

# The Mercy Lottery: A Review of the Obama Administration's Clemency Initiative

A Report of  
the Center on the  
Administration of  
Criminal Law at  
NYU Law School



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The Center on the Administration of Criminal Law at NYU Law School analyzes important issues of criminal law, with a special focus on prosecutorial power and discretion. It pursues this mission in three main arenas: academia, the courts, and public policy debates.

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# Executive Summary

Nearly a year-and-a-half has passed since the conclusion of President Obama's ambitious clemency initiative (the Initiative). Through the Initiative, President Obama commuted the sentences of 1,696 men and women. But this was only a small fraction of the 24,000 people incarcerated in the federal Bureau of Prisons (BOP) who sought clemency. How were so many applicants deemed unworthy? And what about the 7,881 people whose petitions were never reviewed? Some of these people met many, if not all, of the six announced Initiative criteria that were weighed in determining whether to grant clemency. So what separated them from the lucky few who got clemency? How did a President who jump-started the clemency process also fail to grant clemency to so many people, despite an initial prediction that as many as 10,000 federally incarcerated people would qualify?

The answer lies in the way the design and implementation of the Initiative. The Initiative was well meaning, but it suffered from a lack of infrastructure and resources. It was also a bureaucratic maze that was controlled by the Department of Justice, and this design increased the likelihood of a clemency petition being denied at any given point in the process. To tackle clemency, the next administration should do the following:

- **Build out infrastructure and secure resources before announcing an initiative**
- **Encourage transparency in the clemency process, by clearly explaining how any criteria will be used to screen petitions**
- **Re-design the clemency process by moving it out of the Department of Justice**
- **Re-imagine what clemency is, to ensure that any initiative is faithful to clemency's roots.**

This report analyzes the Initiative that the Obama Administration implemented and ran from 2014 to 2017. The report tells the stories of individual petitioners who were either denied clemency or

whose petitions were never granted, despite being ideal candidates by the Initiative's own terms. Their stories are important, because they are evidence that the Initiative left behind many people who were worthy of a second chance. Some of these people are serving life sentences for non-violent offenses, some are serving functional life sentences, having had sentences commuted to 30-year terms, while others never had the satisfaction of having their petitions decided. All of them share one thing in common: they were ideal candidates who were, for reasons unknown, passed over by the Initiative.

Their stories are also important because they highlight the flaws in the institutional design of the clemency process and the criteria used to assess clemency petitions. While the Administration's 1,696 clemency grants should be celebrated, as should the commitment to reinvigorating clemency, we should not lose sight of the fact that there were flaws with the process that prevented many petitioners from getting relief from draconian drug sentences. By highlighting problems that can be improved, the next administration to embrace clemency reform can improve upon the groundwork laid by the Obama Administration.



# Introduction

President Obama’s clemency initiative ran from 2014 to 2017.<sup>1</sup> First hinted at in a January 2014 speech given to the New York State Bar Association by then-Deputy Attorney General (DAG) James Cole and later formally announced in April 2014,<sup>2</sup> the goal of the Initiative was to identify a greater number of people in federal prison who were worthy of clemency. In identifying these people, Cole remarked that the Initiative was trying to bring fairness to, and promote public confidence in, the justice system, by identifying “older, stringent punishments that are out of line with sentences imposed under today’s laws”<sup>3</sup> and reviewing these cases for clemency.

In order to accommodate the anticipated influx of petitions in response to the Initiative, the Department of Justice (DOJ) partnered with a consortium of criminal justice reform organizations to assist in screening petitioners. Clemency Project 2014 (CP14), as the consortium was known, was a non-governmental working group of six advocacy organizations<sup>4</sup> whose goal was to identify people in federal prison who met the DOJ’s clemency criteria and connect them to pro bono counsel who could assist them in filing clemency petitions. NYU Law School’s Clemency Resource Center (CRC) and its sister organization, the Mercy Project, stepped up to help CP14 screen petitions and file them for people who met the Initiative’s criteria. Housed within the Law School’s Center on the Administration of Criminal Law, and with generous funding from a private donor and the Open Society Foundation, the CRC and Mercy Project provided “pop up” legal services for people in the BOP who wanted to petition for clemency under the Initiative.<sup>5</sup>

Between 2014 and 2016, the CRC and Mercy Project filed approximately 200 petitions for clemency with the Office of the Pardon Attorney. Of these applications, President Obama granted relief to 96 of our clients.

From 2014 to 2017, as a result of CP14’s efforts, more than 24,000 people in federal prison petitioned for clemency under the Initiative.<sup>6</sup> President Obama granted 1,696 clemency requests pursuant to the Initiative. As of January 19, 2017, 7,881 petitions remained pending before the Office of the Pardon Attorney (OPA).<sup>7</sup> All told, these numbers were far below the 10,000 estimate provided by Attorney General Eric Holder.<sup>8</sup>

This report aims to capitalize on the experiences and lessons learned as a result of the CRC and Mercy Project’s work, and to provide a blueprint for future administrations on how to improve the clemency process. It also seeks to remind the public that executive clemency reform is still urgently needed. The profiles of the individuals whose petitions were either denied or were never acted upon make this clear and demonstrate that a process that fails to offer them relief is fundamentally broken. Part I describes the people who were left behind. Some of them are CRC and MP clients, while others either submitted petitions on their own or were represented through CP14. Some are serving life sentences for drug offenses, while others were given only illusory second chances, with life sentences commuted to thirty-year terms. All share one commonality: despite being excellent candidates for a second chance, none of them got one. Part II details the Initiative’s procedures, as well the statistics associated with grants and denials. Part III makes recommendations for future Administrations regarding the exercise of the clemency power, based on lessons learned here.

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<sup>1</sup> United States Sentencing Commission, *An Analysis of the Implementation of the 2014 Clemency Initiative*, Sept. 2017 at 1 (hereinafter, “USSC Report”), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901\\_clemency.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf).

<sup>2</sup> Press Release, U.S. Dep’t of Justice, *Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants*, Apr. 23, 2014 (hereinafter, “Cole Press Release”), <https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new>.

<sup>3</sup> *Ibid.*

<sup>4</sup> U.S. Department of Justice, *Clemency Initiative*, <https://www.justice.gov/pardon/clemency-initiative>.

<sup>5</sup> Erin R. Collins, *The Administration of Hope*, 29 FED. SENT’G. R. 263, 264 (June 2017), <http://fsr.ucpress.edu/content/ucpfsr/29/5/263.full.pdf>.

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<sup>6</sup> USSC Report, *supra* at 1.

<sup>7</sup> *Id.*

<sup>8</sup> Alice Li, *Eric Holder Discusses How Many Inmates Might Be Released Under Clemency Initiative*, WASH. POST, Dec. 4, 2015, [https://www.washingtonpost.com/video/national/eric-holder-discusses-how-many-inmates-might-be-released-under-clemency-initiative/2015/12/05/5259c596-9ad5-11e5-aca6-1ae3be6f06d2\\_video.html?utm\\_term=.5b3f3c2a0486](https://www.washingtonpost.com/video/national/eric-holder-discusses-how-many-inmates-might-be-released-under-clemency-initiative/2015/12/05/5259c596-9ad5-11e5-aca6-1ae3be6f06d2_video.html?utm_term=.5b3f3c2a0486).

# PART I

## Who Got Left Behind?

For 1,696 people, the Initiative remedied draconian sentences (though some still ended up with many years to serve before being eligible for release, and with sentences still disproportionate to their crimes). For 7,881 people—3,469 of whom were convicted of drug offenses—their clemency petitions were never decided on and remain pending before OPA. And for the majority of the 24,000 individuals who petitioned for clemency under the Initiative, their petitions were denied.<sup>9</sup> Behind these statistics are human stories that illustrate not only the arbitrariness of the Initiative, but also the flaws in its design and administration, and why a renewed commitment to clemency is still so urgently needed.

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<sup>9</sup> The CRC and Mercy Project filed petitions for many of these people. Likewise, other pro bono attorneys, and in some cases, the incarcerated people themselves, filed petitions with compelling facts in favor of clemency.



# Robert Michael Jordan

In 2005, Robert Michael Jordan was sentenced to 240 months in prison for a crack conspiracy. At the time of his arrest, he had a little over 58 grams of crack cocaine. His case presents a prime example of how prosecutorial discretion and harsh drug sentencing laws can ratchet up a person's sentence beyond anything proportionate to their crime. In Robert's case, prosecutors successfully argued that he was responsible for selling a much larger amount of crack (between 150 and 500 grams). To make this argument, they relied on statements from co-defendants and other witnesses. It was unclear why the United States Probation Officer accepted prosecutors' version of events, given that one witness was unable to quantify the amount that Robert sold, and another co-defendant stated that he purchased only between 7 to 14 grams of crack from Mr. Robert.

Although Robert never committed or threatened violence, was not a leader, prosecutors nonetheless was not a leader, doubled Jordan's sentence from 10 to 20 years. This enhancement was based on Jordan's *single* prior drug offense, for which he received a suspended sentence at the age of seventeen. As a result, the court sentenced Robert to 240 months, which was substantially longer than all but one of his co-defendants, despite the fact that Jordan was a minor player in the conspiracy.

Robert's sentence almost certainly would be lower had he been sentenced during the Initiative.<sup>10</sup> First, Attorney General Eric Holder directed prosecutors to stop filing enhancements unless a person is involved in conduct that makes the case appropriate for severe penalties. Given Robert's low position in the conspiracy, and that he had no

history of violence, an enhancement would almost certainly never have been filed. Taken together with the downward revision of the Sentencing Guidelines, which reduced Jordan's offense level to the original statutory minimum (120 months), it is not difficult to conclude that Jordan's sentence would be substantially lower.

Moreover, since his imprisonment, Robert has taken extraordinary steps to rehabilitate himself. He earned his GED in 2008 and has taken over 300 hours of classes, including anger management, parenting, child development, and addiction issues. Significantly, he has never earned a single disciplinary infraction over his 11 years in prison, which is remarkable considering the adjustment associated with transitioning to prison. His past progress reports also evaluate him as "Outstanding."

Despite being incarcerated, Robert has also worked to maintain a relationship with his family. He has been married to his wife for eight years and has strong relationships with his children and stepchildren. Instead of shying away from his past, Robert has shared his story with them to ensure that they make better decisions. His wife credits Robert with making their three sons honor students and for being a positive influence in their lives. Jordan's daughter described their strong "father-daughter" bond built through letters, cards, emails, and visits.

Robert was the paradigmatic clemency candidate: he was charged with a crack offense, and he was sentence would have been shorter had he been sentenced during the Initiative. But on January 13, 2017, President Obama denied Jordan's petition. His estimated release date is August 2022, when he will be 49 years old. He will have spent nearly 204 months, or 20 years, in prison for a nonviolent drug offense.



<sup>10</sup> On May 10, 2017, Attorney General Jeff Sessions rescinded certain Obama-era DOJ charging policies, directing prosecutors to charge the most serious, readily provable offense, including charging offenses that carry mandatory minimums. However, at the time Robert applied for clemency, the charging policy in operation meant that prosecutors would not have filed a sentencing enhancement in his case.

# Lori Kavitz

In 2002, United States District Judge Mark Bennett remarked that, in sentencing Lori Kavitz to 292 months for a methamphetamine conspiracy within 1,000 feet of a public park or playground,<sup>11</sup> it was “idiotic, arbitrary, unduly harsh, and grossly unfair” and said it was one of many “unjust sentences” he was forced to impose. Lori did not engage in violence,<sup>12</sup> was not the leader of the operation, and did not play any role in manufacturing the drugs, and there was never any suggestion that she had ties to a larger drug organization. However, as was the law at the time, the sentencing court’s hands were tied. Despite his obligation to follow and apply the law, Judge Bennett told the parties that he didn’t “have to agree with it, and I don’t have to remain silent. Matter of fact, I can’t remain silent and operate in good faith. So next to you and your family, there’s nobody that regrets imposing this sentence more than I do.”

When Lori applied for clemency, Judge Bennett wrote to OPA, telling them that her sentence “screams out to me, for mercy and earned clemency.”<sup>13</sup> Judge Bennett’s words are well taken: Lori is serving a sentence that would almost certainly be substantially lower today. First, the United States Sentencing Commission lowered the drug guidelines in 2014, and the guidelines



themselves are no longer mandatory—meaning Judge Bennett would not be forced to hand out an “idiotic” or “unjust” sentence. In addition, the methamphetamine guidelines under which Lori was sentenced have come under attack as excessive, because they were not based on empirical data or national experience. Taken with Judge Bennett’s comments at sentencing and his letter supporting Lori’s clemency petition, it is not hard to see how her sentence would be substantially shorter today.

Moreover, Lori did not give up in the face of this substantial sentence. Instead, she has taken advantage of numerous

BOP classes and programming. Her educational transcript is extensive and includes over 170 hours of participation in the Alternatives to Violence program (including becoming a program leader), numerous courses to prepare her for a future career, and courses in Spanish, German, and current affairs. She has also taken on leadership roles, facilitating classes and conflict resolution programming, and tutoring others in ESL courses and assisting them in attaining their GEDs. Notably, she has also gained the trust of BOP officials: after receiving her Commercial Drivers’ License in 2014 (following 1200 hours of training), Lori was promoted to “town driver.” In this position, she transports incarcerated people to doctors’ appointments and runs errands for the prison outside of camp.

Despite support from her sentencing judge and her own extraordinary rehabilitation, on January 6, 2017, Lori’s petition was denied. Her estimated release date is September 15, 2018, one month before her 60th birthday. She will have served a little over 194 months, or 16 years, in prison for a nonviolent drug offense.

<sup>11</sup> Many states have begun reconsidering drug-free school zone laws in an effort to end long sentences for nonviolent drug offenses and reduce mass incarceration. See, e.g., <http://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2016/09/15/why-states-are-taking-a-fresh-look-at-drug-free-zones>; <https://www.tennessean.com/story/news/2017/12/08/nashville-council-members-urge-relief-man-sentenced-under-drug-free-school-zone-law/934617001/>;

<sup>12</sup> Although she was given an enhancement for possessing a firearm, no weapon was ever found, and there was no evidence presented at sentencing that she had ever used a weapon. Lori Kavitz Executive Clemency Petition, June 28, 2015 (on file with author).

<sup>13</sup> Tana Ganeva, *She Got 24 Years For Her Boyfriend’s Meth. Even Her Sentencing Judge Supports Clemency*, WASH. POST, Nov. 29, 2016, [https://www.washingtonpost.com/news/the-watch/wp/2016/11/29/she-got-24-years-for-her-boyfriends-meth-even-her-sentencing-judge-supports-clemency/?utm\\_term=.343615679dcd](https://www.washingtonpost.com/news/the-watch/wp/2016/11/29/she-got-24-years-for-her-boyfriends-meth-even-her-sentencing-judge-supports-clemency/?utm_term=.343615679dcd).

# Chad Marks

Chad Marks grew up in Rochester, with parents who suffered from drug and alcohol addiction. At the age of three, his mother left his abusive father, who shot at them as they left. Eventually, she married a man who sold drugs. At some point, Chad began selling drugs and became involved selling cocaine. Chad exercised his right to go to trial, and in March 2008 he was sentenced to 40 years in prison. The sentence was a result of “stacking” together mandatory minimums for two charges related to possessing a weapon. Notably, pre-trial plea discussions between Chad’s attorney and prosecutors revealed that the latter was willing to offer Chad 10 or 20 years—it was only when Chad opted for trial that a “trial penalty” in the form of the firearms charges were added. This practice of adding charges to coerce plea bargains or otherwise punish people for going to trial, has since been discouraged by AG Holder,<sup>14</sup> so it is highly unlikely prosecutors would have added those charges during the Initiative’s time frame.

Chad’s rehabilitation has been remarkable. He has completed more than 20 life skills courses, as well as personal development courses, such as anger management. He now teaches a fast-track



GED program to other people in prison, as well as a seminar on alternatives to violence, and he co-authored a prison reentry program, “RISE.” BOP staff have praised his work assisting others in prison. In fact, Chad assisted another person with whom he was incarcerated with his clemency petition, which was eventually granted by President Obama on January 19, 2017.

In October 2016, Chad wrote President Obama a letter about prison, rehabilitation, and second chances. President Obama wrote back, conveying his belief that even people who make significant mistakes have the capacity to change and positively impact the lives of others, and that he was trying to make the justice system one that rehabilitates and allows people to forge a brighter future ahead. Unfortunately, this chance was not given to Chad. On January 18, 2017—the same day the inmate whom Chad assisted received clemency—Chad’s petition was denied. His projected release date is March 12, 2038, when he will be nearly 60 years old. He will have served over 420 months, or 35 years, in prison for a nonviolent drug offense.

<sup>14</sup> See Dep’t of Justice Memorandum, *Dep’t Policy on Charging and Sentencing* (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> (directing prosecutors not to file charges to exert pressure to plead).

## Seth Cox

Seth Cox began using methamphetamine at the age of twelve. He sold whatever he could to support his addiction, from small amounts of drugs to household items. Eventually, Seth found his way to a methamphetamine producer and supplier. Over the next two years, he agreed to get supplies for this person in exchange for methamphetamine, which he used and sold to others. There was no indication Seth ever made the drugs himself—or that he was present when it was made. Nor were there allegations of violence, or that Seth was somehow a leader in the organization. Instead, it appeared that Seth's drug addiction was a major factor in his involvement. Seth was convicted and given a 300-month sentence, which was later reduced to 262 months. If he were sentenced today, Seth would benefit from the Guidelines' across-the-board reduction, as well as the increased judicial scrutiny given to the methamphetamine Guidelines, which has resulted in judges giving an increasing number of below-Guidelines range sentences over the past five years.

What is most striking is how Seth turned his life around in prison. Facing a long prison sentence,

he chose to tackle his drug addiction through drug education programming, and he has taken courses varying from financial literacy to communications. Seth worked hard to prepare himself for life after prison, enrolling in a resume and job skills course



and working to become a certified welder. He has researched how to make his welder dream a reality, even speaking with his BOP Education Supervisor to coordinate eventual reentry efforts with outside organizations. Seth also works as a lead technician in the maintenance department, where he has earned the trust of his supervisor, who complimented him on

his hard work and diligence, going so far as to say that he would hire Seth outside of prison. Finally, Seth has recommitted himself to his family, including his 15-year-old daughter. He has taken parenting classes to better himself, and he hopes to become the parent she deserves.

On September 30, 2016, Seth was denied clemency. His projected release date is July 20, 2025, when he will be 44 years old. He will have served more than 228 months, or 19 years, in prison for a nonviolent drug offense.

# LaVonne Roach

As a child, LaVonne Roach’s mother abused her, and she began using drugs at the age of 11 to cope with the misery of her home life. She was in a string of abusive relationships and had a child at the age of 14. It was this pattern—of drug addiction and the cycle of abuse—that contributed to her decision to help her then-fiancé distribute methamphetamine. In 1998, LaVonne was sentenced to 360 months for her role in this conspiracy. Despite evidence at trial that LaVonne was following her fiancé’s orders, and that the conspiracy splintered after her fiancé died, the court enhanced her sentence after finding that she was a leader in the conspiracy. In making this decision, there was no evidence that the court considered any of the sentencing guideline factors relevant to this determination.<sup>15</sup> Instead, the court accepted statements made by cooperating witnesses, who testified to the unremarkable fact that Roach bought and sold methamphetamine—not the type of conduct that generally merits a sentencing.

Despite the court’s barebones findings, there is a high likelihood that LaVonne would have received a lower sentence today. Aside from the Guidelines’ reduction of offense levels for methamphetamine, LaVonne’s criminal history was miscalculated, resulting in a higher criminal history category (category III, instead of category II). In reality, her only prior convictions were for three misdemeanor shoplifting crimes, committed over 10 years before she was sentenced. LaVonne’s personal history—the



abuse she suffered and her life-long addiction to drugs—would also be compelling grounds for a *Booker* variance.<sup>16</sup> Like the other people whose stories are told here, LaVonne did not give up or quit in the face of a long prison sentence. Instead, she took it as an opportunity to rehabilitate herself. She enrolled in a non-residential drug treatment program (even after being turned down from the residential program due to the length of her sentence), and she completed thousands of hours of educational programs, including obtaining her GED. LaVonne also prepared for her eventual release by taking professional courses, earning certificates in office systems and documents, accounting, and completing a two-year paralegal program. She also committed to personal development, enrolling in weekly therapy and self-help groups, and her psychologist recommended her to participate in the CHOICES program, which allows her to mentor high-risk youth.

LaVonne was not on President Obama’s final list of clemency grantees, and her petition remains pending with OPA. Her estimated release date is January 28, 2024, when she will be 59 years old. She will have spent nearly 27 years in prison for a nonviolent drug offense.

<sup>15</sup> These factors include (i) whether Roach had decision-making authority, (ii) the nature of her participation in the offense, (iii) whether she recruited accomplices, (iv) whether she had a right to a larger share of profits, (v) the degree of her participation or planning in the offense, (vi) the nature and scope of her illegal activity, and (vii) the degree of controlling authority she had over others. See Federal Sentencing Guidelines Manual § 3B1.1 (2016), <https://www.uscourts.gov/guidelines/2016-guidelines-manual/2016-chapter-3#NaN>.

<sup>16</sup> In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Guidelines were only advisory, opening the door for judges to take into account personal circumstances when arriving at a sentence.

# Robert Shipp

In 1988, Robert Shipp was an honor student in high school when his older brother was stabbed to death. It was around this point when, according to Shipp's mother and sister, he began having trouble in his life. Eventually, that trouble led Robert to participate in a conspiracy to sell crack cocaine. Even though he was only involved for five short months, Robert was sentenced to life in prison (which was later cut to 360 months). In another example of how disproportionate Robert's sentence was, the sentencing court expressed disbelief at the fact that the suppliers in this conspiracy were given much shorter sentences.



Robert was sentenced before *Booker*, and it is highly likely that his sentence would be lower today. For one thing, his sentencing judge, United States District Judge Marvin Aspen, expressed disbelief at having to sentence Robert to life, given his young age and the fact that his co-defendants were older and more involved in the conspiracy, including recruiting Robert to join it. Judge Aspen was similarly troubled by the fact that the suppliers in the conspiracy were given much shorter sentences of 12 and 14 years. In fact, Judge Aspen reiterated his views in a letter to Robert's, which was submitted in support of Robert's application for clemency.

Robert has now spent nearly half his life in prison. He has missed his daughter grow into an adult, now with a family of her own, and he missed the death of his father, with whom he was very close. Despite these hurdles, Robert has conducted himself admirably in prison even as

he was moved between 11 different prisons. His BOP progress reports note his positive adjustment and good rapport with staff, as well as good work reports. Robert has participated in over 85 different classes in a wide variety of subjects, from completing a college course with a 4.0 GPA, to a lifestyle intervention class, where he

was a great student and active participant, as well as a good role model for younger students. Most importantly, he has maintained a loving and close relationship with his family, who have offered to support him and let him work in the family business.

Despite his harsh sentence for what amounted to five months of misconduct, the support of his sentencing judge and his family, on January 6, 2017, Robert was denied clemency. His projected release date is November 26, 2019, when he will be 47 years old. Based on a mistake he made that lasted only five months, he will have spent 304 months, or 25 years, in prison for committing a nonviolent drug offense.

# Edwin Alvarez

Edwin Alvarez's childhood was marked by a father who abused him until he was 15, at which point Edwin fled home. When his parents divorced, Edwin struggled with this, dropping out of high school and drinking and doing drugs. By his admission, Edwin knew his life was in "freefall."

It was during this period that he began selling methamphetamine with his girlfriend. In February 2006, a confidential informant who purchased drugs from Alvarez also offered to sell him guns. The informant, working with ATF, engaged in a "reverse sting," offering to sell a number of different guns to Edwin, many of which carried



severe mandatory minimum sentences, despite the fact that Edwin was not looking for these specific types of firearms.

Alvarez's sentencing judge, United States District Court Judge Mark Bennett was critical of ATF's "reverse sting" approach and the possibility of "sentencing manipulation,"<sup>17</sup> so he initially set an evidentiary hearing on these sentencing issues. While the hearing was eventually cancelled, the government agreed to let Alvarez plead to a lesser gun charge that carried a lower mandatory minimum, and Judge Bennett varied substantially, sentencing Alvarez to the mandatory minimum of 15 years in prison.

All things considered, Edwin's sentence would likely be lower if he had been sentenced at the time he applied for clemency. First, the Guidelines

across-the-board reduction means that Edwin's base offense level would be lower. The ATF practice of using reverse stings has also come under increasing scrutiny,<sup>18</sup> which raises the likelihood that Alvarez's gun charge would either be folded into a sentencing enhancement, or perhaps not charged at all.

In the twelve years that he has been imprisoned, Edwin has turned his life around, acknowledging that he was no longer the 21-year-old kid who thought he knew everything. He earned his GED, an Associate's Degree in Accounting and Business Administration, and he has taken a wide range of additional

classes, including courses on parenting, money management, and anger management. His brother, a CPA, offered him a job if Edwin were released. He has worked to keep his personal connections despite being incarcerated, maintaining a relationship with his son, whom he shares with his girlfriend (who was also convicted with Edwin in the drug conspiracy). In fact, despite the fact that her daughter became involved with drugs through Edwin, his girlfriend's mother wrote a letter of support praising Edwin as a loving father and the son she never had.

Despite his remarkable turnaround, Edwin's petition is still sitting with OPA. His estimated release date is November 18, 2019. He will have spent 164 months, or thirteen-and-a-half years, in prison for a nonviolent drug offense.

<sup>17</sup> Judge Bennett's reference to "sentencing manipulation" refers to the fact that ATF directed the confidential informant to sell specific firearms to Alvarez that would trigger higher sentencing penalties. See Edwin Alvarez Clemency Petition Executive Summary, Oct. 21, 2016 (on file with author).

<sup>18</sup> In 2015, federal litigation over ATF's use of reverse stings was brought in Chicago, where a federal judge criticized the practice as "self-inflicted wounds" that should be "relegated to the dark corridors of our past." See Jon Seidel, *Judge Blasts ATF's Stash-House Stings But Declines to Toss Criminal Charges*, CHICAGO SUN-TIMES, Mar. 12, 2018, <https://chicago.suntimes.com/news/judge-blasts-atfs-stash-house-stings-but-declines-to-toss-criminal-charges/>.

# Geary Waters

In 2002, Geary Waters was sentenced to 360 months in prison for selling crack and marijuana. The government did not charge him with a conspiracy, and he was not accused of using violence or threats of violence. Nor were there any allegations that Geary was part of a larger drug trafficking ring or cartel. While Geary did have prior criminal convictions, none of them involved violence. Geary exercised his right to a trial, and two weeks before it was scheduled to start, the government successfully enhanced his mandatory minimum sentence from 10 years to 20 years' imprisonment. The enhancement, which was seemingly triggered by Geary's insistence on proceeding to trial, was filed without regard to the fact that Geary was charged with a nonviolent drug offense and had no record of violence. Geary's prior convictions, the bulk of which were for low-level drug offenses, including a marijuana conviction, made him a career offender, and he was ultimately given a sentence of 360 months.

Geary, like the other people profiled here, was a strong clemency candidate. First, he was given a sentencing enhancement that no longer aligned with the principles of the Obama-era DOJ, which discourage the use of enhancements unless someone is involved in conduct that merits severe sanctions.<sup>19</sup> Given that Geary (i) was not an organizer or leader of a conspiracy (which was not even charged), (ii) did not use or threaten violence, and (iii) had no ties to a larger organization or cartel.

Second, he was also sentenced before *Booker*, which meant that the court was prevented from exercising any discretion to sentence Geary below the applicable Guidelines of 360 months to life. This meant that Geary's difficult upbringing was

ultimately ignored. Geary was repeatedly mugged as a teenager by older men in his neighborhood, including being held up at gunpoint, causing him to seek friendship with older men, one of whom ultimately convinced Geary to begin selling drugs. Geary's home life was also challenging, as his parents divorced when he was fourteen, and his father was an alcoholic, which fueled arguments and occasional abuse between his parents.

In the face of his 360-month sentence, Geary made positive decisions in an effort to rehabilitate himself. He has taken a variety of courses designed to develop marketable skills should he be released from prison. This includes taking over 50 courses on everything from employability, basic business finance, and job interview skills, and resume writing. Many of these rehabilitative efforts occurred when Geary was housed at FCI Victorville, a federal facility notorious for violence.<sup>20</sup> In fact, Geary was attacked there during a riot, which resulted in his only serious BOP infraction—for having a “lock in a sock” that he used for protection. This infraction occurred over ten years before Geary applied for clemency.

Geary also worked hard to maintain strong familial relationships. He has taken courses on parenting and has continued to be involved in raising his only daughter, despite being in prison. Although his daughter was a child when Geary was sent to prison, she wrote that her father has consistently sent her educational letters and news clippings in an effort to help her expand her knowledge and keep her on the right path. His daughter wrote that she was proud of her father for his continuing self-education and his dedication to her, despite the fact that he has been in prison.

Despite all of Geary's hard work in the fourteen years since he was imprisoned, President Obama denied Geary clemency on January 18, 2017. His estimate release date is May 29, 2026. Geary will be 56 years old and will have spent 26 years in prison for a nonviolent drug offense.

<sup>19</sup> Former AG Eric Holder issued a memorandum detailing the factors to consider before seeking a sentencing enhancement. They include (i) whether someone is a leader, organizer, or manager in a conspiracy, (ii) if violence was used or threatened, (iii) any ties to larger drug trafficking organizations or cartels, and (iv) any co-defendant sentencing disparities that could result if an enhancement is sought. See United States Dep't of Justice, Office of the Att'y Gen., *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* at 3 (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

<sup>20</sup> See Letter fr. E.J. Hurst, Esq. to Comm'n on Safety and Violence in America's Prisons at 1-11 (Apr. 20, 2005) [http://www.victorvillefoia.org/downloads/Hurst\\_Victorville\\_Prison\\_Comm\\_04202005.pdf](http://www.victorvillefoia.org/downloads/Hurst_Victorville_Prison_Comm_04202005.pdf) (detailing violence and security incidents at FCI Victorville).



# Michael Pelletier

In 2008, Michael Pelletier was sentenced to life without parole for conspiring to import and distribute marijuana. He became involved with marijuana to alleviate the physical pain and emotional stress he suffered after he was crushed by a tractor and paralyzed from the waist down when he was 11 years old. When he was involved in distributing marijuana, there was never any indication Michael was violent, or that he had ties to any larger drug organization. Michael opted to go to trial and his co-defendants took plea deals and cooperated against him. Michael was the only person to receive a life sentence:



his six co-defendants received substantially lower sentences ranging from 24 months to 145 months.

Since his incarceration, Michael has accepted responsibility for his actions. In his petition, he told OPA that he wanted to live a productive life, even with his disability, but that he had gone about it the wrong way. From the benefit of counseling and other programming he has taken while in prison, such as anger management, Michael now understands that his

involvement in marijuana stemmed largely from his emotional response to the fact that he would never walk again. Michael has since found an outlet in art as an oil painter. The BOP has certified him to teach an art class to other people in prison, and he uses his talent to help others and keep himself distracted from his handicap, which restricts his activities and has led to a host of physical complications, including urinary tract infections and spasms, severe osteoporosis that has led to multiple fractures, and foot drop due to a lack of physical therapy.

Michael now has been imprisoned in connection with his marijuana offense since 2006. Since that time, his elderly father passed away. He has no children and would like to repair the damage he has done to society and his family by working in the community and using his art talents. Despite having served more than twelve years in prison, Michael's petition was never ruled on before President Obama left office. Without further action, Michael will die in prison for a nonviolent drug offense.

# Phyllis Hood

In 2006, Phyllis Hood was sentenced to 262 months in prison for her role in a methamphetamine conspiracy, which was driven by her long addiction to the drug. The government engaged in the very practice that the AG Holder sought to discourage through its Smart on Crime initiative: despite having no history of violence or ties a cartels or larger drug organizations, the government filed a sentencing enhancement to double Phyllis' mandatory minimum to 20 years. In a rare move, the sentencing court, in its statement of reasons, specifically declined to sentence Phyllis to the enhanced mandatory minimum.



Phyllis was an excellent clemency candidate. Her sentence would almost certainly be lower at the time she applied for clemency, due to a number of factors. First, no reasonable prosecutor would file an enhancement today, given Holder's policy discouraging prosecutors from filing sentencing enhancements. Second, the Guidelines across-the-board reduction lowered Phyllis' sentencing range. Furthermore, the Guideline for methamphetamine has increasingly come under attack by federal judges, with 33.6 percent of sentences below the Guidelines range. Finally, Phyllis was sentenced one year after *Booker*, and the court made only a passing reference to whether the sentence was "reasonable."

Today, the court would be required to conduct a more comprehensive look at Phyllis' characteristics, the nature of her offense.

Phyllis was nearly 54 years old when she entered prison to serve her 21-year-plus sentence. Since then, her mother and father have died. She tried to keep her vocational and job skills up-to-date in the event she is released, taking keyboarding and word processing skills. Phyllis has also taken control of and accepted her responsibility for her addiction, which she has kicked in prison. Phyllis' work ethic is also strong, and she has consistently received

good work evaluations. BOP staff trust Phyllis to be a driver around the federal penitentiary where she is incarcerated. Phyllis planned to reunite with her brothers in the family home that her parents once owned—a plan that the BOP believes was stable. In fact, the BOP began preparing for Phyllis' eventual release by submitting a relocation request to the probation office where Hood would be supervised.

Despite BOP's belief that Phyllis was going to get clemency, her petition never received any decision. Her petition was sent in September 2016, less than one month after the DOJ announced an August 2016 cutoff for all petitions. Her projected release date is July 28, 2023, when she will be 68 years old. She will have served 19 years in prison for a nonviolent drug offense.

# Craig Cesal

In 2003, Craig Cesal was sentenced to life in prison for a marijuana conspiracy in which he used his business to assist in transporting marijuana. Up to that point, Craig had never been in trouble and was a businessman and active community member. Although he was initially offered a plea deal that would have allowed him to admit to a smaller amount of marijuana and avoid a life sentence, prosecutors pushed for the life sentence in response to Craig breaching his plea agreement at his plea hearing by wavering when asked about his role in the drug conspiracy (despite the fact that probation still recommended that Craig was responsible for a lesser amount of marijuana). Craig was sentenced in a pre-*Booker* world: the prosecutor noted that it was “sad” that the only sentence available was life, and the sentencing judge also acknowledged that his hands were tied. As a result, Craig is the only member of his conspiracy who will die in prison: his co-defendants have all served their prison terms and have returned home. In fact, one co-defendant served his term, left prison and was subsequently convicted of second crime, served a second sentence, and has again returned home.

Craig was a prime candidate for the Initiative. As a first-time, non-violent offender<sup>21</sup> without ties to any large-scale drug organizations, his sentence



would almost certainly be lower today, even if prosecutors took the hardline position in response to Craig breaching his plea. The across-the-board reduction of the drug Sentencing Guidelines meant that Craig would no longer be facing a mandatory life sentence, and the repeal of *Booker* also meant that the sentencing judge would no longer have his hands tied—a significant fact, given that nearly 67 percent of marijuana sentences were below the Guidelines range in 2014.

Craig’s conduct while incarcerated has been exemplary. He has taken a number of professional development courses, acted as a Suicide Watch Companion for other inmates, and became a Eucharistic Minister with the Catholic Church to be able to counsel other people in prison. Despite the toll that his life sentence took on his family—his children went from excelling in school to barely graduating, and his son ended up homeless and addicted to heroin, dying at 23 while Craig was in prison—Craig has also tried to maintain a relationship with his daughter.

Despite his clean record and his commitment to rehabilitating himself, Craig’s petition was denied on November 29, 2016. He will likely die in prison for a first-time, non-violent drug offense, involving a drug that is now legal in at least nine states.

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<sup>21</sup> A legally owned and registered gun was found at Cesal’s business, but the government argued that this should enhance Cesal’s sentence, because he used his business in the conspiracy. Cesal did not have any weapons on him when he was arrested after agreeing to assist in the transport of marijuana. See Craig Cesal Executive Clemency Petition (on file with author).

## From Life... to Life?

For some, the shortcomings of the Initiative were not in the denials, but in the grants themselves. As the initiative progressed, the Obama Administration began changing its approach to commutations. A USA Today analysis of the President's 673 grants as of September 2016 showed a sharp change in strategy: starting in August 2016, many people whose sentences were commuted were still left with a year or more, and in some cases, more than a decade, to serve on their sentences.<sup>22</sup> In October 2016, President Obama announced the commutation of 102 sentences, with only 21 people scheduled for release from federal prison in February 2017. The majority of the recipients would not be released until later in 2017 or years in the future.<sup>23</sup>

Aside from being a "remarkable departure from recent past practice," the turn toward "term" commutations (commuting sentences of people without making them immediately eligible for release) appeared to be the Obama Administration's attempt to effectively recalculate peoples' sentences using current federal sentencing guidelines, and not the harsher sentencing practices that were in effect in earlier time periods.<sup>24</sup>

For these people who were given "term" commutations, these grants were bittersweet and in many respects illusory, because they were still facing the reality of serving a substantial amount of time—in some cases up to 22 years—in prison. Finally, commutation—even from life to a term of years—is hard to square with President Obama's own words, written in a 2016 blog post, that "it just doesn't make sense to require a nonviolent drug offender to serve 20 years, or in some cases, life, in prison."<sup>25</sup> It is also frustrating to clemency reform advocates who urged that, if the Obama Administration was shifting its strategy to increasingly grant "term" commutations where people would still be serving portions of their sentence, then the Administration should also make larger groups of people eligible for relief, even if it only results in a short reduction of a prison sentence.<sup>26</sup>

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22 Gregory Korte, *Cells Stay Locked After Obama Clemency: President Grants Requests, But Inmates Still Have Years To Serve*, USA TODAY, Sept. 16, 2016.

23 Ray Locker, *Obama Commutes Record Total 774 Sentences*, USA TODAY, Oct. 6, 2016, <https://www.usatoday.com/story/news/politics/2016/10/06/obama-commutes-xx-more-sentences/91685468/>.

24 Korte, *supra* note 18.

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25 Posting of President Barack Obama, *A Nation of Second Chances*, May 5, 2016, <https://obamawhitehouse.archives.gov/blog/2016/05/05/nation-second-chances>.

26 Josh Siegel, *Obama Could Expand 'Unprecedented' Clemency Push for Prisoners*, DAILY SIGNAL, Dec. 1, 2016, <https://www.dailysignal.com/2016/12/01/obama-could-expand-unprecedented-clemency-push-for-prisoners/>.

# David Vaught

In 2010, David Vaught was sentenced to life in prison for his role in a methamphetamine drug ring. At the time of his sentence, he was 43 years old and had been addicted to methamphetamine since 1984, when he was a senior in high school. His addiction drove his decision-making, including the decision to become involved in the methamphetamine ring that led to his conviction. This was apparent to his sentencing judge, the United States District Judge Terry R. Means, who took the extraordinary step of writing BOP after he sentenced David to tell them that he would never have sentenced him to life in prison if the statute had not required it. Judge Means reiterated this view in a letter he submitted in support of David's clemency, explaining that a life sentence was "unduly harsh."

David's sentence was all but ensured by the prosecutor, who extracted a trial penalty when David exercised his right to go to trial, rather than plead, as all his other co-defendants did. The prosecutor filed a new indictment charging *only* David, and not his co-defendants, with a higher drug weight, and he also enhanced David's mandatory sentence to life in prison, thereby tying Judge Means' hands in the process. As a result, David—who was never a leader or manager or supplier and was by all accounts the lowest member of the conspiracy—received a life sentence.



Since his incarceration, David has turned his life around, becoming precisely the type of person the Initiative was meant to reward. He has been drug-free since entering prison, and he has never had a single disciplinary incident in the entire time he has been incarcerated. He works full-time in a Unicor factory making clothing for the U.S. Military, and he is pursuing theological and values and character-based coursework to one day fulfill his goal of opening a ministry to help people suffering from drug addiction. His teachers have praised him as exemplary and one of the "brightest and best" participants.

On January 17, 2017, in one of his last acts of clemency, President Obama commuted David's sentence to 324 months, or 27 years, in prison. David, who has been incarcerated since May 2009, still must serve almost 24 years before his projected release date of November 2032. He will be a month shy of his 66th birthday by this point. While the clemency grant is certainly better than the death sentence David previously received, it is difficult to reconcile David's grant with the Administration's description of clemency as given to people "who are ready to make use ... of a second chance."<sup>27</sup> David will not have his "second chance" opportunity for 16 more years.

<sup>27</sup> Ryan J. Reilly, *Obama Commutes 153 Sentences, Pardons 78, in Clemency Push*, HUFFINGTON POST, Dec. 19, 2016, [https://www.huffingtonpost.com/entry/obama-commutation-pardon-clemency\\_us\\_58581b72e4b0b3ddfd8db881](https://www.huffingtonpost.com/entry/obama-commutation-pardon-clemency_us_58581b72e4b0b3ddfd8db881).

# Marvin Anthony

In 2007, Marvin Anthony was sentenced for his role in a crack conspiracy. The government saw Marvin as a low-level participant—they did not make any allegations at trial or at sentencing that he should receive an enhancement for being an organizer or leader. Nor did the government allege or present evidence of violence or ties to larger drug organizations or cartels.

However, despite these facts, the government ensured Marvin would die in federal prison. Just days before his trial was scheduled to start—in a move that looked a lot like a “trial penalty”—prosecutors successfully enhanced Marvin’s mandatory minimum sentence from 10 years to life imprisonment. In enhancing Marvin’s sentence to life, prosecutors relied on two old drug convictions that occurred in 1989 and 1991, which occurred 12 years before Marvin’s conduct in his federal case.

Marvin’s sentence was substantially longer than all but one of his four co-defendants, who were sentenced to terms of 5 years’ probation, 60-months, 70-months, and 360-months. Only one other person received a life sentence. That Marvin received a life sentence when he was not seen as a leader or organizer shows the gross sentencing disparity he received as a result of the government’s decision to apply the trial penalty.

Marvin met all the factors for clemency. He was charged and convicted under the old crack cocaine sentencing disparities. Today, the amount of drugs involved in his conspiracy would not even trigger the 10-year mandatory minimum; Marvin would face a 5-year mandatory minimum sentence. Nor would prosecutors have been able to reflexively file a sentencing enhancement. First, DOJ policy under Obama counseled against coercing plea agreements through the threat of enhanced penalties. Second, the DOJ announced a policy cabining the use of sentencing enhancements unless a defendant was involved in conduct made the case appropriate for severe sanctions. Marvin’s conduct did not even

come close to meeting the factors that the DOJ required before a prosecutor could seek a sentencing enhancement.

Moreover, since his conviction Marvin has rehabilitated himself. Aside from two low-level infractions, over his near-decade in prison, he took extensive personal, educational, and vocational programming, including obtaining his GED and taking anger management and communication classes. Marvin has also recommitted himself to religion, taking several courses on Christianity and the Bible. Rediscovering his faith helped Marvin deal with missing the births of his grandchildren, and the death of his son.

He has also received commendations for his work as a UNICOR employee, where is a cook and orderly. The BOP has also consistently given him positive remarks in progress reports, noting that he receives good work reports and maintains communication with his family.

Despite the hardship of prison, Marvin never lost contact with his family. To the contrary, he remained with his fiancée, with whom he had been with since 2001. They share a child together, and she wrote a letter of support indicating that Marvin was also a father to her two other children. If he had been granted clemency, Marvin would have returned to his fiancée and their daughter, who was just a toddler when Marvin was sent to prison. The two of them had dreams of opening a restaurant before Marvin left for prison, and they planned to kickstart that dream, had Marvin been released.

On October 26, 2016, President Obama commuted Marvin’s sentence from life to 262 months, or nearly 22 years in prison. At the time of the grant, Marvin still had to serve nearly ten more years in prison. Marvin has been incarcerated since 2007 and will have spent nearly 19 years in prison for a nonviolent drug offense involving a drug whose sentencing penalties have been decreased in the years after Marvin’s conviction. When he receives his “second chance,” he will be 61 years old.

# David Barren

From 2004 to 2005, David Barren distributed cocaine throughout the Maryland area laundered the proceeds. At the time he became involved with drugs, David was a divorced, single father who was raising four children all on his own. After his arrest in 2008, David opted to go to trial, and in 2009 he was sentenced to life plus 20 years. Despite a lack of evidence suggesting that David committed or threatened violence.

In the face of what was essentially a death sentence, David committed himself to turning his life around. Since entering federal prison in August 2010, David avoided any serious misconduct and began a concerted effort to make the best of his situation. He did this by taking a variety of courses—despite the heavy knowledge that he would likely never be able to take advantage of these skills—getting his GED, obtaining a paralegal certification with a 4.0 grade point average, and mentoring younger persons who are incarcerated with him.



He also never gave up on his family responsibilities: David has maintained strong relationships with parents, his siblings, and his four children, all of whom are either in college, serving in the armed forces, or working and thriving as members of their communities. David's redemption and turnaround was so compelling that his congressional representatives each submitted letters of support on his behalf, noting that the initiative was meant for people just like Barren—those who committed nonviolent drug offenses—and urging President Obama to give David the second chance that he so deserved.

On January 19, 2017, in what was his final grant of clemency, President Obama commuted David's sentence to 360 months, or 30 years, in prison. Upon hearing the bittersweet news, one of David's family members noted, "God knows I'm so appreciative that David's been commuted, but if you don't owe 20, how do you owe 30?"<sup>28</sup> At the time of his grant, Barren had served eight-and-a-half years in prison. As of 2018, he still has nearly 16 years to serve before his projected release date of April 2034. When David's second chance finally starts, he will be eight months shy of his 70th birthday.

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28 C.J. Ciaramella, *This Inmate Received Clemency from Obama. He Still Might Die in Prison*, REASON, Jan. 27, 2017, <https://reason.com/blog/2017/01/27/this-inmate-received-clemency-from-obama>.

# How Do We Make Sense of the Denials?

What separates the successes from the denials? That is the million-dollar question that will likely never be answered. Clemency denials are not accompanied by a statement of reasons or anything resembling a judicial opinion explaining the rationale for a decision, and petitioners have no right to appeal this decision. Instead, petitioners and their attorneys are left to guess at reasons for the denial, or, in some cases, the grant that converts their sentence to a term 30 years, comparing their own circumstances to those whose petitions

were granted. Clemency advocates can also only speculate about the role that U.S. Attorneys played in either forcing denials or pushing for conservative “life-to-30 years” grants. People whose petitions are still sitting there, pending before OPA, are also left to speculate about what might have been if only their petitions had been submitted in time to be considered. Instead, these petitions are sitting in limbo before the OPA, with the dawning realization that the Trump Administration is highly unlikely to take any positive action.



# PART II

## The Clemency Initiative

The story of how these people came to be left behind begins and ends with the clemency initiative announced by the Obama Administration. The Initiative was announced by then-Deputy Attorney General James Cole on April 23, 2014. Cole said the goal was to “quickly and effectively identify appropriate candidates”<sup>29</sup> for clemency, and he described the Initiative as a natural extension of President Obama’s desire to restore “fairness and proportionality for deserving individuals,”<sup>30</sup> in particular those who were subjected to harsh sentencing disparities for federal drug offenses involving crack cocaine.<sup>31</sup> However, DAG Cole was careful to note that the Initiative was not limited to crack cocaine offenders. Instead, he said that all people who met the following six criteria would have their petitions considered:

1. They are currently serving a federal sentence of incarceration, but by operation of law would likely have received a substantially lower sentence if they had been convicted of the same crime today;
2. They are non-violent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels (the so-called “leader/organizer/manager” enhancement in the United States Sentencing Guidelines);
3. They had served at least ten years of their prison sentence;
4. They had no significant criminal history;
5. They demonstrated good conduct while in prison; and
6. They had no history of violence prior to or during their period of incarceration.

29 Ryan J. Reilly, *DOJ Gears Up for Massive Obama Clemency Push*, HUFFINGTON POST, Apr. 23, 2014, [https://www.huffingtonpost.com/2014/04/23/obama-clemency-doj\\_n\\_5196110.html](https://www.huffingtonpost.com/2014/04/23/obama-clemency-doj_n_5196110.html).

30 Cole press release, *supra* note 2.

31 *Ibid.*

Thus, in laying the groundwork for the Initiative, Administration officials emphasized the need to correct outdated and unduly harsh sentencing laws that were disproportionate to someone’s offense. For instance, in January 2014, Attorney General Eric Holder observed that “some pretty draconian sentencing measures” were put in place that led to nonviolent offenders “serving sentences that are far too long.”<sup>32</sup> Around the time the Initiative was announced, Holder emphasized the need to change OPA’s decision-making, both by looking at people who were not “traditionally thought of as good candidates” and changing OPA’s focus.<sup>33</sup> In September 2014, after the Initiative’s announcement, Holder cast the issue as one of “civil rights,” and he expressed hope that more clemency decisions would be made in the next few months of 2014.<sup>34</sup>

### The Screening Process

In order to facilitate the identification of eligible persons, the BOP sent a notice to every person in federal prison. The notice also contained a survey to fill out regarding their eligibility, which was then passed on to CP14 for screening purposes.<sup>35</sup> The survey consisted of fourteen questions that loosely overlapped with the six criteria for eligibility, and it informed people that CP14 would screen requests for assistance and connect with only those survey respondents who appear to meet the criteria. For those who did not receive assistance from CP14, the BOP informed them that they could file clemency petitions on their own.

For those people who met the Initiative criteria, CP14 was supposed to assign them a *pro bono* attorney,<sup>36</sup> who would then work with them to

32 Josh Gerstein, *Obama’s Drug Sentencing Quagmire*, POLITICO, Jan. 5, 2015, <https://www.politico.com/story/2015/01/barack-obama-drug-sentencing-policy-113954>.

33 Ryan J. Reilly, *DOJ to Overhaul Clemency Process for Drug Offenders*, Apr. 21, 2014, HUFFINGTON POST, [https://www.huffingtonpost.com/2014/04/21/obama-clemency-drug-offenders\\_n\\_5186069.html](https://www.huffingtonpost.com/2014/04/21/obama-clemency-drug-offenders_n_5186069.html).

34 Gerstein, *supra* note 28.

35 U.S. Bureau of Prisons, *Notice to Inmates: Initiative on Executive Clemency*, [https://www.bop.gov/resources/news/pdfs/Notice\\_to\\_Inmates\\_Initiative\\_on\\_Executive\\_Clemency.pdf](https://www.bop.gov/resources/news/pdfs/Notice_to_Inmates_Initiative_on_Executive_Clemency.pdf).

36 On October 19, 2015, CP14 stopped accepting requests for *pro bono* assistance through their organization. See U.S. Dep’t of Justice, *Clemency Initiative*, <https://www.justice.gov/pardon/clemency-initiative>.

assemble and file a clemency petition for consideration by the OPA. The OPA would review the petition and make recommendations to the DAG, who in turn undertook her own review and could accept or reject the OPA's recommendations.<sup>37</sup> The DAG's recommendations would then be passed on to the White House Counsel's Office, who would undertake their own review before deciding which clemency petitions were suitable for the President to sign.<sup>38</sup>

### The Initiative Unfolds: 2014 to 2017

CP14 was almost immediately overwhelmed by the number of individuals seeking clemency. The BOP received more than 33,000 responses<sup>39</sup> to its survey, which CP14 then had to assess for eligibility.<sup>40</sup> This was a time-consuming process. First, in some cases, the information needed to ascertain eligibility—such as the pre-sentence report (PSR)—was not digitized.<sup>41</sup> Given that eligible applicants were supposed to have served at least 10 years of their sentence, this meant tracking down PSRs, many of which were archived in hard copy, and sometimes seeking answers from the prosecutors and judges who sentenced the applicants.<sup>42</sup> In addition, *pro bono* counsel often had to request the PSR from the BOP, which sometimes took months to provide (until CP14 implemented an expedited procedure in the fall of 2016).<sup>43</sup> Indeed, CP14 estimated that it took an attorney an average of roughly 30 days

to complete a full applicant review.<sup>44</sup> Second, the process involved up to five internal levels of review within CP14 before an application could finally be sent to OPA (which in turn had its own bureaucratic maze to navigate).<sup>45</sup>

For those serving federal sentences, this meant a long (and agonizing) wait to hear whether they would be assigned a pro bono attorney through CP14. For instance, Antonio Bascaro—who, at 82 years old, is the longest currently incarcerated individual for a marijuana offense—reported that he was not assigned pro bono counsel until 17 months after he applied for assistance through CP14.<sup>46</sup> Then, seven months after this assignment, counsel withdrew due to his own lack of experience and resources. Even though Bascaro had already been approved by the CP14 screening committee before his counsel withdrew, he was nevertheless notified that his case was again being “personally reviewed to see if he qualifies for representation.”<sup>47</sup> He was denied clemency on August 8, 2016.<sup>48</sup> Likewise, Linda Byrnes, who was serving 22 years for distributing marijuana, submitted her application to CP14 in August 2014. As of March 2016, she was still waiting to hear whether she would be assigned a pro bono attorney.<sup>49</sup> At the end of the day, CP14 submitted over 2,600 petitions to OPA, which was just a fraction of the 36,000 people who requested pro bono assistance.<sup>50</sup>

37 Letter from Deborah Leff to Sally Quillian Yates, Dep. Att’y Gen., Jan. 15, 2016, <https://www.documentcloud.org/documents/2777898-Deborah-Leff-resignation-letter.html>.

38 Sari Horwitz, *Obama Administration Gets a New Pardon Attorney For High-Profile Clemencies*, WASH. POST, Feb. 3, 2016, [https://www.washingtonpost.com/world/national-security/longtime-federal-prosecutor-to-become-pardon-attorney/2016/02/03/9907a80a-ca7d-11e5-88ff-e2d1b4289c2f\\_story.html?utm\\_term=.4e7c593c2e76](https://www.washingtonpost.com/world/national-security/longtime-federal-prosecutor-to-become-pardon-attorney/2016/02/03/9907a80a-ca7d-11e5-88ff-e2d1b4289c2f_story.html?utm_term=.4e7c593c2e76).

39 Some estimates are closer to 35,000 inmates, or about 16 percent of the federal prison population at that time. See Sari Horwitz, *Bureaucracy Slows Clemency Efforts*, WASH. POST, Mar. 1, 2015, <https://www.pressreader.com/usa/the-washington-post-sunday/20150301/81552289315405>.

40 Bill Keller, *The Bureaucracy of Mercy*, THE MARSHALL PROJECT, Dec. 14, 2015, <https://www.themarshallproject.org/2015/12/13/the-bureaucracy-of-mercy>.

41 *Ibid.*

42 Horwitz, *supra* note 35.

43 Collins, *supra* note 5.

44 Julia Edwards, *Obama's Prisoner Clemency Plan Faltering as Cases Pile Up*, REUTERS, Mar. 14, 2016, <https://www.reuters.com/article/us-usa-justice-clemency-insight/obamas-prisoner-clemency-plan-faltering-as-cases-pile-up-idUSKCN0WGoB9>.

45 Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VERMONT L. REV. 465, 477-489 (2017), <https://lawreview.vermontlaw.edu/fewer-hands-more-mercy-a-plea-for-a-better-federal-clemency-system/>.

46 Lauren Krisai, *President Obama's Clemency Project is a Bureaucratic Nightmare*, REASON, June 10, 2016, <http://reason.com/archives/2016/06/10/president-obamas-clemency-project-is-a-b>.

47 *Ibid.*

48 U.S. Dep't of Justice, *Commutations Denied by President Barack Obama*, <https://www.justice.gov/pardon/obama-denials/commutations-denied-president-barack-obama>.

49 Edwards, *supra* note 40.

50 Nat'l Ass'n of Criminal Defense Lawyers, *Clemency Project 2014*, <https://www.nacdl.org/cp2014/>.

In many respects though, CP14's hands were tied by the Initiative. An already time-consuming process was made more so by having to review an applicant's file for six different criteria that were often murky. Although it was relatively easy to determine whether someone had served at least 10 years of their sentence, the rest of the factors were more subjective. In most instances, the Sentencing Guidelines can ratchet up someone's criminal history score based on a few low-level drug offenses. Would this be a "significant" criminal history? And what factor would the passage of time play in determining whether a youthful offense that involved violence counted toward a "history of violence," if that same person had since avoided incurring disciplinary infractions during intervening years spent in federal prison?<sup>51</sup> Was someone a "low level" offender if their conspiracy involved a large amount of drugs? These were all questions that could not be answered by any legal precedent or by the Initiative's vague and undefined criteria.

Not surprisingly, the Initiative struggled under the weight of applications and the lengthy review process. Clemency advocates repeatedly expressed concerns about the low number of applications submitted to OPA, and OPA in turn increased pressure on CP14 to move more quickly. In March 2015, a little under a year after the Initiative was announced, OPA had only received 14 applications for clemency stemming from the Initiative.<sup>52</sup> Rumors began circulating about vague cut-off dates, beyond which OPA would not review petitioners' applications,<sup>53</sup> and the time frames were constantly shifting. For instance, in June 2015, OPA urged applicants to move more quickly to submit documents: in a video seminar given to clemency attorneys, Leff stated "sooner is better" and cautioned that "delaying is not helpful."<sup>54</sup> In April 2016, Deputy Attorney General Sally Yates sent an open letter to CP14 and announced that "time was

of the essence."<sup>55</sup> In a conference call in August 2016, OPA suggested that petitions submitted through September 2016 would make the review cut-off. However, the DAG then announced that August 2016 was the deadline for clemency petitions to be reviewed.<sup>56</sup>

The bureaucratic logjam was not alleviated once a petition was filed with OPA. Petitions faced six additional levels of review within (i) OPA, (ii) the DAG's office, and (iii) the White House Counsel's office, before it could even make it to President Obama.<sup>57</sup> In many instances, the U.S. Attorney's Office who prosecuted the case, as well as the judge who sentenced the petitioner, were allowed to opine on the application.<sup>58</sup> When one considers that each review required subjective application of the six Initiative criteria, it is no surprise that the Initiative was mired in backlogs.

These multiple levels of review also created tension between the various decision-makers involved in the process. In January 2016, Pardon Attorney Deborah Leff resigned her position, citing a lack of resources and access to the White House Counsel's Office.<sup>59</sup> Leff noted that her office was asked to review nearly 10,000 petitions with few attorneys and no additional hires forthcoming. She also noted that DOJ was overruling OPA's recommendations in an increasing number of cases, and she was particularly troubled by her inability to present her views to the White House Counsel's Office regarding why OPA recommended a given petitioner for clemency.<sup>60</sup>

51 Collins, *supra* note 5.

52 Horwitz, *supra* note 35.

53 Collins, *supra* note 5.

54 Peter Baker, *Obama Plans Broader Use of Clemency to Free Nonviolent Drug Offenders*, N.Y. TIMES, July 3, 2015, <https://www.nytimes.com/2015/07/04/us/obama-plans-broader-use-of-clemency-to-free-nonviolent-drug-offenders.html>.

55 Ltr. fr. Dep. Att'y Gen. to CP14, *An Open Letter to Clemency Project 2014 Lawyers*, Apr. 25, 2015, <https://www.politico.com/f/?id=00000154-61bc-dbae-a95f-7bfd0fc80000>

56 *Clemency Initiative*, *supra* footnote 4.

57 Osler, *supra* note 41.

58 U.S. Gov't Accountability Office, *Federal Prison System: Justice Could Better Measure Progress Addressing Incarceration Challenges*, June 2015 at 14, <https://www.gao.gov/assets/680/670896.pdf>.

59 Debra Cassens Weiss, *Pardon Attorney's Resignation Letter Cites Backlogs and Reversals*, ABA JOURNAL, Mar. 29, 2016, [http://www.abajournal.com/news/article/pardon\\_attorneys\\_resignation\\_letter\\_cites\\_backlogs\\_and\\_reversals](http://www.abajournal.com/news/article/pardon_attorneys_resignation_letter_cites_backlogs_and_reversals).

60 In response to her resignation, DAG Yates hired longtime federal prosecutor Robert Zauzmer to head OPA, and Zauzmer was allowed to have direct contact with White House Counsel. See Sari Horwitz, *Lack of Resources, Bureaucratic Tangles Have Bugged Down Obama's Clemency Efforts*, WASH. POST, May 6, 2016, [https://www.washingtonpost.com/politics/courts\\_law/lack-of-resources-bureaucratic-tangles-have-bugged-down-obamas-clemency-efforts/2016/05/06/9271a73a-1202-11e6-93ae-50921721165d\\_story.html?utm\\_term=.3e4cb5be1196](https://www.washingtonpost.com/politics/courts_law/lack-of-resources-bureaucratic-tangles-have-bugged-down-obamas-clemency-efforts/2016/05/06/9271a73a-1202-11e6-93ae-50921721165d_story.html?utm_term=.3e4cb5be1196).

Leff's complaint—that DOJ was increasingly overruling OPA's recommendations and barring her from speaking with White House Counsel—reflected a common criticism that DOJ lacked the will or ability to think objectively about clemency grants. Back in 2009, Sam Morison, a former OPA employee, wrote a memorandum to AG Holder warning of the “near total collapse of the pardon advisory process,” explaining that the dysfunction disproportionately affected minorities.<sup>61</sup> Morison also warned that OPA was “institutionally ingrained” to reject petitions.<sup>62</sup>

In the end, it was the Initiative's petitioners who bore the brunt of these added layers of bureaucracy and tension between OPA and DOJ brass. At the end of March 2016, there were more than 11,000 clemency requests pending with OPA.<sup>63</sup> In April 2016, DAG Yates urged that “time is off the essence,” and she asked CP14 to meet deadlines, including one no later than mid-May, to ensure that DOJ would be able to adequately review all pending petitions.<sup>64</sup> Faced with these impending deadlines, CP14 wrote a similar letter to approximately 3,000 BOP inmates informing them that they should file their clemency petitions pro se, rather than wait for legal assistance.<sup>65</sup>

DOJ's backlog did not diminish appreciably as the end of the Initiative neared: in May 2016, roughly six months before President Obama left office, there were 10,621 clemency petitions pending at the OPA.<sup>66</sup> OPA's 26 attorneys would have had to review roughly 408 petitions each over the next six months before Obama left office—and this did not even account for the other levels of bureaucratic review outside OPA.<sup>67</sup> Ultimately, the backlog meant that a full 89 percent of President Obama's clemency grants were made in the last ten months of

office, and 31 percent of these grants came within the President's final month in office.<sup>68</sup>

## The Initiative By the Numbers

More than 24,000 inmates—roughly 12 percent of the federal prison population<sup>69</sup>—petitioned for clemency under the Initiative. In the end, President Obama granted clemency to 1,696 people in the form of sentence commutations.<sup>70</sup> Who were these grantees? They were overwhelmingly male (94 percent) and black (70.9 percent), followed by white (19.1 percent), Hispanic (8.7 percent) and Other race petitioners (1.3 percent).<sup>71</sup> Although DAG Cole never explicitly limited the Initiative to drug offenses, at some point this shift must have occurred, because every clemency recipient in the Initiative was sentenced for a drug-trafficking offense. The majority of the drug offenses involved crack cocaine offenses (61 percent), followed by methamphetamine (17.4 percent), powder cocaine (15.4 percent), and marijuana trafficking (4.2 percent).<sup>72</sup>

Consistent with the goal of the Initiative—to rectify unduly harsh sentences—the average sentence initially imposed on these Initiative recipients was 340 months (over 28 years) of imprisonment. Nearly all of the recipients (95.3 percent) had also been convicted of an offense that carried a mandatory minimum penalty that was ten years or longer, and nearly all Initiative recipients received a sentence of 20 years or longer, or life imprisonment (88.2 percent). Likewise, the sentence commutations granted by President Obama made substantial reductions in the sentences imposed on the petitioners. The average reduction in sentence

61 Liz Goodwin, *Obama Plans Clemency For Hundreds of Drug Offenders*, YAHOO NEWS, Apr. 21, 2014, <https://www.yahoo.com/news/obama-plans-clemency-for-hundreds-of-drug-offenders--162714911.html>.

62 *Ibid.*

63 Josh Gerstein and Sarah Wheaton, *Obama Team Making Last-Ditch Push on Commutations*, POLITICO, Apr. 29, 2016, <https://www.politico.com/story/2016/04/obama-commutations-effort-222631>.

64 *Ibid.*

65 *Ibid.*

66 Krisai, *supra* note 42.

67 *Ibid.*

68 Rachel Barkow and Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 436 (2017) (hereinafter “Barkow and Osler I”) [https://its.law.nyu.edu/faculty/profiles/representativeFiles/Designed%20to%20Fail\\_%20The%20President\\_s%20Deference%20to%20the%20Department%20of\\_6FB1CO09-1B21-6206-60A51F5735671595.pdf](https://its.law.nyu.edu/faculty/profiles/representativeFiles/Designed%20to%20Fail_%20The%20President_s%20Deference%20to%20the%20Department%20of_6FB1CO09-1B21-6206-60A51F5735671595.pdf).

69 There were approximately 196,000 people in federal prison as of April 23, 2014, when the Initiative was announced. See USSC Report at 32.

70 President Obama granted clemency to 1,716 petitioners during his eight years in office. However, 10 of those grants predated the Initiative, and 10 other grants do not appear to have been granted as part of the Initiative. See USSC Report at 12.

71 USSC Report, *supra* note 1.

72 *Ibid.*

made under the Initiative was 39 percent. This represented a 140-month (11-year) reduction in sentence.

Notably, despite announcing six criteria it would consider in reviewing clemency applications, it does not appear that the DOJ adhered to these criteria in the majority of cases. According to an analysis conducted by the United States Sentencing Commission, out of 1,696 clemency grants, only 86 recipients (5.1 percent) appear to have met all six factors. The statistics are particularly interesting when looking at a recipient's propensity for violence or other misconduct—factors one might associate with lowering the likelihood of obtaining clemency. For instance, one of the six criteria DOJ weighed was whether a petitioner had a “serious criminal history.” Of the Initiative's clemency grantees, 1,434 (86 percent) grantees had a criminal history score of three or more points.<sup>73</sup> In fact, 804 recipients (48.1 percent) were assigned to the highest Criminal History Category (Category VI), and of the 804 grantees in Category VI, most of them (84.5 percent) were deemed career offenders. Accordingly, it appears that either the DOJ was using a different metric than Criminal History scores to assess the “seriousness” of a petitioner's criminal history, or this factor was not heavily weighted.

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<sup>73</sup> The “three or more points” is used as a baseline for “significant criminal history,” because AG Holder's Smart on Crime Initiative directed AUSAs to refrain from charging mandatory minimum offenses unless a defendant had a “significant criminal history,” which AG Holder defined as “three or more criminal history points.” See Memorandum from Att'y General Eric Holder to the U.S. Attorneys and Ass't Att'y General for the Criminal Division, August 12, 2013, at 2, <https://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-drug-guidance.pdf>.

# PART III

## The Path Forward— Lessons for Clemency Reform

The Obama Administration’s decision to reinvigorate the clemency power and use it for more than just the wealthy and politically connected is a decision that should be rightfully praised. However, problems with the Initiative’s rollout and institutional design also meant lost opportunities to help more people get out from under unduly harsh sentences. These lost opportunities seem even more tragic, due to the Trump Administration’s hostility to sentencing reform and seeming desire to return to the War on Drugs rhetoric and criminal justice philosophy that gave rise to lengthy sentences for nonviolent drug offenses, thereby sparking the need for the Initiative in the first instance.

So what is the path forward for federal clemency? The next administration that seeks to exercise the clemency power should ensure, at a minimum, that the following steps are taken:

### Improve Clemency’s Infrastructure

As the Initiative unfolded, it was painfully clear that OPA lacked the infrastructure to process the substantial increase in clemency applications received. Despite AG Holder’s vow to meet this demand by assigning “potentially dozens of lawyers—with backgrounds in both prosecution and defense—to review applications and provide the rigorous scrutiny that all clemency applications require,”<sup>74</sup> OPA was short-staffed from the start and was forced to solicit volunteers from within DOJ to assist in

reviewing clemency petitions.<sup>75</sup> Of course, the most compelling evidence that government infrastructure was lacking was that DOJ had to enlist CP14 to do all of the initial screening and referral work.

A little less than two years into the Initiative, resources were still in short supply. In January 2016, Pardon Attorney Deborah Leff resigned. In her resignation letter, she complained of a lack of resources to be able to adequately respond to the increase in petitions as a result of the Initiative.<sup>76</sup> At the time of her resignation, OPA had 10 lawyers and was virtually the same size it was 20 years ago.<sup>77</sup> In April 2016, OPA announced it would hire 16 attorneys (for a total of 26).<sup>78</sup> But with 10,621 petitions pending in May 2016, this meant that 26 attorneys would have to review 408 petitions each before President Obama left office.<sup>79</sup>

Although CP14 was proposed as a workaround solution to OPA’s staffing shortage, it also faced similar shortages of its own. In December 2015, CP14 had a staff of six, working in borrowed office space and relying on donations from legal advocacy groups.<sup>80</sup> It was also unable to rely on manpower from the federal public defenders’ offices, after a July 31, 2014 opinion issued by the Administrative Office of the United States Courts effectively barred these lawyers from drafting or submitting clemency petitions.<sup>81</sup> Unlike OPA, they also faced a knowledge shortage: even with over 1,500 volunteer lawyers<sup>82</sup> working to screen and draft clemency petitions, many of them had no experience with criminal law or federal sentencing issues and required extensive training.<sup>83</sup>

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75 Peter Baker, *Obama Plans Broader Use of Clemency to Free Nonviolent Drug Offenders*, N.Y. TIMES, July 3, 2015, <https://www.nytimes.com/2015/07/04/us/obama-plans-broader-use-of-clemency-to-free-nonviolent-drug-offenders.html>.

76 Letter from Deborah Leff, *supra* note 33.

77 Krisai, *supra* note 42.

78 *Ibid.*

79 *Ibid.*

80 Keller, *supra* note 36.

81 See Alia Malek, *Federal Defenders Barred From Massive Clemency Drive*, AL JAZEERA, Aug. 1, 2014 <http://america.aljazeera.com/articles/2014/8/1/drugs-clemency-attorneys.html>.

82 See Lorelei Laird, *Clemency Project 2014 Is Out to Help Prisoners Doing Excessive Time Due to Inflexible Sentencing*, ABA JOURNAL, July 2015 [http://www.abajournal.com/magazine/article/clemency\\_project\\_2014\\_is\\_out\\_to\\_help\\_prisoners\\_doing\\_excessive\\_time](http://www.abajournal.com/magazine/article/clemency_project_2014_is_out_to_help_prisoners_doing_excessive_time)

83 Keller, *supra* note 36.

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74 Sari Horwitz, *Justice Department Prepares for Clemency Requests From Thousands of Inmates*, WASH. POST, Apr. 21 2014, [https://www.washingtonpost.com/world/national-security/justice-department-prepares-for-clemency-requests-from-thousands-of-inmates/2014/04/24/3237688-c964-11e3-a75e-463587891b57\\_story.html?utm\\_term=.9b296337dd37](https://www.washingtonpost.com/world/national-security/justice-department-prepares-for-clemency-requests-from-thousands-of-inmates/2014/04/24/3237688-c964-11e3-a75e-463587891b57_story.html?utm_term=.9b296337dd37).

The next administration must ensure that sufficient funding and resources are available to OPA *before* any initiative gets underway. If outside legal organizations will be assisting, they should meet with these groups and ensure that staffing and training are in place. Finally, whoever administers the initiative should create expedited procedures for obtaining information necessary for drafting a clemency petition. Instead of forcing attorneys to track down sentencing transcripts, PSRs, or other materials from courts, the U.S. Attorney’s Office, or defense counsel, the administration should ensure at the outset that procedures are in place to expedite requests for such information.<sup>84</sup> The BOP should also be directed to create streamlined processes for pro bono counsel to communicate with their clients about clemency petitions.<sup>85</sup> All of these procedures would go a long way toward reducing the time needed to complete an application and submit it to OPA.

### More Transparency

The next administration must also reconsider what criteria it will use to identify “worthy” clemency applications and work to clearly articulate how the criteria will be used. Although the focus of the Initiative was on drug offenses, the criteria never explicitly mentioned this, and BOP solicited interest from every person in federal prison, including people whose crimes were not the focus of the Initiative.<sup>86</sup> The criteria’s subjectivity also introduced substantial uncertainty in the process, given that the Initiative’s multi-review bureaucracy meant that these six criteria were being applied by twelve different reviewers at any given time.

The subjectivity of the criteria also thwarted a goal of the Initiative. Although an aim of was to restore trust and faith in our justice system, the six criteria injected a measure of uncertainty into the system: were the criteria simply a sorting mechanism to prioritize applications? Or were they factors that had to be met in order to qualify for the

Initiative?<sup>87</sup> In speaking with a CRC attorney who worked on a number of petitions, she expressed concern that the criteria were overly restrictive, in that petitioners who might otherwise be worthy of clemency were being excluded from CP14 unless they met every single criteria. The criteria also contributed to a feeling of randomness—petitioners and their attorneys described clemency grants under the Initiative as a lottery. One person in federal prison who served time with a clemency grantee questioned how this grantee was given clemency, because he was still involved in gang activity while incarcerated.<sup>88</sup> A USA Today article profiled two brothers, Harold and Dwayne Damper, who were convicted and sentenced for the same drug operation. Despite the more serious criminal record, Dwayne was granted clemency, while Harold’s petition was denied.<sup>89</sup> Indeed, the notion of the lottery is reflected in the Sentencing Commission’s analysis that the six criteria were only met by five percent of Initiative grantees and over 97 percent who met the criteria were left behind.<sup>90</sup>

In response to this criticism, White House Counsel Neil Eggleston noted that the Administration often had “more information about these people than others did,” including prison performance records and information about prior crimes,<sup>91</sup> suggesting that the White House Counsel was supplementing CP14 and OPA’s review with private information that was not shared with petitioners or

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87 When the Initiative was announced, the DOJ announced the criteria would be used to “prioritize[] consideration” of clemency applications. However, in other instances, they were referred to as “eligibility criteria,” and DAG Cole’s prepared remarks stated that the Initiative was “open to candidates who meet six criteria.” USSC Report at 8.

88 Seth Ferranti and Robert Rosso, *Obama’s Clemency Lottery*, THE FIX, July 7, 2015, <https://www.thefix.com/content/obama%E2%80%99s-clemency-lottery>.

89 Gregory Korte, *Two Brothers, Two Petitions for Clemency, Two Different Outcomes*, USA TODAY, Jan. 9, 2017, <https://www.usatoday.com/story/news/politics/2017/01/09/two-brothers-two-petitions-clemency-two-different-outcomes/96297020/>

90 USSC Report *supra* at 2 (identifying 2,687 people convicted of drug offenses in the BOP who met criteria as of January 19, 2017, and finding that 92 of them, or 3.4 percent, were granted clemency).

91 Maurice Chammah, *The Man Who Ran Obama’s Clemency Machine*, THE MARSHALL PROJECT, Feb. 14, 2017, <https://www.themarshallproject.org/2017/02/14/inside-obama-s-clemency-machine>. The prison performance records were available to the applicants and their counsel, so it is unclear what Eggleston means here.

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84 Although a process was eventually formalized for requesting PSRs, this was not established until the fall of 2016. See Collins, *supra* note 1.

85 *Ibid.*

86 Barkow and Osler, *supra* at 436.

their counsel. Of course, an acknowledgement that non-public information was being relied on, other than the four corners of a petitioner's application, just underscores the fact that the Initiative's criteria were not necessarily as important as they were initially portrayed, and that the clemency review structure sometimes operated in ways that did little to promote trust and faith in the clemency process.

### Re-Design Clemency

The use of criteria to screen applications raises a larger question: was this the best way to implement the Initiative? As a matter of institutional design, having up to twelve levels of review does not promote efficient decision-making in processing clemency requests—especially when each of level of review is left to interpret six subjective criteria like the ones promulgated by the Initiative. Given former OPA staff's observations about DOJ's intransigence, as well as the fact that the "vertical" review structure promoted strong incentives at each stage of the process to deny, not grant, the petition,<sup>92</sup> the path to clemency actually constricted with each criteria and level of review.

The next administration to tackle clemency must move away from this vertical, multi-level review process. For starters, the OPA should be moved out of the DOJ. Clemency experts have noted the inherent conflict of interest that exists when the same department that prosecutes cases is then asked to revisit whether the sentence was in fact too harsh.<sup>93</sup> While DAG Yates is right to observe that the DOJ is not the "Department of Prosecutions,"<sup>94</sup> removing OPA from DOJ solves the conflict (or perceived conflict) that exists when you ask career prosecutors to reverse other prosecutors' decisions, and substantially lessens the likelihood that such bias will infect the clemency process. If this proposal sounds radical, it is not: former White House Counsel Greg Craig unsuccessfully lobbied

for this exact reform back in 2009.<sup>95</sup> Craig wanted to create an expert commission answerable to the White House—not the DOJ—to screen candidates for clemency.<sup>96</sup> In justifying his proposal, Craig noted that DOJ had "an institutional interest in preserving convictions and preserving sentences."<sup>97</sup>

This redesign also has its roots in modern history: President Gerald Ford utilized a similar procedure when he created a special commission to review clemency petitions for those who were charged with Vietnam War draft evasion offenses.<sup>98</sup> Using specific criteria, the commission was charged with using its judgment to identify worthy applicants.<sup>99</sup> Notably, this did not result in a time delay, as about two-thirds of the requests were granted in a year.<sup>100</sup>

So what would a redesigned clemency process look like? Experts have proffered a variety of suggestions, from an independent agency comprised of experts who represent a range of interests in the criminal justice process,<sup>101</sup> to a process whereby categories of offenses are identified and then granted clemency, such as all individuals serving sentences for crack-cocaine offenses who were sentenced before 2010 (when the Fair Sentencing Act was passed).<sup>102</sup> While these approaches differ, the main goal is that they remove discretion from the DOJ, which the next administration should commit to, if meaningful clemency reform is to take hold.

92 Osler, *supra* at 489-91.

93 Barkow and Osler I, *supra* at 425-441; Rachel Barkow and Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHICAGO L. REV. 1, 18 (2015) (hereinafter "Barkow and Osler II"), [https://its.law.nyu.edu/faculty/profiles/representativeFiles/Barkow%20-RestructuringClemency\\_of608070-B097-A25A-1286ACC521972C2D.pdf](https://its.law.nyu.edu/faculty/profiles/representativeFiles/Barkow%20-RestructuringClemency_of608070-B097-A25A-1286ACC521972C2D.pdf);

94 Keller, *supra* note 36.

95 Keller, *supra* note 36; Gerstein, *supra* note 28.

96 Keller, *supra* note 36.

97 Gerstein, *supra* note 28.

98 *Ibid.*

99 Marc Mauer, Nancy Gertner, and Jonathan Simon, *Time For a Broad Approach to Clemency*, THE HILL, June 3, 2016, <http://thehill.com/blogs/congress-blog/judicial/282117-time-for-a-broad-approach-to-clemency>.

100 Gerstein, *supra* note 28.

101 Barkow and Osler II, *supra* note 87.

102 David Cole, *Why Hasn't Obama's Clemency Initiative Helped More Nonviolent Drug Offenders?* THE NEW YORKER, July 4, 2016, <https://www.newyorker.com/news/news-desk/why-hasnt-obamas-clemency-initiative-helped-more-nonviolent-drug-offenders>; Mauer, et al., *supra* note 93.



## Re-Imagine Clemency

At its roots, clemency is an extra-legal concept designed to check other branches of government. As Alexander Hamilton described it in the Federalist Papers, clemency exists for reasons of “humanity and good policy,” and to provide “easy access to exceptions.”<sup>103</sup> This reflects both a commitment to the “ancient value of mercy,” as well as the idea that clemency served as a counter-balance to guard against overzealousness and mistakes made by other branches of government. It checks the legislative branch because of the “inevitable instinct of legislators, propelled by political impulse, to create harsh sentences against unpopular criminals that would prove disproportionate in particular cases.”<sup>104</sup> It also allows the President to oversee and check federal prosecutors who go too far in their charging decisions and creates a compensatory tool to ensure that “laws do not extend to cases where it would be unjust....”<sup>105</sup> But these goals can only be properly achieved when the clemency power is exercised independent of the prosecutors who sought the sentences in question, and the president is willing to issue grants not only when laws have changed, but when harsh laws remain on the books and result in disproportionate sentences in particular cases.

Re-imagining clemency also means (i) recognizing that people are not the sum total of the worst thing they have done, (ii) rethinking the role that second chances ought to have in our criminal justice system, and (iii) accepting that part of clemency is taking it is taking on a certain amount of risk by giving someone a second chance. As Professor Mark Osler notes, clemency “does involve risk,” if only because it is supposed to afford someone a second chance at a “real and meaningful period of adult

life.”<sup>106</sup> Re-imagining also means recognizing the tension between a fully reinvigorated clemency power and the type of grants given to David Vaught, Marvin Anthony, and David Barren, all of whom will be in their sixties, and in one case nearly seventy, before they get to start their “second chance.”

Re-imagining clemency also means moving away from the rhetoric of “exceptionalism.” This does not mean ignoring the fact that President Obama gave many people that real and meaningful second chance. What it does mean is moving beyond promoting a story of “exceptionalism”—exceptional mercy by the President for people who were “uniquely deserving” of a second chance<sup>107</sup>—because this ignores the fact that, as the statistics and the human stories show, there were many “exceptional” people who were left behind. As one clemency recipient stated, “I have a list of names of people I would like to see come home. But there are even more people who I’ve never met. To give a list of names would exclude too many people.”<sup>108</sup>

Thus, re-imagining clemency means that the next administration must reject the “fallacy” that clemency is only a “second chance” given to a small number of “deserving” individuals.<sup>109</sup> It means recognizing that granting clemency to people like David Vaught is not really in keeping with the spirit of clemency. Instead, it just lays bare the following tension: if the Initiative sought to rectify sentences that were disproportionate and cruel—and if clemency is the only avenue of relief—then what was the purpose of keeping him in prison for another 16 years? The next administration to consider clemency must commit to resolving this tension and to “a deeper rethinking of what we consider a second chance.”<sup>110</sup>

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103 Dennis Cauchon, *Mr. President, You're Doing Clemency Wrong. It's Not About the Law, It's About Mercy*, WASH. POST, July 17, 2015, [https://www.washingtonpost.com/opinions/obama-is-wrong-granting-clemency-isnt-a-legal-decision/2015/07/17/234612fo-2bf9-11e5-bd33-395c05608059\\_story.html?utm\\_term=.60d8984cod37](https://www.washingtonpost.com/opinions/obama-is-wrong-granting-clemency-isnt-a-legal-decision/2015/07/17/234612fo-2bf9-11e5-bd33-395c05608059_story.html?utm_term=.60d8984cod37).

104 Barkow and Osler II, *supra* at 17.

105 Rachel Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 851-866 (2015), [https://its.law.nyu.edu/faculty/profiles/representativeFiles/Barkow%20-Clemency&Presidential\\_OF5B0049-B3C1-FA6C-57B3C73A5EF4A162.pdf](https://its.law.nyu.edu/faculty/profiles/representativeFiles/Barkow%20-Clemency&Presidential_OF5B0049-B3C1-FA6C-57B3C73A5EF4A162.pdf).

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106 Ciaramella, *supra* note 24.

107 Lilita Segura, *Obama's Clemency Problem-And Ours*, THE INTERCEPT, Dec. 24 2016, <https://theintercept.com/2016/12/24/obamas-clemency-problem-and-ours/>

108 *Ibid.*

109 *Ibid.*

110 *Ibid.*

# Conclusion

President Obama’s clemency initiative reinvigorated the clemency power, and his commitment to giving people a second chance should be commended. However, celebrating the grants he made cannot be done in a vacuum. If we are to change the criminal justice system and the way it conceives of sentencing, punishment, and second chances, we also need to understand how it was that 18,749 people were denied that same chance, and another 8,880 people never received any answer about their request for mercy.<sup>111</sup> And if a properly functioning justice system includes a robust application of the clemency power, then we must confront the Initiative’s shortcomings regarding how it identified “worthy” recipients. The idea that clemency was only worthy for 1,696 individuals in the federal prison system is a far cry from the initial 10,000 figure that Holder initially predicted. Beyond even that, however, it reflects a presumption that second chances in the justice system are only for the exceptional few. It is this attitude that needs to be changed if criminal justice reform—and not just clemency—is to truly be successful.

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111 Rebecca McCray, *In Obama’s Final Hours, Many Prisoners Left in Commutation Limbo*, ROLLING STONE, Jan. 20, 2017, <https://www.rollingstone.com/politics/features/in-obamas-final-hours-prisoners-left-in-commutation-limbo-w462116>.



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