



Willie Horton's Shadow: Clemency in Massachusetts

A healthy criminal justice system punishes no more than is necessary and creates opportunities for rehabilitation. Clemency advances both goals. This Report of the Center's State Clemency Project focuses on Massachusetts, where just one sentence has been commuted since 1997. Without a realistic opportunity for clemency, more than 1,000 individuals serving life-without-parole sentences in Massachusetts—13 percent of the state's prison population—are condemned to die behind bars.¹

Before 1980, governors sometimes commuted more than a dozen sentences in a single year, drawing from a prison population several times smaller than today's. The Center's archival review found that commutations were overwhelmingly granted to people serving life sentences for murder, most of whom served several decades or more before receiving clemency. This shows that an active clemency system does not mean being "soft on crime;" it means recognizing personal change and accommodating new standards of proportionality.

Criminal justice policy is often shaped by moments of fear and outrage, in response to exceptional acts of violence packaged in media for mass consumption. Clemency is no exception. Although the decline of clemency in Massachusetts was part of a broader shift toward harsher punishment that occurred around 1980, memories of specific crimes—like those committed by Willie Horton—suffuse political rhetoric with such emotional force that those with authority to restore

clemency believe that doing so would risk political suicide. Yet, with today's sprawling criminal codes and lengthy sentences, clemency is more necessary than ever before.

Politics alone do not explain why commutations are no longer granted in Massachusetts; there are also structural and institutional problems with the way clemency is administered there. The Advisory Board of Pardons, which recommends petitioners to the governor's office, is stacked with law enforcement professionals who lack the perspective of a defense advocate or formerly incarcerated person. Moreover, the fact that the Advisory Board also administers parole means that clemency attracts fewer resources and less attention than in states where an agency is exclusively devoted to clemency. These design elements, together with the fear-based messaging that distorts thinking around criminal justice policy, tell the story of clemency's demise in Massachusetts.

¹ Massachusetts Department of Corrections, 2017 Prison Population Trends, 22.

1. A History of Clemency in Massachusetts

An archival review of official documents shows that commutations fell off precipitously around 1980, likely a function of a broader shift toward more retributive penal practices that began in the 1970s. Those most affected by clemency's decline were people serving life sentences for first-degree or second-degree murder, who received 84% of commutations issued between 1950 and 1980. Parole, which is administered by the same entity that issues clemency recommendations to the governor, also became less accessible to lifers in Massachusetts. In 1987, with clemency already declining and prisons swelling beyond capacity, the Willie Horton saga created a climate in which politicians became unwilling to tolerate the perceived risks of discretionary release.

How clemency is granted in Massachusetts

The process for reviewing clemency petitions consists of three stages, discussed in greater detail in Part 2 of this Report. To summarize, a petition is reviewed first by the Advisory Board of Pardons, whose seven members are appointed by the governor. After reviewing the petitioner's background and criminal history, the Advisory Board typically holds a formal public hearing. It then transmits a written recommendation to the governor either favoring or opposing clemency for the petitioner. Next, the governor decides whether to grant clemency, taking account of the Advisory Board's recommendation and the governor's Executive Clemency Guidelines, which are substantive criteria for evaluating the merits of clemency petitions. If the governor decides to grant clemency, that decision is subject to the consent of the Executive Council, a body of eight directly-elected officials who serve two-year terms. The Council may consent to clemency only after holding its own public clemency hearing. A petitioner must pass all three stages—the Advisory Board, governor, and Executive Council—in order to be granted clemency.

Clemency's decline in Massachusetts, by the numbers

For much of the twentieth century, the governor of Massachusetts granted a handful of commutations each year, usually to individuals who had already served many years in prison and who showed evidence of rehabilitation. This practice continued into the 1970s, when Governors Frank Sargent and Michael Dukakis commuted 90 sentences, but fell off dramatically under the King administration (1979–1983), and has not recovered. Of the 267 commutations that have been granted in Massachusetts since 1945, 238 (or 89%) occurred before 1980. Only one sentence has been commuted since 1997.²

Would-be candidates became discouraged by the dearth of grants, and petitions for clemency fell. Between 1973 and 2018, the number of petitions processed annually by the Board fell steadily from 101 to 10. *See* Figure 4.³ The frequency of public hearings held by the Advisory Board has also declined significantly. The Board held an average of 5.5 hearings per year during the 1980s, 2.9 hearings per year during the 1990s, and fewer than 1 per year after 2000. That the Advisory Board of Pardons has conducted only seven commutation hearings since 2005 suggests that few petitioners in the last decade have been seriously considered for clemency.

Clemency's decline in the early 1980s corresponded with the ascent of tough-on-crime politics and the explosion of prison populations across the United States. Governor Michael Dukakis commuted about 50 sentences during his first stint as governor, from 1975 to 1979, before losing the 1978 Democratic primary to Edward J. King. Like gubernatorial candidates in other states at this time, King cultivated an image of being "tough on crime."⁴ He ushered in mandatory minimums and attempted to restore capital punishment. Whereas Dukakis granted 48 commutations during the previous term, King would grant just 11.

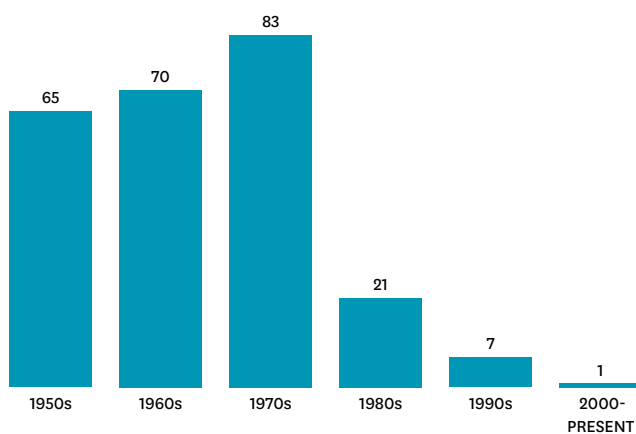
² Unless stated otherwise, all statistics have been obtained from government sources by public records request. Because pardons generally do not affect incarcerated persons, they are beyond the purview of this Project, though official statistics indicate that pardons have declined along with commutations.

³ Data regarding the number of petitions processed by the Advisory Board is not available prior to 1973.

⁴ *See*, e.g., Black, *infra* note 17.

Dukakis recaptured the governor’s office in 1982, but his stance on clemency had been warped by the changing political tides, and he commuted just 10 sentences between 1983 and 1991. Meanwhile, he hired more police officers and sought to construct more prisons to accommodate the state’s booming prison population. A 1985 Boston Globe article observed that Dukakis mentioned crime in every major address to the state legislature during his second term, after mentioning it just once between 1975 and 1978.⁵

Figure 1: Commutations Granted by Decade



Who received clemency in Massachusetts?

In Massachusetts, commutations were usually granted to individuals serving long sentences of confinement. The state punishes first-degree murder with mandatory life imprisonment without the possibility of parole. Second-degree murder carries a mandatory life sentence, with parole eligibility after a term fixed by the sentencing court,⁶ usually 15 years. According to a report by the Sentencing Project, people serving actual and de facto life sentences (i.e. sentences of 50 years or longer before parole consideration) comprise 23.2% of the Massachusetts prison population. Only four states have a larger proportion of individuals serving actual and de facto life sentences.⁷

Between 1950 and 1980, approximately 84% of commutations were granted to individuals convicted of first-degree or second-degree murder. Whereas clemency grants declined after 1980, the lifer population soared. In 1971, when 275 people were serving life sentences, Governor Sargent commuted 10 sentences. In 2015 there were 2,022 people serving life sentences. Had the 1971 ratio of lifers to commutations remained constant, Governor Patrick would have commuted 73 sentences in 2015. Instead, no sentences were commuted that year, and Patrick commuted just one sentence during eight years in office.

Over two decades after the last life sentence was commuted, the percentage of incarcerated persons who are serving life or de facto life sentences in Massachusetts continues to grow rapidly. In 2010, after a parolee named Dominic Cinelli murdered a police officer, legislators expanded the number of offenses that trigger the state’s habitual offender law.⁸ Under that statute, a third felony conviction requires that the individual serve the maximum allowable sentence with no parole eligibility. The number of crimes that can trigger a life-without-parole sentence grew from one to 20. After the statute passed, between 2012 and 2016, the state’s population of lifers grew 16%.⁹ Only three states—Maryland, Mississippi and Vermont—saw a larger increase in the percentage of individuals serving life or de facto life sentences over that four-year stretch.¹⁰ Today, Massachusetts is one of four states in which greater than 10 percent of incarcerated persons are lifers with no parole eligibility.¹¹ The only hope for these people is clemency.

⁵ Kenneth J. Cooper, *Dukakis’ New Image—Crime Fighter*, Boston Globe (March 31, 1985).

⁶ M.G.L.A. 265 § 2.

⁷ Ashley Nellis, The Sentencing Project, *Still Life: America’s Increasing Use of Life and Long-term Sentences* (May 3, 2017).

⁸ See H.B. 4286.

⁹ See Nellis, *supra* note 7.

¹⁰ *Id.*

¹¹ Gordon Haas & Lloyd Fillion, in conjunction with the Criminal Justice Policy Coalition, *Life without parole: A Reconsideration*. Boston: Criminal Justice Policy Coalition (2016). The other three states are Delaware, Louisiana, and Pennsylvania.

Those who received clemency typically had served many years of their sentence. Between 1950 and 1980, life sentences for first-degree murder were commuted to an average of 42 years, while life sentences for second-degree murder were commuted to an average term of 24.5 years to life. These figures allow several important inferences. The first is that actively granting clemency does not imply that individuals convicted of serious crimes “get off easy;” those who received

clemency in Massachusetts nevertheless served significant time. Second, an active clemency system can advance individualized justice while preserving the relationship between the length of a sentence and the relative severity of an offense. Specifically, the data show that, among those who received commutations, individuals convicted of first-degree murder served significantly more prison time than individuals convicted of second-degree murder.

Figure 2: Commutations by Administration

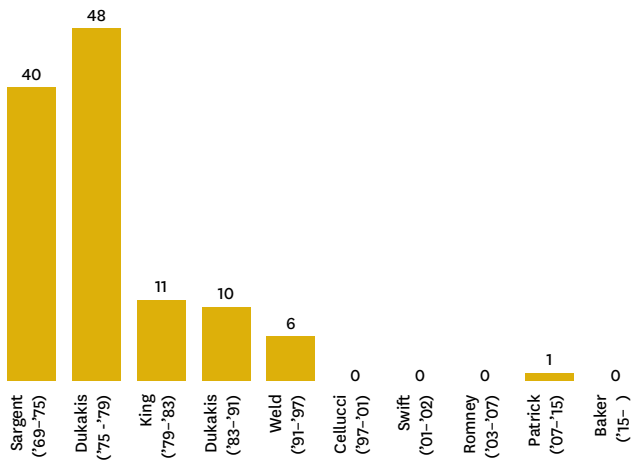


Figure 4: Petitions Processed by the Advisory Board

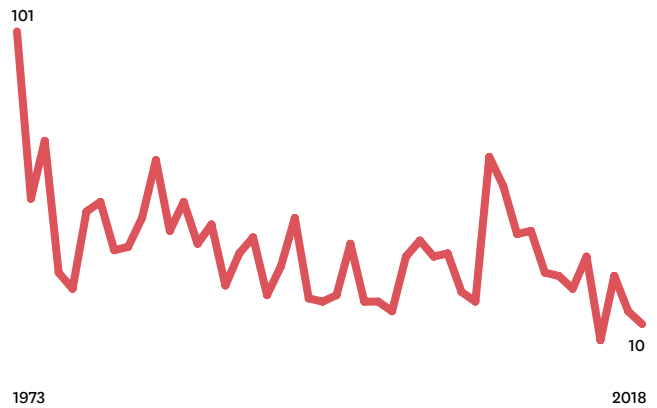


Figure 3: Commutations and LWOP Population

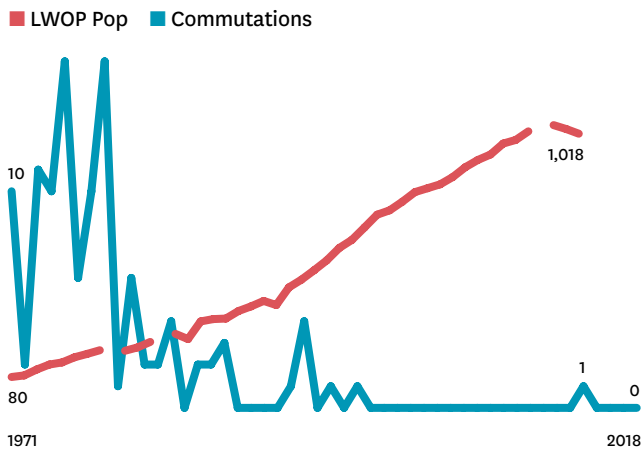
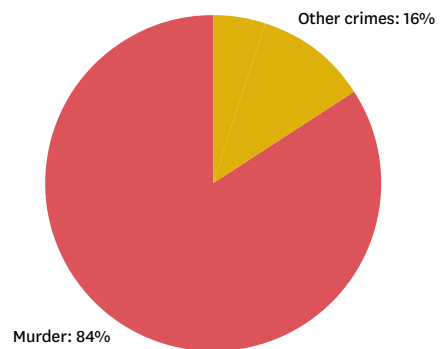


Figure 5: Sentences Commuted by Type of Crime



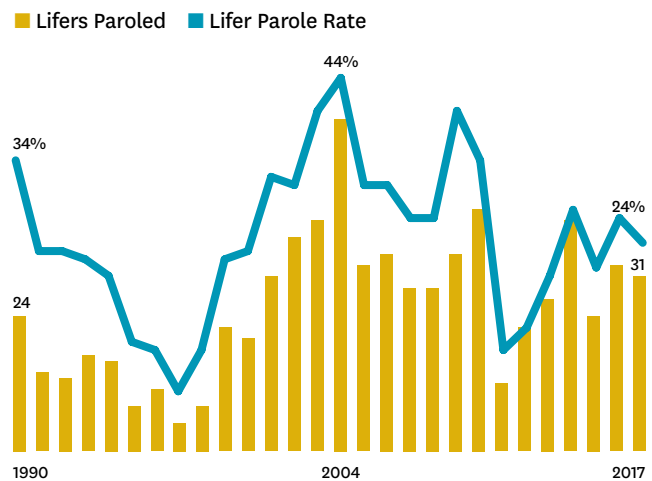
Inaccessibility of Parole

Efforts to curtail parole compounded the effect of clemency’s decline in Massachusetts. In 1994, legislators passed a truth-in-sentencing statute that curtailed parole eligibility for large segments of the prison population and eliminated good time credit.¹² Before 1994, most individuals were parole-eligible after serving one-third or two-thirds of the statutory minimum. Now, one must serve out the full minimum term before being considered for parole.¹³ According to a report by the Urban Institute Justice Policy Center, the percentage of individuals released to parole by the DOC dropped from 80 percent in 1980 to 33 percent in 2002.¹⁴ Meanwhile, commutations, already in decline, abated completely during the 1990s.

Historically, lifers have been less successful at parole hearings than other incarcerated persons. Between 1990 and 2017, the parole rate for lifers (i.e. the percentage of parole hearings resulting in parole) fluctuated from a low of 6% in 1997 to a high of 44% in 2004. *See* Figure 6. In 2017, the latest year for which data is available, the parole rate for lifers was 24%. This volatility reflects the power of the Willie Horton effect. In December 2010, a parolee named Dominic Cinelli murdered a police officer, prompting the resignation of all but one Board member and the appointment of a new chairperson. In the prior eight years, the parole rate for lifers was 34%. Immediately after the Cinelli incident, the rate dropped to 11% in 2011 and 14% in 2012. The overall parole rate also dropped noticeably, from 63% in 2010 to 47% in 2011. Further, the annual number of parole hearings decreased, and the Board began taking longer to make decisions.¹⁵

Fortunately, some politicians appear ready to act. Representative Jay D. Livingstone and Senator Joseph A. Boncore introduced legislation in January of 2019 that would provide individuals convicted of first-degree murder with an opportunity for parole consideration after 25 years.¹⁶ The law would apply retroactively. Individuals between 14 and 18 years of age at the time of their crime would serve a minimum of 15 to 20 years, except for those convicted under the felony murder or joint venture rules, who would serve a minimum of 10 to 12 years.

Figure 6: Parole for Lifers (1990–2017)



12 Massachusetts Sentencing Commission, *Survey of Sentencing Practices: Truth-in-Sentencing Reform in Massachusetts* (Oct. 2000).

13 *Id.*

14 The Urban Institute Justice Policy Center, *Prisoner Reentry in Massachusetts* (March 2005).

15 Jean Trounstein, *Why Massachusetts’ Parole System Requires Reform*, Boston Magazine (Jun. 25, 2013), available at <https://www.bostonmagazine.com/news/2013/06/25/massachusetts-needs-parole-reform/2/>.

16 House Bill No. 3358, An Act to reduce mass incarceration.

Politics in the Land of Willie Horton

Clemency might have recovered from its steep decline in the early 1980s, had it not been for the actions of a lifer named Willie Horton. In June of 1986, Horton failed to return from his weekend furlough, and in April of 1987 he assaulted a man before repeatedly raping the man's fiancé. Dukakis endured a crucible of public rage in the media. Across the country, discretionary release programs came to be viewed as political landmines. Massachusetts immediately terminated its furlough program, even though only .1% of furloughed individuals in 1986 took flight. The tendency to reflexively overhaul a criminal justice policy after a single violent crime, regardless of the policy's overall success, became known as the "Willie Horton effect." Politicians were eager to exploit these political moments by proclaiming their rivals to be "soft on crime." Representative Marjorie Clapprod of the Massachusetts House of Representatives described this toxic environment in a 1990 Boston Globe article:

"They wrapped the American flag around our necks and shoved Willie Horton down our throats and many politicians were swept away by the angry tides. Now we have paralysis. It is a frightening trend towards public policy-making by metaphor. Willie Horton became a metaphor in an angry environment when folks were looking for a quick and simple answer. We have effectively blocked the outflow of those who are ready to reenter society. We have pushed down one end of the balloon, and the other end of the balloon is ready to explode."¹⁷

Discretionary release programs in Massachusetts have yet to recover. In 1994, officials suspended a work-release program following crimes committed by a participant named Robert E. Stewart, who was serving a life sentence for second-degree murder. Instead of returning to prison after his work shift, Stewart stole a car and shot a police officer, before dying in a high speed chase with New Hampshire state police.¹⁸ Officials recalled to prison 40 other individuals convicted of second-degree murder who had been participating in the program. The same year, a spate of murders by Reginald McFadden, a clemency recipient from Pennsylvania, drew national attention and solidified the view of clemency as a political time-bomb.

The specter of Willie Horton reappeared in Massachusetts in 2010. Fifty-seven-year-old parolee Dominic Cinelli shot and killed police officer John Maguire while attempting to rob a department store in the Boston suburb of Woburn, MA. At the time of his parole in 2008, Cinelli had served 22 years of three concurrent life sentences for armed robbery, assault with intent to commit murder, and escape. The son of a former Boston police officer, Cinelli had an extensive criminal record; he had been sentenced in 1986 under the state's habitual offender statute. The Board denied his initial bid for parole in 2005, noting that Cinelli was "a habitual criminal who had only recent improvement after years of poor adjustment." Three years later, at the 2008 hearing, the Board noted Cinelli's completion of the Alternatives to Violence program, his continued participation in substance abuse treatment, his church attendance, and his completion of a GED program. Family members attended the hearing and pledged to support Cinelli in his reentry to the community. The Board voted 6-0 to grant parole, conditioned on further substance abuse treatment and drug testing. Based on its written decision, the Board believed genuinely in Cinelli's good-faith rehabilitation. Unfortunately, however, Cinelli's reentry was unsuccessful.

¹⁷ Chris Black, *Horton Case Keeping the Jail Cells Shut*, Boston Globe (July 8, 1990).

¹⁸ *Work-Release is Suspended After Inmate Shoots Officer*, New York Times (Apr. 6, 1994).

Cinelli's crimes enraged the public, which directed its ire at the Board. Local law enforcement leaders called for wholesale review of the parole process.¹⁹ In 2011, Governor Patrick forced the resignations of all five remaining members who had voted to parole Cinelli. He replaced the Board's chairman with Suffolk County assistant district attorney Joshua Wall, who continued to lead the Board until Patrick appointed him to a state judgeship in July of 2014.²⁰ Resigning from the Board following the Cinelli saga were Mark A. Conrad (former Milton, MA, police officer), Doris Dottridge (a former Mashpee, MA, police officer), Candace J. Kochin (former assistant deputy superintendent for treatment for the Hampshire County Sheriff's Office), Pamela Lombardini (former federal probation officer), Thomas F. Merigan, Jr. (former federal probation supervisor), and Leticia S. Munoz (clinical psychologist).

One former parole board chairman predicted in 2011 that the overhaul would "have a dramatic effect on the parole rate." Indeed, the parole rate for lifers fell sharply in 2011 and 2012. Legislators, meanwhile, expanded the habitual offender statute in order to broaden the application of LWOP and other lengthy, determinate sentences.²¹ Nevertheless, the Board's composition in 2008 was not altogether different from its current composition; then, as now, the Board was comprised mostly of individuals with law enforcement backgrounds.²²

Ironically, a more rational reform than dismissing the entire Board was already in place at the time of Officer Maguire's shooting in 2010. In early 2009, just months after paroling Cinelli, the Board introduced its first evidence-based risk assessment tool.²³ According to a 2011 report by the Massachusetts Executive Office of Public Safety & Security (EOPSS), had the tool been in place in 2008, Cinelli would have registered a score of 9 out of 10 (indicating a high risk of recidivism).²⁴ Evidence-based risk assessment, while far from perfect, is believed to be more reliable than the subjective,

instinct-based decision-making that led to Cinelli's parole. The EOPSS report noted several additional institutional shortcomings associated with Cinelli's parole. First, the Board failed to notify the Middlesex County district attorney in advance of Cinelli's 2008 parole hearing; prosecutors had opposed Cinelli's unsuccessful 2005 bid for parole, and likely would have opposed his parole again in 2008. Second, Cinelli's parole officer failed to make "collateral contact"²⁵ for five consecutive months leading up to December of 2010, when Cinelli committed the crime. It is impossible to say whether strict adherence to these policies would have prevented tragedy in Cinelli's case. It is likely, however, that Cinelli would have been denied parole on the basis of risk, had the risk assessment tool been implemented several months earlier, when Cinelli was paroled.

Like Willie Horton, Cinelli was an outlier, whose actions did not reflect other paroled lifers. The postmortem released by the EOPSS noted that 7,901 parolees (including 341 lifers) had been under Parole Board supervision in 2009. Of this group, 877 parolees (or 11%) returned to custody during the calendar year: 8% for technical violations and 3% for commission of a new crime. How many of these new convictions were for violent crimes is not known, though it is generally believed that first-time "violent" offenders are less likely to recidivate than people convicted of property crimes.²⁶ In retrospect, it is difficult to justify the official response to Cinelli's crime on rational grounds. Indeed, the Massachusetts parole system was outperforming parole in other states: in 2009, 78% of the state's parolees successfully completed their parole, compared to a national average of 51%.²⁷

¹⁹ See, e.g., Maria Cramer & Jonathan Saltzman, *09' parole of officer's killer gets hard look*, www.Boston.com, (Dec. 29, 2010).

²⁰ A review of the decision to parole Cinelli by the Executive Office of Public Safety & Security found several procedural breakdowns, including the Board's failure to notify the Middlesex District Attorney's Office. See Memo Re: Cinelli from Undersecretaries of EOPSS to Mary Beth Heffernan, Secretary, EOPSS (Jan. 12, 2011).

²¹ Gordon Haas & Lloyd Fillion, *Life Without Parole: A Reconsideration*, 36 (2003).

²² See Jonathan Saltzman, *Killings a year apart show parole's risks*, *Boston Globe* (Dec. 31, 2010).

²³ See Memo Re: Cincelli, *supra* note 20, at 5.

²⁴ *Id.*

²⁵ According to the Cinelli Memo, "[c]ollateral contacts are designed to provide the parole officer with a way to assess the parolee's status (at home, in the community, at work, in programming, etc.) without relying on the parolee himself."

²⁶ U.S. Department of Justice, Special Report, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005–2014)* (May 2018).

²⁷ See *id.* at 3.

2. The Institutions and Structure of Clemency in Massachusetts

Petitioners for clemency in Massachusetts face a daunting three-stage review. First, the Advisory Board of Pardons—which also serves as the Massachusetts Parole Board—holds a public clemency hearing. Based on its findings, the Advisory Board submits a written recommendation to the governor’s office, which conducts the second stage of review. If the governor decides to grant clemency, that decision is subject to the consent of the Executive Council, which conducts its own public hearing before a final determination is made.²⁸ This section describes the process in further detail and identifies structural design flaws that hamper the administration of clemency in Massachusetts.

The Advisory Board of Pardons

A petitioner initiates the process by submitting his or her petition to the Executive Secretary of the Governor’s Council, which transmits the application to the Advisory Board of Pardons.²⁹ The Board carries seven full-time, salaried officials, appointed to five-year terms by the governor with the consent of the Executive Council.³⁰ Members must be drawn from one of the following professions: “parole, probation, corrections, law, law enforcement, psychology, psychiatry, sociology and social work.”³¹ All but one current member have a law enforcement background. See table on page 11.

The Advisory Board’s first order of business is to forward the petition to the attorney general, commissioner of correction, police chief of the municipality in which the crime was committed, and the district attorney in whose district

the sentence was imposed.³² These officials have six weeks to provide the Board with a written recommendation regarding the propriety of commutation. Meanwhile, the Advisory Board reviews the petition for “substantial compliance” with statutory requirements and with the governor’s Executive Clemency Guidelines. Upon a finding of substantial compliance, the Board’s Executive Clemency Unit conducts “a preliminary investigation and prepare[s] a case summary concerning the petitioner’s criminal, social, and institutional histories,” and any other facts deemed relevant to the merits of the petition.

At 10 weeks from the petition’s filing, the Board must take one of two courses. If it decides that no public hearing is necessary, it transmits the petition to the Governor along with a written recommendation and any recommendations offered by the aforementioned officials. Alternatively, the Board may call for a public hearing on the petition’s merits; the Board has six months from the petition’s filing to hold the hearing and transmit a recommendation to the governor. The attorney general and the district attorney must be notified in advance of the hearing and afforded an opportunity to testify and examine the petitioner’s witnesses.

The purpose of an Advisory Board hearing is to determine whether a petitioner has, by “clear and convincing evidence,” proved that commutation would advance the interests of justice and fully protect public safety.³³ Pursuant to state regulations, the Board conducts its analysis according to the governor’s Executive Clemency Guidelines.³⁴ Although the Board may “make rules relative to the calling of meetings and to the proceedings thereat,” it “shall not review the proceedings of the trial court, and shall not consider any questions regarding the correctness, regularity or legality of such proceedings, but shall confine itself solely to matters which properly bear upon the propriety of the extension of clemency to the petitioner.”³⁵ The Board may consider evidence received after the hearing but prior to the Board’s vote.

³² M.G.L.A. 127 § 154

³³ 120 C.M.R. 900.01. The Massachusetts Code of Regulations defines “clear and convincing evidence” as evidence showing that a conclusion is “highly and substantially more probable to be true than not.” 120 C.M.R. 100.00. This standard guides the Board’s fact-finding as well as its ultimate, quasi-legal determination on the merits of a petition.

³⁴ *Id.*

³⁵ M.G.L.A. 127 § 154

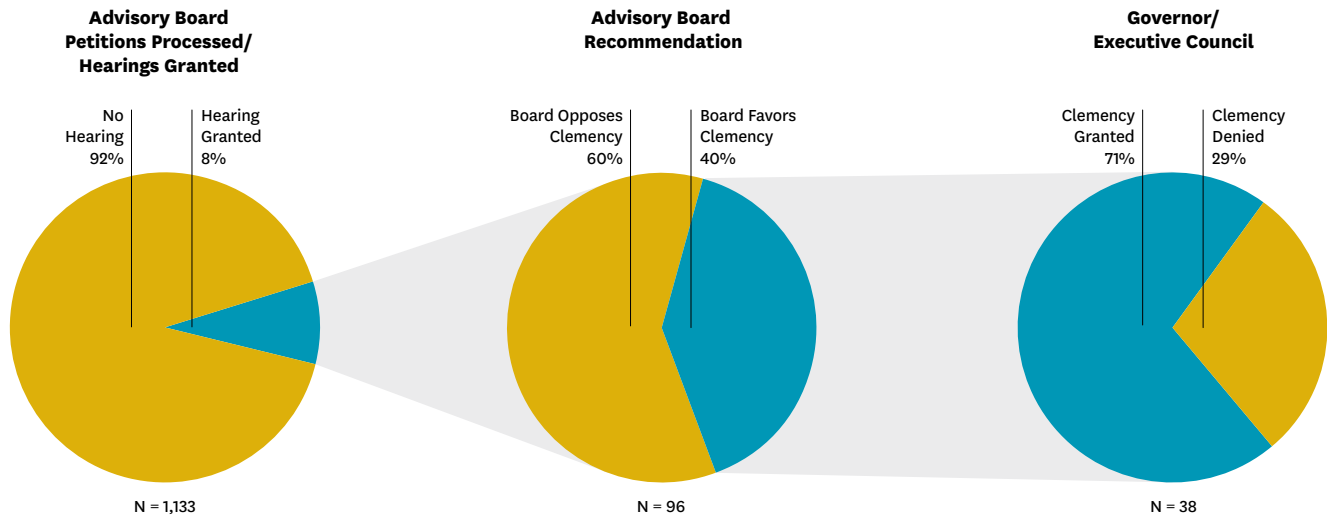
²⁸ This requirement applies only to petitioners serving time for a felony conviction.

²⁹ 120 C.M.R. § 901.02

³⁰ The Board’s chairman is designated by the Governor.

³¹ M.G.L.A. 27 § 4.

Figure 7: A Statistical Analysis of the Clemency Process



Importantly, the Board’s clemency hearings are adversarial. Prosecutors and other law enforcement officials often use the hearing to reflexively defend the underlying conviction, as if the Board were simply an appellate court, without considering whether clemency is in the public interest. The hearing is followed by a Board vote recommending whether the governor should grant clemency.³⁶ A person who receives a favorable recommendation from the Advisory Board has a 71% chance of being granted clemency. See Figure 7.

As Figure 7 indicates, most petitioners do not receive a hearing before the Board. Since 1980 (the earliest year that data is available), only about 8.5% of commutation petitions (a total of 96 petitions) earned a hearing.³⁷ See Figure 7. Of the 96 hearings held during this time, 38 (or 40%) were followed by a favorable Board recommendation. This means that roughly 3% of individuals who petition the Board for clemency receive a favorable recommendation. Of the 38 petitioners recommended favorably by the Board, 27 (or 71%) were ultimately granted clemency. Conversely, the Executive Clemency Guidelines in effect during the Patrick administration expressly stated that the Governor would “rarely, if ever, grant commutation relief where...the Advisory Board advises against the granting of such relief.”³⁸

The Governor

Once the Advisory Board issues its report and recommendation, a clemency petition is reviewed by the governor. An incoming governor traditionally publishes a new version of the Executive Clemency Guidelines, substantive criteria for evaluating the merits of clemency petitions. The Guidelines are meant to direct the Advisory Board’s review process and indicate how the governor’s office itself will evaluate petitions.

The current Guidelines, issued by Governor Baker in 2015, identify “two paramount considerations in deciding whether to grant clemency”: (1) the “nature and circumstances of the offense” (e.g. the impact on the victim and on society as a whole), and (2) “the character and behavior of the Petitioner,” particularly post-offense behavior.³⁹ Baker’s Guidelines state that the governor is unlikely to consider commuting a life sentence for first-degree murder until the petitioner has served fifteen years, which is the amount of time normally served by someone convicted of second-degree murder prior to parole consideration.⁴⁰ Massachusetts law requires that the governor report all acts of clemency to the legislature at the end of each year, though the governor need not provide rationale for clemency decisions.

36 Dissenting members may transmit a minority opinion for the Governor’s consideration. The Board’s recommendations and reports are accessible by public records request for a period of 10 years from the date of a petition’s filing.

37 Data for the year 1986 was not available.

38 Executive Clemency Guidelines Issued by Governor Deval L. Patrick, III.(B)(2)(h) (May 21, 2007).

39 Executive Clemency Guidelines issued by Governor Charles D. Baker, Dec. 10, 2015.

40 *Id.* at 4.4 (Special Factors for Clemency Relating to Sentences for First Degree Murder).

The Executive Council

Per the state constitution, the governor’s clemency decision is subject to the “advice and consent” of the Executive Council. The Council is a body of eight elected officials, each representing a district for a two-year term, plus the Lieutenant Governor, who presides over the Council *ex officio*. In addition to its clemency duties, the Council provides advice and consent for various gubernatorial appointments, including judges and members of the Parole Board, as well as for expenditures drawn from the state treasury. Current council members include three with law enforcement backgrounds, three former prosecutors, and a former trial judge. *See* Figure 9. Six of the eight are lawyers.

Whereas the Advisory Board must apply the governor’s Executive Clemency Guidelines, the Council is free to apply its own substantive criteria; it must, however, hold a public hearing if it wishes to ratify a favorable clemency determination. Rules and procedures governing such hearings are left to the Council’s discretion.⁴¹ In fact, the Council has traditionally operated without written rules of procedure.⁴² Thus, a petitioner granted a hearing before the Council may have little or no advance knowledge about the nature of the proceeding.

If the Council decides to hold a hearing, it must notify and solicit input from the attorney general and the district attorney in the jurisdiction in which the petitioner was prosecuted. Both the attorney general and district attorney may appear at the hearing and may examine the petitioner’s witnesses “and present to [the Council] full information as to the case of the commonwealth against the petitioner...”⁴³ After each hearing, the Council votes in private. A clemency grant becomes final when a majority of the Council votes to ratify it.⁴⁴

Institutional Composition

The success of an advisory body depends largely on its composition. To the extent that sentencing commissions are instructive, clemency boards should reflect not only the perspective of prosecutors, corrections experts and law enforcement officials, but also that of defense attorneys, formerly incarcerated persons, and victims’ advocates.⁴⁵

The Advisory Board’s governing statute provides that members “shall be graduates of an accredited four-year college or university and shall have had at least five years of training and experience in one or more of the following fields: parole, probation, corrections, law, law enforcement, psychology, psychiatry, sociology and social work.” Despite the diverse backgrounds from which the governor may choose Board members, for years the Board has been dominated by law enforcement professionals. *See* Figure 8. The Council has a similar composition. *See* Figure 9.

Concerns about the Board’s lack of diversity were aired in a 2002 report issued by the Boston Bar Association Task Force on Parole and Community Reintegration, which was convened to address declining parole rates.⁴⁶ (Recall that the Advisory Board and Parole Board are the same body.). The report made the following observations, which apply equally to the Board’s clemency and parole functions:

[T]he need for a diversified parole board has long been recognized by criminologists [] and other social scientists, the Massachusetts legislature, and the Massachusetts Parole Board. As gubernatorial appointments, Parole Board members’ attitudes and beliefs about criminal justice issues...often reflect the views of that appointing authority. Considerable disparities in rates of parole among parole boards appointed by different Governors result when parole board membership is not diversified.

A parole Board composed largely or even entirely of persons from law enforcement may meet the literal letter of the law, but a strong argument can be made that it is contrary to the spirit of the statute...⁴⁷

41 William G. Cosmas, Jr., *From Here to Clemency: Navigating the Massachusetts Pardon Process*, 49-SPG B. B.J. 23 (2015).

42 One Member, a former state court judge, faced vociferous opposition when she proposed adopting a set of basic rules of procedure. Shira Schoenberg, *Governor’s Councilor Mary Hurley proposes new rules, causing controversy on a board with history of name-calling* (Aug. 24, 2017), https://www.masslive.com/politics/index.ssf/2017/08/governors_councilor_mary_hurle_1.html. Written “rules of order for the assembly of the council” were printed in 1991 and 1993, but even members of the Board seem to have been unaware of their existence.

43 M.G.L.A. 127 § 153.

44 M.G.L.A. 127 § 152.

45 *See* Rachel E. Barkow, *The Politics of Forgiveness: Conceptualizing Clemency*, 21 Fed. Sent. R. 3 (2009).

46 *Report of the Boston Bar Association: Parole Practices in Massachusetts and Their Effect on Community Reintegration*, Task Force on Parole and Community Reintegration (August 2002).

47 *Id.* at 29.

Figure 8: Advisory Board of Pardons (current members)

Board Member	Professional Background
Paul M. Treseler (Chair)	Prosecutor
Tonomey Coleman	Defense attorney
Tina Hurley	Corrections
Colette Santa	Corrections
Dr. Charlene Bonner	Court Psychologist / Consultant
Sheila Dupre	Corrections
Gloriann Moroney	Prosecutor

Figure 9: Executive Council (current members)

Council Member	Professional Background
Lieut. Gov. Karyn Polito (R) (ex officio)	Politician
Joseph C. Ferreira (D)	Police Chief / Attorney / Volunteer Prosecutor
Robert Jubinville (D)	Police Officer / Attorney
Marilyn Petitto Devaney (D)	Politician
Christopher Iannella (D)	Attorney—personal injury
Eileen Duff (D)	Public Policy
Terrence W. Kennedy (D)	Prosecutor / Trial Lawyer
Jennie Caissie (R)	Special Prosecutor / Lawyer / Police Commissioner
Mary E. Hurley (D)	Judge / Politician / Attorney

The Task Force observed that throughout the 1970s and 1980s, the Advisory Board had a relatively diverse membership. After 1990, however, the Board became dominated by former prosecutors, corrections experts, and police officers. This shift in composition coincided with a 29% decline in parole for non-lifers.⁴⁸ The parole rate for lifers convicted of second-degree murder dropped from 41% in 1990 to 0% in 2000.⁴⁹ Despite the Task Force’s recommendation to make the Board more diverse, law enforcement professionals continue to dominate the Board.⁵⁰

The presence of law enforcement throughout the clemency process bears emphasis. The Advisory Board—presently featuring three corrections experts, two former prosecutors and a lone defense attorney—solicits input from the prosecutors and police officers involved in the petitioner’s arrest and prosecution. It then conducts an adversarial hearing, which itself resembles a criminal prosecution. Then the governor (who may also be a former prosecutor!) conducts a second review. If the governor favors clemency, the petitioner presents his or her case to a separate administrative body (the Council), where presently half the members were once prosecutors or police chiefs and no member has a background in criminal defense. The Council conducts a hearing according to unwritten rules and invites the district attorney and attorney general—who may have already appeared at the Advisory Board hearing—to oppose the petition for a second time. A full majority of the Council must vote to ratify the governor’s decision to grant clemency. The result: one commutation since 1997.

⁴⁸ *Id.* at 35.

⁴⁹ Prisoners’ Legal Services, White Paper: The Current State of Parole in Massachusetts (Feb. 2013).

⁵⁰ The Task Force also expressed concern that “positions on the [Board] are allowed to remain vacant for lengthy periods of time... [and] individuals continue to sit as voting members of the Parole Board long after their terms have expired.”

Diffusion of responsibility among three groups of decision-makers

One drawback of a multi-agency clemency model is the threat of collective inaction. This is particularly true where each agency has competing institutional priorities that draw attention and resources away from the agency's clemency responsibilities. More specifically, the Advisory Board's primary function is parole, not pardons or commutations; the Executive Council provides advice and consent on a broad range of gubernatorial appointees and on expenditures from the state treasury; and the governor's office oversees a vast administrative state. It is not surprising that clemency, with all its political hazards, has fallen by the wayside.

Clemency may seem gratuitous or non-essential in the context of more traditional government functions, and it is therefore easy to ignore when resources are constrained. For instance, the Executive Council must perform its advice-and-consent duty as to the appointment of judges in order for the state judiciary to remain functional; in contrast, the Council could fail to act on clemency petitions without disrupting any other government branch or office. Meanwhile, the Advisory Board is responsible for viewing and monitoring thousands of parole cases every year; whereas parole must be granted in order to prevent catastrophic overcrowding in prisons, clemency is a narrower release mechanism with little effect on the size of the overall prison population. The Board's 1985 annual report indicated that, at most, several percentage points of the agency's budget were allocated to clemency.⁵¹ That number is almost certainly lower today, since the Board holds fewer hearings now than it did during the 1980s. So long as the Board and Council continue to perform their other responsibilities, neither is likely to risk the financial or political capital required to reinvigorate clemency in Massachusetts.

More generally, there are drawbacks to vesting a single entity, such as the Advisory Board, with partial responsibility for both clemency and parole. Parole and clemency are like substitute goods; when one is less available, demand for the other grows. Yet, when one institution administers both parole and clemency, a single institutional event—such as a change in leadership or reduction in funding—may disrupt the provision of both goods, creating a bottleneck at the back-end of the justice system. For instance, recall that the entire Board was forced to resign in 2011 after a parolee murdered a police officer, leading to a sharp decrease in parole for lifers.

Individual Political Incentives

One advantage of advisory boards, whose members are usually unelected, is that they provide political insulation for the governor. A board's political independence—its capacity to make potentially unpopular decisions without fear of reprisal—will be compromised if the board is captured by the political or career interests of individual members. In the case of the Advisory Board, past chairpersons have consistently matriculated to state judicial appointments, often directly from serving on the Board. Recent examples include Joshua Wall (chairman from 2011-2014), Maureen E. Walsh (2004-2008), and Michael J. Pomarole (2000-2002); for all three, the Advisory Board provided a bridge between a district attorney's office and a judgeship. Other Advisory Board members have gone on to run for statewide offices. It is impossible to know for certain whether and to what extent the Advisory Board's decision-making has been influenced by the career aspirations of its members. Nevertheless, it is fair to question whether the Advisory Board and Executive Council can deal at arms length given that Board members seeking political appointments know that they will face a confirmation hearing before the Council.

3.

Reviving Clemency in Massachusetts

Decades have passed since commutations were regularly granted in Massachusetts. Without a functioning clemency system, at least 13% of people incarcerated there will die behind bars.⁵² The result, as a former commissioner of corrections put it, is “a system built on despair,” in which the individual “has very little incentive to do anything but his time.”⁵³ There is no reason to expect structural changes to clemency in the near future. Nevertheless, the existing structure is presumably capable of generating at least a handful of commutations each year, since it was already in place at the time clemency fell off during the 1980s.

One straightforward improvement would be for the Advisory Board to hold more clemency hearings. Since 2005, the Board has averaged one hearing every two years, despite receiving 386 petitions over that time. This degree of inactivity signals institutional apathy and discourages individuals from petitioning for clemency. It also obscures the Board’s decision-making process; if petitions are rejected without a hearing and report, the process remains a black box. Governor Charlie Baker and the Executive Council must pressure the Advisory Board to become more active.

Further, the governor and Executive Council should assemble a more diverse Advisory Board. The Board’s current membership is dominated by former law enforcement professionals, with just one defense attorney; adding a formerly incarcerated person would provide an essential perspective that the Board currently lacks.

Prosecutors could also figure prominently in the effort to revitalize clemency. The Advisory Board and Council are required by law to solicit testimony from the district attorney in the jurisdiction where a petitioner was convicted. If prosecutors choose to testify, they should not oppose clemency based on personal ideology, and should acknowledge the office’s limitations in assessing rehabilitation. Nor should they opine on whether a grant of clemency would deprecate the seriousness of the offense. Instead, a prosecutor might explain how an

individual’s sentence was the product of charging policies that are no longer in place today. For defendants who plead out, prosecutors should provide context about how plea bargaining affected the sentencing outcome in ways unrelated to the individual’s culpability or to the circumstances of the crime. In Massachusetts, the decision to charge murder in the first degree permanently removes a person from parole consideration upon conviction, leaving clemency as the only avenue toward release. If negotiations appear to have been coercive, that observation should be made to the Board and Council.

The Advisory Board report for petitioner Deanne Hamilton illustrates what information a prosecutor should and should not interpose. The report explained that, as a result of revisions to the criminal code, Hamilton would have received a shorter sentence in 2014 than the 7.5-year term she received in 2009. The new sentencing policy reflected a “legislative intent to provide earlier parole eligibility for convicted non-violent drug offenders serving minimum mandatory sentences,”⁵⁴ an observation critical to the Board’s recommendation favoring clemency. In contrast, appended to the same report was a letter from Plymouth County District Attorney Timothy J. Cruz, urging the Board not to recommend Hamilton for clemency. Cruz noted the “substantial amount of resources” required to indict Hamilton and to defend her conviction on appeal, as well as the overriding need to “combat the epidemic of drug abuse and addiction that plagues Plymouth County.”⁵⁵ These statements reflect one prosecutor’s interested opinion about broad policy issues, and bear little on the propriety of shortening an individual sentence.

Whatever measures are taken, there is no doubt that Massachusetts would benefit from a functioning clemency system. A commutation does more than prevent needless suffering for one person; it incentivizes rehabilitation among those who will not outlive the original terms of their sentence. As this Report has found, second chances have an important place in the history of justice in Massachusetts. Officials should honor that history by restoring clemency.

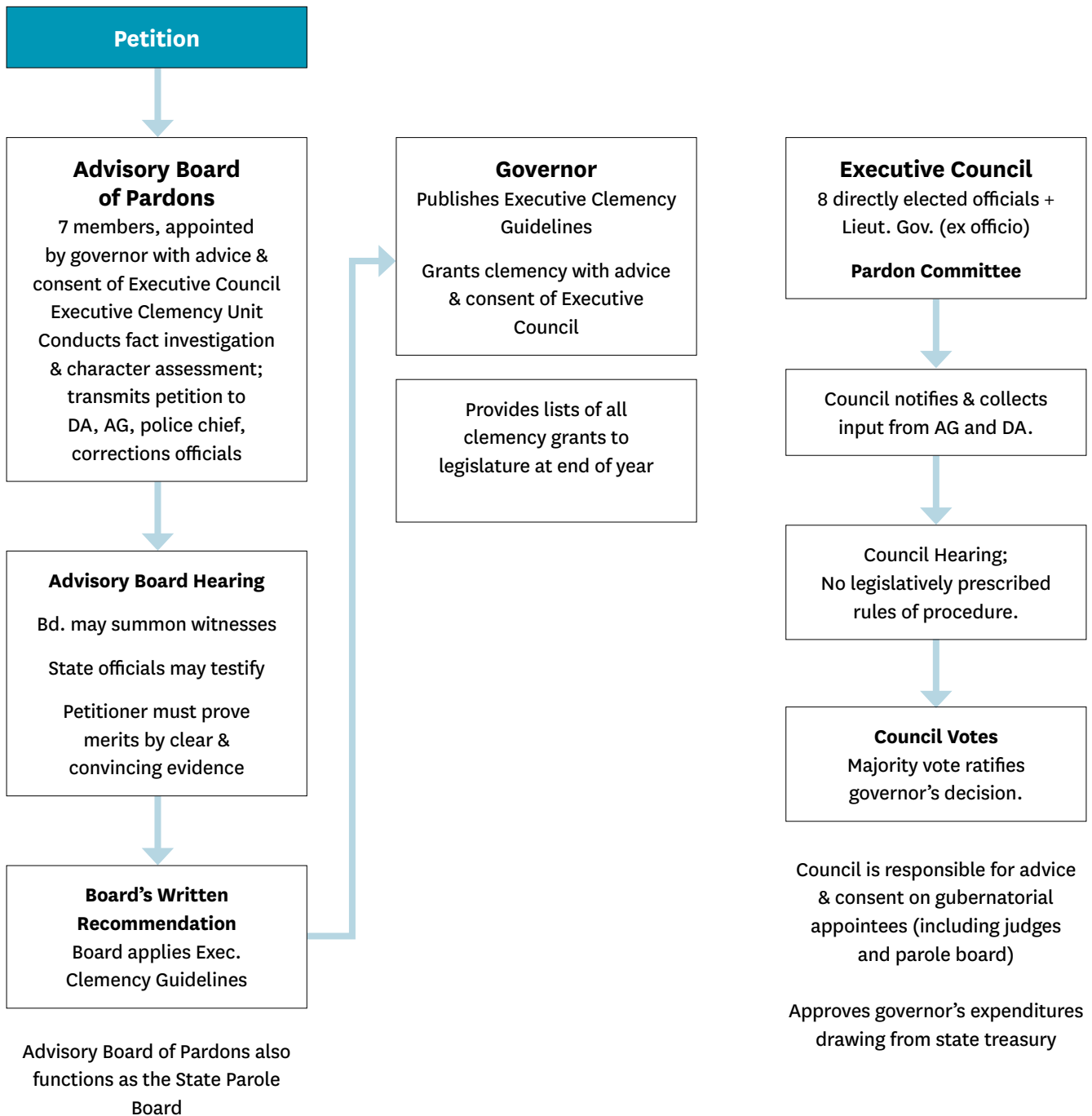
⁵⁴ Massachusetts Advisory Board of Pardons, Recommendation in the Clemency Matter of Deanne Hamilton, 3 (Oct. 31, 2014) (“Hamilton Report”).

⁵⁵ Mr. Cruz also detailed Hamilton’s lengthy criminal record. In addition to Mr. Cruz’s letter addressing the Advisory Board, Plymouth County Assistant District Attorney Jessica Healey appeared in person to oppose commutation. See Hamilton Report at 6.

⁵² See Nellis, *supra* note 7, at 10.

⁵³ See Black, *supra* note 17.

The Massachusetts Clemency Model



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