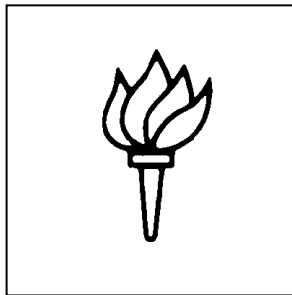


NEW YORK UNIVERSITY

SCHOOL OF LAW

PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES
WORKING PAPER NO. 14-38



Clemency and the Unitary Executive

Rachel E. Barkow

August 2014

CLEMENCY AND THE UNITARY EXECUTIVE
RACHEL E. BARKOW*

* Segal Family Professor of Regulatory Law and Policy and Faculty Director, Center on the Administration of Criminal Law, NYU School of Law. Thanks to Aimee Carlisle, Kadeem Cooper, Heather Gregorio, Steve Marcus, Neal Perlman and Sam Zeitlin for excellent research assistance. I acknowledge with gratitude the financial support of the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund at NYU. Thanks to Brad Clark, Adam Cox, Mark Osler, and Rick Pildes for comments.

CLEMENCY AND THE UNITARY EXECUTIVE

President Obama's use of enforcement discretion to achieve important domestic policy initiatives – including in the field of criminal law – have 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 his or her own agents or 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. 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 all but overlooked. It is a critical mechanism for the President to control the executive department. Those in favor of a unitary executive should encourage its more robust employment. But even critics of unitary executive theory should embrace clemency as a mechanism of control because, whatever the merits of other unitary executive 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 comes with an established historical pedigree. It is also a crucial checking mechanism given the landscape of criminal justice today. The current environment of overbroad federal criminal laws and excessive charging by federal prosecutors has produced a criminal justice system of unprecedented size and scope with overcrowded and expensive federal prisons and hundreds of thousands of individuals 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 United States Attorneys enforce the law.

TABLE OF CONTENTS

INTRODUCTION.....	3
I. THE CONSTITUTIONAL PARDON POWER.....	8
A. <i>The Use of the Clemency Power</i>	11
B. <i>Analyzing the Decline</i>	15
1. <i>Politics</i>	16
2. <i>Structural bias at DOJ</i>	20
II. CLEMENCY AND THE UNITARY EXECUTIVE.....	24
III. THE MODERN RELEVANCE OF CLEMENCY.....	45
A. <i>Fewer Mechanisms for Controlling Prosecutors</i>	45
B. <i>Increasing Danger of Overreach</i>	50
C. <i>The Need for Relief from Collateral Consequences</i>	58
CONCLUSION.....	61

INTRODUCTION

Several of President Obama’s most important domestic policy initiatives involve decisions not to enforce federal law.¹ 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.”² President Obama also turned to his enforcement discretion to address the backlash from disappointed consumers who discovered they could not keep their health insurance policies because those policies failed to meet minimal requirements under the Affordable Care Act. President Obama campaigned for the law with a pledge that under the Affordable Care Act, “if you like your plan, you can keep it,” so to keep that promise, he told insurance companies he

¹ 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) (calling the President’s decision to exercise discretion not to enforce statutes as “[t]he Obama Administration’s preferred tool for domestic policy”).

² Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enforcement [hereinafter Napolitano Memo] (June 15, 2012), 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 U.S. for at least five years, arrived in the U.S. before the age of sixteen, are not currently over the age of 30, and have not been convicted of any crimes other than minor misdemeanors. *Id.*

would refuse to enforce those provisions of the law that would require cancelation of the policies, at least through 2014.³

Enforcement discretion has been equally important in criminal policymaking in the Obama Administration. In the wake of 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,⁴ suggesting that if a case fell outside those areas, it would not be prosecuted, even if it violated the letter of the Controlled Substances Act.⁵ The Department provided similar guidance about what cases would be prosecuted federally in those states that have legalized medical marijuana.⁶ In the summer of 2013, the Department of Justice further announced new charging policies in drug cases that could trigger mandatory minimum sentences.⁷ Whereas previous Department policies had required prosecutors to charge the most serious readily provable offense,⁸ the current

³ 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 Maggie Fox, *You Deserve Better: Obama Offers Fix for Canceled Health Insurance Plans*, NBC NEWS, Nov. 14, 2013, available at <http://www.nbcnews.com/health/obama-gives-people-extra-year-keep-health-insurance-2D11591250>. 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).

⁴ See Memorandum from James M. Cole, Deputy Att’y Gen. of the United States, to All U.S. Attorneys 1-2 (Aug. 29, 2013) (listing the enforcement priorities that are particularly important to the federal government 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), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

⁵ *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.”).

⁶ See Memorandum from David W. Ogden, Deputy Att’y Gen. of the United States, to Selected U.S. Attorneys (Oct. 19, 2009) [hereinafter Ogden Memo], available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf> (“As a general matter, pursuit 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 Attorney General, to United States Attorneys (June 29, 2011) [hereinafter Cole Memo] (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).

⁷ Memorandum from Eric Holder, Jr., Att’y Gen. of the United States, to the United States Attorneys and Assistant Atty Gen. for the Criminal Division (Aug. 12, 2013).

⁸ See Memorandum from John Ashcroft, Att’y Gen. of the United States, to All Federal Prosecutors (Sept. 22, 2003), available at http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm (declaring the policy of the Department of Justice to be to “charge and pursue the most serious, readily provable offense”). When Eric Holder became Attorney General, he softened the policy to tell prosecutors that they

charging policy instructs prosecutors that “severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers” and thus prosecutors should not charge quantities necessary to trigger mandatory minimum sentences as long as certain criteria are met.⁹

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.¹⁰ There is now a vigorous debate about where the President’s duty under the Take Care Clause ends and legitimate enforcement discretion given limited resources begins.¹¹

But even with broad powers to set enforcement charging policies, the President controls only the discretion of his or her agents at the front-end. What about enforcement decisions already made with which the President disagrees? After all, there is bound to be slack between the President’s wishes and the behavior of his or her many agents even when the President provides guidance at the front-end because no front-end guidance can anticipate every possible law violation and its circumstances. And providing too much detail about enforcement discretion undermines the deterrent effect of the law, so guidance *ex ante* is typically somewhat vague to give 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

must “ordinarily charge” the most serious, readily provable offense (instead of that they “must charge” it) and also cautioned prosecutors to consider individualized assessments of the fit between the charge and circumstances of the case, purposes of the Federal criminal code, and the impact on Federal resources. *See* Memorandum from Eric Holder, Att’y Gen. of the United States, to All Federal Prosecutors, *available at* <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf>; Alan Vinegrad, *Justice Department’s New Charging, Plea Bargaining and Sentencing Policy*, N.Y. L.J., June 10, 2010 (situating Holder’s charging, plea bargaining and sentencing policy among previous Attorney General memoranda).

⁹ Specifically, the criteria are: “The defendant’s relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person; The defendant is not an organizer, leader, manager or supervisor of others within a criminal organization; The defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels; and The defendant does not have a significant criminal history.” Holder Memo (Aug. 2013), at 2.

¹⁰ *See, e.g.*, 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 against President Obama over Obama’s use of executive authority); Robert J. Delahunty & John C. Yoo, 91 TEX. L. REV. 781, 782 (2013) (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, 674–65 (2014) (calling for limited executive discretion for nonenforcement). *But see, e.g.*, 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 Deferred Action for Childhood Arrivals program); Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. 115, 117–18 (2013) (arguing that Obama’s selective enforcement of DACA was not actually suspension or dispensing of law).

¹¹ *See infra* TAN XX-XX.

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. And yet almost all the focus has been on front-end oversight with little to no attention paid to what could be done at the back-end, after enforcement decisions have already been made. This is understandable in most contexts, of course, given presidential preferences for focusing guidance efforts at the pre-enforcement stage and because of legal impediments to influencing pending cases or reversing judgments already made.¹²

But criminal cases are different. The President is not limited to front-end controls or removing prosecutors if he or she believes prosecutors have gone too far. The President has broad and explicit back-end control as well. The Pardon Clause vests the President with “Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”¹³ Even those commentators most critical of the President’s refusal to enforce laws have conceded that the clemency power has an unambiguously broad reach.¹⁴ Clemency is a valuable and important weapon in the President’s toolkit for making sure that enforcement reflects his or her priorities and values and that his or her agents do not overreach.

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 — 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 all but overlooked. It is a critical mechanism for the President to control the executive department. Those in favor of a unitary executive should encourage its more robust employment, as it is a mechanism just as powerful, if not more so, than the power to remove executive officers with whom the President disagrees as a policy matter or the ability to provide front-end

¹² See, e.g., Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211-1214 (2013) (describing the convention against “presidential direction of the adjudicative activities of executive agencies”); *Portland Audubon Society v. Endangered Species Comm.*, 984 F.3d 1534 (9th Cir. 1993) (holding that the President and White House staff may not engage in ex parte contacts with agencies in formal adjudications under the terms of the Administrative Procedures Act).

¹³ U.S. CONST. art II, § 2. Slightly over half of the state constitutions phrase the clemency power similarly. Kobil, *supra* note XX, at 605.

¹⁴ See *infra* TAN XX-XX.

enforcement guidance. But even critics of unitary executive theory should embrace clemency as a mechanism of control because, whatever the merits of other unitary executive 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 comes with an established historical pedigree.

The clemency power is also 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.¹⁵ At the same time, it has become difficult for Presidents to control federal prosecutions because of a developed convention against removing them¹⁶ and because of the limits of front-end enforcement guidance. The pathologies associated with federal criminal law-making have produced a federal criminal justice system of unprecedented size and scope with overcrowded and expensive federal prisons and hundreds of thousands of individuals hindered from reentering society because of a federal record.¹⁷ Clemency is a key tool for addressing poor enforcement decisions and injustices in this system, as well as checking disparities in how different United States Attorneys enforce the law.

¹⁵ See, e.g., William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 505 (2001) (arguing that the overbreadth of criminal law “empower[s] prosecutors”), 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 (describing the “academic consensus” on the overbreadth of federal criminal law); Ronald Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 74 (1998) (noting “more than 10,000 regulatory requirements or proscriptions carrying criminal sanctions under the current federal law”); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 413 (2001) (arguing that “prosecutors frequently charge more and greater offenses than they can prove beyond a reasonable doubt”); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 879–82 [hereinafter *Policing of Prosecutors*] (describing the institutional incentives permitting prosecutors to file excessive charges).

¹⁶ See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1201–04 (2013) (noting the development of a convention against midstream removal of U.S. Attorneys).

¹⁷ See Lauren E. Glaze & Erinn J. Herberman, BUREAU OF JUSTICE STATISTICS, NCJ 243936, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 10 (2013), <http://www.bjs.gov/content/pub/pdf/cpus12.pdf> (stating that in 2012, there were 216,900 inmates being held in federal prisons); Mark Motivans, BUREAU OF JUSTICE STATISTICS, 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); see also AM. BAR ASS'N, CRIMINAL JUSTICE SYSTEM IMPROVEMENTS 2 (2008) (reporting that the federal prison population “has more than doubled in the last 20 years”).

Part I begins by describing the President's clemency power¹⁸ 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 power in light of the current federal criminal 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 Article II. Specifically, the Pardon Clause of the U.S. Constitution states the president "shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."¹⁹

There was little debate over the Clause at the Framing.²⁰ The New Jersey and Virginia plans did not include a provision for the granting of clemency, but Alexander Hamilton introduced a proposal based on the British model to provide for executive clemency powers.²¹ Hamilton argued that that the executive should "have the power of pardoning all offences except Treason; which he shall not pardon without the approbation or rejection of the Senate."²² The Report of the Committee of Detail modified the language to replace the exception for treason to instead exempt from pardons those cases of impeachment, and it made no mention of a role for the Senate.²³ 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.²⁴ The President's power to pardon was much broader than the clemency power possessed by most state governors at the time, who faced legislative override or sharper restrictions on its scope. The President's power in the Constitution is subject to no legislative restrictions, and pardons can issue any time after a crime has occurred, even before trial.²⁵

¹⁸ 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. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575-76 (1991).

¹⁹ U.S. CONST. art II, § 2. Slightly over half of the state constitutions phrase the clemency power similarly. Kobil, *supra* note XX, at 605.

²⁰ *Schick v. Reed*, 419 U.S. 256, 260 (1974) (pointing out that the Framers "did [not] devote extended debate to its meaning").

²¹ Kobil, *supra* note 18, at 590 n.125.

²² 1 The Records of the Federal Convention of 1787, at 292 (M. Farrand ed. 1911).

²³ See Kobil, *supra* note 18 at 590. A proposal at the Convention to require Senate consent for pardons was rejected by a vote of 8 to 1. *Id.* at 590, n.130.

²⁴ See Kobil, *supra* note 18, at 590.

²⁵ See Akhil Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 189 (2006).

The Court has recognized that the Pardon Clause includes five forms of clemency.²⁶ Pardons and reprieves are mentioned expressly. The President's power of reprieve delays the execution of the punishment imposed by the court.²⁷ A pardon, which removes the legal consequences of a conviction, may be granted either before or after a criminal begins his or her sentence.²⁸ In practice, pardons have typically been granted after an individual has served his or her sentence and the individual has a demonstrable record of law-abiding behavior.²⁹ 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 removes statutory disabilities imposed by reason of having committed the offense."³⁰

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.³¹ The Supreme Court has acknowledged that the differences between amnesties and pardons amount to "philological interest" rather than "legal importance,"³² but has observed that amnesties are typically "addressed to crimes against the sovereignty of the State, to political offenses, [and] forgiveness being deemed more expedient for public welfare than prosecution and punishment."³³ Amnesties typically come in the aftermath of war or some other political upheaval.³⁴ The Court has interpreted the Pardon Clause to vest the President with the power of commutation,³⁵ which is to give a lesser sentence than the one imposed, and to remit fines and forfeitures³⁶ on the theory that these are lesser powers included with the greater power of pardon.

²⁶ See Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 570 (2001)

²⁷ See W.H. Humbert, *THE PARDONING POWER OF THE PRESIDENT* 26 (1941).

²⁸ See Kobil, *supra* note 18, at 576; Humbert, *supra* note 27, at 23.

²⁹ See Kobil, *supra* note 18, at 576.

³⁰ Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. CIV. RTS. & CIV. LIBERTIES 253, 290 (2010).

³¹ John M. Mathews, *The American Constitutional System* 168 (1st ed. 1032) ("Amnesty differs from pardon in that it applies to whole classes of persons or communities rather than to individuals.").

³² *Knote v. United States*, 95 U.S. 149, 153 (1877).

³³ *Burdick v. United States*, 236 U.S. 79, 94-95 (1915).

³⁴ See Morison, *supra* note 30, at 291 (2010).

³⁵ See *Biddle v. Perovich*, 274 U.S. 480 (1927). The commuted sentence may be any lesser sentence, not one originally contemplated. *Schick v. Reed*, 419 U.S. 256, 266 (1974) (holding that the president may decrease the sentence as she wishes but cannot "aggravate" it).

³⁶ See *Osborn v. United States*, 91 U.S. 474 (1875); *Illinois Cent. R.R. v. Bosworth*, 133 U.S. 92, 103 (1890).

In light of its textual clarity and historical background, courts have recognized few limits on the President's clemency power.³⁷ Other than impeachment, it covers "every [criminal] offence known to the law,"³⁸ including charges of contempt of court.³⁹ A pardon cannot affect the vested rights of a third party nor can it command the return of monies paid into the United States treasury,⁴⁰ but outside of that, the President may attach conditions to a grant as long as they do not "otherwise offend the Constitution."⁴¹ While the Court allowed an individual to decline a pardon that was granted with the aim of making an individual testify in a case where he had invoked his right against self incrimination,⁴² individuals may not decline commutations and insist on serving more time.⁴³

"[T]he President may exercise his discretion under the Reprieves and Pardons Clause for whatever reason he deems appropriate"⁴⁴ or for "no reason at all."⁴⁵ The President is not "required to base decisions on objective and defined criteria."⁴⁶ In *Ohio Adult Parole Auth. v. Woodard*,⁴⁷ a majority of the Justices concluded that pardon procedures must comply with the Due Process Clause.⁴⁸ 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

³⁷ 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 v. Reed*, 319 U.S. 256, 267 (1974).

³⁸ Ex parte Garland, 71 U.S. (4 Wall.) 333 (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 30, at 278-79.

³⁹ Ex parte Grossman, 267 U.S. 87, 179 (1925).

⁴⁰ See *Knote v. United States*, 95 U.S. 149 (1877).

⁴¹ *Schick v. Reed*, 419 U.S. 256, 266 (1974). For example, one common condition in the early years of the republic was enlistment in the Navy. Kobil, *supra* note 18, at 593. For an excellent discussion of conditional pardons, see Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CAL. L. REV. 1665 (2001).

⁴² See *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 upon the [individual's] constitutional freedoms." *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1236 (D.D.C. 1974).

⁴³ See *Biddle*, 274 U.S. at 487-88.

⁴⁴ *Hoffa*, 378 F. Supp. at 1225.

⁴⁵ *Connecticut Bd. Of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981).

⁴⁶ *Id.*

⁴⁷ 523 U.S. 272 (1998).

⁴⁸ Justice O'Connor made this point in her concurrence, and the four Justices in dissent agreed with her. *Id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 292 (Stevens, J., dissenting in part).

clemency process.”⁴⁹ Judicial supervision of pardons is thus minimal. For its part, Congress cannot limit the power in any way.⁵⁰ 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.”⁵¹

This 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 pardons of the current one,⁵² or a Congress angry enough to seek impeachment.⁵³

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

A. *The Use of the Clemency Power*

Early presidents used their pardon power often. Margaret Love notes that pardons were 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.”⁵⁴ Before the Civil War, the system was relatively informal.⁵⁵ Until the middle of the 19th century, the Secretary of State

⁴⁹ *Id.* at 289 (O’Connor, J., concurring in part and concurring in the judgment).

⁵⁰ See *Garland*, 71 U.S. at 380 (“This power of the President is not subject to legislative control.”).

⁵¹ *United States v. Klein*, 80 U.S. 128, 147 (1871).

⁵² President Ford’s pardon of President Nixon affected his popularity and may have cost him the election. See Scott Shane, *Critics of Ford’s Nixon Pardon Now Call It Wise*, N.Y. TIMES (Dec. 29, 2006), available at <http://www.nytimes.com/2006/12/29/world/americas/29iht-pardon.4047202.html>.

⁵³ See *Grossman*, 267 U.S. at 121 (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. See 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).

⁵⁴ Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1175 (2010).

⁵⁵ 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, *The Twilight of the Pardon Power*, *supra* note 54 at 1176 (noting the early reliance of presidents on their secretaries of state as “official custodian of pardon documents” and on 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, while President

had official authority to investigate and issue pardon warrants, though typically the Attorney General also reviewed the applications.⁵⁶ 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.⁵⁷

As federal criminal laws expanded, the pardon 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 AG to take over the process of reviewing all pardon 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 1891.⁵⁸

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.⁵⁹ Between 1892 and 1930, 27% of applications received some form of clemency grant.⁶⁰ More than 75% of those grants involved the reduction or elimination of a prison term.⁶¹

The first big shift in clemency practice changed after federal parole emerged on the scene in 1910. Parole essentially replaced clemency as the primary mechanism for reducing sentences.⁶² 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, not commutation, was the mechanism for shortening sentences.⁶³ Between 1910 and 1929, presidents granted more commutations than pardons. However, between 1930 and 1939,

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

⁵⁶ See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 286 (2013).

⁵⁷ See Love, *supra* note 54, at 1177-78.

⁵⁸ See Barkow, *Prosecutorial Administration*, *supra* note 56, at 286-287.

⁵⁹ See Love, *supra* note 54, at 1186.

⁶⁰ See 1892-1930 ATT'Y GEN. ANN. REP. (1892-1930).

⁶¹ See Love, *supra* note 54, at 1186.

⁶² See Love, *supra* note 54 at 1187-91 (describing how “[b]y the end of the 1930s, parole had largely supplanted clemency as a means of releasing prisoners”); see also Krent, *supra* note 42, 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.” U.S. Dep’t of Justice, 3 THE ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES: PARDON 297 (1939). The Cummings Report compares the institutions of pardon and parole, finding preference for parole because “the parole organization has better facilities [than pardon] for determining when a prisoner should be so released and for supervising him thereafter.” *Id.*

⁶³ See Love, *supra* note 54, at 1186-89.

pardons became much more prevalent, with presidents granting 2.2 times as many pardons as commutations.⁶⁴ 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.⁶⁵ Thus, even with this structural change that shifted primary responsibility for sentence reduction 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.⁶⁶

The 1980s ushered in the second, more dramatic shift in clemency practice. It was the beginning of the substantial decline in clemency that we continue to see at present. First, parole was abolished in the federal system with the passage of the Sentencing Reform Act,⁶⁷ so individuals sentenced after November 1, 1987 received determinate sentences.⁶⁸ 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.⁶⁹ Although a few people highlighted the need for commutation practice to change in light of the

⁶⁴ See 1930-1939 ATT’Y GEN. ANN. REP. (1930-1939). The ratio of commutations to pardons fell dramatically in the early 20th century. U.S. DEP’T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY *Clemency Statistics*, available at <http://www.justice.gov/pardon/statistics.htm> (last visited July 8, 2014). Between 1920 and 1935, the percentage of total clemency actions that were commutations fell dramatically. In 1920 and 1925, the percentage of clemency actions that were commutations was 50% and 49%, respectively. See Humbert, *supra* note 27, at 97–98. By 1930, the percentage dropped to 38%, and in 1935, the percentage of commutations was just 11%. See *id.*

⁶⁵ In 1915, approximately 202 federal inmates were released on parole and 73 released due to commutation; those numbers grew by 1920, when approximately 919 inmates were released on parole and 306 due to commutation. By 1935, parole had firmly taken root: approximately 2447 federal inmates were released on parole, while only 36 received commutations. BUREAU OF JUSTICE STATISTICS, HISTORICAL CORRECTION STATISTICS IN THE UNITED STATES, 1850–1984 at 164 tbls.6-18, 6-19a (1986); *Clemency Statistics*, U.S. DEP’T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, available at <http://www.justice.gov/pardon/statistics.htm> (last visited July 8, 2014). The parole numbers here are approximate because the BJS historical data reported parolees as a percentage of released inmates, not as an absolute total.

⁶⁶ The inverse relationship between parole and pardons discussed *supra* continued into the 1940s and 1950s. In 1940 and 1945, approximately 2931 and 3852 federal prisoners were released on parole, while 31 and 25 inmates received commutations, respectively. By 1950 and 1955, parole releases grew to approximately 3646 and 4396 while commutations decreased to 14 and 4. See BUREAU OF JUSTICE STATISTICS, HISTORICAL CORRECTION STATISTICS IN THE UNITED STATES, 1850–1984, *supra* note 65; *Clemency Statistics*, U.S. DEP’T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, *supra* note 65. In the same time period, the number of pardons generally increased. In 1940, Roosevelt granted 242 pardons, in 1945, Roosevelt and Truman combined to pardon 374. *Clemency Statistics*, U.S. DEP’T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, *supra* note 65. In 1950, Truman pardoned 400, but in 1955, Eisenhower granted only 59 pardons. See *id.*

⁶⁷ See Pub. L. No. 98-473, 98 Stat. 1987, 2017 (codified at 18 U.S.C. § 3624) (2006).

⁶⁸ See Peter B. Hoffman, *History of the Federal Parole System*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/uspc/history.htm> (last visited Aug. 6, 2014).

⁶⁹ See S. REP. NO. 98-223, at 34–35 (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”).

abolition of parole before Congress, the executive branch did not modify its practices.⁷⁰

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.⁷¹ President Reagan's immediate predecessor, President Carter, granted 21% of 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.⁷² President Reagan's clemency grant rate dipped to 12%.⁷³ Thus while the trend was already downward, the decline grew steeper with President Reagan's presidency and 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.⁷⁴ Criminal law emerged as a key political issue, and politicians learned that being seen as weak on crime was a devastating political liability.⁷⁵ 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%.⁷⁶

⁷⁰ When the House 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 Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 98th Cong., pt. 2, at 866 (testimony of Dennis Curtis, professor, Univ. Southern Cal. Law Ctr.) (commenting that, "[i]f we were to abolish parole, and thereby decrease our opportunities to correct mistakes in sentencing or to grant mercy when appropriate, we would invite the 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 House 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 Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 97th Cong., pt. 3, at 1002 (1981) (testimony of Norm Maleng, Vice-Chairman, Wash. State Sentencing Guidelines Comm'n) (commenting on S. 1630, a precursor to the Sentencing Reform Act, 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 pt. 1, at 64 (testimony of Jonathan Rose, Assistant Att'y Gen., U.S. Dep't of Justice) (noting that "if you eliminate the parole system, you will eliminate a safety valve," but that "there is always the executive clemency mechanism as well"); *id.* at pt. 1, at 204 (testimony of William Greenhalgh, professor, Georgetown Univ. Law Ctr.) (responding to questioning by Rep. McCollum, who noted that "we always have executive clemency if we do not have parole"; Professor Greenhalgh responded that clemency "does not happen very often").

⁷¹ *See Love, supra*, note 54, at 1170-1171; Barkow, *supra* note 56, at 288.

⁷² *See Kobil, supra* note 18, at 602; Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT. R. 139, 140 (2001).

⁷³ *Id.*

⁷⁴ Barkow, *supra* note 56, at 288.

⁷⁵ *Id.*

⁷⁶ Mark W. Osler, *Clemency for the 21st Century: A Systemic Reform of the Federal Clemency Process*, at 1 (2013), available at <http://ssrn.com/abstract=2248361>.

The rate of decline of commutation grants 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%.⁷⁷ The decline continued into the 1920s⁷⁸ and 1930s: in 1930, the rate was 7%.⁷⁹ In 1940 and 1945, President Roosevelt granted 2% and 3% of commutations, respectively.⁸⁰

President Nixon granted seven percent of the requested commutations, a rate that dipped to three percent with President Carter, and less than one percent with Presidents Reagan and George H.W. Bush.⁸¹ Although the rate of commutations granted grew to 1.1 percent with President Clinton, it fell to .13 percent with George W. Bush, and stands at .01 percent with President Obama.⁸²

Clemency grant rates have plummeted to such low levels that observers have noted that it has become "hard to tell what distinguished the lucky winners from the thousands of disappointed suitors" and in the end, the process seems to "operate [. . .] like a lottery."⁸³ The NY Times editorial board has been harsher, declaring that the comparison is unfair to lotteries.⁸⁴

B. *Analyzing the Decline*

The number of people with federal convictions is at an all-time high, and the current federal prison population is greater than the prison population of any state. Given the rise in federal prosecutions and prisoners, the number of clemency requests has likewise increased.⁸⁵ Yet the number of grants of

⁷⁷ *Clemency Statistics*, U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, <http://www.justice.gov/pardon/statistics.htm> (last visited July 7, 2014). Because the Office of the Pardon Attorney did not distinguish between pardon and commutation petitions until 1962, the percentages of commutations granted reflects the number of commutations granted divided by the total number of pardon and commutation petitions received.

⁷⁸ In 1919, 1920, and 1921, President Wilson granted 23, 33, and 22 percent of commutations, respectively. *Clemency Statistics*, U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, <http://www.justice.gov/pardon/statistics.htm> (last visited July 7, 2014). Commutations for alcohol offenses during Prohibition likely accounts for this spike. See William M. Landes, Richard A. Posner, *The Economics of Presidential Pardons and Commutations*, 38 J. LEGAL STUD. 61, 74 (2009).

⁷⁹ *Clemency Statistics*, U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, <http://www.justice.gov/pardon/statistics.htm> (last visited July 7, 2014).

⁸⁰ *Id.*

⁸¹ *Clemency Statistics*, U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY <http://www.justice.gov/pardon/statistics.htm> (last visited June 19, 2014).

⁸² *Id.*

⁸³ Love, *supra* note 54, at 1201-1202.

⁸⁴ Editorial, *What Happened to Clemency?*, N.Y. TIMES, Aug. 22, 2013, at A26.

⁸⁵ See *Clemency Statistics* U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, <http://www.justice.gov/pardon/statistics.htm> (last visited June 5, 2014) (showing a 47% increase

clemency 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.⁸⁶ This section considers the key reasons for the decline despite the strong constitutional footing of the clemency power.

I. Politics

The main reason there are 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.⁸⁷ 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.⁸⁸ 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 followed quickly behind. 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.⁸⁹ The media plays a part in the dynamic as well by focusing attention on the most heinous crimes, regardless of overall crime rates or patterns, thus creating the impression of constant threat and danger.⁹⁰

Not much stands against this push for more expansive laws and sentences. Those likely to become criminal defendants do not self-identify to advocate for change.⁹¹ Those already branded as criminals and their families

in clemency petitions between 1994 and 2004 and a 265% increase in petitions between 2004 and 2014).

⁸⁶ See, e.g., Dawn E. Johnson, *What's a President to do? Interpreting the Constitution in the Bush Administration Abuses*, 88 B.U. L. REV. 395, 398 (2008) (describing the Bush administration's expansion of executive privilege); Deborah Pearlstein, *Ratcheting Back: International Law as a Constraint on Executive Power*, 26 CONST. COMMENT. 523, 523 (2010) (describing the Bush Administration's expansion of executive power to "detain, interrogate, and try suspected terrorists" in the wake of September 11); 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. J., Mar. 30, 2012, <http://online.wsj.com/article/SB10001424052702303812904577292273665694> (noting Obama's broad use of executive authority to "press his domestic agenda").

⁸⁷ 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.")

⁸⁸ Garland, *supra* note 25; Stuntz, *supra* note 25.

⁸⁹ See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005).

⁹⁰ *Id.* at 749-750.

⁹¹ See *id.* at 726.

and friends are likewise not well positioned to lobby for change because they are disproportionately poor, lack organization, and in many cases do not even have the right to vote.⁹² And while the effects of the get-tough criminal justice system have produced negative effects on particular communities and blocks,⁹³ those communities do not always push back against tougher criminal laws because many individuals in those communities prefer a strong punitive response, in spite of its costs, because of their view that it is worth the tradeoff to avoid more pervasive violence.⁹⁴ Racial justice groups are similarly conflicted in responding to this dynamic because, even though tough-on-crime politics have had a disproportionately harsh effect on people of color, people of color are themselves divided on how to deal with the issue.⁹⁵ 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 too many other areas.⁹⁶ These groups have thus by and large focused on improving the rights of law-abiding citizens and placing less of a focus on criminal justice.⁹⁷

An elected official — including a President or governor thinking about clemency — facing this imbalance quickly realizes that there is little to be gained by 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.⁹⁸ But they always stand ready to lose because the risk is ever-present that one bad decision will grab the public's attention and make them vulnerable to being voted out of office. That was certainly the lesson drawn from Willie Horton, an individual who committed a rape and robbery while on furlough from a life sentence who was featured in one of George H.W. Bush's campaign ads against former Massachusetts Governor Michael Dukakis. Many credit the ad as being a

⁹² *See id.*

⁹³ *See* Jennifer Gonnerman, *Million-Dollar Blocks*, VILLAGE VOICE, Nov. 9, 2004, available at <http://www.villagevoice.com/2004-11-09/news/million-dollar-blocks/>.

⁹⁴ *See* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 36-45 (2012).

⁹⁵ *See id.* at 42-44.

⁹⁶ Michelle Alexander, *THE NEW JIM CROW* 54, 211-17 (2012).

⁹⁷ Alexander, *supra* note 96, at 211-17 (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 justice” that evoke sympathy and defy stereotypes, which criminals do not).

⁹⁸ 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. And because it is difficult to demonstrate the link between criminal justice initiatives and crime rates, even if those reforms produce results quickly, the public may doubt the causal link.

critical part of Dukakis's defeat — and certainly that has been the lesson that politicians have drawn from it.⁹⁹

This political climate has produced an American incarceration rate higher than that of any other country,¹⁰⁰ with the proportion several times greater than other Western democracies.¹⁰¹ There has been a proliferation of new criminal laws with ever-broader coverage and more relaxed mens rea requirements.¹⁰² Parole, as noted, has been greatly constricted.¹⁰³ Sentences for most offenses have gone up sharply.¹⁰⁴ Mandatory minimum sentences and dramatic increases for recidivist offenders, such as three-strikes laws, are commonplace.¹⁰⁵

⁹⁹ See *Dead Man Walking Out*, ECONOMIST, June 8, 2000, available at <http://www.economist.com/node/315488> (describing President Clinton's hawkish positions on criminal justice as a lesson learned from the Horton legacy); see generally David Anderson, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE (1995).

¹⁰⁰ *Prison Population Rates per 100,000 of the National Population*, INTERNATIONAL CENTRE FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited Sept. 25, 2013).

¹⁰¹ The United States imprisons 716 people per 100,000 of population. For comparison, the United Kingdom imprisons 149 per 100,000, Canada 114, and Germany 79. *Id.*

¹⁰² See, e.g., *id.* at 260–63 (noting that “[c]riminal liability rules grew broader, [and] the number of overlapping criminal offenses mushroomed,” and describing a doctrinal shift away from requiring prosecutors to show that defendants intended to commit a wrong or break a law); Brian W. Walsh and 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); John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION L. MEMO. NO. 26, June 16, 2008, at 1 available at <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes> (finding that Congress added about 57 crimes per year between 2000–07, a rate in line with the 1980s and 90s, and that many of the new crimes lacked mens rea requirements).

¹⁰³ The federal government and sixteen states have abolished discretionary parole entirely. See *Parole*, 38 GEO. L.J. 817, 817 (2009). Many of those that did not 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, 1044 (2010); see also Todd Reimers, PAROLE: THEN & NOW 3 (1999), available at

<http://www.senate.state.tx.us/SRC/pdf/ib0599.pdf> (mapping state parole policies).

¹⁰⁴ See UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 46 (2004) [hereinafter FIFTEEN YEARS OF GUIDELINES SENTENCING] (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, 1105-06 (1992) (noting that the 1980 determinate sentencing legislation in North Carolina slightly reduced the sentence lengths for the twenty most common felonies).

¹⁰⁵ See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 69 (2009) (observing the proliferation of mandatory minimum sentencing laws, and noting that 25 states and the federal government have “three

These developments have occurred across the range of jurisdictions, state and federal, and, if anything, the dynamic at the federal level has been the most 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.¹⁰⁶ The sharpest increase has occurred in the last four decades, with more than 40% of the federal criminal laws passed since the Civil War coming since 1970, and more than 25% passed since 1980.¹⁰⁷ Federal sentences are typically more severe than state sentences for similar crimes,¹⁰⁸ and the federal government is less likely than the states to pay attention to the costs associated with more severe sentences.¹⁰⁹

It is thus easy to see how federal clemency has been a casualty in this environment despite its firm rooting in the Constitution. Although he was not the beneficiary of clemency, the shadow of Willie Horton looms large over executives considering clemency, and we have seen Horton comparisons emerge in that context.¹¹⁰ 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 2009.¹¹¹ Many posited that the commutation would have a negative effect on his future chances for elected office.¹¹² In addition to the Horton

strikes and you're out" laws); Marc Mauer, *Why Are Tough on Crime Policies So Popular*, 11 STAN. L. & POL'Y REV. 9, 11 (1999) (stating that as of 1999, every state and the federal government had at least some mandatory sentencing laws).

¹⁰⁶ 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. Sensenbrenner, 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. Scott) (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).

¹⁰⁷ Barkow, *Policing of Prosecutors*, *supra* note 15, at 885.

¹⁰⁸ See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 574 (2011).

¹⁰⁹ See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 Colum. L. Rev. 1276, 1300-1310 (2005)

¹¹⁰ See, e.g., Jay Carney, *Huckabee's Willie Horton*, TIME, Dec. 5, 2007, available at http://swampland.time.com/2007/12/05/huckabees_willie_horton/ (referring to Governor Huckabee's pardon controversy as "Huckabee's Willie Horton"); Jonathan Martin, *Gregoire, Other Governors Reluctant to Grant Clemency*, SEATTLE TIMES, June 20, 2010, available at http://seattletimes.com/html/localnews/2012168458_clemency21m.html (discussing Governor Gregoire's pardons in the context of Willie Horton).

¹¹¹ See Perry Bacon Jr. & Garance Franke-Ruta, *After Policy Killings, Huckabee Defends Clemency for Suspect*, WASH. POST, Dec. 1, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/01/AR2009120102601.html> (citing "some prominent conservatives [who] say the episode could be damaging to his candidacy").

¹¹² See, e.g., Kate Zernike, *Old 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,

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, Hillary Clinton's former law partner, and billionaire fugitive Marc Rich.¹¹³ Criticism of Clinton's clemency¹¹⁴ led him to defend the pardons and commutations a month later in an op-ed in the *New York Times*.¹¹⁵ Dan Kobil recounts how an Ohio governor lost a reelection bid in part because he commuted death sentences of six individuals. The press corps who had hoped the Ohio governor could get a second term complained that he could have done more good by not commuting the sentences. As one put it: "So you saved the lives of six nonentitiesAnd who cares? If you you'd kept your mouth shut, the world would be no poorer, and you'd be around for another four years to fight for the underdog."¹¹⁶

In this environment, it should hardly be surprising that that many current governors in the national political spotlight have sharply limited their offices' clemency grants¹¹⁷ or that the occupants of the presidency have done the same.

2. *Structural bias at DOJ*

While politics is the main force driving clemency's decline at the federal level and elsewhere, it is important to note that the process and structure for issuing clemency decisions also plays a role in how often it is used. The decline in clemency at the federal level has been particularly pronounced because it is now embedded in a structure that makes grant recommendations unlikely. Since 1891, pardon 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, where it remains to this day. The

Op-Ed., *Mike Huckabee's Maurice Clemmons Problem*, SEATTLE TIMES, Dec. 18, 2013, <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.").

¹¹³ See Sonya Ross, *Clinton Pardons More Than 100*, WASH. POST, Jan. 20, 2001, available at http://www.washingtonpost.com/wp-srv/aponline/20010120/aponline104904_000.htm.

¹¹⁴ See, e.g., Elaine Shannon & Viveca Novak, *Bill, How Low Can You Go?*, TIME, Feb. 17, 2001, available at <http://content.time.com/time/nation/article/0,8599,99807,00.html> (criticizing Clinton for pardoning Manhattan lawyer Harvey Weing); Editorial, *An Indefensible Pardon*, N.Y. TIMES, Jan. 24, 2001, available at <http://www.nytimes.com/2001/01/24/opinion/an-indefensible-pardon.html> (criticizing Clinton for pardoning Marc Rich).

¹¹⁵ William J. Clinton, Op-Ed., *My Reasons for the Pardons*, N.Y. TIMES, Feb. 18, 2001, § 4, at 13.

¹¹⁶ Kobil, *supra* note 18, at 608 (quoting M. DiSalle, *THE POWER OF LIFE OR DEATH* 204 (1965)).

¹¹⁷ See Maggie Clark, *Governors Balance Pardons with Politics*, STATELINE, Feb. 5, 2013, <http://www.pewstates.org/projects/stateline/headlines/governors-balance-pardons-with-politics-85899449577> (citing Wisconsin's Scott Walker, New York's Andrew Cuomo and Massachusetts' Deval Patrick).

bulk of the Deputy Attorney General's work involves the supervision of federal prosecutions, so his or her main focus is on enforcement. To give the DAG authority over clemency thus creates an inherent tension because all clemency decisions are, in effect, reviews of prosecutorial decisions already made. Put another way, each pardon application is "a potential challenge to the law enforcement policies underlying the conviction."¹¹⁸ Shifting supervision to the DAG thus meant that clemency decisions "increasingly reflected the perspective of prosecutors" who would be disinclined to second-guess themselves and their policies.¹¹⁹

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 brought it. A pardon application that was not supported by at least one of those officials could be denied without being sent along to the President. Margaret Love reports that, during the period between 1900 and 1936, more than half of the petitions were forwarded to the White House with a recommendation in favor of a clemency grant.¹²⁰ Presumably, not all the positive recommendations came from judges, but from the U.S. Attorneys as well.

Of course 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 concern or political issue. These prosecutors would likely share the general public's sense of concern over disorder. Moreover, the desire of federal prosecutors for career advancement may make them 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. There is undoubtedly a desensitizing effect of working on criminal cases day after day that may make prosecutors less shocked than others would be by a particular punishment.¹²¹ If you hand out 20-year sentences on a routine basis, a five-year or ten-year sentence that is disproportionate given the facts may not seem as big of a deal as it would be to someone who takes a fresh perspective on the case. The negative effects of these sentences might not be as stark to the

¹¹⁸ Love, *supra* note 54, at 1194.

¹¹⁹ 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).

¹²⁰ Love, *supra* note 54, at 1181-1182.

¹²¹ G. K. CHESTERTON, *The Twelve Men*, in *TREMENDOUS TRIFLES* 80, 85-86 (1909) ("[T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policeman, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it 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. They do not see the awful court of judgment; they only see their own workshop.").

prosecutor who sees them handed out day after day. So as these sentences became commonplace because of the political process, prosecutors would become further immune to the idea that any one case was 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 Department. 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.”¹²² 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.”¹²³ Prosecutors are more accustomed to viewing cases without attention to collateral consequences on families or third parties such that they may miss instances where the punishment does not make sense as a matter of justice or where applying a law in 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.¹²⁴ The rules stress that a commutation is “an extraordinary remedy that is rarely granted.”¹²⁵ The Department appears to have first taken the position that a commutation should be viewed as “extraordinary” in a report issued after parole had replaced pardons as the primacy mechanism for releasing offenders.¹²⁶ And in a system where parole is available, one can see the basis for that view, because parole officials can look at the same factors that the executive could consider in reviewing a commutation request. But the Department’s view on commutations did not change when parole was abolished, thus leaving in place the notion that a commutation request should be seen as extraordinary and rarely granted, even when parole did not provide an alternative means of reviewing sentences or changed circumstances.

The regulations do not impose 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 applicants seeking a pardon to wait for three years from release to file, and five years in the case of serious crimes.¹²⁷ Those waiting periods were extended during the Reagan Administration and remain in effect today. Under

¹²² Humbert, *supra* note 27, at 121 (quoting Mitchell’s Address, Reform in Criminal Procedure, October 13, 1932).

¹²³ *Id.*

¹²⁴ Kobil, *supra* note 18, at 603.

¹²⁵ U.S. Dep’t of Justice, United States Attorneys’ Manual 1-2.113.

¹²⁶ Love, *supra* note 54, at 1191.

¹²⁷ *See id.*

the 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.¹²⁸ Reviewing officials are to consider the “post-conviction conduct, character, and reputation” of the applicant, the “seriousness and relative recentness of the offense,” and the applicant’s “acceptance of responsibility, remorse, and atonement.”¹²⁹ In addition, the Department states that a legal disability from a sentence that “unduly affect[s] the petition” should also be considered.¹³⁰ 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.¹³¹

The President is not bound to follow the Pardon Attorney’s recommendations as a matter of law,¹³² but as a matter of practice, the President has been quite deferential to the recommendations. It would be politically risky to grant a pardon in the face of a negative recommendation from the Pardon Office, particularly if the individuals receiving the grant would go on to commit an additional crime.¹³³

Presidents do not seem to have paid much attention to this dynamic or to care about it until the end of their terms in office, when 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 having abandoned the clemency power completely. But by then it is usually too late 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 pardons 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.”¹³⁴ President George W. Bush explicitly complained that he was not being provided with

¹²⁸ *See id.*

¹²⁹ Attorney’s Manual 1-2.113.

¹³⁰ *Id.*

¹³¹ During President Obama’s time in office, 1,579 pardon petitions were received by the Pardon Office, and 52 petitions were granted. During President George W. Bush’s administration, 2,498 pardon petitions were received and 189 were granted. Office of the Pardon Attorney, *Clemency Statistics*, U.S. Department of Justice, <http://www.justice.gov/pardon/statistics.htm>.

¹³² 28 C.F.R. § 1.11 (2014).

¹³³ *See* Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 606 (2012) (noting that “it would be a bold – or foolhardy – president who overrode the recommendations of his pardon attorney”).

¹³⁴ Love, *supra* note 54, at 1200.

grant recommendations when he sought them and urged President Obama to focus on fixing the pardon process.¹³⁵

President Obama seemed poised to take this advice when he first assumed office and his initial White House Counsel considered the creation of a clemency board that would take the pardon authority out of the Department of Justice.¹³⁶ He now appears to have abandoned that plan, and instead seems to have adopted a strategy for increasing the number of positive grant recommendations by the Department by providing specific criteria for cases where he is inclined to give clemency.¹³⁷ Both approaches reflect the fact 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.¹³⁸

Thus even in a political climate that depresses the grant rate, presidents are still interested in using this power and President Obama's recent actions represent a recognition that the institutional design of the current pardon system is not ideal for using this constitutional power.

As the next section explains, reforming the structure of clemency should be considered an urgent matter for any President. It is a constitutional duty that cannot be ignored and represents a key avenue for controlling the executive branch.

II. CLEMENCY AND THE UNITARY EXECUTIVE

Commentators have recognized several purposes of clemency. In an early case interpreting the power, Chief Justice Marshall called its application "an act of grace."¹³⁹ Subsequent cases have similarly emphasized clemency's

¹³⁵ See Peter Baker, *The Final Insult in the Bush-Cheney Marriage*, N.Y. TIMES, Oct. 10, 2013, at 28 (quoting President Bush's final words to President Obama before Obama's inauguration as "whatever you do, make sure you set a pardon policy from the start and then stick to it.").

¹³⁶ Rachel E. Barkow and Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. Chi. L. Rev. __ (forthcoming) (draft on file with author).

¹³⁷ This is known as Clemency Project 2014 and targets cases where individuals with minimal criminal histories and without a record of violence or prison disciplinary proceedings are currently serving long sentence for offenses where that has been a change in the law such that they would likely have received a substantially lower sentence if sentenced today. See National Association of Criminal Defense Lawyers, *Clemency Project Overview and FAQs*, available at <http://www.nacdl.org/clemencyproject/>. The project relies on defense lawyers to screen the cases for these criteria, but recently hit a set-back when the Administrative Office for the Courts ruled that federal public 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, available at <http://america.aljazeera.com/articles/2014/8/1/drugs-clemency-attorneys.html>.

¹³⁸ For an argument that the proper fix involves the creation of a clemency board, see Barkow and Osler, *supra* note 136.

¹³⁹ *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 159-160 (1833).

function as dispensing individualized mercy.¹⁴⁰ 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.¹⁴¹ Clemency can also be used to address charging and sentencing decisions to ensure that punishment is just and proportionate.¹⁴² 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.”¹⁴³ This function of clemency has long 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.¹⁴⁴

Other commentators have emphasized the benefits to the state from granting clemency. Blackstone argued that clemency grants “endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.”¹⁴⁵ Coke also noted that mercy strengthened the king’s power.¹⁴⁶ 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.¹⁴⁷ James Wilson argued during the Constitutional Convention that pardons could be used to get individuals to testify against others.¹⁴⁸

¹⁴⁰ See, e.g., *Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011) (noting in dicta that “clemency [. . . 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) (observing that clemency “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 clemency power as allowing the President to “forgive” the defendant). See also James D. Barnett, *The Grounds of Pardons in the Courts*, 20 YALE L.J. 131, 131 (1910) (referring to a pardon as “an act of grace” and “work of mercy”).

¹⁴¹ Brian M. Hoffstadt, *supra* note 26, at 572 (noting that clemency can address two types of errors: “convicting the wrong person” or “convicting the right person without affording her the full panoply of constitutional and legal rights to which she is entitled”).

¹⁴² See *id.* at 568 (2001) (noting that clemency’s roles includes “enhancing the fairness of sentences”).

¹⁴³ *Grossman*, 267 U.S. at 120.

¹⁴⁴ 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”).

¹⁴⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES *398.

¹⁴⁶ E. Coke, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 233 (4th ed. London 1669) (“Mercy and truth preserve the king, and by clemency is his throne strengthened.”).

¹⁴⁷ James Iredell, Address at the North Carolina Ratifying Convention (July 28, 1788), in 4 THE FOUNDERS’ CONSTITUTION 17 (P. Kurland & R. Lerner ed. 1987).

¹⁴⁸ See Rosenzweig, *supra* note 133, at 598. James Iredell also pointed out the use of pardons as a tool to obtain cooperation from co-conspirators. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot ed. 1836) (noting that “it is often necessary to convict a man by means of his accomplices” and the

Justice Holmes expressly rejected a view of the pardon in individual terms. “A pardon,” he argued “is not a private act of grace from an individual happening to possess power.”¹⁴⁹ Rather, it is “a part of the Constitutional scheme,” and its grant reflects “a determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.”¹⁵⁰

Scholars 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.¹⁵¹ James Iredell, at the North Carolina ratifying convention, pointed out that clemency allowed the executive to check overbroad general laws because “[i]t is impossible for any general law to foresee and provide for all possible cases that may arise.”¹⁵² 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.”¹⁵³ 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.”¹⁵⁴

While clemency performs all the functions previously mentioned, it has another role that has been all but ignored. The clemency power is a key mechanism for the President to control executive power and the agents of that

President “ought to be intrusted [*sic*] with the most effectual means of procuring” accomplice testimony).

¹⁴⁹ *Biddle v. Perovich*, 274 U.S. 480, 361 (1927).

¹⁵⁰ *Id.* at 361-62.

¹⁵¹ *See, e.g.*, Morison, *supra* note 30, 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 133, at 593 (noting that pardon power is “the personification of the government acting as a check on the institutions of government”); Hoffstadt, *supra* note 26, at 593 (“[T]he clemency power acts as an Executive check on both the Legislative and the Judicial branches.”); Margaret Colgate Love, *supra* note 119, at 1506 (observing that clemency can “serve [. . .] the purpose of checking the legislature”); Kobil, *supra* note 18, at 596 n.176 (noting that “clemency was intended to give the executive a check on the legislative and judicial functions”); Note, Executive Revision of Judicial Decisions, 109 HARV. L. REV. 2034 (1996) (noting that the role of the pardoning power in checking judicial decisionmaking has been recognized by the Supreme Court).

¹⁵² Iredell, *supra* note 147, at 17-18.

¹⁵³ *Id.*

¹⁵⁴ The Federalist No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For a more modern statement, see Moore, *supra* note 144, 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.”).

power, namely federal prosecutors.¹⁵⁵ It is not particularly surprising that criminal law scholars have not focused on this 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.¹⁵⁶

What is more surprising is the fact that unitary executive theorists have not given clemency much due. 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,¹⁵⁷ 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 decisionmaking through the clemency power.

At the heart of unitary executive theorists' claims is that "all federal officers exercising executive power must be subject to the direct control of the President."¹⁵⁸ The core textual support for this theory is that the Vesting Clause of Article II places "[t]he executive Power" in "a President."¹⁵⁹ Some unitary theorists also rely on the Take Care Clause as establishing a hierarchy within

¹⁵⁵ 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 54, at 1206. Akhil Amar has similarly observed that pardon is one of the "threads that defined America's presidency." Amar *supra* note 25, at 189 (2006).

¹⁵⁶ See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 992 (2006) (arguing that scholars have overlooked separation of powers analysis as it relates to criminal law administration); Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 400 (2013) (noting that few scholars have applied separation of powers framework to criminal law jurisprudence).

¹⁵⁷ See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 14* (2008); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 598 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1038 (2006); Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357 (1990); Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41. For the principal work rejecting the unitary executive branch theory, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47-55, 119 (1994).

¹⁵⁸ Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1157 (1992).

¹⁵⁹ U.S. Const. art. II, §1, cl. 1 (emphasis added).

the executive department that places the President at the top.¹⁶⁰ Unitary executive theorists praise this design because it places clear lines of authority in the President, thus fostering accountability¹⁶¹ and efficiency.¹⁶²

In the literature and case law, the key contentious implication of this theory has been that it renders unconstitutional those agencies that are headed by individuals that cannot be removed at will by the President.¹⁶³ Unitary executive thought has been preoccupied with this relationship between removal and the civil regulatory state.¹⁶⁴

The focus on whether 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

¹⁶⁰ Calabresi & Rhodes, *supra* note 156, at 1165-1167.

¹⁶¹ 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); Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110 (1994) (“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.”).

¹⁶² See, e.g., Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 56 (1986) (“[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. COMMENTARY 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 161, 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).

¹⁶³ See, e.g., *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3147 (2010) (noting that while good cause removal provisions had been upheld in *Humphrey’s Executor* and other cases, two layers of removal protection was an unconstitutional constraint on the President’s removal power); Neomi Rao, *Symposium: Presidential Influence Over Administrative Action: A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2542 (2011) (arguing that “[t]he 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 agencies, are unconstitutional”); Paul R. Verkuil, *The Status of Independent Agencies after Bowsher v. Synar*, 1986 DUKE L.J. 779, 788 (1986) (noting that “[t]he Reagan administration ha[d] argued in a variety of settings that congressional restrictions on...independent agencies in general are unconstitutional,” and that in *Synar v. United States*, the D.C. Circuit “accepted the administration’s position”).

¹⁶⁴ See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *supra* note 157; Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523 (2008); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *supra* note 157. See also Rachel E. Barkow, *Insulating Agencies*, 89 TEX. L. REV. 15, 16 n.2 (2010) (citing articles addressing removal).

matter of formal law.¹⁶⁵ 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 Department of Justice and the U.S. Attorneys' Offices within it are not in the mold of the so-called independent agencies that have occupied the bulk of the unitary executive scholarship and the Supreme Court's case law.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸ Adrian Vermeule argues that, quite apart from for-cause removal, "conventions" — norms situated between law and politics — better

¹⁶⁵ 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 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 (noting that U.S. Attorneys "may be dismissed for any reason or for no reason").

¹⁶⁶ See *Chabal v. Reagan*, 841 F.2d 1216, 1220 (3d Cir. 1988) ("[I]t can hardly be suggested that [United States Attorneys] are not 'purely executive' officers or that the President lacks the plenary authority to remove them."); see also 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).

¹⁶⁷ See, e.g., 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) (focusing on the independent counsels counsel law as a challenge to unitary executive theory); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive in Historical Perspective*, 31 ADMIN. & REG. L. NEWS 5, 8-14 (2005) (same); 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); John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1950-53 (2009) (same); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 14-23 (1994) (same); Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 Notre Dame L. Rev. 1, 2-4 (2004) (same).

¹⁶⁸ See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18 (2010) ("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) (arguing that "there is no single feature - not even a for-cause removal provision - that every agency commonly thought of as independent shares"); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1174 (2013) (stating that "[t]he legal test of independence [for-cause tenure protection] fails adequately to describe or make sense of agency independence in practice").

explain agency independence.¹⁶⁹ Along with the Chair and Vice Chairs of the Federal Reserve and SEC, FCC and FEC Commissioners, Vermeule uses United States Attorneys as examples of officials lacking formal, textually-based for-cause tenure, but benefiting from conventions of independence.¹⁷⁰ 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.”¹⁷¹ 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 Gonzales received when he removed United States Attorneys who had been appointed by President George W. Bush during the middle of President Bush’s administration.¹⁷²

More fundamentally, while removal has been the center of attention in the scholarship and the 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 have pointed out, there are two other, stronger means by which the President could control the executive department aside from removal.¹⁷³ 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.”¹⁷⁴ Second, instead of acting directly in place of a subordinate, the President “has the power to nullify or veto their exercises of discretionary power.”¹⁷⁵

Clemency is a prime illustration of a mechanism by which the President could supplant a discretionary decision or exercise control by using a presidential veto over the discretionary executive power of a subordinate.

¹⁶⁹ Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1162–63, 1181–94 (2013).

¹⁷⁰ *See id.* at 1175, 1201.

¹⁷¹ Vermeule, *supra* note 169, at 1202.

¹⁷² *See infra*, TAN XX-XX; Vermeule, *supra* note 169, at 1202 (describing the backlash).

¹⁷³ Calabresi & Rhodes, *supra* note 156, at 1166 (noting that removal is “[t]he third and weakest model of the unitary executive”). Calabresi & 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, *Insulating Agencies*, *supra* note 168, at 42–64 (discussing these political means, such as agencies’ funding sources, restrictions on agency personnel, and relationships with other agencies).

¹⁷⁴ Calabresi & Rhodes, *supra* note 156, at 1166; *see also* Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective On Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 353 (1989) (“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* Peter L. Strauss, Foreword, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704–05 (arguing that where Congress delegates functions to an agency, the President’s role “is that of overseer and not decider”).

¹⁷⁵ *Id.* at 1166.

Federal prosecution is a core executive power,¹⁷⁶ and the prosecutors who hold that power exercise enormous discretion in deciding whether and how to charge criminal cases.¹⁷⁷ There are often multiple federal statutes that could be charged in a given case, and prosecutors have had largely unbridled discretion to pick from among them or to not charge at all.¹⁷⁸ In making this selection, prosecutors control whether defendants will be subject to mandatory minimum sentences and what sentencing range will be triggered under the Sentencing Guidelines.¹⁷⁹ Prosecutors also determine which offenders should receive a sentence reduction for cooperation.¹⁸⁰

These prosecutorial decisions receive almost no oversight by courts precisely because courts view these decisions as within the “special province of the Executive.”¹⁸¹ In *Heckler v. Chaney*, the Supreme Court held that agency enforcement decisions are “presumptively unreviewable.”¹⁸² 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.”¹⁸³ Commentators have largely accepted this deference to prosecutorial decisionmaking.¹⁸⁴ Courts leave it to the

¹⁷⁶ *Morrison v. Olsen*, 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.”).

¹⁷⁷ See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876-84 (2009) (discussing the wide-ranging and weakly checked power of federal prosecutors); Richard A. Bierschbach & Stephanos Bibas, *supra* note 159, at 403-05 (arguing that the prevalence of plea bargaining, the wide-range of potential charges, 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 Development*, 6 SETON HALL CIR. REV. 1, 2 (2009) (“Prosecutors decide which cases to pursue and what plea bargains to accept, determining the fates of the vast majority of criminal defendants who choose not to stand trial.”).

¹⁷⁸ See Barkow, *Policing of Prosecutors*, *supra* note 15, at 877 (“Because numerous federal laws govern similar behavior and are written broadly, prosecutors often have a choice of charges, which often, in turn, means a choice of sentence as well.”) (citation omitted). Stuntz, *supra* note 15, at 518; Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1423 (2008).

¹⁷⁹ See Barkow, *Institutional Design*, *supra* note 177, at 877 (noting that the prevalence of mandatory minimum laws allows prosecutors to bring charges that come with strict penalties).

¹⁸⁰ See *id.* at 877–78 (noting that the prosecution’s decision to depart on the basis of substantial assistance is the only way most defendants are able to avoid mandatory minimum sentences).

¹⁸¹ *United States v. Armstrong*, 517 U.S. 456, 464 (1996); see also *In re Aiken County*, 725 F.3d 255, 263 (DC Cir. 2013) (describing the broad Presidential power of prosecutorial discretion).

¹⁸² *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (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.”).

¹⁸³ *Heckler v. Chaney*, 470 U.S. at 832.

¹⁸⁴ As Robert Misner puts it, “[m]ercy is tolerated readily in prosecutorial decisionmaking, particularly in charging decisions.” Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L.

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."¹⁸⁵

Yet Presidents have done very little to regulate criminal law enforcement discretion even though there are significant disparities in how different United States Attorneys charge cases.¹⁸⁶ The Attorney General, the President's delegate to oversee all federal prosecutors, has offered little guidance on how federal prosecutors should exercise their prosecutorial discretion. Each United States Attorney has "plenary authority with regard to federal criminal matters" within that U.S. Attorney's district and is "invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority."¹⁸⁷ The Department has offered more guidance in various memos and through the U.S. Attorney's 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.

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 94 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, which necessarily means a certain level of generality.

The Department's memos address charging policies that apply across case types as well as specific memos addressing particular laws. In terms of the general charging memos, in recent decades, most Attorney Generals have advised prosecutors that they should charge the most serious readily provable offense.¹⁸⁸ They have differed, however, in how strongly they have commanded it — *i.e.*, varying in saying should versus must — and whether

REV. 1303, 1306 n.25 (2000). *See also* Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1352 (arguing that the exercise of prosecutorial discretion typically falls outside of judicial review).

¹⁸⁵ *Armstrong*, 517 U.S. at 464. *See also* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 684-685 (2014) (noting that the Office of Legal Counsel takes a similarly broad view of the scope of executive charging discretion).

¹⁸⁶ *See* Brian D. Johnson, THE MISSING LINK: EXAMINING PROSECUTORIAL DECISION-MAKING ACROSS FEDERAL DISTRICT COURTS, at iii-iv (2014) (describing disparities in charge reductions and case declinations across age, gender, race, and geographical characteristics), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/245351.pdf>; Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUSTICE Q. 394, 425 (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).

¹⁸⁷ USAM 9-2.00 (2009).

¹⁸⁸ 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 8.

prosecutors should make that decision after an individualized assessment of the fit between the charge and circumstances of the case, the purposes of federal criminal law, and the impact on federal resources.¹⁸⁹ 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.”¹⁹⁰ Thus, whereas most other AGs in recent history have left it to line prosecutors to decide how particular laws should be enforced given the individual defendant and the facts of his or her case, under the Ashcroft methodology, prosecutors would still have discretion, but it would be limited to assessments of what the evidence could prove, not the broader question of whether charges make sense based on individual circumstances and in light of resource constraints and the broader purposes of criminal law.

Moreover, every Attorney General has also recognized discretion to engage in plea bargaining.¹⁹¹ Under the initial Civiletti memo, prosecutors were instructed that they could agree to a lesser or related offense if it “bears a reasonable relationship to the nature and extent” of the defendant’s conduct and “yields “an appropriate sentence under all the circumstances of the case.”¹⁹² The standard has changed with different AG’s, but even in its most restricted form in the Ashcroft memo, it still permitted prosecutors to accept a lesser charge with written supervisory approval.¹⁹³ Today, under AG Holder, prosecutors are instructed that any plea bargain “should reflect the totality of a defendant’s conduct” and be “informed by an individualized assessment of the specific facts and circumstances of each particular case.”¹⁹⁴

The Department has also set out general guidance on sentencing protocols, with its policies changing as the background law has changed. In the pre-Sentencing Guidelines era, the Department took the view that sentencing was “primarily the function and responsibility of the court” and authorized sentencing recommendations only when required by the plea agreement or “the public interest warranted an expression of the government’s view.”¹⁹⁵ But the memo made clear this would not be a common occurrence, as prosecutors were

¹⁸⁹ *Id.* (discussing differences among the memos). For examples of approaches that give line prosecutors more discretion, see Memorandum from Janet Reno, Attorney General, to Holders of U.S. Attorneys’ Manual, Title 9, Principles of Federal Prosecution (Oct. 12, 1993); Memorandum from Eric Holder, *supra* note 8; USAM 9-27.300 (2009). 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 to Heads of Department of Justice Components and United States Attorneys, Federal Prosecution Priorities (Aug. 12, 2013).

¹⁹⁰ Memorandum from John Ashcroft, *supra* note 8, at 2.

¹⁹¹ Vinegrad, *supra* note 8, at 3.

¹⁹² Principles of Federal Prosecution (U.S. Dept of Justice, July 1980) (Civiletti Memo).

¹⁹³ Vinegrad, *supra* note 8, at 3.

¹⁹⁴ *Id.*

¹⁹⁵ Civiletti Memo, *supra* note 192.

told to “avoid routinely taking positions with respect to sentencing.”¹⁹⁶ With the advent of the Guidelines, the Department instructed prosecutors to advocate for sentences consistent with the Guidelines.¹⁹⁷ Under the current, advisory Guidelines regime, the Department instructs prosecutors that Guidelines sentences are typically appropriate and thus prosecutors “should generally continue to advocate for a sentence within that range.”¹⁹⁸ But “given the advisory nature of the guidelines, advocacy at sentencing, like charging and plea agreements, must also follow from an individualized assessment of the facts and circumstances of each particular case.”¹⁹⁹

Thus for most of the past 34 years, the Department’s general policies on charging have given prosecutors considerable discretion. Even under the most restrictive regime of the Ashcroft memo, prosecutors could take different views on what could be “readily” proven and could seek supervisor approval of a lesser charge. The Department’s policies consistently have left room for prosecutors to take different positions on how federal law should be enforced.²⁰⁰

The general charging memo is not the only guidance, however. The Department has also issued memos on how specific laws should be enforced or how particular categories of defendants should be treated. Although they are more targeted, these guidance memos also leave federal prosecutors with ample discretion. For example, there are a series of memos specifying what factors should be considered before charging a corporation criminally. In 1999, then-Deputy Attorney General Eric Holder issued a policy memorandum listing eight factors prosecutors should consider when deciding whether to charge a corporation.²⁰¹ Four years later, in the wake of Enron’s collapse, the Justice Department replaced Holder’s memo with then-Deputy Attorney General Larry Thompson’s “Principles of Federal Prosecution of Business Organizations,” which made the Holder factors binding rather than advisory and emphasized

¹⁹⁶ *Id.*

¹⁹⁷ Departures were generally disfavored. *See, e.g.*, Thornburgh Memo (requiring supervisor approval to seek Guidelines departure); Ashcroft Memo (instructing supervisors not to consent to departures unless the defendant cooperated, the case was in the fast-track program, or in other “rare” circumstances).

¹⁹⁸ Holder Memo, *supra* note 9.

¹⁹⁹ *Id.*

²⁰⁰ *See* Brian D. Johnson, THE MISSING LINK: EXAMINING PROSECUTORIAL DECISION-MAKING ACROSS FEDERAL DISTRICT COURTS, 57, 104 (using dataset of 284,869 federal arrests between 2003 and 2005 to find strong evidence for “significant variation” across federal districts in case dismissals and charge reductions). *See also* 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 the Petite policy, grand jury advisement, and the presentation of exculpatory evidence to the grand jury).

²⁰¹ *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 at Part II.A (June 16, 1999), *available at* <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.pdf>

good corporate governance and cooperation with investigators.²⁰² The Thompson memo stressed two controversial factors to determine corporate cooperation: whether the corporation would waive attorney-client privilege regarding conversations with its employees, and whether the company would decline to pay attorneys' fees for culpable employees.²⁰³ In 2006, following broad criticism over these factors,²⁰⁴ then-Deputy Attorney General Paul McNulty issued new guidance backtracking from waiver and attorneys' fees.²⁰⁵ Then-Deputy Attorney General Mark Filip's memo in 2008 forbids prosecutors from asking for privilege waivers and instead allows prosecutors to consider "whether the corporation has provided the facts about the events" in considering its cooperation.²⁰⁶ Despite this instruction, 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.²⁰⁷

Another area where the Department has provided greater, though still general, guidance is with respect to drug offenses. State decisions to decriminalize marijuana, either in general or for medicinal purposes, prompted some of the memos, because those state efforts raised significant federalism issues about how the federal government should respond to local decisions to legalize the sale and use of marijuana to some extent. In the memo addressing jurisdictions that legalized medical marijuana, the Department clarified that prosecuting "significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs."²⁰⁸ The Department then noted that "pursuit of these priorities 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."²⁰⁹ The memo went on to give characteristics that

²⁰² 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 (Jan. 20, 2003), *available at* <http://www.albany.edu/acc/courses/acc695spring2008/thompson%20memo.pdf>.

²⁰³ *See id.* at 7–8.

²⁰⁴ *See, e.g.*, Letter from Robert D. Evans, Dir. of the Am. Bar Ass'n Gov't Affairs Office, to the United States Sentencing Comm'n 1 (Mar. 28, 2006) (urging the Sentencing Commission that "waiver of attorney-client privilege" should not be a factor in determining cooperation), *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/attyclient/060328letter_aba_ussc.authcheckdam.pdf.

²⁰⁵ Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Atty's (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf.

²⁰⁶ Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Atty's 9 (Aug. 28, 2008), *available at* <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf>.

²⁰⁷ *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).

²⁰⁸ Ogden Memo, Oct. 19, 2009.

²⁰⁹ *Id.* at 2.

would “not be in clear and unambiguous compliance with applicable state law and may indicate illegal drug trafficking activity of potential federal interest,” including the presence of violence, the use of firearms, or ties to other criminal enterprises.²¹⁰ But even without the presence of the listed facts, a prosecutor could still bring a federal charge because “the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted.”²¹¹ And a later memo from Deputy Attorney General James Cole clarified that the Department did not intend to shield from prosecution “[p]ersons who are in the business of cultivating, selling or distributing marijuana . . . regardless of state law.”²¹²

The Department provided additional guidance after decisions in Colorado and Washington to legalize small amounts of marijuana and regulate its sale, production, and distribution.²¹³ Emphasizing the Department’s “limited investigative and prosecutorial resources,” the Deputy Attorney General Cole issued memo in August 2013 emphasizing the areas that are the Department’s priorities for enforcement,²¹⁴ and noting 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,”²¹⁵ suggesting areas where the federal government would decline to bring prosecutors. Here, too, however, the memo left ample discretion with the U.S. Attorneys in those states. The memo cautioned 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.”²¹⁶

Thus, these memos, while addressing specific substantive issues, are nevertheless written in broad terms that give U.S. Attorneys ample discretion to determine how to enforce federal law even in states that have legalized medical marijuana. And, in fact, U.S. Attorneys Offices have varied in their interpretations of the memos and their charging decisions.²¹⁷

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Memorandum from James M. Cole, Deputy Attorney General, to United States Attorneys, June 29, 2011.

²¹³ Cole Memo, *supra* note 6.

²¹⁴ *Id.*

²¹⁵ *Id.* at 2.

²¹⁶ *Id.* at 3. President Obama has himself recognized the tension between his duty to execute the laws and state legalization, asking “How do you reconcile a federal law that still says marijuana is a federal offense and state laws that say that it’s legal?,” Kevin Liptak, Obama Enforcing Pot Laws in States That Have Legalized It Not a Top Priority, CNN Political Ticker, <http://political-ticker.blogs.cnn.com/2012/12/14/obama-enforcing-pot-laws-in-states-that-have-legalized-it-not-a-top-priority/>.

²¹⁷ For example, U.S. Attorneys in California indicated in August that the Cole Memo 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*, EAST BAY

The Department's recent memo regarding drug offenses that carry mandatory minimum sentences is similar in that it provides a list of criteria that, if satisfied should lead prosecutors to decline to charge the quantity that would trigger a mandatory minimum sentence.²¹⁸ But the criteria are written in sufficiently broad terms that they leave each prosecutor's office wide discretion in deciding whether the memo's requirement has been satisfied. For instance, one requirement is that "[t]he defendant's relevant conduct does not involve . . . the possession of a weapon."²¹⁹ Most defendants sell drugs as part of a group, so this leaves open to each U. S. Attorney's Office whether it will charge mandatory minimums if any of the defendant's associates had a weapon, even if the defendant did not know that others did. Similarly, another requirement is that the defendant cannot have "significant ties to large-scale drug trafficking organizations, gangs or cartels."²²⁰ Here, too, there is a room for wide variation. Many local street gangs also sell drugs. Does that mean low-level corner sellers who are part of local gangs should be subject to mandatory minimum sentences even if the particular defendant is not the "serious, high-level, or violent drug trafficker" that the memo says mandatory minimums are meant to target?²²¹ A defendant is also still subject to mandatory minimum charging if he or she supervises others within a criminal organization.²²² Again, the question is whether the Department intends to leave open to each office an interpretation that allows a low-level street seller to be charged, just because that individual might supervise someone who is an even smaller fry in the overall network of which they are part. Even the last requirement, that a defendant cannot have a significant criminal history,²²³ is open to varying views. The Department says it is "normally" defined as someone who has three more criminal history points under the Sentencing Guidelines, but leaves open

EXPRESS (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), 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>.

²¹⁸ See *supra* note XX.

²¹⁹ Holder Memo, *supra* note 9, at 2.

²²⁰ *Id.*

²²¹ *Id.* at 1.

²²² *Id.* at 2.

²²³ *Id.* at 2.

that it “may involve fewer . . . depending on the nature of any prior convictions.”²²⁴

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 Administration’s positions on the Affordable Care Act²²⁵ and the Department’s recently released immigration enforcement memo on exercising prosecutorial discretion with respect to individuals who came to the United States as children,²²⁶ these memos have drawn attention to the 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,²²⁷ have argued that, in some of these instances at least, 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.²²⁸ Their view is that the President’s duty to enforce can only be excused for a limited set of reasons.²²⁹

²²⁴ *Id.* at 2.

²²⁵ See Fox, *supra* note 3; 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) (informing insurance commissioners that certain health plans will not be considered out of compliance with the Affordable Care Act), available at <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/COMMISSIONER-LETTER-11-14-2013.PDF>; OFFICE OF CONSUMER INFO. & OVERSIGHT, U.S. DEP’T OF HEALTH & HUMAN SERVS., INSURANCE STANDARDS GUIDANCE SERIES—INFORMATION (2010) (WAIVING ENFORCEMENT OF PORTIONS OF THE AFFORDABLE CARE ACT), AVAILABLE AT <HTTP://WWW.CMS.GOV/CCIIO/RESOURCES/REGULATIONS-AND-GUIDANCE/DOWNLOADS/GUIDANCE-LIMITED-BENEFIT-2ND-SUPP-BULLETIN-120910.PDF>; SEE ALSO ZACHARY S. PRICE, *ENFORCEMENT DISCRETION AND EXECUTIVE DUTY*, 67 VAND. L. REV. 671, 674 (2014) (DESCRIBING PRESIDENT OBAMA’S CLAIM TO WAIVE CERTAIN REQUIREMENTS OF THE Affordable Care Act).

²²⁶ Napolitano Memo, *supra* note 2. The immigration memo in particular has received significant attention because it deals with the highly politicized topic of immigration and because it fosters a policy that Congress seems to have rejected by not passing the Development, Relief, and Education for Alien Minors Act (DREAM Act). Delahunty & Yoo, *supra* note 9, at 784 (accusing the Deferred Action for Childhood Arrivals (DACA) program of “effectively [writing] into law ‘the DREAM Act’”). But see Wadhia, *supra* note 10, at 69 (pointing out differences between the Dream Act and the DACA program).

²²⁷ John Yoo, for instance, has long defended a robust theory of the unitary executive, John Yoo, *supra* note 167, at 1950–53 (2009), but has come out strongly against the DACA policy. 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 (2013).

²²⁸ See 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 Obama’s delay in enforcing the ACA as the focus of Rep. Boehner’s lawsuit against Obama); Robert J. Delahunty & John C. Yoo, *supra* note 227, at 784–85 (arguing that 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 Obama’s immigration policy violate the Take Care Clause); David S. Rubenstein, *Immigration*

One consideration widely acknowledged as legitimate is a lack of resources.²³⁰ 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," they later soften that stance and recognize that Congress's failure to provide sufficient enforcement resources may excuse that duty.²³¹ "[T]he President," they concede, "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."²³² 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.²³³

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"); Price, *supra* note 225, at 751-752, 759-761 (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").

²²⁹ See, e.g., Delahunty & Yoo, *supra* note 227, 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 225, 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).

²³⁰ See *Myers v. United States*, 272 U.S. 52, 291-292 (1926) (Brandeis, J., dissenting) ("Obviously the President cannot secure full execution of the laws, if Congress denies him adequate means of doing so. . . . The 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.").

²³¹ Delahunty & Yoo, *supra* note 227, 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 836-845.

²³² Delahunty & Yoo, *supra* note 227, at 792

²³³ Delahunty & Yoo, *supra* note 227, at 847-849. The Administration takes the view that cases involving young students who arrived in the U.S. before the age of 16 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. Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) (providing guidance to Immigration and Customs Enforcement 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 . . .

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.²³⁴ 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.”²³⁵ A recent critique of lack of enforcement 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.”²³⁶

One could argue that “[t]he problem of insufficient resources is an endemic feature of the modern federal government”²³⁷ 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.²³⁸ Even Delahunty and Yoo note that “it can be argued that Congress implicitly

, it has not shown that nonenforcement against the DREAMers would result in significant savings or achieve significant benefits.” Delahunty & Yoo, *supra* note 227, at 849. Critics of Delahunty and Yoo argue that this is misguided because Congress has appropriated enough funds to seek removal of less than 4% of the total estimated unauthorized population. Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the Dream Act*, 91 TEX. L. REV. 59, 63 (2013). Saikrishna Prakash points out that Delahunty and Yoo’s article itself cites the relevant statistics demonstrating resource constraints (*see* Delahunty & Yoo, *supra*, note 227, at 789 (acknowledging that “[r]ealistically, ICE cannot remove much of the illegal immigrant population unless Congress increased funds more than twentyfold”) 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 10, at 118.

²³⁴ See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 704 (2014).

²³⁵ Price, *supra* note 231, at 758.

²³⁶ Jeffrey A. Love and Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1217 (2014).

²³⁷ Prakash, *supra* note 10, at 118-119 (2013) (“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.”).

²³⁸ Wadhia, *supra* note 233, at 63 (2013) (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 2013 Memo (noting that “rising prison costs have resulted in reduced spending on criminal justice initiatives, including spending on law enforcement agents, prosecutors, and prevention and intervention programs”); Cole 2013 Memo, *supra* note 6, at 1 (noting that “[t]he Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way”).

encourages, and perhaps desires, broad enforcement of discretionary authority as an antidote to its own overregulation or overcriminalization.”²³⁹

More fundamentally, whether these commentators are right or wrong on the limits of presidential oversight over enforcement discretion,²⁴⁰ they concede their arguments do not apply to clemency.²⁴¹ The Constitution makes the clemency power clear and explicit in the text of Article II, with the lone exception being cases of impeachment.²⁴² The Framers explicitly envisioned that the pardon power would be used to check applications of “the letter of the law,”²⁴³ and the “criminal code,”²⁴⁴ so they did not envision a conflict with the Take Care Clause if the President were to correct what he or she saw as improper applications of the letter of the law. On the contrary, the President has a duty to uphold the Constitution, including the pardon authority. As one commentator has argued, “[t]he executive’s oath to take care that the laws be faithfully executed include[s] the declaration that he will maintain the constitution which confers upon him the pardoning power.”²⁴⁵ That is, the

²³⁹ Delahunty & Yoo, *supra* note 227, at n.57. They also note that the need for discretionary executive decisionmaking to protect against oppressive or disproportionately harsh laws “seems particularly obvious in the area of criminal law enforcement.” *Id.* at 793.

²⁴⁰ For a critique, see Prakash, *supra* note 10, at 115 (2013) (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 *Aiken County*, 725 F.3d at 263 (“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.”); Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 527, 553 (noting examples of early presidents directing district attorneys to begin or end prosecutions).

²⁴¹ Price, *supra* note 231, 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 227, 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)”).

²⁴² Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT. R. 139, 139 (2001) (arguing that, “because 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 as applicable to particular behaviors”).

²⁴³ *Id.*

²⁴⁴ The Federalist No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For a more modern statement, see Moore, *supra* note 144, 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.”); Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power within the Executive Branch*, 61 L. & Contemp. Probs. 47, 52-53 (1998). 53 (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).

²⁴⁵ P.S. Ruckman, Jr., *The Study of Mercy: What Political Scientists Know (and Don’t Know) About the Pardon Power*, 9 U. ST. THOMAS L.J. 783, 792 (2012) (quoting William W. Smithers,

pardoning authority is itself a duty that cannot be ignored pursuant to the Take Care Clause. The sweeping power is a key check in the constitutional system, and “the 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.”²⁴⁶

Clemency does not just stand on different legal footing. There are policy reasons for the president’s broader authority under the clemency power. Clemency is subject to greater scrutiny than decisions whether to enforce because with a clemency determination, there is typically already a record of what the person did against which the clemency grant can be judged. In cases where an individual is not charged, there may be very little publicly available information to second-guess the executive’s decision.²⁴⁷ Clemency also differs in its timing: as the vagueness of the Department’s memos make clear, it is hard for the President to give sufficient guidance *ex ante* of how things should be charged and there are too many cases to keep track of all of them while they are being pursued. Clemency provides an *ex post* corrective for those cases that the President disagrees should have been brought in the first place. Clemency also allows the president to correct decisions of prior administrations with which he 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.”²⁴⁸ The clemency decision is also squarely placed with the President, so it is a decision for which he or she is plainly accountable. A decision not to charge, in contrast, 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 not elected or directly accountable.

Many times since the founding, presidents have opted to use the clemency power to express their disagreement with charging decisions. It is easiest to see this in the broad, systemic grants.²⁴⁹ According to Charles Shanor and Marc Miller, at least one-third of our presidents have used the pardon power in a systematic fashion to further their policies.²⁵⁰ This use began immediately, with President Washington’s pardons of participants in the Whiskey Rebellion,²⁵¹ and continued throughout American history. For

The Use of the Pardoning Power, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 61, 63 (1914) (internal quotation marks omitted).

²⁴⁶ Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1303 (1996).

²⁴⁷ See Barkow, *supra* note 184, at 1353–54 (“Decisions not to charge are generally unknown to any actor other than the defendant or, if relevant, the victim.”).

²⁴⁸ Prakash, *The Chief Prosecutor*, *supra* note 240, at 541.

²⁴⁹ For the best overview of these types of pardons, see Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT. R. 139, 139–40 (2001).

²⁵⁰ *See id.*

²⁵¹ *See id.* at 140.

example, Thomas Jefferson pardoned all those incarcerated under the Alien and Sedition Acts in light of his view that the legislation was unconstitutional. After the Civil War, President Andrew Johnson used his clemency power “single-handedly to eviscerate a large plank of congressional Reconstruction policy.”²⁵² Presidents Ford and Carter 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.²⁵³ 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.²⁵⁴ 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.²⁵⁵

The Framers envisioned clemency as precisely this type of checking mechanism. They did not see it solely 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.”²⁵⁶ It stands “as an independent protection for individual citizens against

²⁵² Morison, *supra* note 30, at 306-311.

²⁵³ Proclamation No. 4483, 42 Fed. Reg. 4391 (Jan. 21, 1977); Mark Osler & Matthew Fass, *The Ford Approach and Real Fairness for Crack*, 23 FED. SENT. R. 228, 229.

²⁵⁴ Shanor and Miller, *Pardon Us*, 13 FED. S. REP. 139 (2001) (noting that 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”).

²⁵⁵ For example, several recent presidents have exercised their clemency power to pardon individuals for minor drug or alcohol-related offenses. In 1992 President George H.W. Bush pardoned Guillermo Medrano Moreno, who was sentenced to two years in 1961 for “a narcotics-related charge,” Edwin Roberts, who was sentenced in 1947 “on a moonshining charge,” and Carl Frank Westminster Jr., who was “sentenced to five months in prison for selling an ounce of marijuana.” *Cast of Minor Characters who Received Pardons*, N.Y. TIMES (Dec. 26, 1992) <http://www.nytimes.com/1992/12/26/us/cast-of-minor-characters-who-received-pardons.html>. President Clinton issued pardons and reprieves that included individuals who “had been sentenced pursuant to mandatory-sentencing drug laws,” who he “felt [. . .] had served long enough.” Clinton, *supra* note 115. 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*, ASSOCIATED PRESS (Nov. 24, 2008) http://www.nbcnews.com/id/27895909/ns/politics-white_house/t/bush-pardons-individuals/#.U-LyoPldWIE (last visited Aug. 3, 2014). In 2013, President Barack Obama commuted the sentences of eight people whose crack cocaine convictions were the result of an “unfair system.” Saki Knafo, *Obama Commutes Sentences of 8 Inmates Convicted of Crack Offenses*, HUFFINGTON POST, (Jan. 23, 2014), 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>). 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 234, at 728-730. See also Paul Rosenzweig, *supra* note 133, at 595-96 (2012) (noting that the pardon power gives the President a mechanism to mitigate punishment where there was not sufficient moral blame to justify the sentence).

²⁵⁶ *Grossman*, 267 U.S. at 120 (emphasis added).

the *enforcement* of oppressive laws that Congress may have passed.”²⁵⁷ The pardon power, in other words, provides a check both on Congress and on the President’s agents.

Individual prosecutors take different views about how cases should be charged, and there is considerable geographic variation even with the Department’s guidance memos.²⁵⁸ The unitary executive framework is a key means for “achieving uniformity in law execution.”²⁵⁹ The President represents national interests, whereas U.S. Attorneys might favor local interests or constituencies that cut against national interests and uniformity.²⁶⁰ 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 the 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.”²⁶¹ It is a one-way check that allows the President to mitigate punishment because the Framers thought criminal cases present a sufficient threat to liberty that required a series of discretionary checks, including executive oversight in the form of clemency.²⁶²

Clemency, then, is a prime example of the kind of structure praised by unitary executive theorists. The President can control the core executive power of prosecution not simply by removing prosecutors and replacing them with those who share his policy views, but by undoing their decisionmaking through

²⁵⁷ *Aiken County*, 725 F.3d at 264.

²⁵⁸ 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 “the 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. Attorney’s 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) (describing how “geographic locality doubtless plays a role in deciding which cases to bring to trial”).

²⁵⁹ Prakash, *The Chief Prosecutor*, *supra* note 240, at 552.

²⁶⁰ Cf. Love & Garg, *supra* note 236, at 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.”).

²⁶¹ 10 ANNALS OF CONG. 596 (1800).

²⁶² *Aiken County*, 725 F.3d 255 at 264 (noting how the pardon power protects individual liberty). This is consistent with other discretionary checks on excessive government power in criminal cases. See Rachel E. Barkow, *supra* note 184, at 1345-1346 (discussing these checks).

the clemency power when he or she believes they exercised their discretion in a way that infringed too much on individual liberty.²⁶³

Although criticism of the unitary executive theory is abundant, the main focus of concern with the theory has been 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 with the President.²⁶⁴ And of course 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.

One would think clemency presents a common ground where proponents and opponents of the unitary executive theory could come together in agreement in recognition of the President's authority in this sphere to control the entirety of the law enforcement power. And perhaps there is agreement 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 used so infrequently in modern times and because it is governed predominantly by discretion and politics and not by law. But as the next part explains, 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*

²⁶³ Prakash, *supra* note 240, at 541 (noting that Presidents have this power because "subordinates are fallible" and also "to enable presidents to assume intertemporal control over prior successful prosecutions" and to prevent some future prosecutions).

²⁶⁴ Calabresi & Rhodes, *supra* note 156, at 1168-69 and n.76 (citing non-unitarians 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, 404-405(1993) (conceding that "the Constitution's location of [the] plenary [pardon] power in the President is a formal aspect of separation of powers that even [those who disagree with unitary executive theorists and separation of powers formalists] must recognize").

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, and because monitoring the thousands of prosecutors and cases has grown increasingly difficult and has produced great disparities in practices among the 94 U.S. Attorney's Offices.

First, consider the President's ability to exercise control through the ability to remove prosecutors whom he or she believes 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 subsequent case of *Morrison v. Olsen* attracted widespread attention by unitary executive theorists.²⁶⁵ 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.²⁶⁶

But the independent counsel law is not the only development that has made it harder to control prosecutors. Even prosecutors working at the Department of Justice are, as a practical matter, hard for the President to remove. In 2006, senior Department of Justice officials told nine U.S. Attorneys to resign from their posts, prompting Congress to question whether the firings were inappropriately based on political reasons.²⁶⁷ The Department'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.²⁶⁸ The scandal and political fallout led Attorney General Gonzales and other high-level Department lawyers to resign.²⁶⁹ Adrian Vermeule, as noted, describes the political backlash as an example of an

²⁶⁵ See, e.g. John Yoo, *supra* note 167, at 1950–51 (2009) (arguing that the independent counsel law violated the Constitution's vesting of executive power in the president); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *supra* note 167, at 603 (noting the realization of Scalia's prediction in his *Morrison* dissent that independent counsels would be manipulated for political purposes); David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 *FORDHAM L. REV.* 71, 76–80 (holding up Scalia's *Morrison* dissent as "the leading judicial articulation of the unitary executive theory").

²⁶⁶ 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).

²⁶⁷ Dep't of Justice, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* at 1 (2008).

²⁶⁸ *Id.* At 356–57.

²⁶⁹ See Steven Lee Myers & Philip Shenon, *Embattled Attorney General Resigns*, *N.Y. TIMES*, Aug. 27, 2007, at A1; Dan Eggen, *Head of the Civil Rights Division to Leave Justice Department*, *WASH. POST*, Aug. 24, 2007, at A7 (noting, in addition to the resignation of the head of the Civil Rights Division, "nearly a dozen other senior Justice Department officials" who resigned in the wake of the scandal).

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.²⁷⁰

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 pardon power in those cases where the U.S. Attorney went too far.²⁷¹ Similarly, because the pardon 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.²⁷²

But it is not just the difficulty in removing prosecutors that makes it harder to control them. The sheer number of prosecutors and cases makes centralized monitoring difficult. There are now approximately 4,800 federal prosecutors around the country²⁷³ spread among 94 districts. They are responsible for charging cases under more than 4000 federal criminal laws — and potentially hundreds of thousands if regulatory crimes are included²⁷⁴ — 40% of which have been promulgated since 1970.²⁷⁵ 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.²⁷⁶ Keeping track of how the law applies in all

²⁷⁰ Vermeule, *supra* note 169, at 1201-02 (noting 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).

²⁷¹ The President does not have a similar check 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.

²⁷² President Bush, for example, pardoned many figures in the Iran-Contra affair, offering several reasons. Peter M. Shane, *supra* note 264, at 401 (noting 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 XX, at n.121. President Bush commuted the sentence of Scooter Libby, who was charged by a special prosecutor, Patrick Fitzgerald. See Scott Shane & Neil A. Lewis, *Bush Commutes Libby Sentence, Saying 30 Months ‘Is Excessive’*, N.Y. TIMES, at A1 (July 3, 2007).

²⁷³ BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007—STATISTICAL TABLES 4 (2011), available at <http://www.bjs.gov/content/pub/pdf/psc07st.pdf> (listing state numbers); EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT—FISCAL YEAR 2010 (listing total number of attorneys employed by U.S. Attorneys’ offices and the percentage involved in criminal matters).

²⁷⁴ See *Regulatory Crime: Overview – Defining the Problem: Hearing Before the H. Comm. on the Judiciary*

Task Force on Over-criminalization, 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).

²⁷⁵ Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 523-524 (2011).

²⁷⁶ *Id.* at 524.

these cases is all the more difficult because most federal cases are resolved by pleas instead of trials.²⁷⁷ 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 Department can produce guiding memos and principles, it is simply not possible for it to police how each of the U.S. Attorneys proceeds.²⁷⁸

Moreover, as the Department recognizes, there will necessarily be regional variation based on “local criminal threats and needs.”²⁷⁹ Not all districts have the same mix of crimes that occur. In some districts, the most serious crimes brought by the federal prosecutors — which are serious for that local community — would be deemed relatively minor in other jurisdictions and be handled by state prosecutors in those districts.²⁸⁰ There are thus large disparities among the 94 different U.S. Attorney Offices in terms of what cases are prosecuted, what kinds of plea agreements are offered, and whether the Office moves for departures under the Sentencing Guidelines.²⁸¹

²⁷⁷ See Bierschbach & Bibas, *supra* note 156, at 403 (“Prosecutors control sentencing largely through plea bargaining, which disposes of more than 95 percent of criminal cases.”).

²⁷⁸ 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) (observing that “DOJ is a fragmented agency, one in which several autonomous decision-makers help shape enforcement policy” and where U.S. Attorneys “have tremendous power over federal criminal law enforcement and a great deal of independence from the DOJ in Washington”).

²⁷⁹ Holder Memo, Federal Prosecution Priorities Memo, *supra* note 9, at 1.

²⁸⁰ Kahan, *supra* note 244, at 52 (noting that federal prosecutors have incentives to “please local interests”); Alexander Bunin, *Article on Booker: Reducing Sentencing Disparity By Increasing Judicial Discretion*, 22 FED. SENT. R. 81 (2009) (noting that “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” and also noting that a community’s “view of the gravity of [an] offense” and the “public concern generated by the offense” are relevant to sentencing); Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn’t*, 117 YALE L.J. 1374, 1379 (2007) (describing political and institutional relationships between U.S. Attorneys, their staff, and local law enforcement and local political entities).

²⁸¹ See UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 87–88 (2004) [hereinafter FIFTEEN YEARS OF GUIDELINES SENTENCING] (observing wide variation between 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); Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 439 & n. 302 (2009) (reviewing 2006–07 U.S. Sentencing Commission data 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); Linda Drazga Maxfield & John H. Kramer, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 8–9, 10 (1998), available at <http://www.ussc.gov/publicat/5kreport.pdf> (finding disagreement between U.S. Attorneys’ offices over the appropriateness of a 5K1.1 letter where the defendant provides information on his own behavior, and no uniform criteria for determining whether assistance was substantial).

These disparities can produce vast sentencing differences. For example, offices have dramatically different charging policies with respect to the sentencing enhancements available under 21 U.S.C. § 851.²⁸² This statutory provision doubles the applicable mandatory minimum sentences for drug offenders with prior felonies, but it is erratically charged.²⁸³ In some districts, more than 75 percent of eligible defendants receive the § 851 enhancements, whereas in other districts, none of the eligible drug offenders received the enhanced penalty.²⁸⁴ Prosecutors similarly 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.²⁸⁵ Offices also disagree on what discounts they offer for substantial assistance.²⁸⁶

Clemency provides an avenue for the President, should he or she so desire, 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 with federal laws because of a local demand for a tough approach when such an 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 what cases go too far because clemency takes place in a specific factual setting. By granting clemency in those cases where he or she sees overreaching, the President communicates to line prosecutors how he or she wants to see the law enforced going forward.²⁸⁷ This is an appropriate role for the President, who is

²⁸² U.S. SENT. COMMISSION, REPORT TO CONGRESS; MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 252- 256 (2011) [hereinafter USSC MANDATORY MINIMUM REPORT] (describing the variation).

²⁸³ See *United States v. Young*, CR 12-4107-MWB, 2013 WL 4399232 (N.D. Iowa Aug. 16, 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); See HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE 7 (Dec. 5, 2013), <http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse-0> (“Sentencing Commission data analyzed for this report shows marked differences among federal districts in the rate at which §851 enhancements were applied to eligible defendants—from a high of 87 percent in the Northern District of Florida to 1.5 percent in the Southern District of California and the Northern District of Texas; there were also seven districts where the enhancement was not applied to any of the eligible offenders.”).

²⁸⁴ Mandatory Minimum Report, *supra* note 282, at 252- 256, see also *United States v. Young*, 2013 WL 4399232 (N.D. Iowa 2013).

²⁸⁵ *Id.* at 113-115 (describing the “inconsistent” charging practice and pointing out that “the practice sometimes varied within districts, either by division or by individual prosecutor”).

²⁸⁶ *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.”)

²⁸⁷ Love, *supra* note 236, at 1206.

accountable to the national electorate, and is precisely the kind of oversight the Framers envisioned through the pardon power.²⁸⁸

This is not to say that removal or front-end tools, such as enforcement memos, do not serve an important role, or that clemency is more important. Removal and front-end guidance remain important, 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 front-end guidance given the breadth and scope of federal criminal law make clemency more important than ever as another critical tool for the executive to exercise 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.²⁸⁹ Politicians, to demonstrate that they are tough and responsive to crime, pass “highly general” criminal laws that they spend little time analyzing.²⁹⁰ Congress expects prosecutors to work out the details and calibrate enforcement of the law to changing times and circumstances.²⁹¹ In other words, Congress leaves it up to the executive to make sure these sweeping laws do not sweep too far.²⁹²

But federal prosecutors are not well situated to be the only backstop against these laws reaching too far.²⁹³ For starters, prosecutors have an interest in keeping laws sweeping because the current system is built on plea bargaining, and what drives plea bargaining is increased prosecutorial leverage.

²⁸⁸ See Amar, *supra* note 25, at 186 (noting that Article II’s pardon power “confirms the president’s place at the apex of three grand pyramids of national power: military, administrative, and prosecutorial”).

²⁸⁹ 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.”); Mark W. Osler, *The Ford Approach and Real Fairness for Crack Convicts*, 23 FED SENT’G REP. 228 (2011) (advocating the use of mass clemency to reduce crack cocaine sentences); Charles Shanor & Marc Miller, *Pardon Us: Systemic Presidential Pardons*, 13 FED. SENT’G REP. 139, 151–52 (2001) (same); Elizabeth Rappaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT’G REP. 184, 186 (2006) (advocating mass clemency for immigrants with misdemeanor convictions to prevent their deportation).

²⁹⁰ Kahan, *supra* note 244, at 50.

²⁹¹ For the classic analysis of this political dynamic, see Stuntz *supra* note 15, at 545-49.

²⁹² It is, in the words of Adam Cox and Cristina Rodriguez, a “de facto delegation.” Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 513, 528-529 (2009).

²⁹³ 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 discussion of Judge Gleeson’s opinion in *United States v. Holloway*, *infra*, at n. 301.

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.²⁹⁴ They may charge or threaten to charge defendants with crimes to pressure them to plead guilty or cooperate.²⁹⁵ If defendants refuse to plead or cooperate, they face huge trial penalties in the federal system.²⁹⁶ Sentences are, on average, three times higher if defendants opt for trial.²⁹⁷ Even innocent individuals may plead guilty to avoid that risk, particularly when the evidence makes it unclear how a jury will decide. This is why prosecutors endorse passage of mandatory minimums and resist reforms that would limit them.²⁹⁸

But for those individuals who do go to trial and lose, they are receiving sentences that even the prosecutors in their case thought were excessive, because prosecutors were willing to accept sentences far lower. These cases are often well suited for clemency because their sentences were based on the

²⁹⁴ Mandatory Minimum Report, *supra* note 282, at 106 (stating study findings that “[t]he overwhelming majority of the prosecutors interviewed opined that mandatory

minimum penalties are effective law enforcement tools because they encourage guilty pleas and cooperation”)

²⁹⁵ See HUMAN RIGHTS WATCH, AN OFFER YOU CAN’T REFUSE, *supra* note 283, at 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 of the Eastern District of New York, can be ‘so excessively severe, they take your breath away.’”). They may also “face incentives to advance imaginative readings of vague criminal offenses in order to please influential local interests.” Kahan, *supra* note 290, at 52.

²⁹⁶ For example, in a sample of 5,858 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 pled guilty. See HUMAN RIGHTS WATCH, AN OFFER YOU CAN’T REFUSE, *supra* note 283, at 7. Similarly, of defendants convicted of drug offenses carrying mandatory minimums, those who went to trial received sentences averaging 11 years longer than those who pled guilty, perhaps in part because only 4.9 percent of those who went to trial received relief from the mandatory minimum laws, compared to 60.4 percent of those who pled guilty. *Id.* at 11. See also Jeffrey T. Ulmer, James Eisenstein & Brian D. Johnson, *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 1, 25 (2009) (finding a 15% sentence length increase for federal defendants who go to trial rather than plead guilty, controlling for Sentencing Guideline-based factors); 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 L. SOC. R. 789, 810 tbl.4 (1997) (noting that black federal defendants receive the harshest trial penalties relative to white and Hispanic defendants).

²⁹⁷ Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 347-48 (2005) (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”); *Human Rights Watch Report*, *supra* note 283, at 2 (noting that “[i]n 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)”).

²⁹⁸ See Letter from National Association of Assistant United States Attorneys, (Jan. 2, 2014) (opposing Smarter Sentencing Act), available at <http://www.naousa.org/news/133.pdf>; Barkow, *supra* note 89, at 728.

posturing prosecutors deem necessary to get pleas, not on the sentences prosecutors actually thought appropriate.

Consider the case of Francois Holloway.²⁹⁹ 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, subjecting 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 130-147 months if he pleaded guilty. His lawyer thought he could win at trial, so he turned down the offer. He lost at trial and received a sentence of more than 57 ½ years (691 months). It cannot possibly be the case that a defendant deserves a sentence five times greater — 42 years longer³⁰⁰ — 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.³⁰¹ In Holloway's case, his accomplice pleaded guilty, testified at trial and received a sentence of 27 months — even though the accomplice carried the firearm and Holloway did not.³⁰² None of Holloway's codefendants received sentences greater than six years.³⁰³ Clemency exists in part to allow the President to police coercive exercises of prosecutorial power that produce sentences far longer than are just and that place too great a burden on the constitutional exercise of the trial right.³⁰⁴

²⁹⁹ United States v. Holloway, *available at* <http://sentencing.typepad.com/files/holloway-memo-filed-7-28-14.pdf>.

³⁰⁰ *Id.* at 4 (calculating the difference between the sentence Holloway received with how long he would have served had he taken the plea offer).

³⁰¹ Clemency has been used in the past to even out sentences among codefendants. See, e.g., Hoffstadt, *supra* note 26, at 585 n.102 (providing example of commutations issued by President Clinton).

³⁰² Stephanie Clifford, Citing Fairness, *U.S. Judge Acts to Undo a Sentence He Was Forced To Impose*, N.Y. TIMES July 28, 2014, *available at* <http://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>.

³⁰³ *Id.*

³⁰⁴ Judge Gleeson sentenced Holloway in 1996. In 2013, he asked the current United States Attorney for the Eastern District of New York to agree to vacate two of the 924(c) convictions so that Holloway could face a “more just resentencing.” *Holloway* at 6-7. The U.S. Attorney initially denied the request, citing clemency as the appropriate avenue to correct the sentence in the case. *Holloway* at 6. In May of 2014, Judge Gleeson asked the U.S. Attorney to reconsider because of the unlikelihood that Holloway would receive relief through the pardon process. *Id.* at 7. The United States Attorney agreed, and Holloway was resentenced on July 29, 2014 to time served. 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 why the story made the N.Y. Times — because it is so unusual. The typical avenue of correction is the one the United States Attorney originally cited: clemency.

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 a role because of their institutional identity. They do not see themselves as analogous to regulatory agencies that 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.³⁰⁵ Even though prosecutors have discretion to decide whether to charge offenders with crimes, they seem uncomfortable with the idea of exercising that discretion to ignore laws entirely or to cabin their use to a narrower category than what the language of the law permits. The general view is that they must enforce all laws even with changes in administrations.

This is evidenced by the fact that the Department of Justice 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 minimums charging policies and on drug enforcement policies in states that have authorized either medical marijuana or recreational marijuana are exceptions to the usual DOJ approach. The normal approach is to leave line prosecutors and each US Attorney with broad discretion to decide how to proceed within their district armed with only the broadest outlines from the Department 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 tailored on the ground. On the contrary, DOJ charging memos typically take a robust view of these laws. Indeed, as noted, for a time it was official DOJ policy that prosecutors had to charge defendants with the “most serious, readily provable offense or offenses”³⁰⁶ 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, authorized by Congress, without recognizing that Congress passed those laws assuming they would be checked by the discretion of prosecutors.

³⁰⁵ *But see*, Rachel E. Barkow, *supra* note 89, at 721 n.4 (noting scholars who have used an administrative law lens to analyze criminal justice agencies).

³⁰⁶ Memorandum from Attorney Gen. John Ashcroft: Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), *available at* http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm. Roughly half a million individuals were prosecuted federally while the memo was in effect from September 22, 2003, until it was displaced by the Holder memo on May 19, 2010. U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORTS, FYS 2003-2010 (2003-2010), *available at* http://www.justice.gov/usao/reading_room/foiannuals.html (noting that for the fiscal years 2003-2010, 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). Given the memos 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.

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, they are vague and leave open the possibility that prosecutors will bring actions even when the President believes that is not the best use of finite federal law enforcement resources.³⁰⁷ Particularly with a federal prison population that is at a record high and overcrowded — and that eats 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 who is expressly charged with this task in the Constitution. As Judge Brett Kavanaugh of the DC 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.³⁰⁸

Hamilton envisioned precisely this function for clemency. When Hamilton was promoting clemency as a needed corrective, there were many severe and mandatory punishments in the law. Like the jury,³⁰⁹ 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, the past few decades have seen a dramatic surge in federal mandatory sentencing provisions that are especially in need of a check by clemency because judicial checks are often lacking.³¹⁰

³⁰⁷ See *supra* TAN XX-XX (describing the broad caveats to these charging policies).

³⁰⁸ *Aiken County*, 725 F.3d 15.

³⁰⁹ Rachel E. Barkow, *Recharging the Jury*, 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).

³¹⁰ The Sentencing Commission has summarized the three biggest changes in mandatory sentencing since the middle of the 20th century. “First, Congress enacted more mandatory minimum penalties. Second, Congress expanded its use of mandatory minimum penalties to offenses not traditionally covered by such penalties. Today, the majority of convictions under statutes carrying mandatory minimum penalties relate to controlled substances, firearms, identity theft, and child sex offenses. Third, Congress enacted mandatory minimum penalties that are generally lengthier than mandatory minimum penalties in earlier eras.” U.S. Sentencing Comm’n, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, at xxv (October 2011)

In the era of discretionary and indeterminate federal sentencing that governed from 1910 until 1987,³¹¹ 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.³¹² Parole officials thus determined almost 19,000 people — 39.5 percent of the prison population at that time³¹³ — were 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 that are excessive in particular cases.³¹⁴

In the federal system, mandatory sentencing is used most frequently in drug cases,³¹⁵ and there are particular reasons to be concerned with overbreadth in that context.³¹⁶ The trigger for the statutory mandatory minimum sentence is quantity.³¹⁷ Congress passed these laws on the assumption that greater

(Mandatory Minimum Report), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Executive_Summary.pdf

³¹¹ This time frame marks the beginning and end of parole in the federal system. Act of June 25, 1910, ch. 387, 36 Stat. 819; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 20102-20103 (implementing a truth-in-sentencing grant program which included an 85 percent (or higher) time served requirement for certain offenders).

³¹² See Thomas P. Bonczar & Lauren E. Glaze, *ADULTS ON PAROLE, FEDERAL AND STATE-BY-STATE, 1975-2012* (2013), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1997>.

³¹³ In 1987, the federal prison population was approximately 48,000. At 2, available at *Prisoners in 1987*, BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, available at <http://www.bjs.gov/content/pub/pdf/p87.pdf>.

³¹⁴ Krent, *supra* note 42, at 1674 (noting 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 noted above, *supra* TAN XX-XX, to get the U.S. Attorney's Office to agree to vacate a conviction two decades old to allow him to resentence the defendant provides another possible outlet for correction.

³¹⁵ "Over three-quarters (77.4%) of convictions of an offense carrying a mandatory minimum penalty were for drug trafficking offenses." Mandatory Minimum Report, *supra* note 282, at xxvii.

More than three-quarters of 77.4% were for drug trafficking.

³¹⁶ 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." *Holloway*, at 10.

³¹⁷ For example, possession with intent to distribute one gram of LSD, 28 grams of crack, or 500 grams of powder cocaine carries a mandatory five-year minimum.³¹⁷ Possession with intent to distribute 10 grams of LSD, 280 grams of crack, or 5 kilograms of powder cocaine escalates the mandatory minimum to ten years. *Id.* § 841(b)(1)(A); see also U.S. DEP'T OF JUSTICE, NAT'L INST. 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 the mandatory-minimums into the Sentencing Guidelines, are the single most important determinant of the drug offender's sentence length.").

quantities produce greater harms and individuals dealing in larger quantities were the kingpins of the trade.³¹⁸ It does not appear 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 the all the reasonably foreseeable quantities of drugs trafficked by that conspiracy.³¹⁹ That 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.³²⁰ 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 conspiracy.³²¹

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 1986.³²² 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.³²³ In 1987, the Sentencing Commission, following Congress's lead, adopted a 100-to-1 crack to powder cocaine quantity ratio to

³¹⁸ U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (Oct. 2011) (“the kingpins . . . can be identified by the amount of drugs with which they are involved”) (quoting Sen. Byrd, 132 CONG. REC. 27, 193–94 (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”).

³¹⁹ *See* 21 U.S.C. § 846 (2006) (establishing attempt and conspiracy liability as subject to the same penalties as those prescribed for principle 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-Beniquez*, 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”).

³²⁰ *See* Memorandum Explaining a Policy Disagreement with the Drug Trafficking Offense Guideline at 12–15, *United States v. Diaz*, 11-CR-00821-2 (JG), 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013).

³²¹ *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. (n.2) (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 defendant should have reasonably foreseen his conspirator’s sale of one kilogram because defendant “was a high-level gang member”).

³²² *See Kimbrough v. United States*, 552 U.S. 85, 94 (2007)

³²³ U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 90 (May 2002) [hereinafter “2002 Report”] (summarizing legislative history of the Anti-Drug Abuse Act of 1986).

define base sentences for crack and powder cocaine offenses.³²⁴ In the following decades, the Sentencing Commission strongly criticized the 100-to-1 ratio, issuing four reports citing research that the ratio was unjustifiable based on scientific evidence.³²⁵ 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.³²⁶ But the 2010 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. And if a pattern of injustice gets exposed through a series of clemency grants, it can prompt legislative reexamination. Clemency has long been “a tool by which many of the most important reforms in the substantive criminal law have been introduced,” prompting changes in areas of self-defense, insanity and the grading of crimes.³²⁷

While line prosecutors and even U.S. Attorneys may feel unqualified to analyze whether laws on the books are built on faulty premises or if they should be narrowly construed in enforcement because they would otherwise be too broad, the President should not feel a similar reluctance in making enforcement policy.³²⁸ 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.³²⁹ 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

³²⁴ U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (Feb. 1995) [hereinafter 1995 REPORT] (noting that the 1987 guidelines used the 100-to-1 quantity ratio).

³²⁵ 1995 Report, *supra* note 324, at 197–198; U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (Apr. 1997); 2002 Report, *supra* note 323, at 91, 103; U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (May 2007).

³²⁶ 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.”).

³²⁷ Love, *supra* note 236, at 1184-1185 (citing and quoting U.S. Dep’t of Justice, 3 The Attorney General’s Survey of Release Procedures: Pardon 295 (1939)).

³²⁸ 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 18, at 635.

³²⁹ Kahan, *supra* note 290, at 54-55 (noting that more oversight by “DOJ, through the President” would produce more moderate outcomes than leaving decisions with each US Attorney and would be “more sensitive to . . . the public fisc generally.”).

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.³³⁰ It is hugely costly 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 protecting public safety.³³¹ And when so many people are incarcerated, the effects on communities and third parties can make the effort counterproductive and produce more crime than it prevents. Without adequate checks on this process in the judiciary or in parole, clemency takes on added importance. “History teaches that the demand for clemency increases when the legal system lacks other mechanisms for delivering individualized justice, recognizing changed circumstances, and correcting errors and inequities.”³³²

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 who continue to live with collateral consequences of convictions.³³³ Federal convictions severely constrain employment and housing opportunities, access to federal benefits, and civic participation. In all but two states, felony convictions restrict voting

³³⁰ 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 COMMISSION, 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 (showing that in 2012, federal judges sentenced offenders above the Guidelines range 1,631 times, but below the Guidelines range 37,710 times, including 14,723 times without recommendation from the prosecution); PUBLIC OPINION STRATEGIES, PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA 4–5 (2012) (finding that supermajorities of voters, 77–87%, favor reduced sentences for nonviolent offenders).

³³¹ Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Dep’t of Justice, to the Hon. Patti B. Saris, Chair, U.S. Sentencing Commission at 7 (July 11, 2013), available at <http://www.justice.gov/criminal/foia/docs/2013annual-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); NATIONAL CRIMINAL JUSTICE ASSOCIATION, THE IMPACT OF FEDERAL BUDGET CUTS ON STATE AND LOCAL PUBLIC SAFETY (2013) (documenting reductions in police and prosecutorial staff and services in states around the country due to budget cuts).

³³² Love, *supra* note 236, at 1204. 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. Daniel T. Kobil, *supra* note 18, at 639 (1991). See also Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 572–84 (2001) (making the case for further use of the clemency power as an extrajudicial tool of corrective justice due to current systemic failures).

³³³ See generally Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153 (1999).

rights.³³⁴ A federal conviction can disqualify an individual from federal grand or petit jury service,³³⁵ from serving in the military,³³⁶ and from possessing firearms.³³⁷ The employment consequences of a federal conviction are vast: certain federal convictions preclude individuals from a host of jobs³³⁸ and are grounds for denying or revoking certain employment licenses.³³⁹ Convictions can also lead to the revocation of drivers' licenses.³⁴⁰ Federal regulations create both permissive and mandatory exclusions from public housing for certain convictions.³⁴¹ Federal convictions can bar persons from crucial forms of federal assistance, including food stamps and student loans.³⁴²

These collateral consequences have a devastating effect on the ability of formerly incarcerated individuals to reenter society successfully without committing more crimes.³⁴³ Other than a pardon, there are no alternative mechanisms for offenders to clear their records at the federal level.³⁴⁴ Some states have alternative mechanisms for expunging criminal records or obtaining 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.³⁴⁵ Individuals

³³⁴ See Jean Chung, SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 (2014) http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf.

³³⁵ See 28 U.S.C. § 1865(b)(5) (2006).

³³⁶ 10 U.S.C. § 504(a).

³³⁷ 18 U.S.C. § 922(g)(1).

³³⁸ See, e.g., 12 U.S.C. § 1829 (2006) (insured financial institutions); 18 U.S.C. § 1033 (2006) (the business of insurance); 20 U.S.C. § 7115 (2006) (elementary and secondary schools); 42 U.S.C. § 5119a (2006) (care providers for vulnerable populations); 49 U.S.C. § 44935 (2006) (airports).

³³⁹ See, e.g., 46 U.S.C. § 70105 (2006) (Transportation Worker Identification Card); 49 U.S.C. § 31310 (2006) (Commercial Motor Vehicle Operator License); 49 U.S.C. § 5103a (2006) (Hazardous Material Endorsement).

³⁴⁰ 42 U.S.C. § 159.

³⁴¹ 24 C.F.R. § 982.553.

³⁴² See, e.g., 21 U.S.C. § 862a(a) (2006) (lifetime ban from Temporary Assistance to Needy Families and food stamps for felony drug convictions); 20 U.S.C. § 1091(r) (2006) (forms of federal student loan assistance); 38 U.S.C. § 6104 (veteran's benefits); 5 U.S.C. § 8146 (2006) (government employee benefits).

³⁴³ Lahny Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 156-157 (2010) (noting the high rates of recidivism and the monetary costs of collateral consequences).

³⁴⁴ Love, *supra* note 54, 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.”).

³⁴⁵ MARGARET COLGATE LOVE, AM. CONSTITUTIONAL SOC'Y, REINVENTING THE PRESIDENT'S PARDON POWER 13 (2007), available at <https://www.acslaw.org/files/Presidential%20Pardons%20Issue%20Brief%20-%20October%202007.pdf>. MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION, A STATE-BY-STATE RESOURCE GUIDE 7 (July 2005)

thus need pardons more than ever to avoid collateral effects that may make reentry difficult or impossible.³⁴⁶

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 also remove the collateral consequences of a conviction.³⁴⁷ Second, the president could grant partial or conditional pardons that limit certain 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.³⁴⁸ 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 grounds that the full pardon power in Article II implies lesser pardon powers.³⁴⁹ A partial pardon would thus fall within the logic of *Wells*. Indeed, a president could couch as 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

(noting that in 42 states and in the federal system, “pardon provides the only system-wide relief from collateral sanctions and disqualifications based on conviction”).

³⁴⁶ Samuel Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 34 n.67 (2005) (noting 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 333, at 162; MARGARET COLGATE LOVE, AM. CONSTITUTIONAL SOC'Y, REINVENTING THE PRESIDENT'S PARDON POWER (2007), available at <https://www.acslaw.org/files/Presidential%20Pardons%20Issue%20Brief%20-%20October%202007.pdf>.

³⁴⁷ Morison, *Presidential Pardons and Immigration Law*, *supra* note 8, at 327 (noting that “[i]t 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 that the conduct underlying a conviction,” the underlying conduct itself might “demonstrates 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 consequences of convictions that flow from statutes, such as the inability to obtain federal housing assistance.

³⁴⁸ For example, Governor 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 Drunk Driver*, TOPEKA CAPITAL-J., Jan. 15, 2009, 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. Melissa C. Chiang, Comment, *Some Kind of Process for Felony Reenfranchisement*, 72 U. CHI. L. REV. 1331, 1332 (2005).

³⁴⁹ *Ex parte Wells*, 59 U.S. at 314 (“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) (noting that “the King may extend his mercy upon what terms he pleases, and may annex to his bounty a condition precedent or subsequent”).

an individual's record. Under this theory, the president could offer a full pardon, 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 when it comes to executive control over collateral consequences because there is no comparable *ex ante* mechanism that allows prosecutors to limit their scope. Even 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.

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 correct disparities and 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 an energetic, effective President with unilateral control over the executive branch, and it is time we did as well.