

**Justice Department Administration of the President's Pardon Power:
A Case Study in Institutional Conflict of Interest**

By Margaret Colgate Love*

I. Introduction

The president's constitutional pardon power has been administered by the attorney general since before the Civil War, but this arrangement has never been adequately explained or justified. On its face it appears rife with conflict of institutional interests: how could the agency responsible for convicting people and putting them in prison also be tasked with forgiving them and setting them free? In spite of these apparently antithetical missions, the Justice Department managed the pardon program in a low-key and reliable manner for well over a century, staffing it with a handful of career lawyers operating on a shoestring budget, and churning out hundreds of favorable clemency recommendations each year for the president's consideration. While there were occasionally controversial grants there were never scandalous ones, and the president was able to use his power to good effect in wartime and in peace.¹

It is only in the past two decades that questions have been raised about the integrity and functionality of the pardon process, focusing squarely on the agency and individuals purporting to control access to the president's power. One commentator, writing shortly after President Bill Clinton's shocking final pardons, remarked that "the pardon process seems to have been captured by the very prosecutors who run our inevitably flawed criminal justice system."² More recently, a former White House Counsel remarked that "we cannot improve or strengthen the exercise of this power without taking it out of the Department of Justice" because "federal prosecutors are not the people seen as being reliable or impartial advisors to the President in the exercise of this function."³ During the presidency of George W. Bush, the Department's inspector general found that the pardon attorney himself had been guilty of misconduct in processing applications for clemency, in one case providing the White House erroneous advice that led the president to deny relief he was apparently otherwise inclined to give.⁴ President Obama has

* Law Office of Margaret Love. Former U.S. Pardon Attorney (1990–1997). I am grateful for the guidance and encouragement of Richard Cassidy, Susan Martyn, Judge Pat Wald, and my daughter Jenny Osborne.

¹ The administration of the president's pardon power from 1789 to 1980 is described in Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIME & CRIMINOLOGY 1169, 1173-93 (2010) (hereinafter "Twilight").

² See Evan Schultz, *Does the Fox Control Pardons in the Henhouse*, 13 FED. SENT. R. 177 (2001), originally published as *Pardoning Around (Outside of) the Rules*, LEGAL TIMES, Mar. 12, 2001.

³ Gregory Craig, Counsel to President Obama (2008-2009), Remarks at the American Constitution Society Conference on Pardons, May 10, 2012, <http://www.propublica.org/documents/item/356129-greg-craigs-remarks-at-the-ac-s-conference-on>.

⁴ See OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, A REVIEW OF THE PARDON ATTORNEY'S RECONSIDERATION OF CLARENCE AARON'S PETITION FOR CLEMENCY (Dec. 2012), <http://www.propublica.org/documents/item/541206-doj-oig-review-of-the-pardon-attorneys>; see also

himself expressed “frustration” with the nature of the clemency advice provided him by the Justice Department in cases involving long mandatory drug sentences.⁵

President Obama’s decision in early 2014 to launch a large-scale clemency initiative,⁶ and the Justice Department’s unprecedented decision to rely upon a consortium of private organizations to manage it,⁷ make this a propitious time to consider whether the presidency is well-served by an arrangement making officials responsible for prosecuting crime the primary source of clemency advice.

This essay concludes that the culture and mission of the Justice Department have in recent years become determinedly and irreconcilably hostile to the beneficent purposes of the pardon power, and to its regular use by the president. The resulting institutional conflict of interest⁸ calls into question the continued viability of a system for controlling access to the pardon power that has existed for more than 150 years. Even returning advisory responsibilities to the attorney general in her capacity as a member of the president’s cabinet will not suffice to allow the Justice Department to remain as gatekeeper for clemency applicants. Fortunately, there is a readily available alternative that would retain the best aspects of the current advisory system and minimize its disadvantages. While questions about the specific role pardon should play in the federal justice system may interest readers, they will not be addressed here.

I do not claim originality for the idea that the pardon process must be restructured because the hostility of federal prosecutors has frustrated the president’s use of his

Dafna Linzer, *Brooklyn Minister, Target of Racist Comments by Former Pardon Attorney, Waits For a Second Hearing*, ProPublica, Jan. 16, 2009, <http://www.propublica.org/article/brooklyn-minister-target-of-racist-comments-by-former-pardon-attorney-waits>; George Lardner, Jr., *Begging Bush’s Pardon*, N.Y. TIMES, Feb. 8, 2008, <http://www.nytimes.com/2008/02/04/opinion/04lardner.html> (describing the backlog of clemency applications in Justice, and the charges that resulted in the pardon attorney’s resignation).

⁵ See Nedra Pickler, *Obama Commutes Sentences for 8 Drug Convictions*, AP, Dec. 19, 2013, http://hosted2.ap.org/APDEFAULT/3d281c11a96b4ad082fe88aa0db04305/Article_2013-12-19-US-Obama-Commutations/id-a60e84aae5604a42963097e46504012e; see also Charlie Savage, *Obama Commutes Sentences for 8 in Crack Cocaine Cases*, N.Y. TIMES, Dec. 20, 2013, <http://www.nytimes.com/2013/12/20/us/obama-commuting-sentences-in-crack-cocaine-cases.html> article in Dec. 2013.

⁶ <http://www.justice.gov/pardon/new-clemency-initiative>.

⁷ See Josh Gerstein, *Grassley Questions Commutation Drive*, THE POLITICO, January 13, 2015, <http://www.politico.com/blogs/under-the-radar/2015/01/grassley-questions-obama-commutation-drive-201027.html>. See also Gerstein, *Obama’s Drug Sentencing Quagmire*, THE POLITICO, January 5, 2015, <http://www.politico.com/story/2015/01/barack-obama-drug-sentencing-policy-113954.html>.

⁸ The term “institutional conflict of interest” is customarily used in the context of government-supported scientific research to describe a situation where a research institution’s financial interests (or those of its senior officials) pose a risk of undue influence over the design or execution of a research project. See Department of Health and Human Services, Office of Inspector General, *Institutional Conflicts of Interest at HHS Grantees*, January 2011, <https://oig.hhs.gov/oei/reports/oei-03-09-00480.pdf>. This article is concerned with institutional conflict of a different sort, one that involves incompatible or even irreconcilable allegiances or responsibilities within an organization. See notes 62 through 64, *infra*.

constitutional power.⁹ The contribution of this article will be to reflect on the way the present advisory system came into being and served the presidency for more than a century, to analyze why it has become irreparably dysfunctional, and to recommend a simple administrative way to restore pardon to the role envisioned for it by the Framers.

II. Administration of the Pardon Power from 1789 to 1980

In the *Federalist Papers*, Alexander Hamilton justified giving the president exclusive control of the “benign prerogative of pardoning” in terms of two great public purposes: tempering the law’s harsh results as a matter of compassion, and interceding to avoid political damage.¹⁰ In a government otherwise of limited powers, public opinion was the only check on the president’s pardoning.¹¹

While Hamilton believed that the president alone was “a more eligible dispenser of the mercy of the government than a body of men,” he did not explain how the president was supposed to exercise this awesome unfettered power. Early presidents pretty much made it up as they went along, predictably falling into the habit of relying on those most familiar with the criminal process. Thomas Jefferson initiated a practice of seeking the views of district attorneys and judges, a practice continued by his successors.¹² Presidents also relied on their attorneys general for advice about how and when to exercise their constitutional power.¹³

⁹ Scholars who have urged removal of the clemency process from the Justice Department include Paul J. Larkin, Jr., *Clemency 2.0* 1, 41-42 (Heritage Foundation 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649941; Rachel Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 13-15, 18-19 (2015); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 606 (2013); and The Editorial Board of the New York Times has also urged an “overhaul” of the clemency process to “tak[e] it out of the hands of the Justice Department, where federal prosecutors with an inevitable conflict of interest recommend the denial of virtually all applications.” *It’s Time to Overhaul Clemency*, N.Y. TIMES, Aug. 18, 2014, http://www.nytimes.com/2014/08/19/opinion/its-time-to-overhaul-clemency.html?_r=0.

¹⁰ THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As to the first of these purposes, Hamilton observed that “without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.” With respect to the second, he proposed that “in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth.”

¹¹ *Id.* (“Humanity and good policy conspire to dictate that the benign prerogative of pardoning be as little as possible fettered or embarrassed.”). While the prospect of punishment at the polls or impeachment may have little persuasive value for a president at the end of his term, the Framers believed that the president would always be restrained by the risk of what James Iredell called “the damnation of his fame to all future ages.” JAMES IREDELL, ADDRESS IN THE NORTH CAROLINA RATIFYING CONVENTION (1788), reprinted in THE DEBATE ON THE CONSTITUTION, at 380–82 (Bernard Bailyn, ed., The Library of America 1993).

¹² See George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT’G REP. 212, 220, n. 21 (2004)(citing Jefferson’s statement in National Archives and Records Administration, Petitions for Pardon – 1789–1860, Record Group 59//893, box 2, file 104).

¹³ See HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE 149 (1937).

In the early years of the Republic, the pardon power played an essential operational part in what was still a relatively primitive justice system, just as it was in England.¹⁴ Evidently unimpressed by the dire predictions of the Utilitarian philosophers of the Enlightenment,¹⁵ presidents used the pardon power regularly and generously to benefit ordinary people for whom the results of a criminal prosecution were considered unduly harsh or unfair, as well as for reasons of statecraft.¹⁶ This kind of low-level pardoning took place largely out of the public eye, and presidents spent what seems today like a great deal of their time in office personally mulling pardon requests. Frequently these requests came from judges compelled to apply laws they regarded as excessively harsh, or from federal prosecutors who had second thoughts about a criminal defendant's punishment, and sometimes even about his guilt.¹⁷

At a time when basic principles of culpability were still loosely defined, and courts had only limited authority to review a jury's guilty verdict or vary statutory penalties, pardon performed a variety of important error-correcting and justice-enhancing functions that made it almost as valuable to prosecutors and judges as it was to criminal defendants.¹⁸

¹⁴ See Douglas Hay, *Property, Authority and the Criminal Law*, in DOUGLAS HAY ET AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN 18TH CENTURY ENGLAND* 44 (1975) (Pardon "moderated the barbarity of the criminal law in the interests of humanity. It was erratic and capricious, but a useful palliative until Parliament reformed the law in the nineteenth century.").

¹⁵ See KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST* 35-45 (1989). For example, Cesare Bonesana, Marchese Beccaria, wrote in 1764:

Clemency is a virtue which belongs to the legislator, and not to the executor of the laws; a virtue which ought to shine in the code, and not in private judgment. To shew mankind that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to nourish the flattering hope of impunity, and is the cause of their considering every punishment inflicted as an act of injustice and oppression. The prince in pardoning gives up the public security in favour of an individual, and, by his ill-judged benevolence, proclaims a public act of impunity.

OF CRIMES AND PUNISHMENTS, Chapter 46 (*Of Pardons*) (Philip H. Nicklin, ed. 1819).

¹⁶ Examples of pardon used as a tool of statecraft abound in American history, often linked to wartime exigency or post-war amnesties. See *Twilight*, *supra* note 1 at 1173-75 (footnotes omitted):

George Washington granted his first pardons in 1794 to Pennsylvania farmers challenging the federal government's power to tax whiskey. Sixty years later, Abraham Lincoln used the pardon power to bring a measured end to another dangerous internal rebellion, this time involving the "largest massacre of whites by Indians in American history." Presidents since Thomas Jefferson have issued post-war pardons to deserters and draft evaders and issued pardons to signal their disagreement with a law. Pardon has also figured in such politically divisive issues as labor organizing, race relations, polygamy, and Puerto Rican independence. Arguably the most famous statecraft pardon is Gerald Ford's of Richard Nixon.

¹⁷ See generally Lardner & Love, *supra* note 12.

¹⁸ See, e.g., Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 *UCLA L. REV.* 503, 531-43 (1992). The attorney general's practice of reporting the reasons for each clemency recommendation tells a grim story about federal justice in the late nineteenth and early twentieth centuries, suggesting that little progress had been made toward the humane and efficient system that Enlightenment philosophers like Kant and Beccaria had expected would eliminate the need for pardon. Between 1885 and 1931, 181 pardon recommendations were based in whole or in part upon "doubt as to guilt;" 52 cited "insufficient evidence" to support conviction; 93 announced that grantees were innocent or the victims of

Considering this, it is not surprising that presidents granted clemency to a high percentage of those who asked for it, forestalling or halting prosecutions, cutting short prison sentences or remitting them entirely, forgiving fines and forfeitures, and restoring citizenship rights lost as a result of conviction. Pardon also played an important role in hastening reforms in the legal system, a function that would likely have been approved by the otherwise critical Utilitarians.¹⁹

Until the Department of Justice was established in 1870, the secretary of state (one of only three cabinet secretaries) was the official custodian of pardon documents and theoretically responsible for investigating applications for relief.²⁰ In 1852 Daniel Webster, Millard Fillmore's secretary of state, formally handed over responsibility for investigating and making recommendations on clemency petitions to the attorney general, though the State Department still issued pardon warrants and kept the pardon archives.²¹ But the actual process for considering applications remained informal and idiosyncratic.²² During the Civil War, Lincoln's attorney general Edward Bates was the first to understand how important it was to control access to the president, and he assigned his personal secretary Edmund Stedman to keep track of those to whom the kind-hearted chief executive had promised mercy.²³

mistaken identification; and 46 noted the "dying confession of the real murderer." W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* tbls. 5 & 6.(1941).

¹⁹See U.S. DEP'T OF JUSTICE, 3 *THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON* 295-96 (1939) (pardon "has been the tool by which many of the most important reforms in the substantive criminal law have been introduced"). Specific law reforms propelled by pardon trends are described in Love, *Twilight*, *supra* note 1 at 1185-87. After the federal experiment with parole was abandoned in 1984, and a system of determinate sentences reinstated, some scholars predicted that pardon would once again claim a useful role. See MOORE, *supra* note 15 at 86 (speculating that the abolition of federal parole could lead to "an expanded and crucial role for pardons").

²⁰ See generally Lardner & Love, *supra* note 12. Journalist George Lardner, Jr. is preparing a comprehensive history of presidential clemency based on extensive research in State Department and Presidential archives, and he has generously shared with me several draft chapters of his untitled manuscript. Most of the information about pardoning prior to 1858 comes from the chapter tentatively titled "A Golden Age for the Pardon Power."

²¹ See CUMMINGS & MCFARLAND, *FEDERAL JUSTICE*, *supra* note 13 at 149. President Cleveland transferred authority to issue pardon warrants to the Justice Department by executive order in 1893. See Lardner & Love, *supra* note 12 at 220 n.21 (citing Exec. Order of June 16, 1893) (on file at the Office of the Pardon Attorney).

²² George Lardner reports that President Polk "was his own pardon attorney," who wrote careful notes, demanding copies of indictments and court records, insisting on reports from judges and district attorneys . . . His pardons often provided harsh glimpses of the justice system, setting out a judge's admissions about the unreliability of a key prosecution witness in one case, a jury's belated discovery of false testimony in another, and in yet another the incompetence of a steamboat inspection that left a crippled captain facing civil prosecution because his boiler exploded. Lardner, *supra* note 20 at 341 (citations omitted).

²³ Stedman reported, "My chief, Attorney General Bates, soon discovered that my most important duty was to keep all but the most deserving cases from coming before the kind Mr. Lincoln at all; since there was nothing harder for him to do than put aside a prisoner's application." J. T. Dorris, *President Lincoln's Clemency*, 20 J. ILL. ST. HIST. SOC'Y 547, 550 (1953) (citing LAURA STEDMAN & GEORGE M. GOULD, 1 *LIFE*

After the Civil War, a regime in which a petitioner could appear personally before the president to plead for a pardon had become impracticable as the federal justice system grew in size and complexity. Moreover, a system based on personal access made it too difficult for a president to say no and too easy for individuals with a personal or political agenda to influence the exercise of presidential power. The solution to both problems was to place the administration of the pardon power firmly and exclusively in the hands of the attorney general and his new agency, the Department of Justice.²⁴ This made sense not just to avoid compromising the president or wasting his time (functions that could as readily have been performed as before by the secretary of state), but also to ensure that the pardon power would function as an integral part of the criminal justice system.

From the beginning, the Justice Department considered its role in pardon matters as that of an honest broker, whose responsibility it was to provide the president with “an impartial representation of the case,” and “to accord to the convict all that he may be fairly entitled to have said in his favor.”²⁵ That the Department took its role as neutral arbiter seriously is evidenced by the hundreds of favorable recommendations it sent to the president each year. Federal prosecutors had a key role in producing this rich harvest, as is evidenced by the deference shown their recommendations in the Department’s clemency regulations.²⁶ Ensuring a central role in the pardon process to those officially responsible for the underlying criminal case gave the president access to information about the case, and helped insulate him from political pressure and importuning.²⁷

Though there were never more than half a dozen people working in the Office of the Pardon Attorney, the program was extremely efficient judging by the large number of prisoners who gained release prior to the expiration of prison sentences that were measured

AND LETTERS OF EDMUND CLARENCE STEDMAN 265 (1910)). Indeed, the Attorney General reportedly declared that President Lincoln was “unfit to be trusted with the pardoning power” because he was too susceptible to women’s tears. RICHARD N. CURRENT, *THE LINCOLN NOBODY KNOWS* 169 (1958).

²⁴ See Exec. Order of June 16, 1893 (on file at the Office of the Pardon Attorney).

²⁵ See Love, *Twilight*, *supra* note 1 at 1179, quoting from an April 1887 report to Congress by Clerk of Pardons Andrew Boteler. Report 507, Part 3, 50th Cong., 1st Sess., 20–23.

²⁶ See, e.g., “Rules Relating to Applications for Pardon,” February 3, 1898, at Rules 1, 3, 4 (signed by President William McKinley and Attorney General John Griggs) (on file with U.S. Dep’t of Justice, Office of the Pardon Attorney), discussed in *Twilight*, *supra* note 1 at 1181-82. See generally the detailed description of the pardon process between 1893 and 1940 in HUMBERT, *supra* note 18 at 82-94.

²⁷ This is not to say that Justice Department prosecutors were always supportive of a president’s inclination to mercy. For example, in 1932 General William Mitchell commented in a speech to the American Bar Association on the tension that sometimes arose between prosecutors determined to enforce the criminal laws severely, and President Hoover, a veteran practitioner of humanitarian relief. In such cases, the Attorney General seems to have wisely sided with his chief. See Humbert, *supra* note 18 at 121 (quoting Address, Reform in Criminal Procedure, October 13, 1932) (“President Hoover, with a human sympathy born of his great experiences in the relief of human misery, has now and again, not for great malefactors but for humble persons in cases you never heard of, been inclined to disagree with the prosecutor’s viewpoint and extend mercy. We have been glad when such incidents occurred.”)

in months rather than years.²⁸ Even after parole siphoned off the bulk of prisoner cases from the pardon caseload after 1910, several hundred post-sentence pardons (“to restore civil rights”) remained a popular way for the president to recognize and reward rehabilitation where people who had served their sentence had returned to productive lives in the community.²⁹ There were an average of several hundred such grants every year until the Reagan Administration.

As long as the pardon process functioned in an orderly manner and produced a significant number of grants at regular intervals, it had important benefits both for the presidency and for the criminal justice system itself. The president was protected in his exercise of the power by the thoroughness and perceived fairness of the Justice Department’s review, and in turn was able to give policy guidance to executive officials responsible for conducting prosecutions and managing prisons. The president spoke through the pardon power to the other branches of government, both of which appeared to listen.³⁰ It was the regularity and accessibility of the administrative process that maintained a level of public confidence in pardoning, and that in turn kept the president from being suspected of abusing his power even when he occasionally did.³¹ That was all about to change.

III. Public Mercy in the War on Crime

After 1980 presidential pardoning went into a steady decline. While sentence commutations had been relatively rare since the Johnson Administration, post-sentence pardons were still fairly routine through the 1970s, when Presidents Nixon, Ford and Carter each granted 30% or more of the applications received during their terms.³² But the grant rate under President Reagan dropped to 20%, and to less than 10% under the next three presidents.³³ In September 2015, midway through his seventh year in office, President

²⁸ Before the 1920s, it is hard to find a court-imposed prison sentence longer than five years in the attorney general’s clemency charts; even after that, prison sentences as long as ten years were relatively infrequent. *See* 1885–1931 ATT’Y GEN. ANN. REP. (1885–1931).

²⁹ *See* U.S. DEP’T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, CLEMENCY STATISTICS (1995 TO PRESENT) (hereinafter “PARDON STATISTICS”), <http://www.justice.gov/pardon/clemency-statistics>. An average of 150 post-sentence pardons were issued each year between 1960 and 1980.

³⁰ A 1939 Justice Department survey of release procedures in the United States pointed out that pardon was the “direct or collateral ancestor of most [statutory release procedures].” In addition, pardon was “the tool by which many of the most important reforms in the substantive criminal law have been introduced.” *See* ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES, *supra* note 19 AT 295.

³¹ It is no accident that the president tended to get in trouble with pardons only when he failed to utilize the Justice Department’s pardon process. *See* Walter Trohan, *Bridges Seeks to End Secrecy in U.S. Pardons*, N.Y. HERALD TRIB., Aug. 30, 1953, at 10 (President Truman accused of cronyism in pardoning seven current or former government officials on his way out of office, without Justice Department advice).

³² *See* CLEMENCY STATISTICS, *supra* note 29.

³³ President Clinton’s irregular last-minute pardoning splurge raised his overall pardon grant rate to just under 20%, but only because he refused to deny any pardon applications in his final two years, reportedly out of concern about his overall pardoning record. *See* JUSTICE UNDONE: CLEMENCY DECISIONS IN THE CLINTON WHITE HOUSE: BEFORE THE HOUSE COMMITTEE ON GOVERNMENT REFORM, H. REP. NO. 107-454, 107th Cong. 2d Sess.; *see also* BARBARA OLSON, THE FINAL DAYS 1311 (2001) (hereinafter “JUSTICE

Obama had granted fewer pardons than any full-term president since John Adams, acting favorably on only about 3% of the applications received.³⁴ At the same time, the demand for pardon expressed in terms of number of applications filed each year remained about the same. After 1990, mandatory no-parole sentences resulted in skyrocketing commutation filings, though actual grants were rare.³⁵

What accounts for this dramatic drop-off in the president's use of his pardon power? It is tempting to blame retributivist theories of "just deserts"³⁶ and the politics of the "war on crime" as having made executive clemency seem at once contrary to the rule of law and dangerous enough to ruin a political career. It is especially understandable that presidents would want to avoid commuting prison sentences, an activity for which they get little credit while taking substantial risks, and that may be interpreted as interference with a carefully constructed scheme of legislative penalties. But neither of those concerns is directly implicated in the case of post-sentence pardons, where typical applicants have long since completed their court-imposed punishment and been functioning as productive members of society for many years.

There had to be more at work after 1980 to cause such a radical change in what had for two centuries been an ordinary housekeeping activity of the American presidency. All signs point to a new hostility of federal prosecutors toward any form of clemency, and a change in the Justice Department's process for managing the pardon power that gave prosecutors effective control over it.

The first fateful step in the transformation of the pardon process was taken apparently without much consideration of its implications, when Attorney General Griffin Bell decided toward the end of the Carter Administration to delegate responsibility for approving and transmitting clemency recommendations to subordinate departmental officials. This delegation was made formal early in the Reagan Administration, when Attorney General William French Smith gave authority to transmit pardon recommendations to the White House to departmental officials responsible for developing

UNDONE") (Justice Department instructed by the White House in the fall of 2000 to stop sending denial recommendations to the President).

³⁴ *Id.*

³⁵ *Id.* President Obama expressed an interest early in his second term in commuting more prison sentences, and by August of 2015 had freed 89 prisoners through his pardon power, more than his four predecessors combined. Yet this was still a tiny percentage of the thousands who had applied for clemency relief, and likely a small percentage of those eligible for relief under criteria announced by the Justice Department in the spring of 2014. See <http://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new>. At the time of this writing more than 8500 applications for commutation were pending in the Office of the Pardon Attorney, and three times that many were under consideration by Clemency Project 2014, the consortium of private organizations established to secure volunteer lawyers for deserving prisoners seeking release. See Peter Baker, *Obama Plans Broader Use of Clemency to Free Nonviolent Drug Offenders*, N.Y. TIMES, July 16, 2015, http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html?_r=0.

³⁶ See, e.g., Moore, *supra* note 15 at 66-78 (retributivist backlash against rehabilitative ideal embodied in indeterminate sentencing); see also *id.* at 35-45 (utilitarianism disapproval of pardon) and note 14 *supra*.

and implementing prosecution policy.³⁷ At the same time, the Office of the Pardon Attorney was sent packing to a remote Maryland suburb, and the pardon attorney himself denied both executive status and an invitation to senior Justice Department staff meetings. No one could miss the signals sent by the pardon attorney's exile, and functional subservience soon followed.

The formal transfer of responsibility for the pardon program from the attorney general to the official responsible for liaison with prosecutors in the field transformed the general tenor of the advice the president would receive from the Justice Department from that time onwards. One departmental official, himself a former prosecutor, explained in 1988 that "the administration's use of career prosecutors to screen pardon requests has 'resulted in a natural inclination for tighter scrutiny.'"³⁸ The pardon attorney himself had earlier conceded that he had become more "exacting" in his scrutiny of pardon applications, "to better reflect the administration's philosophy toward crime."³⁹ In 1993, to manage an increase in commutation filings, the pardon attorney was directed by staff in the Deputy Attorney General's Office to prepare summary reports recommending denial of clemency in all cases except those in which a Member of Congress or the White House had expressed an interest.⁴⁰

Instead of serving as an independent source of advice for the attorney general in his capacity as counselor to the president, the office of the pardon attorney became subsumed,

³⁷ See Order No. 1012-83, 48 Fed. Reg. 22290 (May 18, 1983), promulgating 28 C.F.R. §§ 0.35-0.36. Twenty-four of the 29 Justice Department officials responsible for overseeing the pardon program since 1980 have been former prosecutors, in many cases former United States Attorneys. Sally Yates, the incumbent deputy attorney general, identifies herself as a "career prosecutor." See, e.g., *Remarks at the Bipartisan Summit on Fair Justice*, July 22, 2015, <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-bipartisan-summit-fair>. Four of the five officials who were not prosecutors themselves assigned a career prosecutor on their staff to oversee the pardon program, and delegated authority to him to sign recommendations to the president. See Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT. RPT. 125, 126 n. 23 (2001) The only one of the five who did not was William Barr, who was responsible for the pardon program as deputy attorney general from 1989 to 1990, and who later served as attorney general (1990 to 1993).

³⁸ See Larry Margasak, *Any Pardons Would Come After Election Day, Observers Say*, Assoc. Press, Jan. 18, 1988 (quoting Deputy Associate Attorney General William Landers); see also as saying that In 1993, to manage an increase in commutations filings, the pardon attorney was directed to prepare summary reports recommending denial of clemency in all cases except those in which a Member of Congress or the White House had expressed an interest.

³⁹ See Pete Earley, *Presidents Set Own Rules on Granting Clemency*, Wash. Post, Mar. 19, 1984, at A17 (quoting Pardon Attorney David Stephenson).

⁴⁰ See Memorandum from then-ODAG staffer Roger Adams to Margaret Love (Oct. 23, 1993) (on file with author). While this directive was later retracted, its spirit continued to inform the Justice Department's administration of the pardon power after Mr. Adams was appointed pardon attorney in 1997. Of the sixty-one commutations granted by President Clinton during his eight years in office, no more than a handful were favorably recommended by the Justice Department. Several of these were requested by prosecutors to correct a mistake of their own making. See Exec. Grant of Clemency to Alain Orozco, July 5, 2001, *discussed in* David M. Zlotnick, *Federal Prosecutors and the Clemency Power*, 13 FED. SENT'G REP. 168, 169 (2001) (cooperator for whom prosecutor had neglected to timely file a sentence reduction motion); Exec. Grant of Clemency to Johnny Palacios, Aug. 21, 1995 (on file with Office of the Pardon Attorney) (same).

in operation and philosophy, by the Department's law enforcement components. No longer did the Justice Department feel its old obligation "to accord to the convict all that he may be fairly entitled to have said in his favor."⁴¹ Rather, it treated every clemency petition as a potential challenge to the law enforcement policies underlying the conviction, and to the authority of its prosecutors.⁴² Even when Attorney General Janet Reno herself confided to the pardon attorney that she would like to encourage President Clinton to issue more pardons, career prosecutors in responsible policy positions made sure that did not happen.

Once pardon policy became part and parcel of a tough-on-crime agenda, pardon practice served primarily to ratify the results achieved by prosecutors, not to provide any real possibility of revising them. Department officials did nothing to encourage interest at the White House in the routine work of pardoning, so the number and frequency of ordinary clemency grants declined. It became more common for the president to by-pass the Justice Department process entirely in cases that interested him, particularly if he thought he wouldn't get the advice he wanted.⁴³ It is no wonder, in light of the relentless negativity of the pardon advice coming from Justice.⁴⁴

⁴¹ See *supra* note 25.

⁴² This tendency was remarked upon by the Editorial Board of the New York Times in January 2013: Presumably, the president is willing to use acts of clemency to right the wrongs of the sentencing and judicial systems. Yet the same cannot be said of the Justice Department, which has a prosecutorial mind-set. It has undermined the process with huge backlogs and delays, and sometimes views pardons as an affront to federal efforts to fight crime.

The Quality of Mercy Strained, N.Y. TIMES, Jan. 5, 2013, http://www.nytimes.com/2013/01/06/opinion/sunday/the-quality-of-mercy-strained.html?ref=opinion&_r=0.

⁴³ See, e.g., Hearings Before the Senate Judiciary Committee Concerning Clemency for FALN Members, 106th Cong., 2d Sess., 1999 WL 27595875 (Oct. 20, 1999) (revealing that the cases of 16 Puerto Rican Nationalists had been staffed inside the White House). Between 1953 and 1999, there were only three occasions on which the President did not follow the established Justice Department procedure for handling pardons: 1) President Ford's 1975 pardon of Richard Nixon; 2) President Reagan's 1981 pardon of two FBI officials who had authorized illegal surveillance of radicals; President Bush's 1992 pardon of six Iran-Contra defendants. See Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1496, nn. 3, 50 (2001).

⁴⁴ See Dafna Linzer & Jennifer LaFleur, *ProPublica Review of Pardons in Past Decade Shows Process Heavily Favored Whites*, WASH. POST, Dec. 3, 2011, http://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElNVQO_story.html:

In 2006, White House Counsel Harriet Miers became so frustrated with the paucity of recommended candidates that she met with Adams and his boss, Deputy Attorney General Paul McNulty. Adams said he told Miers that if she wanted more recommendations, he would need more staff. Adams said he did not get any extra help. Nothing changed. "It became very frustrating, because we repeatedly asked the office for more favorable recommendations for the president to consider," said Fielding, who was Bush's last White House counsel. "But all we got were more recommendations for denials."

See also *The Controversial Pardon of International Fugitive Marc Rich: Hearings Before the H. Comm. on Government Reform*, 107th Cong. 1st Sess. 342-43 (2001) (testimony of Beth Nolan, Counsel to former President Clinton, describing unresponsive Justice Department pardon process at the conclusion of the Clinton Administration, and the ensuing frantic effort at the White House in the final weeks to process the hundreds of clemency requests coming directly to the White House). Samuel Morison, a former staff

It is also no wonder that both Bill Clinton and George W. Bush, deluged with pardon requests from well-connected friends and former colleagues at the end of their terms, found themselves without a reliable administrative process to fall back on. To his credit, President Bush was able to resist the flood of favor-seekers that he later said “disgusted him.”⁴⁵ President Clinton famously was not.⁴⁶

At the beginning of President Obama’s first term, his White House Counsel Greg Craig commissioned a study of possible ways the pardon process might be modified to make it more responsive to and protective of the president, and discussed possible alternatives with Deputy Attorney General David Ogden. However, “the White House scaled back its ambitions” after both Craig and Ogden were replaced.⁴⁷ The only thing surprising about this episode was that the White House so meekly took “no” for an answer from the Department.

Midway through President Obama’s second term he publicly complained about the kinds of pardon recommendations he was receiving from Justice, eerily echoing the complaints of his two most recent predecessors.⁴⁸ The Justice Department’s response was

attorney in the Office of the Pardon Attorney, reported shortly after his departure from Justice that “the bureaucratic managers of the Justice Department’s clemency program continue to churn out a steady stream of almost uniformly negative advice, in a politically calculated attempt to restrain (rather than inform) the president’s exercise of discretion.” Samuel T. Morison, *A No-pardon Justice Department*, L.A. TIMES, Nov. 6, 2010, at ____.

⁴⁵ See GEORGE W. BUSH, DECISION POINTS 104 (2010). President Bush did not escape unscathed, issuing a pardon without input from Justice that he quickly regretted and attempted to rescind. See Charlie Savage, *On Clemency Fast Track, Via Oval Office*, N.Y. TIMES, Jan. 1, 2009, http://www.nytimes.com/2009/01/01/washington/01pardon.html?pagewanted=all&_r=0.

⁴⁶ The circumstances of President Clinton’s controversial final-day grants have been fully explored in the literature. See JUSTICE UNDONE, supra note 33 at 113-1193; Margaret Colgate Love, *The Pardon Paradox: Lessons from Clinton’s Last Pardons*, 31 CAP. U. L. REV. 185, 205-214 (2003). Many of the 176 pardons and commutations were secured outside official channels through the intervention of individuals with direct access to the President, at least some of whom were paid handsomely for their efforts. See, e.g., Peter Slevin & George Lardner, Jr., *Rush of Pardons Unusual in Scope, Lack of Scrutiny; Back-Door Lobbying Had Large Role in Clinton’s Decisions, Observers Say*, WASH. POST, Mar. 10, 2001, at A3. While his successor’s final weeks were also marked by a parade of pardon applicants admitted at the White House through the back door, see *Twilight*, supra note 1 and 1205-1209, for the most part he resisted Bush later wrote that he had been “frustrated” and “disgusted” by the “last-minute frenzy” of pardon requests, and that he “came to see the massive injustice” of a system that gave special access to people who had “connections to the president.” BUSH, DECISION POINTS, supra note 45 at 104.

⁴⁷ Reportedly, both Deputy Attorney General David Ogden and the Attorney General himself were supportive of the White House’s interest in making structural changes in the pardon process, which suggests that resistance must have come from elsewhere in the Department. See Joe Palazzolo, *Despite Efforts, Pardon System Still Unchanged*, Main Justice, April 20, 2010, <http://www.mainjustice.com/2010/04/20/despite-efforts-pardons-system-still-unchanged/>.

⁴⁸ See *President Obama Remarks at Benedict College*, March 6, 2015, <http://www.c-span.org/video/?324684-1/president-obama-remarks-benedict-college-town-hall#>. :

... [W]hen I came into office, for the first couple of years I noticed that I wasn’t really getting a lot of recommendations for pardons that -- at least not as many as I would expect. And many of them were from older folks. A lot of them were people just looking for a pardon so they could restore their gun rights. But sort of the more typical cases that I would have expected weren’t coming up. So I asked

to ask a consortium of private organizations to create a system for vetting clemency applications entirely separate from the official pardon process, in effect outsourcing a clemency initiative it seemed unwilling or unable to handle internally.⁴⁹ Eighteen months into that effort, the process appeared to be in as much disarray as ever, with thousands of commutation applications awaiting disposition⁵⁰ and work on pardon petitions apparently stalled.⁵¹

Nowadays, applicants for sentence commutation experience these changes in the pardon process through speedy rejection or long delays.⁵² Applicants for post-sentence pardon experience them in burdensome procedures calculated to discourage, and in denial of relief even when a case appears to fully satisfy the standards for pardon set forth in applicable policies.⁵³ Presidents experience them through brief unhelpful reports, and through bureaucratic foot-dragging that occasionally blossoms into open rebellion when the president expresses interest in granting clemency, either generally or in a particular case.⁵⁴ On the rare occasions when the public becomes aware of the way the pardon process operates, it confirms persistent myths about pardoning that are a long way from Hamilton's vision of the pardon power as an integral part of the constitutional scheme.⁵⁵

Attorney General Holder to work with me to set up a new office, or at least a new approach, inside the Justice Department. . . .

⁴⁹ See Gerstein, *Grassley Questions Commutation Drive*, *supra* note 7.

⁵⁰ See, e.g. Greg Korte, *Obama Administration clemency push gets slow start*, USA Today, June 1, 2015, <http://www.usatoday.com/story/news/politics/2015/05/31/obama-clemency-initiative/27963853/>.

⁵¹ See, e.g., Michael Isikoff, *Obama commutes dozens of sentences, but remains the 'Scrooge' of pardons*, Yahoo News, July 13, 2015, <https://www.yahoo.com/politics/poised-to-commute-dozens-of-sentences-obama-123815558936.html>; see also Margaret Love, *President declares U.S. a "nation of second chances," but issues no pardons*, Collateral Consequences Resource Center, July 16, 2015, <http://ccresourcecenter.org/2015/07/14/president-declares-u-s-a-nation-of-second-chances-but-issues-no-pardons/#more-5526>.

⁵² See, e.g., AUDIT REPORT 11-45, OFFICE OF THE INSPECTOR GEN., AUDIT OF THE DEPARTMENT OF JUSTICE PROCESSING OF CLEMENCY RECOMMENDATIONS 29 (Sept. 2011) (average processing time for commutation petitions in President Bush's second term went from three years in 2005 to six months in 2009; no commutation petitions were acted on by President Obama in his first 20 months in office).

⁵³ See, e.g., § 1-2.112, United States Attorneys Manual, See <http://www.justice.gov/pardon/about-office-0#s4> ("factors to be considered" in recommending post-sentence pardon include post-conviction conduct, character, and reputation; seriousness and relative recentness of the offense; acceptance of responsibility, remorse, and atonement; need for relief; official recommendations from prosecutors and sentencing judge).

⁵⁴ See, e.g., OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE PARDON ATTORNEY'S RECONSIDERATION OF CLARENCE AARON'S PETITION FOR CLEMENCY, *supra* note 4 (documenting circumstances of Justice Department's erroneous advice to White House). For additional instances of Justice Department obstruction of the president's use of the power, see note 44, *supra*.

⁵⁵ The public outrage over President Clinton's final grants blamed his willingness to use his power to "reward friends, bless strangers, and settle old scores," but failed to recognize the Justice Department's arguably equal responsibility for enabling the most egregious misuse of the power in the history of the American presidency. See Love, *Paradox*, *supra* note 45 at 213-214. President George W. Bush also failed to hold Justice accountable in recounting his pardon-related experiences in his final days in office. See note 46, *supra*.

Meanwhile, the need for a useful clemency mechanism and a reliable process to administer it grew steadily as the punishments visited on federal offenders became progressively more severe, through lengthy mandatory prison sentences and burdensome collateral consequences. While states experimented with innovative approaches to early release from prison and mitigation of collateral consequences, the federal system remained without a functioning safety valve once a case had been concluded. Hamilton's hope that the pardon power would provide an "easy access to exceptions in favor of unfortunate guilt," and a way for the president to "attend to the force of those motives that might plead in mitigation of the rigors of the law," seemed a distant dream of historical interest only. Instead, the Justice Department's self-interested management of the official pardon program has repeatedly frustrated and embarrassed the president, leading him repeatedly to "yield to considerations which were calculated to shelter a fit object of [the law's] vengeance."⁵⁶ For presidents these days, Hamilton from the grave would be a more reliable source of advice on pardons.

IV. Why Justice Should No Longer Administer the Pardon Power

For years, I have insisted stubbornly that the administration of the president's pardon power can and should remain the responsibility of the Justice Department, as long as certain reforms are made in the pardon program, including making the office of pardon attorney a prestigious one and making the attorney general personally responsible for pardon policy and recommendations, as she was before 1980.⁵⁷ I no longer believe that to be a feasible solution, and intend to stop insisting. The president cannot be well-served in the exercise of his pardon power as long as control over pardon policy and practice remains in an agency responsible for criminal prosecutions, and under the control of federal prosecutors.

This is not only – or even primarily -- because the two highest officials in the Justice Department at this time proudly declare themselves to be career prosecutors. Either or both of these individuals might make fine pardon attorneys, were the president to ask them to serve in this capacity. Rather, it is because the values and mission of the agency they lead do not incorporate a duty to be merciful in criminal matters.⁵⁸ That duty, which is all that justifies having a pardon power in the first place, inheres in the office of the president by

⁵⁶ Hamilton, Federalist 74, *supra* note 10.

⁵⁷ See, e.g., *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS. L. REV. 730 (2013); *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1509–10 (2000); see also Brian M. Hoffstadt, *Guarding the Integrity of the Clemency Power*, 13 FED. SENT'G REP. 180, 181–82 (2001) (discussing ways the clemency review process could remain within the Justice Department without being unduly influenced by the perspective of prosecutors)..

⁵⁸ Philosopher Jeffrie Murphy has argued that pardon is grounded squarely and exclusively in the concept of mercy, which in his view is an "autonomous moral virtue" entirely separate from justice. *Mercy and Legal Justice*, in Jeffrie Murphy & Jean Hampton, FORGIVENESS AND MERCY 175 (1988). Through his pardon power the president expresses the moral values of the community as opposed to the values of the legal system, and may "legitimately ignore the just deserts of an individual and pardon that individual if the good of the community required it." *Id.*, at 174 n. 9. By contrast, prosecutors, like judges, are concerned exclusively with justice, and "there is simply no room for mercy as an autonomous virtue with which their justice should be tempered." *See id.* at 173-74.

virtue of his role as chief executive, and it is more a duty of politics than one of justice.⁵⁹ The theory of public mercy on which the existence of the pardon power depends has been eloquently expressed by presidents from George Washington⁶⁰ to George H.W. Bush.⁶¹

For many years the political duty to be merciful coexisted with the legal duty to do justice in the office of the attorney general, by virtue of the president's executive order assigning the attorney general, a member of his cabinet, to provide him counsel in pardon matters. But the connection between mercy and justice in the administration of the pardon program was disrupted thirty years ago, when the non-statutory responsibility to recommend clemency was delegated to departmental officials whose only job was the statutory one of prosecuting crime. The unprecedented irregularities in the pardon process in the past 20 years are witness to this breakdown.⁶²

It could be argued that the lost connection with the president's duty to be merciful could be restored by returning to the administrative arrangement that existed between 1898 and 1983, when the attorney general personally signed every letter of advice to the president in pardon cases. But there are practical and institutional reasons why this is not a desirable solution. The practical reasons are obvious, and are most likely what led to the delegation to begin with. The institutional reasons are even more powerful, and relate to the Justice Department's unreserved embrace of the unforgiving culture of the crime war.⁶³

⁵⁹ See Love, *Collar Buttons*, *supra* note 43 at 1506-09 (arguing, based on Professor Murphy's theory of public mercy discussed in note 58, *supra*, that the president has a political duty to pardon).

⁶⁰ After the so-called Whiskey Rebellion had ended peacefully with the ringleaders pardoned individually and the other insurgents granted amnesty, Washington explained to Congress that his pardons had been motivated both by mercy and the public interest: "[I]t appears to me no less consistent with the public good than it is with my personal feelings to mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity, and safety may permit." President George Washington, Seventh Annual Address (Dec. 8, 1795), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 184 (James D. Richardson ed., 1896), quoted in JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 55-56 (2009).

⁶¹ See Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992)(Iran-Contra defendants):
 [T]he actions of the men I am pardoning took place within the larger Cold War struggle. . . . Now the Cold War is over. When earlier wars have ended, Presidents have historically used their power to pardon to put bitterness behind us and look to the future. . . . The actions of those pardoned and the decisions to pardon them raised important issues of conscience, the rule of law, and the relationship under our Constitution between the government and the governed. Notwithstanding the seriousness of these issues and the passions they aroused, my predecessors acted because it was time for the country to move on. Today I do the same.

⁶² See, e.g., note 45 *supra*.

⁶³ See, e.g., *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (EDNY, 2013) ("To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one* — not even the prosecutors themselves — thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty."); see also Alec Karakatsanis, *President Obama's Department of Injustice*, N.Y. Times, Aug. 18, 2015, <http://www.nytimes.com/2015/08/18/opinion/president-obamas-department-of-injustice.html?ref=opinion> (describing the case of Ezell Gilbert, in which federal prosecutors repeatedly resisted his efforts to secure a reduction of his sentence which they themselves conceded was illegal, on grounds that it would disturb the finality of judgments in other cases and "open the floodgates" to hundreds of similarly-situated

Because of her obligation to support this institutional culture, I would argue that it is no longer possible (even if it were practicable) for the attorney general to step back into the role of principal advisor to the president on pardon matters.

The institutional conflict that makes it impossible for the attorney general to advise the president in the exercise of his pardon power is unlike the conflict between management of agency operations and investigation of management malfeasance, or between investigation and prosecution of crime. These purely functional conflicts may be acceptably managed by insulating components within the larger agency, as has been done with the inspector general and the FBI.⁶⁴ But an institutional conflict rooted not simply in competing functions but in competing loyalties or values may be impossible to reconcile within the same command structure. Such an irreconcilable conflict arose during the Nixon Administration when the personal and political loyalties of the Justice Department's top political officials thwarted the prosecution of criminal activity by the president himself, and led Congress to transfer responsibility for prosecuting top political officials from the attorney general to an independent official appointed by the courts.⁶⁵ The conflict between prosecution and pardon functions within the Justice Department is similar to the one sought to be resolved by the post-Watergate Independent Counsel law, though it arises from too little loyalty to the president rather than too much. Like that earlier institutional conflict, it calls for a similar extractive solution.⁶⁶

Of course removing the pardon process from the Justice Department does not mean that prosecutors should have no role in it. They should, and an important one. Pardon policy has important implications for the entire criminal justice agenda, from charging policy to sentencing practice, and prosecutors in the field are entitled to have a say about how the criminal laws are enforced. In particular cases prosecutors have unique access to the facts and a perspective on how an act of mercy in one case can affect how other cases

individuals). These cases involved routine prosecutorial policies and practices, not prosecutorial misconduct, and illustrate why the Justice Department can no longer be entrusted to give the president the kind of advice he needs in clemency matters.

⁶⁴ Another functional conflict within the Justice Department that could benefit from greater insulation of components is the one between prosecutors and prison officials. *See* Margaret Colgate Love, *Should the AG Look Outside BOP For Its New Director?*, THE CRIME REPORT, August 13, 2015, <http://www.thecrimereport.org/viewpoints/2015-08-should-the-ag-look-outside-bop-for-its-new-director>.

⁶⁵ *See* 28 U.S.C. § 591-599 (1999).

⁶⁶ The Independent Counsel Act was ultimately allowed to expire because its lack of institutional controls on authority and budget too easily produced politically motivated witch hunts, but the continuing validity of its approach is demonstrated by the way the Justice Department has approached highly politicized prosecutions in the last 15 years. For example, in 2003, acting Attorney General James Comey appointed a United States attorney to investigate the Valerie Plame national security leaks using the general delegation provisions of the Justice Department regulations. Mr. Comey specifically noted that he was giving the special counsel plenary powers not limited by the department's regulations. *See* Charlie Savage, *Ashcroft Steps Aside in Probe into CIA Leak*, BOSTON GLOBE, Dec 31, 2003, http://www.boston.com/news/nation/articles/2003/12/31/ashcroft_steps_aside_in_probe_into_cia_leak/?page=full.

are handled. They should recommend disposition, but their recommendation should not be dispositive.

It is worth noting that not a single state gives prosecutors substantial control over pardon recommendations, though most formal pardon advisory systems contemplate a role for prosecutors.⁶⁷ Even in New Jersey, the one state whose criminal law enforcement structure closely resembles the federal government's, the governor is advised by the parole board not the attorney general.⁶⁸

Fortunately, the pardon attorney has a natural institutional home in the Executive Office of the President, and it would take only a signal from the president to accomplish the transfer, as he transferred the pardon advisory function to the attorney general 150 years ago.⁶⁹ There is no need for any more elaborate or different administrative set-up than presently exists in the Office of the Pardon Attorney. With a trusted senior adviser in charge, and an accountable decision-making process in which the Justice Department played an important part, the president would be both protected and encouraged in the use of his power exactly as envisioned by Alexander Hamilton more than two centuries ago. The work of the office could be accomplished by a small staff, since one of its primary missions would be to encourage the development of statutory alternatives to clemency.⁷⁰ Reducing the need for clemency would relieve not only the president's workload but also his exposure to risk that the systemic use of clemency now presents. Ideally, the goal of

⁶⁷ See Margaret Love, NACDL Restoration of Rights Resource, Chart #3 (Characteristics of Pardon Authorities), <http://ccresourcecenter.org/wp-content/uploads/2015/07/Chart3.4.26.15.pdf>.

⁶⁸ See N.J. Stat. Ann. § 2A:167-7 (governor may refer applications for pardon to the New Jersey State Parole Board for investigation and recommendation, though he is not bound by them). Interestingly, the 1947 New Jersey Constitution that transferred pardoning power from a "court of pardons" consisting mainly of judges to the governor alone also provides for the creation of a commission to assist and advise the governor in the exercise of his pardon power. See N.J. Const. art. V, § 2, ¶ 1. No such single-purpose panel has ever been created.

⁶⁹ In this regard, OPA is unlike the Federal Bureau of Prisons, which has similar problems of captivity by prosecutors, but no logical place to come to rest outside of the Justice Department. As I've recommended elsewhere, the best solution to the institutional conflict involving BOP would be to create conditions in which its independence can be assured even inside Justice, by having its director presidentially appointed to a substantial but limited term of years, much like the director of the FBI. See Margaret Colgate Love, *Should the AG Look Outside BOP for its New Director*, THE CRIME REPORT, August 13, 2015, <http://www.thecrimereport.org/viewpoints/2015-08-should-the-ag-look-outside-bop-for-its-new-director>. But this solution, unlike the one suggested here for OPA, would require congressional authorization, both for presidential appointment and for departmental re-organization.

⁷⁰ For a possible approach to reduction in prison terms, see Model Penal Code: Sentencing, § 305.7, Tentative Draft No. 2 (Mar. 25, 2011); see also *id.* § 305.6 and Margaret Colgate Love & Cecelia Klingele, *First Thoughts about "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859 (2011). For an approach to mitigating the effect of collateral consequences, see Model Penal Code: Sentencing, §§ 6x.01 et seq., Tentative Draft No. 3 (April 24, 2014); see also Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247 (2015).

any pardon program ought to be improvement of the legal system to reduce if not eliminate the need for clemency.⁷¹

V. Conclusion

Providing advice to the president in the exercise of his constitutional pardon power is one of the original responsibilities of the Justice Department, even antedating its responsibility for housing federal prisoners. But in recent years the Department's pardon program has become dysfunctional, serving the parochial interests of federal prosecutors rather than the interests of the presidency. The only way to deal with the institutional conflict that produced and perpetuates this situation is to transfer the pardon program to the president's direct supervision in the Executive Office of the President. This move will have a variety of benefits, including facilitating the president's ability to oversee the workings of the criminal justice system, for which he has a special responsibility under the Constitution. More specifically, it will introduce salutary political accountability to federal prosecution policy through presidential oversight and potential revision. Above all, it will give the president control for the first time in decades over his own "benign prerogative."

⁷¹ See notes 15 and 19, *supra*; see also Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT. RPTR. 119, 124 (2001) ("Wherever a rule can be structured to guide the discretion of judges or administrative agencies in determining – with reasons – whether to mitigate the sentences of similarly situated offenders, we think such a system should ordinarily be accorded priority over one that relies exclusively upon the unstructured, unexplained discretion of a president to grant or deny individual pardons or commutations."); Margaret Colgate Love, *Clemency is Not the Answer*, THE CRIME REPORT, July 17, 2015 (arguing that the systemic problem of over-long prison sentences being served by federal drug offenders should be addressed by the courts under existing statutory authority rather than through clemency), <http://www.thecrimereport.org/viewpoints/2015-07-our-approach-to-clemency-needs-a-reset>.