of the most important reforms in the substantive criminal law have been introduced”). The enactment of a paroling authority in the early twentieth century, and its establishment by statute in 1930, took considerable pressure off the pardon power for reducing prison sentences, as did the development of various defenses to criminal prosecution and the demise of the regime of “civil death” (see *id.*); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Penn. L. Rev. 1789, 1792 (2012). In an eerie premonition of Trump's pardoning, the editor of the 1939 five-volume Justice Department series (one Wayne Morse, later distinguished longtime Senator from Oregon) spoke of pardon's potential “flagrant abuse” in “the hands of arbitrary rulers exercising the power merely to indulge their personal whims.”
- 22 See Chin, *supra* note 21.
- 23 See George W. Bush, Decision Points 105 (2010) (“On the ride up Pennsylvania Avenue on Inauguration Day, I told Barack Obama about my frustrations with the pardon system. I gave him a suggestion: announce a pardon policy early on and stick to it.”). Obama paid little attention to his pardoning responsibilities until his second term and left the Justice Department's pardon process in shambles. See Love, *Obama's Clemency Legacy*, *supra* note 20.
- 24 Kenneth Vogel & Annie Karni, *Biden Is Developing a Pardon Process with a Focus on Racial Justice*, N.Y. Times, May 17, 2021.
- 25 Daniel Freed & Steven Chanenson, *Pardon Power and Sentencing Policy*, 13 Fed. Sent'g Rep. 120 (2001).
- 26 See Gleeson, *supra* note 14. Prior to the First Step Act, judicial authority to modify a sentence under this statute depended on a motion being filed by the Bureau of Prisons.
- 27 Judge Gleeson remarks on how the courts who were willing to reduce his clients' sentences were also uniformly unwilling to cite the racially disparate application of mandatory firearm sentences as a reason for their action:

DOJ's disparate deployment of § 924(c) stacking against Black men was a far less powerful argument than we expected. No one challenged the troubling data reported three times over a fourteen-year span by the Sentencing Commission. . . . [T]he most telling indication that we're not yet able to deal with racial disparities that are baked into our system is that even though there are now many dozens of opinions that have reduced stacked § 924(c) sentences based on extraordinary and compelling reasons, not a single one even mentions the undisputed fact that those mandatory sentences were invoked disproportionately against Black men. *Id.*

- 28 National Association of Criminal Defense Lawyers, *Second Look – Second Chance: The NACDL Model “Second Look” Legislation* (2021).
- 29 See Murray, *supra* note 15.
- 30 See *Jane Doe v. United States*, 168 F. Supp. 3d 427, 446 (E.D.N.Y. 2016) (Gleeson, J.) (granting a “certificate of rehabilitation” in recognition of “Doe's good conduct following completion of her sentence”).
- 31 See Gabriel J. Chin & David Schlüssel, *Has the Time Come for Relief for Federal Convictions?*, 33 Fed. Sent'g Rept. 335–36 (2021).
- 32 See Crouch, *supra* note 2.
- 33 None of the critics urging that the pardon process be removed from the Justice Department (see Love, *Trump's Self-Serving Pardons*, *supra* note 18) explain how the Justice Department could have successfully served as gatekeeper to the president's power for more than one hundred years, recommending favorably a substantial percentage of those who applied. See Office of the Pardon Attorney, Dep't of Justice, *Clemency Statistics*, <https://www.justice.gov/pardon/clemency-statistics>. In the late nineteenth century, when staffing of pardons and recommendations was primarily the responsibility of federal prosecutors, “49 percent of the applications for presidential pardons were granted.” See Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Interest* 53 (1989); see also Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. Crim. L. & Criminology 1131, 1131 (2010).
- 34 See Chin, *supra* note 21.
- 35 This informal delegation was formalized in the Reagan administration. See 28 CFR §§ 0.35, 0.36. The circumstances of the delegation and its almost immediate results are discussed in Love, *Justice Department Administration*, *supra* note 16, at 98–99.
- 36 Bill Clinton decided in his final year in office that he wanted to improve his pardoning record and sought recommendations from the Pardon Attorney, but by that time the program had all but ceased to function and was able to promise him only a handful of recommendations. For an account of what happened when he was left to his own devices, see Love, *Pardon Paradox*, *supra* note 10, at 193–204; see also Dafna Linzer, *Clarence Aaron Was Denied Commutation but the Bush Team Wasn't Told All the Facts*, Wash. Post, May 13, 2012; Linzer & LaFleur, *ProPublica Review of Pardons in Past Decade Shows Process Heavily Favored Whites*, Wash. Post, Dec. 3, 2011 (noting George W. Bush White House frustration with steady stream of denial recommendations from the Justice Department). President Obama, too, expressed surprise at how few favorable recommendations for commutation of sentence were sent to him. See Cora Currier, *President Obama Tells Clarence Aaron He Can Finally Go Home*, Pro Publica, Dec. 19, 2013.
- 37 See generally Love, *Justice Department Administration*, *supra* note 16. It is not surprising that the department's first response to President Obama's declared interest in commuting drug sentences was to farm out

responsibility for managing this initiative to private organizations rather than try to identify eligible cases through established official mechanisms in each judicial district. See *id.* at 90 n.8 (2015), citing Josh Gerstein, *Grassley Questions Obama Commutation Drive*, Politico (Jan. 13, 2015), <http://www.politico.com/blogs/under-the-radar/2015/01/grassley-questionsobama-commutation-drive-201027.html>. It is a minor miracle that the Obama initiative produced as many grants as it did. See Inspector General Review, *supra* note 16; Sentencing Commission Analysis, *supra* note 16.

³⁸ See, e.g., Shon Hopwood, *The Misplaced Trust in the DOJ's Expertise on Criminal Justice Policy*, 118 Mich. L. Rev. 1181, 1201–02 (2020).

³⁹ See Vogel & Karni, *supra* note 24.